

Private infrastructure facility

Practical guide * note this is not a statutory guideline

General

This practical guide is for proponents making an application for approval of a project as a private infrastructure facility and for the Coordinator-General to take land under section 153AA of the *State Development and Public Works Organisation Act 1971* (the Act).

This practical guide should be read in conjunction with the Act. Following the practical guide is not an indication that approval of a project as a private infrastructure facility will be granted or that land will be acquired by the Coordinator-General. Proponents should obtain their own advice on whether they have complied with the Act before submitting an application to the Coordinator-General.

The Act establishes a process for the taking of land for a private infrastructure facility. This process reflects the principle that a proponent must try to reach agreement with registered owners (and native title parties if applicable) and have completed a satisfactory environmental assessment of the project before seeking approval of the project as a private infrastructure facility.

This process can be summarised in the following steps:

Step 1—Land negotiations

The proponent of the project must take reasonable steps to negotiate the purchase of the land required for the project with the registered owners of the land and—if native title exists—negotiate an indigenous land use agreement (ILUA).

Step 2— Making an application

If the proponent is unable to reach agreement with the registered owner (and the native title parties if applicable) the proponent may make an application for the approval of the project as a private infrastructure facility and for the Coordinator-General to take the land

required for the infrastructure facility. However, the application can only be made if—

- (a) the project has been declared a coordinated project for which an EIS is required, the Coordinator-General has publicly notified the Coordinator-General's report for the project, and the Coordinator-General's report has not lapsed; or
- (b) the Coordinator-General is satisfied that an adequate environmental assessment has been carried out for the project in accordance with an environmental assessment process under an Act.

The application must identify the land that the proponent is applying to the Coordinator-General to acquire for the proposed infrastructure facility (the subject land). The subject land must be consistent with the land assessed in the EIS or other environmental assessment process carried out for the project.

The requirements for making an application are set out in section 153AA(2) of the Act.

Step 3—Consultation

On receipt of a properly made application, the Coordinator-General will seek submissions from people affected by the project and undertake consultation with the registered owners of the subject land (and native title parties if applicable) about the proponent's negotiations to purchase the land (or enter into an ILUA if applicable).

Step 4—Assessing the application

After consultation is completed, the Coordinator-General will assess the application and make a recommendation to the Governor in Council as to whether the requirements of the Act are satisfied.

Step 5 – Governor in Council Decision

The Governor in Council may decide to approve or not approve the project as a private infrastructure facility.

Step 6—Final negotiations with registered owner of land

If the project is approved as a private infrastructure facility, the proponent must negotiate with the registered owner of the subject land and any native title parties one final time. The proponent must also make a final unconditional offer to purchase the land and attempt to enter into an ILUA if there are native title parties affected. This offer must meet the requirements set out in the Act.

Step 7—Acquisition of land

If agreement cannot be reached between the proponent and registered owners of the land, the Coordinator-General may take the land for the private infrastructure facility but only if the Coordinator-General is satisfied that all of the requirements of the Act have been met and that the project will proceed within a reasonable timeframe.

Native title

The Act requires a proponent to negotiate with registered owners to purchase the subject land and provide evidence of those negotiations to the Coordinator-General. Where native title exists over the land, the Act also requires the proponent to obtain consent from the native title holders and any registered native title claimants for the future acts for the project and, if needed, obtain consent for the surrender of native title rights and interests in the subject land, by negotiating an ILUA.

If the negotiations are unsuccessful (and the application for a private infrastructure facility has been approved), the Coordinator-General may compulsorily acquire the land, including the native title rights and interests in the land. As noted above, the Coordinator-General can only exercise this compulsory acquisition power if the Coordinator-General is satisfied all of the requirements of the Act have been met, the project will proceed within reasonable timeframes, and the proponent has taken reasonable steps to enter into an ILUA for the land.

If native title rights and interests are to be compulsorily acquired, section 24MD(6A) of the *Native Title Act 1993* (Cth) (the Native Title Act) requires that the native title holders and any registered native title claimants are entitled to the same procedural rights in relation to

the acquisition of the native title rights and interests as they would have if they instead held freehold title to the land.

