CHAPTER 4

ILUA Negotiation Processes

Introduction

4.1 The range of registered ILUAs and agreements under negotiation reveals the diversity of issues which parties are seeking to address. The Tribunal has pointed out that agreements vary from authorisation of particular future acts to attempts to negotiate comprehensive state-wide ILUAs.[1]

ILUA activity – National Figures as at 20 July 2001[2]

ILUAs registered:	26
ILUAs notified but not yet registered:	2
ILUAs not registered (non-compliant or withdrawn):	5
ILUAs accepted by Registrar and in notification:	5
ILUAs lodged with the Registrar and being considered for notification:	6
ILUA negotiations where the Tribunal is providing assistance:	110
TOTAL	**154**

1 Submission No 8a, p.4.

2 Submission No 8b Attachment A, p.1.

4.2 In total, these figures suggest a significant amount of ILUA activity across Australia. Many ILUA negotiations are occurring without assistance from the Tribunal and are not included in the above figures unless the agreement has been lodged with the Tribunal for registration.[3] The majority of the 110 ILUA negotiations receiving some assistance from the Tribunal are being negotiated in Queensland.[4]

4.3 The Tribunal notes that all of the 44 agreements lodged for registration deal with future act processes or activities that the parties agree may constitute a future act. Those agreements deal with a range of issues including mining activity, development (such as marina or foreshore developments), infrastructure (such as telephone towers and power lines) and settlement of an aspect of a native title application. Notably all 44 agreements provide for cultural clearance.[5]

4.4 While negotiations will vary markedly depending upon the scope, subject matter and parties, the key stages involved in negotiation of ILUAs can be broken down as follows:

- the decision to negotiate;
- preliminary work;
- conduct of the negotiations;
- certification and authorisation (of area agreements);
- registration; and
- implementation of the agreement.

The registration and implementation of ILUAs is discussed in Chapter 7.

The Decision to Negotiate

4.5 There is a number of ways in which native title applications may be settled. Parties may litigate in the courts, conduct negotiations, or a combination of both.

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3 Evidence, p.NT505.

4 Submission No 8b Attachment A, p.2.

5 Ibid. The number 44 is the total of the first five items in the table in paragraph 4.1.

4.6 In other words, it is not a foregone conclusion that parties will decide to negotiate, nor that they will decide to take the path of negotiations leading to an ILUA. If parties decide to negotiate, they have the choice of conducting the negotiations themselves; inviting the Tribunal to mediate; or seeking the assistance of private mediators.

4.7 In addition the resolution of a native title application is not a prerequisite to enable proponents to pursue development opportunities or other activities in the mean time. ILUAs, other mechanisms under the future act provisions (such as the right to negotiate), non-claimant applications and compulsory acquisition of native title rights all provide a means of progressing developments while broader questions regarding native title remain unresolved.

4.8 There are some circumstances in which negotiation of an ILUA is the only means of ensuring the validity of a future act.[6] This is, however, the exception rather than the rule. In general, parties will have the option of utilising either an ILUA or other mechanisms within the future act regime. Indeed, there is nothing to prevent parties pursuing both strategies in tandem. The Tribunal has given evidence that in Queensland the right to negotiate procedures and ILUA negotiations often occur concurrently:

> We are finding that, in many cases, project proponents or the state are initiating a dual process. The state issues a section 29 notice and that starts the clock ticking for a process that has precise time frames and precise outcomes. At the same time, the state or the proponent generally initiates ILUA negotiations, which may well have a broader scope of subject matter under the agreement than a section 29 agreement.[7]

4.9 Under this approach, if the ILUA negotiations do not produce an outcome then the parties can proceed under the timetabled negotiation and arbitration process provided for under the right to negotiate provisions. The advantage of an ILUA in this situation is that the parties have the option of entering an agreement

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6 Submission Nos 13; 24, p.4; and 38, p.13. Evidence, p.NT235. For example a lease could only be issued over vacant crown land subject to native title rights if those rights were compulsorily acquired or an ILUA validated the issuing of the lease.

7 Evidence 3 July 2000, p.NT997.

which deals with a broader range of subject matter than an agreement under the right to negotiate process would encompass.[8]

4.10 Similarly, after experiencing some frustration at the length of time taken to progress ILUA negotiations, Winton Shire Council adopted a strategy of pursuing a non-claimant application in parallel with the ILUA negotiations regarding expansion of the town in the surrounding pastoral reserves.[9]

4.11 When a determination of native title is made, there is still room for agreements about the ways in which those native title rights will interact with other interests.[10] The Tribunal notes that an important use to which ILUAs are being put is to set out the impact of a native title determination on an area and how management will occur after the determination is made.[11] For example, the Kaurareg and Bar-Barrum determinations in Queensland and the Nharnuwangga, Wajarri and Ngarlawangga determination in Western Australia were all accompanied by ILUAs.[12]

4.12 In general, and at all stages of the native title process, parties have an option to negotiate to resolve issues or to seek resolution through litigation or the mechanisms for ensuring the validity of the future acts established by the Act.

