

CHAPTER 7

ILUA Registration and Implementation

Introduction

7.1 Most of the ILUAs *lodged* with the Tribunal (as at 20 July 2001) are area agreements; of the remaining ILUAs, four are body corporate agreements. No alternative procedure agreements have been lodged with the Tribunal to date. Of the 26 agreements that have been *registered*, all are area agreements. The Tribunal is currently assisting with approximately 110 ILUA negotiations.¹

7.2 The Tribunal advises that four of the agreements lodged (all certified area agreements) have:

... attracted objections that were supported by correct documentation. 3 of those have been resolved, the other is currently being processed. In 2 cases, people challenged the agreements, but did not provide supplementary material sufficient to constitute an objection.²

Of the 26 (area agreement) ILUAs registered to date, sixteen have been in Queensland; four in the Northern Territory; three in Victoria; and one each in Western Australia, New South Wales and South Australia.³

Registration Issues

7.3 Chapters 4, 5 and 6 of this report provide an analysis and discussion of the various elements central to the successful negotiation of ILUAs. Those chapters evidence the complexity of negotiation processes, and indeed many witnesses before the Committee and many submissions attest to the difficulty of successfully negotiating an ILUA to completion. Once parties have completed negotiations

¹ Wade R 'Indigenous Land Use Agreements: Their Role and Scope' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001 Brisbane, p.2.

² Submission No 8b Attachment A, p.2.

³ *Ibid*, p.1.

however, it is not a certainty that an ILUA will be registered on the Register of Indigenous Land Use Agreements (the Register) and thereby provide to parties the statutory protection that ss.24EA and 199C offer. The Act prescribes specific requirements that must be complied with before an ILUA can be registered on the Register.⁴

7.4 In his speech to the Native Title Forum in August 2001, the Attorney-General explained that the particular rules relating to registration are an integral aspect of the ILUA legislative regime because of the binding effect of ILUAs upon all native title holders upon registration, not just those who are parties to the ILUA. Parliament has thereby considered that indigenous people must be afforded every opportunity to participate in and consent to the making of the ILUA:

The registration procedures are designed in a way that recognise that the negotiating power of parties may not be equal. ... Once an ILUA has been registered, other protections ensure that fairness to native title holders is maintained. ... The procedural requirements for registering ILUAs attempt to strike a balance between certainty for third parties and governments and fairness for the native title holders who will be affected by the making and registration of any agreement'.⁵

7.5 The Committee has received several submissions and heard evidence from various parties that raise the issue of the burden upon parties fulfilling the procedural requirements for registration. Parties have expressed considerable frustration about the registration process set up under the Act. The areas that have been highlighted include the 3 month registration period for area agreements, strict compliance required by the Act in relation to procedural requirements for registration, notification provisions, mapping requirements, and inadequacies in advertising practices of the Tribunal.

⁴ See discussion in Appendix 6 for overview of legislative requirements for registration.

⁵ Williams The Hon D 'Beyond Mabo: The Practical Realities of Negotiating Native Title' opening Address delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, p.5.

Registration Period and Legislative Requirements

7.6 After what could be a long negotiation period, it takes at least another 3 months before registration of an ILUA can occur.

By the time you put in your application to register an ILUA, it takes the National Native Title Tribunal almost a month to put the notice in the paper. So almost immediately you have gone from three months to four months. Our experience indicates that at the end of the period it takes almost another month before security of title is offered to the applicant, so therefore you go to five months.⁶

The Attorney-General for South Australia has argued a similar point:

ILUAs take a long time to negotiate and it is an added frustration when the registration of an agreement is held up by such a long period for preparation of notices.⁷

7.7 However, it is not only proponents that have expressed frustration about the registration process. Some indigenous parties have also expressed concern about the possible detrimental effect that a delay of 3-5 months for registration can have upon their bargaining position with commercial entities.

7.8 Mirimbiak Nations Aboriginal Corporation gave evidence about the disadvantage under which indigenous people can operate when seeking to negotiate with non-native title parties in relation to the time taken to register an agreement:

The problem with the ILUA process is that the notification registration period is a lengthy one. Someone who has a business proposition that they want to get off the ground now and who has borrowed money to finance it — it may be that they have to make repayments on that money and they cannot make the repayments if they cannot start the business going — cannot wait six months for notification, registration and the rest of that process to get underway.⁸

⁶ Evidence, p.NT500.