For a private infrastructure facility application, a proponent must follow particular procedural steps when negotiating with the registered owner for the purchase of the subject land. Before the Coordinator-General will consider acquiring land for a private infrastructure facility (and also before approving an application for a private infrastructure facility), the proponent must demonstrate to the Coordinator-General that these procedural steps have been followed. Because these steps are required for negotiations with a registered owner, the application of the Native Title Act means the steps must also apply to negotiations with the native title holders or registered native title claimants.

This practical guide provides some guidance on how these obligations under the Native Title Act may be satisfied. Proponents should obtain their own advice as to whether they have complied with the Native Title Act requirements.

The proponent is required in section 153AC(2)(g)(i) of the Act to negotiate for at least 6 months with the registered owner to purchase the land required for the infrastructure facility. As it is not possible for a proponent to purchase native title rights and interests, the proponent is instead required in section 153AC(2)(g)(ii) to attempt to obtain consent by negotiating an ILUA.

The proponent is also required in section 153AE(1)(a) of the Act to negotiate one final time with the registered owner of the land and make the registered owner one final unconditional offer to purchase the land by agreement. As such, the proponent must also make one final attempt to negotiate with the native title holders and any registered native title claimants.

Where the proposed taking of subject land involves only taking an easement over the subject land, and it is not necessary to compulsorily acquire native title rights and interests in relation to the land, the proponent is to take reasonable steps to enter into an ILUA that provides for the non-extinguishment principle to apply to the taking of the easement.

Where there is no registered native title body corporate, the proponent will need to ensure the procedural rights are satisfied in the manner provided by the Native Title Act.

1 Land negotiations

An application for a private infrastructure facility cannot be made by a proponent until the proponent has first negotiated with the registered owners for at least 6 months and taken reasonable steps to purchase the land by agreement. Where native title exists over the land, the proponent is also required to take reasonable steps to enter into an ILUA.

The following is a guide as to what could be considered to be reasonable steps to purchase the land—

1. Give written notice to the registered owner of the subject land, and where native title rights and interests are proposed to be acquired, give written notice to the native title parties for the subject land. Proponents will need to ensure that notices comply with the Native Title Act where applicable.
2. The written notice to the registered owner and native title parties should contain the following information—
 - (a) full details of the proposed infrastructure facility;
 - (b) a detailed plan which shows the location of the infrastructure facility on the subject land and sufficiently identifies the land which the proponent is seeking to purchase;
 - (c) the interest required in the land (and where that interest is an easement, include the easement terms);
 - (d) a contact telephone number for the proponent for information about the proposed infrastructure facility;
 - (e) a statement that it is the intention of the proponent to reach, through negotiation –
 - (i) an agreement with the registered owner of the subject land to purchase the land;
 - (ii) where native title rights and interests are proposed to be surrendered, an ILUA with the native title parties to bring about the surrender of native title rights and interests, and/or consent to the future act required for the project;
 - (f) state the period (which the Act requires must be at least 6 months) during which the negotiations will be carried out; and
 - (g) state the steps the proponent proposes to take to reach an agreement mentioned in paragraph (e).
3. Publish a notice at least once in a newspaper circulating generally in the locality of the proposed infrastructure facility which sets out—
 - (a) details of the proposed infrastructure facility;
 - (b) a plan which shows the location of the proposed infrastructure facility;
 - (c) a contact telephone number for the proponent for information about the proposed infrastructure facility; and
 - (d) a statement that it is the intention of the proponent to reach, through negotiation—
 - (i) an agreement with the registered owner of the subject land to purchase the land; and
 - (ii) where native title rights and interests are proposed to be surrendered, an ILUA with the native title parties to bring about the surrender of native title rights and interests, and/or consent to the future act required for the project.
4. After taking the steps set out in the notice, make an offer to purchase the land at the end of the negotiation period.

