

Land, Rights, Laws: Issues of Native Title



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The recognition of native title in the High Court's Mabo decision in 1992, the Commonwealth Native Title Act in 1993, and the Wik decision in 1996 have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

The provisions of the newly amended Native Title Act 1993 (Cth) relating to Indigenous Land Use Agreements (ILUAs) have not received the same criticism as other changes. In this paper Diane Smith outlines the types of agreements that are made possible under these provisions and examines some of the issues arising from them.

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INDIGENOUS LAND USE AGREEMENTS: NEW OPPORTUNITIES AND CHALLENGES UNDER THE AMENDED NATIVE TITLE ACT

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In the five years since the passage of the *Native Title Act 1993* ('the Act') Indigenous peoples in Australia and their representative organisations, governments, industry and the broader community, have struggled to understand how mutually-beneficial, negotiated agreements can be achieved. A key question raised by many people has been how native title rights and interests are to be effectively exercised on the ground, and how those rights and interests will relate to existing Commonwealth, State and Territory Government systems of land use and management. While a number of native title agreements have been made in different contexts, they have been hampered by the lack of an appropriate statutory framework.

The issue that received widespread support during the highly charged amendment process was the need for more flexible and legally certain agreement-making mechanisms (Commonwealth of Australia 1996, 1997). Concerted pressure to develop such mechanisms increased in mid-1996, when a combined Indigenous and industry National Working Group, sponsored by the Council for Reconciliation (CAR 1996), reached agreement on a number of matters related to improving the fairness and workability of the Act. The Working Group stated that 'voluntary agreements are the preferred first option for resolving indigenous land use issues and native title claims'. Subsequently, the National Indigenous Working Group, formed in response to the *Wik* debate, refined those earlier propositions and submitted

proposals to the Howard Coalition Government which provided for a 'flexible, simple, efficient and certain alternative to the costly claim-based processes contained under the Native Title Act' (NIWG 1997).

The Coalition Government's 'Ten Point Plan' referred to new provisions in the amended Act² for the development of such voluntary agreements - called Indigenous Land Use Agreements (ILUAs) - which have clearly incorporated many proposals from both working groups. Many potential opportunities are created by the ILUA provisions, but challenges are also posed and parties will need to be mindful of these when commencing to use the new statutory framework. This paper provides an overview of the amendment provisions for ILUAs and considers their potential advantages and limitations.³

ILUAs: an overview of the amendment provisions

The amendments provide for three different types of Indigenous Land Use Agreements over an area⁴ of land or water, and their registration with the National Native Title Tribunal:

- Body Corporate Agreements (Part 2, Division 3, Subdivision B);
- Area Agreements (Part 2, Division 3, Subdivision C); and
- Alternative Procedure Agreements (Part 2, Division 3, Subdivision D).

The primary differences between each type of ILUA are:

- the subject matter of the agreements;
- the identity of the parties; and
- the procedures for registering the concluded agreement;

All three types of ILUAs have in common that:

- agreement can be given by native title groups for any consideration (including the freehold grant of land or other interests) and subject to any lawful conditions;
- any persons may request assistance from the National Native Title Tribunal ('the Tribunal') in making agreements, not just actual or potential native title holders;
- an application for registration can be made by any of the parties (with the agreement of all parties) to the Registrar of ILUAs, and must be accompanied by a copy of the ILUA and any other prescribed documentation;
- the Registrar must remove the details of an ILUA from the Register (thereby removing its force of contract) when the Federal Court, on application by a party or the relevant Native Title Representative Body ('Representative Body'), orders its removal on the grounds that a party was induced to enter the agreement by reason of fraud, undue influence or duress by another person (s.199C(3)); and
- any party may appeal the Registrar's decision in the Federal Court.

The amendments made it clear that all three types of agreement may cover future acts (or a class of such acts) that have already been done or which might be done in the future, and which may be invalid because of provisions about native title in the legislation. For example, if the grant of a mining lease should have been subject to the right to negotiate but was not,

then this could be remedied by the parties reaching agreement over its validation, subject to any conditions, and subject to a statement to that effect being included in its registration details. An agreement which dealt with compensation, access and other issues could meet these conditions. The non-extinguishment principle applies to validating invalid future acts unless the ILUA specifically includes a statement that all parties agree to the surrender of native title. The government to which the invalid future act was attributable, and any party who may become liable to pay compensation in relation to the future act *must* be parties to the agreement.