4.13 If parties decide upon negotiation as the means of pursuing their interests then they will need to consider whether the agreement they reach should be registered as an ILUA. The Commonwealth Attorney-General's Department has pointed out in its evidence that the assumption that an ILUA is always necessary is not correct.[13]

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8 Ibid.

9 Submission No 20. Evidence, pp.NT112,123.

10 Submission Nos 1, pp.3-4; 4, p.4; and 32, p.2. French J 'Local and Regional Agreements', *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper No 2, AIATSIS, August 1997, pp.2-3.

11 Submission No 8a, p.4.

12 National Native Title Tribunal *The Kaurareg People's Native Title Determinations: Questions and Answers* May 2001, pp.8-11 and *The Bar-Barrum People's Native Title Determination: Questions and Answers* June 2001, pp.8-9. *Clarrie Smith v State of Western Australia* [2000] FCA 1249.

13 Evidence, p.NT237. Submission No 38, pp.23,30.

4.14 In other words, parties to agreements consider whether there is a need to go through the registration and notification procedures established by the Act to attract the statutory protection associated with an ILUA, or whether enforcement of the agreement under the general law as a contract or deed provides sufficient certainty.

4.15 Several witnesses gave evidence that they do not always seek registration of agreements as ILUAs.[14] Indeed, the Northern Land Council's submission to the inquiry states that generally the NLC has sought to negotiate agreements outside the ILUA provisions.[15] Similarly Goldfields Land Council notes in its submission that it has not utilised the ILUA provisions but has nevertheless entered a number of agreements outside the Act.[16]

4.16 Further, one witness cautioned against the pressure which may be placed on commercial negotiations where indigenous parties seek to address broader social issues in the negotiations.[17] These issues which include autonomy and service delivery are best dealt with through a separate negotiation process between governments and indigenous people but:

> … if state governments are not engaging with indigenous people on these other issues, indigenous people will seek outcomes in the processes that they are involved in, which are these commercial arrangements and it is natural that they will seek the benefits that they see as imperative … in the agreements they are entering into.[18]

4.17 Similarly ATSIC's submission notes that while there are links between the ILUA process and the proposal for a national treaty, the treaty proposal would be more wide-ranging, covering such matters as cultural rights and self-government.[19]

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14 Submission No 5, Evidence, pp.NT236,239,300.

15 Submission No 29, p.7.

16 Submission No 5.

17 Evidence, p.NT259.

18 Ibid. See also Blowes R and Trigger D in Edmunds M (ed.) *Regional Agreements - Key Issues in Australia, Volume 2 Case Studies* AIATSIS, Canberra, 1999, p.109.

19 Submission No 19, p.19.

Preliminary Matters

4.18 Prior to parties commencing negotiations there is a number of preliminary tasks which are crucial and which help to set the tone for formal negotiations.[20] These tasks may well take more time than formal negotiations and they will often be determinative of whether negotiations are successfully concluded.

Identifying the Parties

4.19 An important part of the preliminary work to negotiation of an ILUA will be identifying appropriate parties to the agreement. In some circumstances the Act requires particular parties. For example where it is proposed to extinguish native title rights by surrender to a government, the relevant government must be a party.[21]

4.20 Apart from the statutory requirements, there is also an initial question of what parties are necessary to the agreement in a practical sense. For example where state-wide framework agreements are being considered it is obviously important to ensure all major stakeholders are included in negotiations so that agreements will be effectual. The South Australian Government points out that the state may need to be included in such negotiations as there may be a requirement to amend or enact legislation to underpin the ILUA.[22] Naturally the need to include all the major interested parties must be balanced against the risk of making negotiations unwieldy through the inclusion of too many parties and too broad a range of issues.[23]

4.21 Even where relatively discrete negotiations between a proponent and a native title holder are to take place, proponents may wish to involve the government parties who have (for example) the power to issue mining tenements or alter tenures.[24] In some cases this is achieved through keeping the relevant government

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[20] Submission No 6, p.5.

[21] *Native Title Act 1993* ss.24BD(2), 24CD(5).

[22] Submission No 4, p.6.

[23] Submission No 18, p.8.

[24] Submission No 23, p.22. Evidence, p.NT232.

advised of the negotiations rather than the government participating as a party in those negotiations.[25]

4.22 The Commonwealth Attorney-General's Department notes that native title holders may wish to involve government parties who are able to legislate or take other action to ensure that successors in title of the non-native title parties are bound by the agreement.[26] The issues native title holders may wish to see addressed through the negotiations may also require the inclusion of government parties.[27] As already noted, the Western Australian Aboriginal Native Title Working Group noted that:

> [O]ne of the shortfalls of ILUAs is that, unless the State government is a party to these agreements and looks seriously at consent determinations that arise or could arise in negotiations, the achievements for native title holders are very limited. So it is not just about money; it is about the return of lands to people and control and management over those lands and their responsibilities in relation to it.[28]

4.23 In relation to area agreements, there may be considerable preliminary work involved in identification of the native title party especially if there is no existing native title application, history of previous agreements or land rights claims.[29] The Tribunal has suggested the use of public notices or advertisements prior to negotiations commencing to ensure that all native title parties participate in the negotiations from the outset.[30] In many cases, anthropological, ethnographical or genealogical research is required to assist the identification of native title holders.[31]

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25 Submission Nos 18, p.8; and 24, p.3.