⁷ Submission Nos 6a, p.2; 10, p.2; and 18, p.13; and Evidence, p.NT179. But see also Submission No 3 that supports the 3 month registration process because it introduces a level of transparency and accountability to the ILUA process (p.3).

⁸ Evidence, p.NT300.

The Central Land Council has made a similar comment, in particular in relation to the seasonal nature of work in the Northern Territory:

A five month period in the Northern Territory, where exploration and mining is seasonal — it only takes place during winter — is a commercial problem for them. It is unrealistic. We start negotiations at the beginning of the year and they get their title in September and October. They get a very limited time in which to carry out their exploration program. Programs are budgeted on an annual basis. They say to us, 'If we do not do it soon, we will lose our budget.' I do not know the truth of that, but I suspect it is quite correct. The problem is that ... the length of registration ... [is not] commercially realistic. It makes it difficult for us in dealing with the industry in terms of saying, 'You will get your security of title in time to undertake your exploration activities.' It just does not happen that way.⁹

7.9 The Tribunal has responded to criticisms of the delay in registration by remarking that, with considerable experience to date, its aim is to complete registration within five months from the date of lodgment for registration. It notes that parties can assist the Tribunal in achieving this timeframe by ensuring that documents comply with the requirements of the legislation. In addition, if there are no challenges to registration, this time frame is further achievable.¹⁰ Further, the Tribunal has stated that this five month period could probably be reduced as the Tribunal refines its own processes around advertising, and as parties continue to submit applications of higher quality.¹¹ The Tribunal has stated in its submission that it remains committed to providing parties with information as early as possible in the process, to allow them to develop more reasonable expectations about timeframes, and to ensure that parties do everything themselves to ensure the most efficient turn-around in registration.¹²

Strict Compliance for Registration

7.10 Other submissions have argued that the Act should be amended to provide for 'a substantial compliance only requirement' in relation to the registration of

⁹ Evidence, p.NT500.

¹⁰ Submission No 8b, p.13.

¹¹ Ibid.

¹² Ibid, p.14.

ILUAs.¹³ It is argued that strict compliance with the Act's requirements adds unnecessary costs and delay to the ILUA process, and that by adopting a substantial compliance approach, the process will not be hindered by 'minor process transgressions'.¹⁴ One submission has noted that it considers that 'the requirement for safeguards currently outweighs the need for practicability'.¹⁵

7.11 The Law Council of Australia has commented on the requirement in regulation 7 of the *Native Title (Indigenous Land Use Agreements) Regulations 1999* that certain documents accompany an ILUA, including:

... a statement by each party to the agreement, signed by or for the party, that the party agrees to the application to register the document.

It argues that this requirement is too prescriptive. The Council suggests that the regulations be amended to allow for a statement to be included within the ILUA itself:

All that should be necessary is that the parties to the agreement state in writing that they agree to registration.¹⁶

7.12 The Tribunal notes that there is scope for the Registrar to accept substantial compliance in some instances. In relation to matters required to accompany an application rather than to be included within the terms of the agreement or the application, the Tribunal notes the possibility of flexibility. Other more substantial matters, however, will always be subject to strict compliance with the requirements of the Act:

Proper authorisation, for example, is at the heart of an agreement which, once registered, will bind all native title holders, even if they are not parties to the agreement.¹⁷

¹³ Submission No 23, p.6.

¹⁴ Ibid.

¹⁵ Submission No 1, p.7.

¹⁶ Submission No 17, p.1.

¹⁷ Submission No 8b, p.26.

In deciding which matters are open to flexibility in relation to substantial compliance or otherwise with the Act, the Tribunal must balance the specific requirements of the Act with the requirement that it carry out its functions in a fair, just economical, informal and prompt way (s.109(1)).¹⁸

7.13 A related point also made in one submission is that often a consent determination will be accompanied by an ILUA that makes provision for the doing of future acts in the determination area. It is noted that the Act allows for two separate processes for the making of a determination and the registration of an ILUA:

This adds time and expense to the process. It may be appropriate to consider some alternative arrangements that may streamline this process.¹⁹

7.14 Telstra, in its submission, has cited the opportunity for errors to occur in the need to replicate large volumes of text within the notification provisions, thereby causing delays when re-notification needs to occur, the large cost of publishing such notices and the desirability of using plain English descriptions of the future acts.²⁰

7.15 The Committee is of the view that given the binding effect of a registered ILUA upon successive native title parties, the current legislative requirements are appropriate and the approach of the Tribunal in administering those requirements is balanced, flexible and fair.