An ILUA cannot be used to validate intermediate period acts, which can only be validated by the regime of Division 2A.⁵ However, the recent amendments contained in s.24EBA allow for a Body Corporate Agreement or an Area Agreement (but not an Alternative Procedure Agreement) to be used to *change the effect* on native title of a validated intermediate period act. For example, a different effect on native title could be provided for by the terms of the agreement and by a statement to that purpose being entered on the Register of ILUAs. The government to which the intermediate period future act was attributable, and any party who may become liable to pay compensation in relation to the future act, *must* be parties to the agreement. The amendment does not provide that parties can agree to change the validation of an intermediate period act, only its effect on native title.

The key characteristics of the three types of ILUAs are reviewed below.

Body Corporate Agreements (ss.24BA-BI)

Criteria

For a Body Corporate Agreement (s.24BD) to be made there must be *one or more* registered native title bodies corporate (also known as Prescribed Bodies Corporate and defined under s.253 of the Act⁶) which hold native title to, or have been appointed to act for, the native title holders in relation to the *whole* of the area which is the subject of the agreement. In other words these agreements can only be made after there has been a Federal Court determination of native title and a Body Corporate established to hold in trust or act as an agent for the determined native title holders.

Content

This type of agreement can be about (s.24BB):

- the doing of future acts (singly, multiply or in classes);
- dealing with future acts that have already been done (including validating them) other than intermediate period acts;
- changing the effect on native title of a validated intermediate period act;
- withdrawing, amending or varying native title claim applications;
- the relationship between native title and other rights;
- the manner of the exercise of native title and other rights and interests;
- extinguishing native title by surrender to the relevant government;
- compensation for past, intermediate period or future acts; and
- any other matter concerning native title rights and interests.

Parties

The registered native title bodies corporate *must* be parties. Any other person *may* be a party, including a Native Title Representative Body.

Government *must* be a party if the agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act, or for changing the effect on native title of an intermediate period act. Otherwise it is not mandatory for government to be a party, though it *may* be.

If there are any Native Title Representative Bodies for the area concerned and none of them is to be a party to the agreement, the Body Corporate *must* inform, by notification, at least one of the Representative Bodies of its intention to enter into the agreement. The Body Corporate *may* also consult with any such Native Title Representative Bodies about the agreement (s.24BD). This does not mean that the Representative Body must agree to the Body Corporate Agreement, or even be consulted.

Registration

The procedural requirements for these agreements reflect the fact that native title has been determined by the Federal Court and native title holders have been identified. Accordingly, for the agreement to be registered (ss.24BG–24BI):

- any party may apply to the Registrar of ILUAs for its registration, if all other parties agree;
- the Registrar must notify the public and certain persons if they are not parties; for example, all relevant governments and Native title Representative Bodies; and
- there follows a cooling-off period of one month during which any party may advise it does not want the agreement registered; otherwise it will be registered.

The Registrar must not register the agreement if a Representative Body for any area covered by the agreement advises the Registrar within one month of notice (s.24BH-BI) that it was not notified of the agreement by the Body Corporate. The Registrar must be satisfied that the notification requirement was not complied with.

Area Agreements (ss.24CA-CL)

Criteria

Area Agreements (s.24CD) can be made in any situation *other* than where there are registered native title bodies corporate for the *whole* area subject to the proposed agreement (in which case the agreement would properly be a Bodies Corporate Agreement). Importantly, Area Agreements may cover land or waters where native title has not yet been determined.

Content

Area Agreements can be made about the same wide range of matters as a Body Corporate Agreement (including the validation of invalid future acts other than intermediate period acts, and changing the effect on native title of intermediate period acts (s.24CB(aa) and (ab)). Additionally, an Area Agreement can be made about any matter concerning the statutory access rights conferred by Subdivision Q (s.24CB); namely, rights of access to certain

persons with registered native title claims to lands or waters covered by non-exclusive agricultural and pastoral leases. Again, agreement may be given for any consideration and on any conditions, including the grant of interests in land (s.24CE).

Parties

Parties to an Area Agreement *must* include a newly defined class of Indigenous persons referred to in the legislation as the 'native title group' (defined in s.24CD(1), (2), (3)). For an Area Agreement, the 'native title group' includes, where they exist, all registered native title claimants and registered native title bodies for any of the area to which the agreement relates. Any other indigenous person who asserts that they hold common law native title, but does not have a registered claim, *may* also be a party; as *may* a Representative Body.