26 Submission No 38, p.12.

27 Ibid, p.26.

28 Evidence, p.NT374.

29 Evidence, p.NT298.

30 Neate G 'Indigenous Land Use Agreements: What Certainty for Pastoralists?' paper delivered at *69th Annual Conference of the Pastoralists' & Graziers' Association of WA* 24 February 1999, p.15. Submission No 1, p.5.

31 Evidence, pp.NT299,363-364,425,451,452. Senior C 'The Yandicoogina Process: A Model for Negotiating Land Use Agreements' *Land, Rights, Laws: Issues of Native Title* AIATSIS, Feb 1998, p.13. O'Fairchaellaigh C 'Negotiating Major Project Agreements: The "Cape York Model"' *AIATSIS Research Discussion Paper No 11* 1999, p.11.

4.24 Several parties have advocated an inclusive approach which involves all groups asserting an interest as native title holders.[32] While there may appear to be advantages in dealing with a more discrete group, this ultimately presents dangers including the possibility that agreements will face objections during the notification process or that the agreement will not be properly authorised.[33]

Decision-Making Structures

4.25 A key issue will be whether the native title party has a decision-making structure and process to enable it to participate in negotiations.[34] The development of such a structure can be time consuming and expensive particularly if members of the native title group are widely dispersed geographically as is often the case.[35] While not an ILUA, R Blowes and Dr Trigger noted in relation to the Century Zinc mine negotiations:

> A particularly difficult issue, in our view, is that authority structures among Aboriginal people, by which binding decisions are made among claimants, are invariably a complex matter likely to 'engulf' parts of the negotiation process.[36]

4.26 One submission notes that in South Australia:

> … the establishment, over the past three years, of Native Title Management Committees (NTMCs) as authoritative representatives of claimant communities has provided an essential structure to span the interface between native title processes under Aboriginal custom and tradition, and those under the Australian legal system. However although the NTMCs have been established, they are new intercultural institutions and if they are to be effective they require much support for their essential work in informing, consulting with and representing their community members.[37]

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32 Evidence, pp.NT91,197. Submission No 8a, p.6. Senior C op.cit., pp.4, 6.

33 *Native Title Act 1993* ss.24CG(3), 24CL(3), 203BE(1)(b), 203BE(5), 251A. Submission No 8a, p.6.

34 O'Fairchaellaigh C op.cit., p.8. Senior C op.cit., p.7.

35 Evidence, p.NT501.

36 Blowes R and Trigger D in Edmunds M (ed.) 1999, p.99.

37 Submission No 11, p.6.

Similarly, the Western Australian Aboriginal Native Title Working Group pointed to the need to direct additional resources towards the establishment and support of prescribed bodies corporate or, where there is no determination of native title, organisations which represent the community of native title holders.[38] Such organisations can be considered 'an interactive mechanism between cultures'[39] and are a means of ensuring that there is an appropriate decision-making structure as well as an entity which can perform responsibilities under an agreement.[40]

4.27 Even where there are existing structures in place representing native title holders these may not be appropriate to the particular negotiations. In part this is because projects, such as pipeline developments or the Alice Springs to Darwin railway, impact on more than one native title group.[41] The negotiations between the Department of Defence and the traditional owners of Bradshaw Station, which has an area of 8,710sq km, are another example of negotiations involving a number of native title groups due to the geographic size of the project.[42]

4.28 There may also be an issue where negotiations relate to a small geographic area as the location may mean that some parts of the native title group have a greater responsibility for the area than others or that members of another group have shared interests in the area.[43] In addition the subject matter of the negotiations will be important in defining an appropriate decision-making framework. Dr Edmunds has noted that:

> Political responsibility and action are highly contextual and include a process of defining who is the politically responsible group in any particular situation. This is done on the basis of rights in the country in

38 Evidence, p.NT367. See also Evidence 13 April 1999, pp.NT161-163.

39 Evidence, p.NT387.

40 Evidence, p.NT367.

41 Submission No 18, pp.6, 9. Evidence, p.NT477. Blowes R and Trigger D in Edmunds M (ed.) 1999, pp.121-122,128.

42 Evidence, pp.NT273,463,465.

43 Edmunds M in Edmunds M (ed.), 1999, p.28.

> question, as well as in relation to both the scale of events as well as the kind of events.[44]

4.29 For example, while indigenous people who have only limited rights to the use of an area may defer to the decision of the traditional owners in many instances, it may be appropriate to involve them in negotiations which would irrevocably affect their limited interests (such as a decision to allow open cut mining of an area). Dr Sutton makes a related point in relation to pressure on traditional decision-making mechanisms to adapt to contemporary issues:

> Under modern conditions, economic decisions can lead to the rapid recasting of the local or even regional political, cultural and racial mix. If, 150 years ago, only five people had any real say in when and how a particular grass plain might be burned off, it is unlikely that a similar group of five senior people would today bear the burden of deciding about establishing a new Club Med complex on the same grass plain.[45]

4.30 Some witnesses raised the existence of overlapping native title applications or of conflict between members of the native title group as a factor preventing or hampering negotiation.[46] For example in Queensland, Bulloo and Booringa Shire Councils both raised the existence of overlapping claims as a difficulty preventing the Councils reaching agreements with native title holders.[47] This is a significant issue which needs to be addressed if negotiations are to be successful. But it is not necessarily an insurmountable obstacle. Despite the fact that many indigenous people are reticent in relation to intra-indigenous disputes, there is evidence of agreements being reached in circumstances where there were significant disputes within the native title group.[48]

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44 Ibid. See also Martin D in Edmunds M (ed.), 1999, p.229.