The offer to the registered owner or native title parties should include all terms and conditions of the proposed purchase, easement or ILUA and the registered owner or native title parties must be given sufficient time to consider the offer and seek advice.
5. Offer to pay the registered owner (and if applicable the native title parties) the following costs reasonably incurred during negotiations and promptly pay these costs—
 - (a) the costs of obtaining a land valuation;
 - (b) mediation costs; and
 - (c) the costs of obtaining legal advice about the proposed purchase (and if applicable the proposed ILUA).

In relation to native title, the Coordinator-General will expect to see genuine attempts at contacting the relevant native title parties and facilitating their attendance at meeting for negotiations, for example, through provision of travel costs and accommodation required for attendance at negotiations.

Change of owner

If the registered owner of the subject land changes before a private infrastructure facility application is made, the proponent should give written notice to the new registered owner and take reasonable steps to negotiate and reach agreement with the owner of the subject land (noting that the Act requires at least 6 months negotiation with each registered owner of the land).

2 Application for approval as a private infrastructure facility

The proponent of a proposed infrastructure facility may make an application to the Coordinator-General for approval of the project as a private infrastructure facility and to take land that is required for the proposed infrastructure facility. The Act sets out the types of infrastructure that are an “infrastructure facility”.

The proponent must first give the registered owners and native title parties notice of the application. The application should include copies of these notices.

The application must include evidence that—

- (a) the project has been declared a coordinated project for which an EIS is required, the Coordinator-General has publicly notified the Coordinator-General’s report for the project, and the Coordinator-General’s report has not lapsed; or
- (b) an adequate environmental assessment has been carried out for the project in accordance with an environmental assessment process under another act.

The application must also include evidence that the area of land identified as required for the proposed infrastructure facility is consistent with the land assessed in the EIS or other environmental assessment carried out for the project.

The application must be accompanied by the fee prescribed under a regulation—further information on the fee payable is available at:

www.dsdmip.qld.gov.au/application-for-pif/coordinator-general-projects/assessments-and-approvals/application-for-pif.html

Section 153AA(2) of the Act sets out the other requirements for an application.

Note that a private infrastructure facility application is properly made if the Coordinator-General is satisfied it complies with section 153AA(2) (which includes addressing each of the matters set out in 153AC(2)) of the Act.

Additional information to include in the application

A private infrastructure facility application is to be a self-contained and comprehensive document providing sufficient information for the Coordinator-General to be satisfied the application is properly made. As a guide, the application should include the following—

- (a) the proponent’s registered business name, ABN, telephone number, email address and business address;
- (b) full details of the proposed infrastructure facility, including—
 - (i) the name and address of all registered owners of the subject land; and
 - (ii) where native title rights and interests have not been extinguished over the land, the name and address of all native title parties for the subject land; and
- (c) a single plan which shows all of the following—
 - (i) the area of land as assessed in the EIS or other environmental assessment process overlaid with the area of the subject land;
 - (ii) the proposed location of the infrastructure facility using GIS coordinates; and
 - (iii) the location of other infrastructure on the subject land;
- (d) a description of the nature of the infrastructure proposed on the subject land;
- (e) a separate detailed plan which sufficiently identifies the subject land;
- (f) evidence to demonstrate that the area of land and the interest to be acquired is no more than is reasonably required for the proposed infrastructure facility;
- (g) detail the economic or social significance of the proposed infrastructure facility and the economic or social benefits of the facility to Australia, the State or the region in which the project is to be undertaken;
- (h) evidence that the proponent has the financial and technical capability to complete the project in a timely way;