Mapping Requirements

7.16 Telstra has identified as an area of concern the requirement in the *Native Title (Indigenous Land Use Agreements) Regulations 1999* that a map of the agreement area, *in addition* to a written description of the area, accompany the application for registration of an ILUA. Telstra argues that:

The 'agreement area' will not necessarily match a distinct or defined area of land that has previously been surveyed and mapped, particularly if it reflects the boundaries of a native title claim. Further,

¹⁸ Ibid.

¹⁹ Submission No 24, p.2.

²⁰ Submission No 32, p.3.

an 'agreement area' will often exclude areas of land by formula (eg the land area of certain public works). Mapping these exclusions may require a survey to be carried out, which is expensive and time consuming.²¹

Telstra also considers that the level of map required for an ILUA registration is higher than the level of map required to obtain registration of a native title claim.²² Telstra notes:

Provided that a map is created that reflects the general description of the 'agreement area' in the ILUA or the external boundary of the agreement area, the purpose of the map will be served.²³

7.17 Other submissions have also noted this as a problem. The Cape York Land Council has noted that the requirement in regulation 5 of the *Native Title (Indigenous Land Use Agreements) Regulations 1998*²⁴ that where an ILUA provides that the surrender of native title is intended to extinguish native title, the application for registration must be accompanied by a statement to that effect, identifying the area in relation to which native title is to be surrendered. The Land Council has highlighted the difficulties this has created, and cites the following example:

... land was set aside for particular future acts within a general area, with the exact boundaries to be settled between the parties at a later date. A complete description was therefore not presently available but would be in the future. There was also some initial disagreement (emanating from the NNTT) about whether GPS description would be adequate (with some talk of metes and bounds, which is absolutely less accurate, also being required). It would be helpful for the "complete description" definition to be amended to clarify that GPS alone is adequate (particularly given that GPS is now more accurate than ever before, to within 1 metre or so).²⁵

²¹ Ibid, p.4.

²² Ibid, p.4.

²³ Ibid, p.3.

²⁴ The *Native Title (Indigenous Land Use Agreements) Regulations 1998* were repealed by Statutory Rules 1999, No.335. The requirement in the repealed regulation 5 has been included in regulations 6 (application requirements for body corporate agreements) and 7 (application requirements for area agreements), *Native Title (Indigenous Land Use Agreements) Regulations 1999*.

²⁵ Submission No 2, p.8.

7.18 In this regard, the NSW Government has submitted that it:

... has experienced difficulties in the proper description of the area which is to form the subject of an area agreement. In the Native Title (Indigenous Land Use Agreements) Regulations a complete description of the area is defined to mean a map of the area that shows geographic coordinates. It is noted that the provision of coordinates provides no greater or clearer description of the agreement area than a proper survey map. In one case, there was a substantial delay between lodgment of the ILUA with the National Native Title Tribunal and its subsequent notification. The Tribunal advised that the delay was due to difficulties with the geographic coordinates. This would suggest that some rationalisation of approach is required in the provision of geographic data, leading to an amendment of the Regulations, if greater specificity is sought by the Registrar.²⁶

7.19 The Tribunal has made the following comment about the specificity of mapping requirements within the legislation:

The information about the area of the ILUA has to be sufficiently clear to enable the parties, the Federal Court, the Native Title Registrar and any interested person to be reasonably certain about the internal and external boundaries of the area. Accurate information about the area is essential to enable the Registrar to perform his statutory responsibilities of notification and registration.²⁷

In addition, a clear map and description are necessary to give to the public notice about the area to be affected and to provide persons searching the Register of ILUAs accurate information about land and waters subject to an ILUA. The Tribunal has confirmed:

The area must be described so that it is identifiable on the ground, with reasonable certainty, taking into account the circumstances of the case. In some situations, for example, it may be sufficient for the ILUA area to exclude areas described by a class of tenure, rather than by a parcel number and coordinates. The map and word description must be accurate.²⁸

²⁶ Submission No 34, p.3.

²⁷ Submission No 8b, p.7.

²⁸ Submission No 8b, pp.7-8.

7.20 The Tribunal has issued geospatial guidelines to assist parties when complying with this requirement in the Act.²⁹ The Guidelines apply to both maps and area descriptions in relation to applications for register of native title claims and ILUAs. While there does appear to be some inconsistency in the legislative requirements for maps and area descriptions between those required for an application for registration of a native title claim³⁰ and those for an ILUA, the Committee notes that the guidelines issued by the Tribunal appear to apply some consistency across the two areas. In addition, it is noted that in the Guidelines, the satisfaction of an adequate written description of an area includes that a reference to other native title applications is sufficient.