45 Sutton P 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title' *National Native Title Tribunal Occasional Paper Series* No2/2001, p.31.

46 Evidence, pp.NT35,50,62,83-84. Submission Nos 4, p.5; and 7, p.3.

47 Evidence, pp.NT50,62.

48 Evidence, pp.NT94,322-323. Senior C op.cit., pp.4, 13. Martin D in Edmunds M (ed.), 1999, p.225. French J, pp.4-5.

4.31 It is unrealistic to expect that indigenous communities will generally hold an unanimous view in relation to negotiations.[49] The issue is to identify appropriate mechanisms for managing conflict and enhancing decision-making processes.[50] In simple terms this may involve a parallel process which:

> [A]llows there to be an indigenous process for resolving disputes between groups while collectively pursuing joint negotiation on the development issue with the non-indigenous parties. In other words the indigenous parties are brought together to resolve matters between themselves in a separate forum while in another forum the groups, usually via some form of joint representation, negotiate jointly the elements of an agreement with the non-indigenous parties.[51]

4.32 The issue of appropriate decision making structures may also be relevant to the non-indigenous parties to negotiations. While this is unlikely to be an issue in relation to negotiations with an individual proponent, it may arise where a broader agreement is sought. The Goldfields Native Title Liaison Council,[52] which represents local government, prospectors, explorers, miners and State Government departments, is one example of a structure established to facilitate negotiation where there are multiple non-indigenous parties to proposed agreements. The Council is developing protocols in relation to access for mineral exploration on lands the subject of native title applications.[53] Similarly, industry peak bodies often act as the representative entity for the purpose of negotiations.[54]

Access to Professional Advice

4.33 The Tribunal has pointed out that one of the critical resources required to allow parties to successfully conclude an agreement is access to adequate expert

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49 Evidence, pp.NT374-375; and 16 September 1999, p.NT708. Edmunds M 'Conflict in Native Title Claims' *Land, Rights, Law: Issues of Native Title* Issues Paper No 7 AIATSIS February 1995, pp.1, 8.

50 Jones C 'Parallel Negotiation: Tradition and Development. A mediation model for these troubled times' paper presented at the *5th National Mediation Conference 2000* Brisbane 17-19 May 2000, p.5. O'Fairchaellaigh C op.cit., p.26.

51 Jones C op.cit., p.4. See also Edmunds M, 1995, p.8; and Muir K in Edmunds M (ed.), 1999, p.270.

52 Evidence, p.NT549.

53 Ibid. French J op.cit., pp.6-7.

54 Edmunds M in Edmunds M (ed.), 1999, pp.39-40.

advice. This can include legal, commercial, anthropological, historical and land management advice.[55] For example, native title parties may require access to advice and assistance to be in a position to participate in negotiations on an equal footing with other parties. The Central Land Council stated in evidence, that proponents also recognise they:

> … need an equality of expertise at the negotiating table so that, ultimately you obtain sustainable and equitable agreements between the parties.[56]

4.34 In general such expertise should be available through the representative Aboriginal/Torres Strait Islander body ('representative body'). Evidence from many parties suggests that resource pressures on representative bodies mean that they are often not in a position to provide assistance within the timeframes envisaged by many proponents.[57] This issue is discussed further in Chapters 5 and 6.

4.35 Importantly, some proponents, particularly small miners, individual pastoralists or small local councils, may also require assistance to obtain professional advice in relation to negotiations.

4.36 The Committee received evidence that various types of assistance are available through the Tribunal, state governments and, in the case of local councils, local government associations.[58] The Tribunal's role includes assisting commercial interests to identify native title groups, mediation, facilitation, providing maps and reviewing draft documents to ensure they meet the requirements for ILUA registration. The Tribunal also produces a variety of information products including guidelines for registration of the various types of ILUA and an audio tape entitled *Yarning about ILUAs*.[59]

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55 Submission No 8b, p.16.

56 Evidence, p.NT497.

57 Evidence, pp.NT72,150,197-198,233,260,301,317,320,321,367,383-384,389-391,448.

58 Submission Nos 7; 8a, p.15; 15; and 24, p.3.

59 Submission Nos 8a, pp.15-16; and 8b, p.7.

4.37 The Australian Local Government Association (ALGA) has produced two guides entitled *Working with Native Title* and *Working out Agreements.* It has also delivered information seminars and training workshops to assist councils in the use of these guides.[60] ATSIC, the Commonwealth Attorney-General's Department and the Tribunal provided funding assistance to the ALGA to produce the guides. The Tribunal has also assisted by sending an officer or a member to most of the training workshops.[61] These types of initiatives provide a valuable means of disseminating information regarding native title and building the capacity of local practitioners.