- (i) evidence that the proposed infrastructure facility satisfies an identified need or demand for the services provided by the project, for example, demand projections for the infrastructure facility;
- (j) evidence that the project will be completed in a timely way to satisfy the identified need or demand, including, information about the proposed timing of completion of the infrastructure facility or commencement of service delivery;
- (k) a preliminary financial analysis of the infrastructure facility;
- (l) the results of any investigations of the subject land;
- (m) current title searches for the subject land showing the registered owner of each parcel of land at the time the application is made;
- (n) details of any resource interests on the subject land;
- (o) information about the steps taken by the proponent to purchase the subject land (and if applicable negotiate an ILUA), including—
 - (i) information about all dealings with the registered owner (and native title parties if applicable);
 - (ii) a statement about whether any valuations of the land were provided by the proponent to the registered owner (and native title parties if applicable);
 - (iii) details of any mediations between the proponent and the registered owner (and native title parties if applicable);
 - (iv) evidence that an offer to purchase was made (and offer of compensation to native title parties if applicable);
 - (v) information about whether the proponent has the financial capacity to meet its obligations under any offer to purchase (and obligations under an ILUA if applicable);
 - (vi) information about why agreement could not be reached with the registered owner (and native title parties if applicable); and
 - (vii) information demonstrating payment of the registered owners reasonable costs (and native title parties' costs if applicable);
- (p) where an ILUA has been agreed with native title parties, evidence of the finalised ILUA; and
- (q) any other information the Coordinator-General considers is necessary to assess the application.

The proponent is to give the Coordinator-General two (2) hard copies of the application, and an electronic version of the application.

On receipt of the application, the Coordinator-General will review the application to check it is properly made. The following steps only apply if the application is properly made.

3 Consultation

The Coordinator-General will seek submissions about the project from people affected by the project and undertake consultation with the registered owners (and native title parties if applicable) of the subject land about the proponent's negotiations to purchase the land (and enter into an ILUA if applicable). Copies of the proponent's application will be provided to affected persons. The Coordinator-General may provide copies of submissions to the proponent and request the proponent provide responses to issues raised in the submissions.

4 Assessing the application

Once consultation has been completed, the Coordinator-General will assess the application and make a recommendation to the Governor in Council as to whether the requirements of the Act are satisfied.

5 Deciding the application

The Governor in Council may decide to approve or not approve the project as a private infrastructure facility.

6 Final unconditional offer to purchase

After a project is approved as a private infrastructure facility, the proponent must negotiate one final time with the registered owner of the land and make the registered owner a final unconditional offer to purchase the land (see s153AE).

At the start of the negotiation, the proponent must provide the following information to the registered owner—

- a) updated information about the project, or land required for the project; and

- b) information outlining any change, or proposed change, to the project, or the land required for the project, of which the registered owner has not previously been advised by the proponent.

The final unconditional offer to purchase the land should be dated and signed by the proponent, and must—

- a) be in writing;
- b) not be subject to any conditions except for statutory requirements that apply to the purchase, for example, *Land Sales Act 1984*;
- c) state the amount the proponent is offering to pay for the purchase of the land;
- d) if the interest in the land required is an easement, include the terms of the easement;
- e) include an offer to pay any reasonable costs incurred by the registered owner in seeking a land valuation or legal advice about the offer; and
- f) state the period for which the offer has effect. This must be at least 10 business days after the final unconditional offer is given to the registered owner.

Where native title rights and interests are proposed to be affected, the proponent will also need to negotiate one final time with the native title parties and provide the information set out above. The proponent must also make a final unconditional offer of compensation in relation to the surrender of native title rights and interests (and/or consent to future acts required for the project). Given native title parties should be provided with the same procedural rights as other freehold title holders, the final unconditional offer of compensation should—

- (a) be in writing;
- (b) be signed by the proponent and dated;
- (c) offer to pay compensation subject only to the entry into an ILUA and any additional statutory requirements;
- (d) state the amount the proponent is offering to pay as compensation;
- (e) if the land required for the project is an easement, include the terms of the easement;
- (f) recommend that the native title parties obtain an independent valuation of the land to which the native title rights and interests relate, and legal advice about the offer;
- (g) state that the native title parties must respond to the offer within a specified period from the day the offer is received (such period to be a

reasonable timeframe but not less than 10 business days);

- (h) include an offer to pay the following costs reasonably incurred by the native title parties in relation to the final unconditional offer—
 - (i) the costs of obtaining a valuation of the land to which the native title rights and interests relate;
 - (ii) the costs of obtaining legal advice; and
- (i) be delivered by hand to the native title parties or sent by registered post addressed to the native title parties.