Advertising Requirements

7.21 A related issue was one raised by the Central Land Council in evidence before the Committee: the requirement that notification of registration of an ILUA be by means of newspaper advertisement. The Central Land Council argues that such an approach is based upon the twofold assumption that all indigenous communities have access to newspapers, and that they read English.³¹

7.22 The requirement in clause 6 of the *Native Title (Notices) Determination 1998* is that the notice be published in one or more newspapers that circulate generally throughout the area to which the notice relates, and in a relevant special-interest publication. Clause 7 of the Determination provides that in addition to notice being given in accordance with clause 6, notice may also be given by broadcasting information about the content of the notice by means of a broadcasting service or television transmission service that serves the geographical area within the land or waters that may be affected by the ILUA.

7.23 The Tribunal, in response to this criticism, has outlined that its standard practice in relation to newspaper advertisements is to give notice in a state based

²⁹ National Native Title Tribunal *Geospatial Technical Guidelines for the Preparation of Maps and Area Descriptions* July 2001.

³⁰ *Native Title Act 1993* s.62(2); *Native Title (Indigenous Land Use Agreements) Regulations 1999* r.5.

³¹ Evidence, p.NT499.

newspaper, *The Koori Mail*, and at least one (sometimes more than one) regional newspaper circulating in the area of the agreement. The Tribunal points to the statutory responsibilities that representative bodies have under the Act in relation to ensuring that notices are brought to the attention of people who may hold native title in the relevant area.³²

7.24 The Committee notes however, that the principal role of notification for registration under the Act in relation to ILUAs rests with the Tribunal,³³ not with representative bodies. Further, it would be desirable for the Tribunal to use electronic media as well as newspapers when notifying the public about an ILUA to be registered. In particular, there should be a requirement for the Tribunal to notify indigenous communities about the proposed registration of an ILUA through advertisements on local indigenous radio or television programs, where possible.

Issues Following Registration of ILUAs

7.25 Once an ILUA is registered, it binds all native title holders in relation to the area, including any that were not a party to the agreement. To date, there are limited examples to draw upon because of the small number of ILUAs that have been registered and that have been in operation for a significant period of time. However, several important issues have been raised in the submissions and evidence about matters that arise once an ILUA has been registered.

Confidentiality

7.26 The confidentiality of ILUAs following registration on the Register of ILUAs has been considered problematic. One party considers that it is too restrictive within the legislation. Conversely, another party is concerned about commercially sensitive information being available through the Register.

7.27 The Act requires certain details about ILUAs to be placed on the Register of ILUAs.

³² Submission No 8b, p.30.

³³ *Native Title Act 1993* ss.24BH, 24CH, 24DI.

These include:

- a description of the area covered by the agreement;
- the name of each party to the agreement and the address at which the party can be contacted;
- if the agreement specifies the period during which it will operate — that period; and
- if the agreement includes any statements about extinguishment, validation, or future acts — a reference to the fact, setting out any such statement.³⁴

7.28 In addition, the Registrar may enter any of the details of the agreement that the Registrar considers appropriate.³⁵ Parties may advise the Registrar in writing if they wish for some or all of the details of the agreement not to be available for inspection by the public (apart from the details outlined above that are required to be on the Register).³⁶

7.29 Rio Tinto has confirmed its concern that information required to be included on the Register could be used by a competitor of a party to an ILUA to the benefit of the competitor. To that end, it has suggested that there should be mechanisms in place under the Act to ensure that commercially sensitive information in relation to an ILUA is not publicly available.³⁷ The NSW Government in its submission has stated that:

The Act is unclear as to what the Registrar is to do with the copy of the ILUA which accompanies any application for registration. There is no indication as to what the Registrar is entitled to do with an ILUA which is rejected for registration. Guidelines should be developed as to the use which may be made of an ILUA submitted for registration.³⁸

³⁴ *Native Title Act 1993* s.199B(1). See also Doepel C 'Indigenous Land Use Agreements: Notification and Registration' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, p.12.

³⁵ *Native Title Act 1993* s.199B(2).

³⁶ *Native Title Act 1993* s.199E.

³⁷ Submission No 23, p.8.

³⁸ Submission No 34, p.2.