4.38 Proponents are also able to access funding from the Commonwealth Attorney-General under s183 of the Act for expenses including legal costs; fees for anthropological or historical research; and accommodation and travelling expenses.[62] For example the South Australian Farmers Federation and the South Australian Chamber of Mines and Energy have received funding to assist their participation in the negotiation of the state-wide ILUA for South Australia.[63] The Attorney-General's Department has also funded the Western Australian Municipal Association to provide initial legal advice to its members through a nominated legal firm and the Local Government Association of Queensland to provide advice and conduct training workshops on native title issues.[64]

4.39 A number of witnesses, including the Tribunal, noted that there is a shortage of professionals, in all fields, with experience in dealing with native title matters. This means that even where parties have sufficient funds to obtain technical advice to assist negotiation of their ILUA they may experience difficulty engaging suitable professionals.[65] This is clearly a problem which will diminish over time as a larger pool of professionals gain experience dealing with native title issues. Nevertheless it

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60 Submission Nos 4, p.2; and 8b, p.9. Evidence, pp.NT3-12.

61 Evidence, p.NT8.

62 Attorney-General's Department *Provision of Financial Assistance by the Attorney-General in Native Title Cases: Guidelines* November 1998, para 5.6.

63 Submission No 6, p.8. Evidence 19 April 2000, p.NT873.

64 Submission No 38, p.40.

65 Evidence, p.NT151,251,378,450,539; and 3 April 2001, pp.NT60-62.

often presents a significant hurdle to the finalisation of agreements within the timeframes parties desire.

Setting the Ground Rules

4.40 Several commentators have suggested that a useful preliminary step before formal negotiations commence is to agree on a negotiation protocol (or ground rules) for the negotiations.[66] Naturally the scope and complexity of the negotiations determines whether this step involves development of a formal legal document or merely some discussion of these issues before negotiations commence.

4.41 The process agreement between the Quandamooka Land Council Aboriginal Corporation and Redland Shire Council provides an example of a comprehensive negotiation protocol. It deals with issues including the process which would be followed in reaching an agreement on native title, the subject matter of the negotiations and the principles underpinning the negotiation process.[67]

4.42 The New South Wales Aboriginal Land Council and the New South Wales Minerals Council Ltd have developed a protocol in relation to negotiations regarding agreements for exploration and mining in New South Wales. The protocol provides that the parties will give priority to the negotiation of standardised access agreements regarding exploration under section 26A of the Act and sets out in general terms the arrangements for negotiations.[68]

4.43 Similarly the Victorian Government, the Aboriginal and Torres Strait Islander Commission (ATSIC) and Mirimbiak Nations Aboriginal Corporation entered a protocol regarding negotiations for a native title framework agreement for Victoria. The protocol sets out the issues which may be dealt with by the negotiations including recognition of native title; the relationship between native title and other interests; a simplified future act regime; protection of Aboriginal cultural property; and

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[66] O'Fairchaellaigh C op.cit., p.10. Blowes R and Trigger D in Edmunds M (ed.) 1999, p.100. See also Evidence, p.NT24.

[67] Quandamooka Land Council Aboriginal Corporation and Redland Shire Council *Native Title Process Agreement* 14 August 1997, p.1.

[68] Submission No 27 Attachment B.

provision of employment, training and enterprise development opportunities.[69] ATSIC gave evidence that negotiations for the framework agreement are now well advanced and that the agreement will provide for a simplified process for minor native title agreements.[70]

Conduct of Negotiations

4.44 In relation to negotiations between the parties important factors raised during the inquiry include the time required for negotiation; the location for negotiations; the availability of model agreements; and the authorisation and certification of ILUAs.

Time Required

4.45 Given the wide variety of agreements, it is difficult to generalise about the time required for negotiations. There is however, some evidence of agreements being concluded within a very short timeframe. For example the Adelong gold mine ILUA negotiations with the Wiradjuri and Walgalu peoples were concluded in three months.[71] The Queensland Government also noted that a number of ILUAs have been reached within reasonably short timeframes including the Mackay Surf Life Saving Club and the Mackay City Council gardens ILUAs.[72]

4.46 Notably the Tribunal cautions that:

> If the parties' critical dates are less than six months away an ILUA will not serve their purposes. Because of the authorisation requirements, ILUAs take time to negotiate to ensure that adequate consultation takes place for informed consent. In addition, four months (1+3) for notification needs to be allowed for, plus time for dealing with objections if they arise.[73]

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69 State of Victoria, ATSIC and Mirimbiak Nations Aboriginal Corporation *Protocol for the Negotiation of a Native Title Framework Agreement for Victoria* undated, p.4.