If there are no registered native title claimants or registered bodies corporate for any of the area, then the 'native title group' consists of *one or more* of the following: any Representative Body for the area; and any person who has a common law claim to native title in relation to the area. In other words, this type of agreement can be made *before* there are any native title claims lodged or registered over the area, with Indigenous people who assert a common law claim to native title for the area.

Government *must* be a party if the agreement provides for extinguishment by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act. Otherwise it is not mandatory for government to be a party, though it *may* be. Any other person *may* be a party.

If there are any Representative Bodies for the area of land concerned and none of them is to be a party to the agreement, then a person in the 'native title group' *must* inform, by notification, at least one of the Representative Bodies of its intention to enter into the agreement. A person in the 'native title group' *may* also consult with any such Bodies about the agreement (s.24CD). This does not mean that the Representative Body must agree to the Area Agreement or even be consulted.

Registration

For an Area Agreement to be registered:

- any party may apply to the Registrar of ILUAs for its registration, if all other parties agree;
- the Registrar must notify the public and certain persons if they are not parties; for example, the relevant governments and Representative Body; and
- there follows a three-month period allowed for objections and new native title claims to be registered.

Given the expanded range of native title interests who may potentially be a party to an Area Agreement, there are additional requirements for their registration; namely, the application for registration must state that it has been made with the authority of all identified actual or potential native title holders for the area. There are two alternative mechanisms established for providing such authorisation (s.24CG(3)).

The first possible mechanism is to have a Native Title Representative Body provide a certification (in writing) of the application for registration (s.24CG(3)(a)). Representative

Bodies are given new statutory functions covering this responsibility (s.202(4)(e)). It is *not* mandatory for a Representative Body to provide certification, but if it does, it may only do so if it is satisfied that 'all reasonable efforts' have been made to 'identify all persons who hold, or may hold, native title' and that they have 'authorised the making of the agreement' (s.202(8)). It must also state its grounds or reasons for being of the opinion that those particular requirements have been met (s.202(9)). If the area encompasses the jurisdiction of more than one Representative Body, then all need to certify the agreement if it is to be certified under this procedure.

The second possible mechanism if a Representative Body does not certify an agreement, is for the parties themselves to include a statement with the application for registration of the agreement (s.24CG(3)(b)). That statement must be to the effect that 'all reasonable efforts' have been made to identify 'all persons who hold, or may hold, native title' and that they have 'authorised the making of the agreement'. Those reasonable efforts include consulting with all Representative Bodies for the area subject of the agreement. A further statement must also be included which sets out the grounds on which the Registrar should be satisfied that those requirements have been met.

The definition of 'authorise' underlying both these alternative mechanisms for registration specifies that if the persons claiming or holding the common native title rights utilise decision-making processes operating under 'traditional laws and customs', then those processes must be complied with in order to secure their authorisation to the making of the agreement. Otherwise, where there is no such process, authority to make an agreement must be given in accordance with any process of decision making agreed upon by the native title group (s.251A).

Consideration of objections to an Area Agreement are tailored to the two alternative procedures described above. Where the agreement has been certified by the Representative Body and there is an objection made in writing to its registration by a person/s claiming to hold native title, then in order for it to be registered, the Registrar must be satisfied that, despite the objection, the Representative Body provided certification in accordance with its statutory requirements under s.202(8). Because any registered native title body corporate, if it exists, is required to be a party, this means that in order for the Registrar to register the agreement, all persons determined to hold native title (who are represented by such bodies corporate) will need to agree to the terms of the agreement.

The agreement must not be registered unless the Registrar is satisfied that requirements relating to the identification of, and authorisation by, all actual or potential native title holders have been met. In deciding this, the Registrar *must* also consider any information provided by a Representative Body and persons making the objection.

If the agreement has not been certified by a Representative Body, but rather by the inclusion in the application to register of a statement by the parties, the Registrar cannot register the agreement unless he/she is satisfied that the following persons are parties:

- all registered native title claimants and registered bodies corporate in relation to the area; and
- any persons who lodged a native title claim during the three-month notification period and had that claim registered.