7.30 The Tribunal has commented about the requirements of the Act in relation to this matter:

Parties can request that certain information other than details required under s.199B(1) be kept confidential (s.199E). As a general rule, any other information about the agreement need not appear on the Register. It is a matter for the parties to the agreement to determine whether any other terms to the agreement are to be in the public domain. If parties would like any other information or documents to be kept confidential they should make this request when lodging the documents.³⁹

The Tribunal's submission also makes the point that the Registrar can only keep information confidential to the extent allowed by law, and that legislation such as the Commonwealth *Freedom of Information Act 1982* and requirements imposed by the Act itself may require the Registrar to give a copy of the agreement to a person.⁴⁰

The Tribunal also makes the following point:

Keeping the contents of some ILUAs confidential could lead to practical problems in the long term, for example, if issues of enforceability arise. As noted earlier, a registered ILUA binds all persons holding native title in relation to any or all of the relevant land or waters, irrespective of whether they are parties to the agreement. Accordingly, it would be appropriate for at least those persons who are not parties but are bound by an ILUA to be made aware of its existence and the relevant provisions.⁴¹

7.31 The Committee is of the view that generally a balance is required between protecting commercially and culturally sensitive information and notifying parties potentially affected by the agreement. The current position as outlined in the legislation appears to achieve that correct balance.

Disputes Arising under Registered ILUAs

7.32 The Act makes no provision for resolution of disputes arising under an ILUA following registration. Nevertheless, parties are able to include terms within the ILUA

³⁹ Submission No 8b, p.31.

⁴⁰ Neate G 'Some Legal Issues and Indigenous Land Use Agreements' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, p.19.

⁴¹ Submission No 8b, p.31.

outlining the way that disputes will be resolved if they arise, as is the case with a normal commercial agreement. The Tribunal has made the point that:

In order for an ILUA to be effectively and beneficially implemented over time, it should address how a breach of obligations is to be resolved and should identify the appropriate dispute-resolution mechanisms. Mechanisms for monitoring the ongoing progress and implementation of an agreement will enhance its durability, as will mechanisms for maintaining continuing communication between all parties after the agreement has been registered.⁴²

7.33 The Act also currently makes no provision for the Tribunal to assist the parties to reach agreement when a dispute arises. The Tribunal has pointed to the fact that the Land and Resources Tribunal of Queensland (LRT), unlike the Tribunal, has functions under its enabling legislation, to assist parties in resolution of disputes arising under ILUAs, in the situation where the state is a party, and where the ILUA itself provides that matters are to be referred to the LRT for action.⁴³ The Committee considers that the Act should be amended to grant to the Tribunal powers to assist with dispute resolution (following registration of an ILUA) in circumstances where relevant parties to the ILUA request it.

Deregistration

7.34 The possibility that an ILUA can be de-registered has been raised as a deficiency in the legislation.⁴⁴ One submission argues that the provisions concerning de-registration should be tightened, considering the effort that goes into ensuring that the ILUA can be registered.⁴⁵

7.35 Rio Tinto Ltd has argued that the possibility of deregistration following a determination of native title effectively renders the validity of future acts covered by an ILUA uncertain in certain circumstances. It suggests either that ss.199C(1)(a) and (b) should be removed from the Act, or that future acts contained in an ILUA, once registered, should be accorded the same protection given to acts under

⁴² Submission No 8b, p.17.

⁴³ Ibid.

⁴⁴ Submission No 10, pp.2-3.

⁴⁵ Submission No 23, pp.7,20.

s.24FA. Rio Tinto also argues that, in conjunction, s.199C(1)(b) should be amended to provide that an area covered by an ILUA is subject to a native title determination of the kind envisaged by s.199C(1)(b) to be removed from the operation of the ILUA without the de-registration of the entire ILUA.⁴⁶

7.36 Another submission has argued similarly that once the complex process of registration has occurred, including authorisation and certification, registration should:

... provide a safe harbour from invalidity afforded by Subdivision E of Division 3 of Part 2 of the Act, even if there is a subsequent approved determination of native title made in favour of a person who did not authorise the making of the agreement.⁴⁷

7.37 The Law Council has provided a submission to the Committee in relation to this matter. It has put three points about the situation where an approved determination of native title is made (subsequent to the registration of an ILUA) in relation to a person who did not authorise the agreement. First, the Law Council argues that such a person could be categorised as having failed to respond to the notice provided by the Act. Second, parties to an ILUA should not be disadvantaged if the representative body has failed to discharge its responsibility of notifying any such persons. The third point that the Law Council argues is that very few determinations of native title are final, but most are subject to appeal. In any case, s.13(4) of the Act provides that a determination of native title can be set aside:

Under section 199C, however, the Registrar must deregister the ILUA once the relevant approved determination of native title is made, even if it is immediately appealed. ... The [Law Council] submits that the legislative and regulatory requirements are such high hurdles to registration that, once registered, an ILUA should not be subject to the risk of deregistration (except in circumstances of proven concealment or fraud).⁴⁸

⁴⁶ Ibid, pp.19-21.