70 Evidence, p.NT320.

71 Evidence, p.NT286. See also Submission No 8a, p.14.

72 Evidence, pp.NT178-179.

73 Submission No 8a, p.14. See also Evidence, p.NT181.

4.47 Rio Tinto Ltd gave evidence that voluntary agreements negotiated by the company took up to five years to get to fruition.[74] Similarly the Department of Defence indicated that the agreement in relation to Bradshaw Station has been under negotiation for more than two years.[75] A Queensland solicitor representing proponents in over forty ILUA negotiations suggests that:

> [I]t is very uncommon for ILUAs of any kind to be completed within twelve months and there are instances of ILUAs which have been under negotiation for over four years.[76]

4.48 The Queensland Government has noted that the Opalton ILUA which provided for the grant of 22 mining tenures was negotiated between August 1999 and December 1999 but that signing, certification and registration of the agreement was not completed until December 2000.[77]

4.49 Some parties have expressed frustration at the length of time required to complete agreements.[78] For example the Queensland Boulder Opal Association gave evidence that while the Association and other parties had successfully negotiated the Opalton ILUA (discussed above), a broader, long-term agreement has been under negotiation since early 2000. The Association stated that given the seasonal nature of opal mining in this region:

> Every month and every week, while this [agreement] is not finalised, is a disaster.[79]

The Queensland Government notes that this proposed agreement will allow the granting of a backlog of 200 mining and exploration tenements, enable future grants over 10 years and cover an area roughly the size of Tasmania.[80]

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74 Evidence, p.NT245.

75 Evidence, p.NT273.

76 Submission No 1, pp.2, 5.

77 Submission No 24b, p.2.

78 Evidence, pp.NT116,130,349.

79 Evidence, pp.NT129-130.

80 Submission No 24b, p.2.

4.50 Several witnesses noted that there are competing demands on both native title parties and their representatives and that this militates against agreements being reached within short timeframes. In other words, regardless of the funding resources available, the demands that are being placed on indigenous communities to participate in processes both within and outside the Act, may prevent a particular agreement being reached in the time required or preferred by non-indigenous parties.[81]

Location of Negotiations

4.51 The physical setting and location of negotiations is often an important factor. One reason for this is because it may determine how readily all the relevant parties can be brought together. It is also critical to whether the parties feel comfortable negotiating with one another.[82]

4.52 As members of the native title group may live in a number of locations, in part due to the history of indigenous peoples' forced removal to reserves and missions, the selection of a suitable location for negotiations can be difficult to address. For example, the Gurang Land Council pointed out that drawing a native title group together may mean assisting people from Cairns, Townsville, Palm Island and the Gold Coast to attend meetings.[83] Similarly the Central Land Council noted that one agreement:

> … required us to bring people from Western Australia, Katherine and a variety of other far flung places.[84]

In addition, non-indigenous parties to the agreement may be based in areas which are far removed from the land affected by the agreement. This difficulty can be compounded as indigenous parties may interpret the failure of senior representatives

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81 Evidence, p.NT261,373, 516. Evidence, 3 April 2001, pp.NT58-59.

82 Blowes R and Trigger D in Edmunds M (ed.), 1999, p.107.

83 Evidence, p.NT154.

84 Evidence, p.NT501.

of the proponent to attend meetings as indicating that the proponent is not serious about negotiations.[85]

4.53 Dr Senior describes how the negotiations of the agreement between Hammersley Iron Pty Ltd and Gumala Aboriginal Corporation involved three major bush meetings which dealt primarily with intra-indigenous issues followed by six mediation sessions held in the Pilbara:

> Hammersley always acquiesced in the selection of the venue. The meetings were held in lecture rooms or training rooms which were light and airy and where visual aids were available … Sessions were rearranged to allow attendance at funerals, and elders who wanted to see how things were progressing were encouraged to attend.[86]

4.54 For its part, Central Queensland Land Council noted that the location for meetings is determined on a case-by-case basis taking into account a number of factors including cost and concerns under Aboriginal law and custom.[87]

Aids to Communication

4.55 In regions where English is the second language of native title holders assistance from interpreters may be required. For example in relation to the proposed state-wide ILUA in South Australia, the Aboriginal Legal Rights Movement (ALRM) has translated meetings with native title groups into western desert language to assist older participants. ALRM also notes that the use of diagrams and drawings assisted the understanding of more complex issues.[88]

Model Agreements

4.56 Cape York Land Council's submission notes that the lack of precedents and the newness of the ILUA provisions contributed to delays and difficulties in the final stages of drafting the ILUAs which accompanied the Kaurareg determination of

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85 Blowes R and Trigger D in Edmunds M (ed.), 1999, p.110.

86 Senior C op.cit., pp.7,11. This was an agreement concluded prior to the 1998 amendments to the Act.

87 Evidence, p.NT198.

88 Agius P 'Challenges of Negotiating a Statewide Agreement' paper presented at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, pp.10-11.

native title.[89] Similarly some parties cited the confidentiality of agreements as a difficulty as it prevented access to precedent agreements.[90]

4.57 This problem is gradually being alleviated by the growing experience of all parties in negotiating agreements and increasing availability of model agreements. For example, the Tribunal's website provides a large range of sample and template agreements.[91] Mirimbiak Nations Aboriginal Corporation gave evidence that a proforma agreement for project consent to mining in Victoria has been developed.[92] The Western Australian Municipal Association has also published a booklet entitled *Reaching Agreements: Some Examples for Local Government* which sets out a model negotiation protocol and a model framework agreement for the delivery of local government services.[93]

Certification and Authorisation of Area Agreements

Identification of Native Title Holders and Authorisation

4.58 There is a considerable cost involved in organising meetings to authorise some ILUAs. In relation to area agreements, the Act requires that reasonable efforts have been made to identify all persons who hold or may hold native title in the area and that the agreement is authorised by all the persons identified.[94] The Central Queensland Land Council submission states that given the nature and composition of groups within their region it would be unlikely that this group would have fewer than 250 members.[95] Obtaining authorisation of an agreement may necessitate extensive research to identify the native title group and a number of meetings which

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[89] Submission No 2, p.3. See also Submission No 3, p.5.