The aim in this type of ILUA is to ensure the inclusion of all native title rights and interests in relation to the area. Accordingly, any potential native title holder who wishes to object to an agreement being registered is expected to express that objection by substantiating their asserted native title interests in the area of land and exercising their right to lodge a native title claim (which would have to pass the new threshold test for registration). Then as a registered claimant, the objector would have to become a party to the agreement before it could be registered. If they choose not to do so, and maintain their objection, the agreement *cannot* be registered.

Alternative Procedure Agreements (ss.24DA-DM)

Criteria

Alternative Procedure Agreements can be made in any situation other than where there are registered native title bodies corporate for the *whole* area subject to the proposed agreement (in which case the agreement would be a Bodies Corporate Agreement). Importantly, an Alternative Procedure Agreement may also cover land or waters where native title has not yet been determined.

Content

An Alternative Procedure Agreement can be made about the same wide range of matters as an Area Agreement (s.24DB), with three important differences:

- it may additionally be used to provide a framework (including alternative procedures) for developing other agreements about native title rights and interests;
- because it is not a requirement that native title holders are parties, this type of ILUA *must not* provide for extinguishment of native title (s.24DC); and as a consequence
- it *may not* be used to provide for changing the effect on native title of intermediate period acts.

Parties

Parties to an Alternative Procedure Agreement (s.24DE) include a differently defined 'native title group' than for Area Agreements. In this type of ILUA, the 'native title group' (s.24DE(2)) is defined with a more institutional flavour and *must* consist of (where they exist) all registered native title bodies corporate *and* all Representative Bodies in relation to the area covered by the agreement.

Any registered native title claimant and any other person claiming to hold native title under common law to the area subject to the proposed agreement *may* be a party. In other words, in this type of agreement, the Representative Body is a mandatory party, but registered and common law claimants are not. In circumstances where a Representative Body initiates an Alternative Procedure Agreement as a party in its own right, it is required under its ILUA agreement-making function (s.203BH, s.202A) to 'consult with, and have regard to, the interests of persons who hold or may hold native title in relation to land or waters in that area'.

An important difference from the previous types of ILUAs is that under an Alternative Procedure Agreement every relevant government (according to its jurisdiction) *must* be a

party. Any other person *may* be a party. Again, Indigenous consent to an agreement may be given for any consideration and on any conditions, including the grant of interests in land (s.24DF).

Registration

For an Alternative Procedure Agreement to be registered (ss.24DH–24DM):

- any party may apply to the Registrar of ILUAs for registration if all other parties agree;
- the Registrar must notify the public and certain persons if they are not parties; for example, the relevant governments and Representative Bodies; and
- there follows a three-month period allowed for objections and new native title claims to be registered.

Any person claiming to hold native title in the area may lodge an objection to the agreement on the grounds that it would not be fair and reasonable to register it. There are three conditions (s.24DL), *one* of which must be met before this type of agreement is registered. These conditions relate to whether objections have been made and whether the objections satisfy the Registrar that it would not be ‘fair and reasonable to register the agreement’, having regard to:

- the content of the agreement;
- the effect of the agreement on any native title rights and interests (eg. whether the agreement would unfairly inhibit the enjoyment of those); and
- any benefits provided under the agreement to current (including actual, potential, and succeeding generations of native title holders), including the way in which benefits are to be distributed.

Importantly, under this type of ILUA, new regulations may be made for alternative registration provisions to those under s.24DH-DL.

The effect of ILUA registration

The beneficial effects of registering an ILUA (Part 2, Div 3, Subdivision E) are significant.

Contractual force

An ILUA has effect as a contract while registered (s.24EA) and all persons who hold native title are bound by its terms and conditions in the same way as the registered native title bodies corporate or the native title group, even if they are not parties to the agreement. This binding effect operates on the basis that all actual and potential native title holders are assumed to have had the opportunity to object to its registration.

Future act validation

Future acts covered by an ILUA will be valid if they comply with s.24EB and s.24EBA; namely, the details of the agreement provided to the Registrar *must* include a statement of authorisation by the native title holders to the doing of the future acts in question (with or without conditions), and a statement specifying that the right to negotiate is not intended to

apply to those particular acts. If there is an agreed changed effect on native title, a statement to that purpose must also be included.