The proponent should obtain a receipt for the delivery of the final unconditional offer to purchase.

7 Acquisition of land

If agreement cannot be reached between the proponent and registered owners of the land (or native title parties) for the purchase of the land, the proponent must give the Coordinator-General evidence of compliance with s153AE.

The proponent must also provide evidence that the project will proceed within reasonable timeframes, for example—

- (a) information about the design of the project, including—
 - (i) details of any proposed accommodation works;
 - (ii) an indicative construction program;
 - (iii) a contractor procurement program;
 - (iv) a program for obtaining any approvals required for the project and a status report on the progress of obtaining those approvals;
- (b) a description of all land to be affected by the proposed infrastructure facility, including unregistered interests that are proposed to be acquired;
- (c) details of any arrangements entered into with the providers of other services or utilities required for the project;
- (d) an estimate of capital cost of the infrastructure facility;
- (e) the steps and timetable for reaching financial close or a final investment decision.

The Coordinator-General may take the land for the private infrastructure facility only if satisfied that all of the requirements of the Act have been met, the project will proceed within reasonable time frames and if native title exists, the proponent has taken reasonable steps to enter into an ILUA. Compulsory acquisition by the Coordinator-General will follow the processes set out in the *Acquisition of Land Act 1967*.

8 Arrangements about payment of costs and compensation

If the Coordinator-General obtains from another entity advice or services the Coordinator-General considers necessary in relation to a private infrastructure facility, the Coordinator-General may recover from the proponent the reasonable cost of obtaining the advice or services.

In addition, before acquiring any land for a private infrastructure facility, the Coordinator-General will require the proponent to enter into a cost and compensation agreement with the Coordinator-General which addresses issues such as the payment by the proponent of compensation and costs associated with the proposed acquisition.

The Coordinator-General will also require a guarantee or other security in a form acceptable to the Coordinator-General which covers the estimated compensation payable.

Dictionary

ABN means an ABN (Australian Business Number) under the *A New Tax System (Australian Business Number) Act 1999* (Cth).

EIS means *environmental impact statement*.

future act means a future act as defined by the *Native Title Act 1993* (Cth).

ILUA means an indigenous land use agreement as defined in section 24BA, section 24CA or section 24DA of the *Native Title Act 1993* (NTA).

Native Title Act means the *Native Title Act 1993* (Cth).

native title holders has the meaning given by section 224 of the *Native Title Act*.

native title parties means native title holders and registered native title claimants.

registered native title claimants has the meaning given by section 253 of the *Native Title Act*.

registered owner means:

- (a) *The registered owner of a lot under the Land Title Act 1994 in relation to the land; or*
- (b) *The person registered in the land registry under the Land Act 1994 as the holder of a lease from the State under the Land Act 1994 or the repealed Land Act 1962 for the land.*

resource interest means any lease, licence, permit or other instrument authorised under the –

- (a) *Greenhouse Gas Storage Act 2009; or*
- (b) *Geothermal Energy Act 2010; or*
- (c) *Mineral Resources Act 1989; or*
- (d) *Petroleum Act 1923; or*
- (e) *Petroleum and Gas (Production and Safety) Act 2004*

subject land means the land the proponent is applying to the Coordinator-General to acquire.

the Act means the *State Development and Public Works Organisation Act 1971 (Qld)*.

Disclaimer

While every care has been taken in preparing this publication, the State of Queensland accepts no responsibility for decisions or actions taken as a result of any data, information, statement or advice, expressed or implied, contained within. To the best of our knowledge, the content was correct at the time of publishing. Any references to legislation are not an interpretation of the law. They are to be used as a guide only. The information in this publication is general and does not take into account individual circumstances or situations. Where appropriate, independent legal advice should be sought.

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