[90] Evidence, p.NT512. Submission No 7, p.2.

[91] http://www.nntt.gov.au/nntt/agrment.nsf/area/homepage.

[92] Evidence, p.NT301.

[93] Holmes M *Reaching Agreements: Some Examples for Local Government* Western Australian Municipal Association August 2000, pp.9-22.

[94] See *Native Title Act 1993* ss.24CG(3), 24CL(3), 203BE(1)(b), 203BE(5), 251A. See also discussion in Appendix 6.

[95] Submission No 12, p.2.

bring the group together.[96] As the members of the native title group may live in several locations, this is an expensive and logistically challenging task.[97]

4.59 Some submissions have suggested the authorisation provisions require amendment.[98] For example Rio Tinto Ltd suggests the authorisation and registration provisions are unduly onerous:

> The requirements for extensive anthropological and other enquiries to be undertaken to identify **all** [emphasis in original] potential native title holders is extremely expensive and time consuming. Such detailed and lengthy investigations are unnecessary given the comprehensive notification and objection processes undertaken prior to registration of an ILUA.[99]

Rio Tinto has also argued that the Act in effect allows a small minority of native title holders to veto agreements. It is suggested that this arises from the fact that where there is no traditional decision-making process, the native title group are required to agree on a decision-making process and adopt that process in relation to authorisation of the agreement. Rio Tinto argues that by withholding agreement in relation to the decision-making process a small minority can in effect veto any agreement. The company suggests either that the Act be amended to provide for authorisation by a 75 percent majority or to allow registered native title claimants (who have already been authorised to lodge a claimant application) to enter area agreements.[100]

4.60 In the ordinary course, native title groups who do not have a traditional decision-making process are already able to agree on a process for authorising agreements similar to those proposed by Rio Tinto.[101] There are difficulties with both of the suggested amendments proposed by Rio Tinto. Authorisation by a 75 percent majority is likely to be inappropriate for many native title groups given that members

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96 Submission No 18, p.11.

97 Evidence, pp.NT181,501. Submission Nos 2, pp.7-8; 23, pp.17-18; and 34, p.4.

98 Submission Nos 13; 18, p.11; and 23 pp.6-7, 18-19.

99 Submission No 23, p.18.

100 Submission No 23, pp.18-19. See *Native Title Act 1993* ss.251A, 251B.

101 *Native Title Act 1993* s.251A.

of the group will generally have different levels of responsibility and authority to influence agreements.[102] In addition some members of the group may have specific responsibilities in relation to parts of the group's country which would entitle them to a more influential role in decisions affecting those areas. If agreements are to be sustainable in the long term then the decision-making process must reflect these complexities.

4.61 In relation to the suggestion that agreements be authorised by registered native title claimants, the Tribunal points out that the agreement in question may not arise out of negotiations concerning the claimant application.[103] Even where the agreement does relate to the claimant application, the authority of the registered claimants is generally limited in a number of important respects. For example there is usually a requirement to regularly report back to the native title group and to seek further instructions from the group at important stages.[104]

4.62 The Australian Pipeline Industry Association submission states that:

> [I]t may be possible to require all registered claimant groups to explain [their] authorisation process as a consequence of registration, thus eliminating the need to determine this during the negotiations over future acts in an ILUA.[105]

This proposal assumes that the decision-making process of the native title group will be the same in relation to the making of the claimant application and the entering of an agreement. Clearly this will not be the case if the proposed agreement relates to an area in which there is a number of registered native title applications. In most cases the subject matter of the proposed agreement and the particular geographic areas it would affect will also have implications for how the group can appropriately authorise the agreement. Dr Martin notes that:

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102 Sutton P 'Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title', pp. 12-13,41. Sutton P 'Aboriginal Country Groups and the "Community of Native Title Holders"' *Native Title Tribunal Occasional Paper Series* No1/2001, p.8.

103 Submission No 8b, p.27.

104 Ibid.

105 Submission No 18, p.11.

> [T]he right to speak on specific issues – particularly those quintessentially of the Aboriginal domain, such as traditional lands – is not typically ceded to others as a general right through a process of 'representation', but is the prerogative of particular sets of people in specific circumstances.[106]

4.63 While the requirements for authorisation of area agreements are clearly resource intensive, those provisions are in essence a compromise between the need to create a mechanism which ensures that native title holders are able to enter binding agreements prior to the determination of native title; and the need to protect the rights of native title holders. Given that the Act provides for native title holders to be bound by the agreement upon registration even where they are not parties to it, some caution should be exercised before watering down the provisions of the Act which seek to ensure they have authorised such agreements.[107]

4.64 It seems likely that as more agreements are entered and more determinations of native title occur the process of identifying the native title group and obtaining authorisation of an agreement will require less time and resources.[108] Indeed there will be an increasing number of situations where there is a determination of native title in relation to the area affected by the agreement so that a body corporate agreement can be entered.[109]

Certification of area agreements

4.65 The Act does not require certification of area agreements by representative bodies. The Western Australian Aboriginal Native Title Working Group suggested that there is little incentive for representative bodies to certify agreements as the Tribunal Registrar must be satisfied that the native title holders have been identified and that the agreement was properly authorised by them. Furthermore where the

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106 Martin D in Edmunds M (ed.), 1999, p.229.