Protection against fraud, undue influence and duress

There is further protection for parties in the grounds upon which an ILUA can be removed from the Register (thereby removing its statutory validation) (s.199C(3)). Parties are dissuaded from inducing another party (including by fraud, undue influence or duress) into entering an agreement, as a result of powers given to the Federal Court to order the Registrar of ILUAs to remove an agreement from the Register if the Court is satisfied that such pressures were applied. Furthermore, the Court, on application by a party, may make an order for compensation against the person who committed the fraud etc, made payable to any party to the ILUA who suffered loss or damage as a result of its removal from the Register (s.199C(4)).

Settlement of compensation

Substantial legal certainty is provided to governments and resource developers by the fact that agreement by native title claimants or holders to an ILUA covering future acts can be given for any consideration, including payment of compensation. Those 'negotiated' compensation payments are taken to constitute a final settlement of compensation for the future acts involved.

Compensation for future acts covered by an ILUA is generally limited to what is in the agreement. However, native title holders who were not entitled to compensation under the agreement (for example, a person who is later found to hold native title, but was not entitled to any benefits under the earlier registered agreement) may apply for compensation in the usual way under Division 5. This exception does not apply to persons represented by the registered body corporate under a Body Corporate Agreement, or those persons whose authority was obtained for an Area Agreement.

Certainty

The combined effect, then, of the ILUA registration process, future and past act validation, the possible statutory consent to the surrender of the right to negotiate, the associated settlement of compensation, together with the certification, authorisation and binding of all native title holders to the agreement, is to provide substantial legal certainty for all parties to an ILUA.

The 'assistance' role of the NNTT or alternative State body

When requested by any of the persons making an ILUA, the NNTT or a recognised State or Territory body may assist parties in negotiating the agreement (ss.24BF, 24CF, 24DG). Additionally, for Area and Alternative Procedure Agreements, the NNTT or recognised State or Territory body may, at the request of the parties, assist in negotiating with the person making an objection to the registration of the agreement 'with a view to having the objection withdrawn' (s.24CI(2), s.24DJ(2)).

The role of Native Title Representative Bodies

Representative Bodies are given varying roles in ILUAs, ranging from representation and certification through to direct participation as a party. All these functional roles will raise workload, resourcing and operational competency issues.

A much needed provision of the amended legislation is that Representative Bodies may become a party to an ILUA (in comparison, for example, to the right to negotiate procedure where they can not be a negotiating party and are limited to their representative role). If it is to be a party to an ILUA, a Representative Body *must*, 'as far as practicable consult with, and have regard to the interests of persons who hold, or may hold, native title in relation to the land or waters in that area' (s.202A, s.203BH). If it is not to be a party, at least one Representative Body in the area covered by the agreement must be notified of the agreement by the Body Corporate or a person in the 'native title group' before the agreement can be registered.

An important function relates to their proposed role in Area Agreements where they are called upon to certify the application for registration in writing (s.202(4)(e), s.203BE). Certification by a Representative Body must be made to the Registrar with a statement setting out the grounds for it being of the opinion that all native title holders have been identified and have authorised the making of the agreement. The alternative is for the parties themselves to state that these processes have taken place. In either case, the Registrar will have to be satisfied that those requirements have been met.

A Representative Body may well be reluctant to provide certification if it has not fully participated in the negotiations leading to the agreement. Without such involvement, a Representative Body choosing to certify an agreement could find itself in the position of having to initiate a new round of consultations and research to verify that all members of the native title group have been identified, and to verify the authorisation process and outcome. The failure of the amendments to provide for a mandatory role for Representative Bodies in Area Agreements may serve to undermine the timely implementation of the critical certification stage. Especially given the fact that certification by a Representative Body appears to potentially entail a more timely registration process than that of authorisation by the parties themselves (in which case, an objection entails the lodgement of a claim and the resulting time required for the registration test to be applied).

The resources and skills needed by Representative Bodies to undertake functions related to ILUAs will be considerable. The lessons learnt by land councils in the Northern Territory have direct relevance to these matters (see Smith and Finlayson 1997). Over a period of 20 years, land councils in the Northern Territory, have had to undertake substantial field research to identify all traditional owners for inclusion in land claims and resource development negotiations under the *Aboriginal Land Rights (Northern Territory) Act 1976*. For major mining development projects, the Northern Land Council (NLC) estimates a minimum of 100 days of anthropological research is needed for such a process (NLC pers comm; see also Aboriginal and Torres Strait Islander Commission (ATSIC) 1995: 58). The NLC also conducts wide-ranging consultations with traditional owners involving numerous meetings in order to disseminate information and gain ongoing instructions and informed consent. Similar negotiating, consultation, research and relevant legal experience are sorely lacking amongst many other Representative Bodies.

ILUAs: the potential advantages and opportunities

The new statutory provisions for ILUAs offer a significant opportunity to address the diverse land-use concerns of Indigenous peoples in Australia, resource developers, governments and other stakeholders (see also Australian Local Government Association 1998; Edmunds 1998; French 1996, 1997; Meyers and Muller 1996). They provide a statutory pathway into the agreement process under a wide range of circumstances, and can cover:

- 'side' or ancillary agreements to the claim mediation process;
- negotiated native title settlements, including claim determinations;
- future act agreements;
- land access and use agreements;
- co-management or partnership agreements; and
- frameworks and alternative processes for making other agreements.

ILUAs can be local or regional in their geographic coverage, operating as stand-alone or sequential agreements, and covering specific or multiple common-form matters. Accordingly, they have the potential to:

- reduce separate future act negotiations to a single or related negotiation process;
- reduce contended issues under mediation across separate native title claims;
- reduce delays and costs;
- establish benchmark negotiation or mediation procedures for a region;
- deliver more regionally consistent outcomes; and
- minimise unwelcome fragmentation of land-use and management (whether that fragmentation be cultural or administrative).

ILUAs potentially provide for a fuller consideration of Indigenous concerns and views about 'country'. For example, components of an agreement could be developed to:

- specify preferred Indigenous organisational structures for land use and management;
- specify preferred Indigenous mechanisms for decision-making and representation; and
- incorporate Indigenous land use and management practices.

If one were to approach the ILUA provisions creatively, they could be used:

- to facilitate agreement *between native title claimants or holders* - affording a potentially valuable mechanism within overlapping or disputed claims;
- *between several bodies corporate* formed in relation to a single native title determination over an area of land, in order to establish a future relationship in respect to land use and management; and

- to formalise a proposed land use relationship *between native title claimants/holders and other Aboriginal people* differently defined under State land rights legislation; for example, an ILUA could be made between native title holders and ‘traditional owners’ under the *Aboriginal Land Rights (Northern Territory) Act 1976*, or with land owners and so-called ‘historical’ peoples defined under Queensland and New South Wales State legislation.

The ILUA provisions offer a set of agreement-making tools which are relatively user-friendly and afford parties with:

- flexibility;
- greater capacity to direct the negotiation process and outcomes;
- greater legal certainty and enforceability;
- improved post-agreement implementation; and
- the opportunity to develop preferred processes more attuned to cultural, administrative and economic realities.

They have the potential to be:

- cost efficient and timely;
- sustainable;
- inclusive in their coverage of issues and parties; and
- productive of workable and just outcomes based on practical co-existence.

These will constitute important benefits for all parties.

ILUAs: the challenges and limitations

A major challenge to the development of ILUAs will be to ensure all stakeholders are adequately funded to negotiate. The legislation expands funding available from Legal Aid and Family Services to cover financial assistance to persons who are, or intend to become, a party to an ILUA (s.183). Departmental guidelines for that assistance have recently been revised to extend eligibility to incorporated and unincorporated bodies, including local governments.

It is likely that ATSIC will require additional program funding to ensure all potential native title interests are adequately resourced to participate in the agreement process and to cover the expanded workload of Representative Bodies. The wider cross-section of Indigenous persons able to participate as parties to an ILUA (including, registered claimants, common law holders of native title, Prescribed Bodies Corporate, Representative Bodies, traditional owners and other categories of Indigenous land owners defined under State legislation) will require ATSIC to respond to a far broader range of requests for funding than was the case under the original legislation.

Other potential limitations which might hinder the realisation of the potential advantages of ILUAs include:

- the reluctance of some stakeholders to step aside from their unproductive strategic behaviour in order to actively engage in negotiation and compromise;
- the practical difficulties associated with identifying all persons with native title rights and interests entitled to be a party to an agreement, and the related difficulty of gaining their authorisation;
- if ILUAs are to be workable in terms of their timeliness, cost effectiveness and equity, there will need to be clear objection and assessment criteria which *minimise* delays through administrative inquiry procedures, but *maximise* the opportunity for native title parties to ensure their rights and interests are properly recognised and protected;
- the varying roles of Representative Bodies in ILUAs, ranging from representation and certification through to direct participation as a party, all of which will quickly raise workload, resourcing and operational competency issues; and
- the need for State Governments in particular to develop a 'central agency' and co-ordinated policy approach to native title and agreement making. Without these, government could easily jeopardise or hinder the process.