107 *Native Title Act 1993* s.24EA(1)(b).

108 Evidence, p.NT239.

109 Submission Nos 18, p.12; and 24, p.2.

representative body certifies the agreement the Act provides for an objection process.[110]

4.66 The Northern Land Council has similarly argued that the requirement for the Registrar to be satisfied that all reasonable efforts have been made to identify native title holders and they have authorised the agreement before registering an ILUA duplicates the tasks performed by the representative body in certifying the agreement.[111] Central Land Council noted that it does certify area agreements but also considers the Registrar's role duplicates the functions of the representative body.[112]

4.67 In the case of certified agreements, the Registrar's role in examining the efforts made to identify the native title holders and authorisation of the agreement only arises where a person claiming to hold native title in relation to the area objects to registration of the agreement and does not withdraw the objection.[113] By comparison, where agreements are not certified by the representative body, the Registrar is always required to consider these issues.[114] The Tribunal noted in evidence that:

> [U]nless there is an objection in the case of certification, we do not conduct any inquiry into the lead-up to certification. Those responsibilities are squarely set down in the Act and they fall upon the representative body itself.[115]

4.68 On a practical level, the Tribunal notes that to 20 July 2001 it registered twenty-six ILUAs; and a further seven agreements had been notified or were in notification. The Tribunal had received six purported objections to the registration of area agreements. Of these two did not amount to objections as they were deficient

110 Evidence, pp.NT363,381.

111 Submission No 29, pp.3-4.

112 Evidence, p.NT500.

113 *Native Title Act 1993* s.24CK(2)(c).

114 *Native Title Act 1993* s.24CL(3).

115 Evidence, p.NT530.

in substance, three had been resolved and one was still being processed.[116] While this is only a small number of agreements, there is at least some preliminary evidence that objections to registration may not be a frequent or insuperable obstacle.

4.69 Western Australian Aboriginal Native Title Working Group pointed out in evidence that the Act provides for objections by a person claiming to hold native title in relation to certified area agreements and not in relation to uncertified agreements.[117] The Explanatory Memorandum to the *Native Title Amendment Bill 1997* notes that:

> This is because the appropriate response of potential native title holders unhappy about the registration of such an agreement is to make a native title claim. If such persons become registered native title claimants, they must become parties to the agreement before it can be registered.[118]

Where a native title application is lodged during the notification period, registration of an uncertified agreement will not occur until the Registrar knows whether the native title applicants will become registered native title claimants.[119] This means that certification by a representative body will potentially produce more timely registration.[120]

4.70 The New South Wales Government has suggested that certification ought to take place before the agreement is executed by the parties:

> As registration of an ILUA is essential to its effective operation, the parties need to know that a proposed ILUA is likely to be registered, which is more likely to happen if the representative body is able to give

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116 Submission No 8b, p.8.

117 *Native Title Act 1993* s.24CI.

118 *Native Title Amendment Bill 1997: Explanatory Memorandum,* p.235. See also Submission No 38, p.22.

119 *Native Title Act 1993* s.24CJ.

120 Smith D E 'Indigenous Land Use Agreements: New Opportunities and Challenges Under the Amended Native Title Act' *Land, Rights, Laws: Issues of Native Title*, Regional Agreements Paper No 7 AIATSIS, December 1998, p.10.

> certification. Thus it would be preferable for certification to be obtained prior to the execution of the ILUA by the parties.[121]

Presumably the issue at stake here is that the Government does not wish to enter a binding agreement without some assurance that the agreement has been properly authorised by the native title holders. Possible solutions to this difficulty may be to include a term in the agreement providing that the agreement has no effect until it is registered or to require indemnities from the native title party in relation to future claims by native title holders who did not authorise the agreement.[122]

Summary

4.71 The process of negotiating an ILUA includes a number of vital preliminary steps not least of which is a critical examination whether an ILUA is required, or whether an ordinary contract or an alternative process under the Act will serve the parties' purposes. The negotiations themselves are often time-consuming and resource-intensive. This appears, in part, to be a result of the inherent complexity in reaching agreements with a large group of people who may live in a number of locations. It is also likely, however, that as all parties build their capacity to reach agreements the time and resources required will diminish. In particular the difficulties associated with identification of the native title group and authorisation of area agreements will decline where previous agreements or claims in the area have required the identification of the native title holders and as a result of a growing number of native title determinations.[123]

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121 Submission No 34, p.2.

122 Submission No 18, p.10. Evidence, p.NT237.

123 If there are registered native title bodies corporate for all of the area affected by the agreement a body corporate agreement must be used (*Native Title Act 1993* ss.24BC 24CC, 24DD).