A number of challenges face Indigenous parties wishing to participate in this new agreement-making process.

First, when substantial native title rights and interests are at stake or surrendered in an ILUA, and when future act compensation can be fully settled by agreement, the native title group will need to ensure they obtain fair compensatory treatment under the terms of an ILUA and that benefits are equitably distributed (both within the group and over time).

Second, endemic intra-Indigenous dispute will always prove counter-productive to negotiating agreements. If agreements require authorising consent from all native title claimants or holders - some of whom are in dispute - in many situations agreement will simply be impractical.

Third, new Federal Government proposals to impose a four per cent withholding tax on all payments received by native title parties by way of compensation for the 'temporary impairment or suspension' of native title under an ILUA or any other agreement may act as a disincentive to the agreement process and increase transaction costs associated with the negotiation of agreements.

Fourth, questions remain as to whether an ILUA will bind native title holders over the generations. This is not simply a legal matter, but an important cultural consideration for native title parties. While ILUAs could have such a binding effect, depending on how the native title group is defined within the agreement, it would be wise to be mindful of the difficulties currently facing both traditional owners and the mining company Energy Resources Australia, in relation to the Ranger Mine in Kakadu National Park. There, the highly public revisiting by a younger generation of traditional owners of the issue of consent by their parents to mining suggests that apparently workable and legally agreed solutions may become effectively unworkable when they are seen to take away from subsequent generations the right to speak for country in a way different to their parents and grandparents (Brennan

1997). Native title signatories to an ILUA need to be mindful of their binding effect and inter-generational implications.

Conclusion

Most important amongst the challenges for all parties in obtaining workable, just, timely and durable outcomes will be the need to:

- develop functionally effective, professional Representative Bodies with high levels of negotiating skills and the organisational capacity to provide certification;
- overcome the debilitating effects of intra-Indigenous conflict which will always prove inimical to agreement;
- secure the active engagement and support of governments at all levels; and
- establish adequate and co-ordinated levels of funding for all parties.

If ILUAs are to be both workable and just - and arguably an agreement will not *be workable* unless it is seen to *be just* by all parties - then there will need to be more than assertions of good intentions. The process will need to:

- demonstrate a practical commitment to legal and cultural pluralism;
- be facilitated by adequate funding; and
- be based upon co-ordinated government policy support and active engagement by industry.

¹ A number of people contributed to early versions of this paper, including staff from the National Native Title Tribunal on whose behalf a paper providing a statutory overview was prepared and delivered to a conference on 'Working With Native Title and Reaching Agreement' in Brisbane, 29 April-1 May 1998. In particular, I would like to thank Stephen Sparkes (Legal Section) and Jo-Anne Byrne and Anita Fields (Research and Information Section) from the Perth Tribunal office for their assistance. Linda Roach from the Centre for Aboriginal Economic Policy Research also provided editorial assistance.

² A variety of amendments were proposed to the *Native Title Act 1993*, the most recent being the so-called 'Harradine amendments'

³ This paper is based on a more detailed published account (Smith 1998) of the statutory framework for ILUAs, their policy implications, and practical challenges and opportunities.

⁴ The word 'area' has its ordinary meaning and can include any area of land or water. While there is no statutory requirement, a registered agreement should preferably have its geographic boundary area described with reasonable certainty. Given that registration binds all native title holders to the terms and conditions of the agreement and that substantial native title rights and interests may be involved, parties would be wise to clearly demarcate on a map the intended geographic area of reference for those terms and conditions.

⁵ An 'intermediate period future act' is one which the Bill validates and which took place on, or after, 1 January 1994, but on or before 23 December 1996 and would otherwise have been invalid to any extent because it fails to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title. These acts are defined in s.232A and various categories are defined in s.232B.

⁶ A registered native title body corporate means a prescribed body corporate whose name and address are registered on the National Native Title Tribunal Register under s.193(2)(D)(iii) or s.193(2)(D)(iv). Amended s.57 refers to determination of a Prescribed Body Corporate and its functions under regulation. Section 59 states that regulations may prescribe the kinds of bodies corporate that may be determined under s.56 s.57.

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