⁴⁷ Submission No 17, p.2.

⁴⁸ Submission No 17, p.2.

7.38 Another submission however has argued that the provisions governing the removal of area agreements from the Register of ILUAs are too strict. ATSIIC has argued that s.199C:

... tends to undermine certainty. The identification of native title holders is not a precise matter. Accordingly, it would seem reasonable to consider an amendment to this provision to more accurately reflect what we understand to be the policy intention: that if a substantially different group of native title holders is ultimately identified in the formal determination of native title, for example, after a lengthy hearing of the evidence, then the ILUA should be removed from the Register. It should not apply to situations such as a newly identified subgroup or any native title holder that was in fact notified of the impending registration of the ILUA but did not object.⁴⁹

7.39 Given that successive native title parties are bound by the terms of an ILUA about which they potentially had no say, the Committee is of the view that the process of deregistration in the Act provides a fair balance between the interests of non-native title parties and native title parties. In any case, as the Attorney-General's Department has pointed out, once a future act is done, as long as it was registered when it was done, the act will be valid. The Committee does not recommend any change to the legislation at this time.

Amendment of ILUAs

7.40 Rio Tinto Ltd notes that the Act is silent about how an ILUA is to be amended, and recommends that the Act be amended to provide for ways in which this is to be done.⁵⁰ Another submission has suggested that a possible solution is that amendments could be:

... treated and registered like primary ILUAs (for example with a 3 month objection period for an area ILUA), unless an amendment is minor or to correct an obvious mistake).⁵¹

⁴⁹ Submission No 19, p.10.

⁵⁰ Submission No 23, p.21.

⁵¹ Submission No 2, p.9.

Rio Tinto suggests that except in the case of provisions which aim to bring about the surrender and extinguishment of native title, the amendment of ILUAs should be a simple process, to ensure that ILUAs remain a flexible and useful option for parties.⁵²

7.41 The Tribunal has commented that in a situation where parties wish to amend an ILUA, the agreement does not need to be resubmitted to the Tribunal where intended changes:

... do not affect matters which the Registrar was obliged to consider in deciding whether to enter details of the original agreement on the Register. It might, however, be prudent to inform the Registrar of any such changes so that, in the event of a dispute, there is clear evidence of what constitutes the currently registered ILUA.⁵³

7.42 The Committee is of the view that the Act should be amended to provide for guidance about the way that an amendment to an ILUA will be handled, including the circumstances in which parties are required to go back to the Registrar. This would provide greater clarity for all parties bound by an ILUA. It would suggest that there should be an obligation on parties to inform the Registrar when changes are made to the ILUA (unless particularly minor and typographical) and that major changes may require another notification and objection process, similar to the one in place already.

Powers of Native Title Parties under an ILUA

7.43 Rio Tinto has raised the issue of the inability of native title holders to alienate certain rights in the same way that ordinary holders of title can grant for example, an easement.⁵⁴ The consequence of this is that because native title holders are not able to grant or suspend rights, even temporarily, native title rights are extinguished when neither party favours this outcome. Rio Tinto considers this to be unnecessarily detrimental to the native title holders.⁵⁵

⁵² Submission No 23, p.21.

⁵³ Submission No 8b, pp.17-18.

⁵⁴ Submission No 23a.

⁵⁵ Ibid.

7.44 As Rio Tinto acknowledges, these difficulties relate to the nature of native title as currently understood by the common law. In essence, the Act provides for the recognition and protection of a customary title. It allows, as far as possible, for the content of native title to be defined by the traditional laws and customs of native title holders. Rio Tinto's suggestion of enabling native title holders to grant easements or licences would involve a fundamental departure from this approach.

7.45 Further, while native title holders cannot grant an interest in land such as an easement, they can consent to the State or Territory doing so. If their consent is obtained through the ILUA mechanism, the non-extinguishment principle will apply⁵⁶ to protect their native title.

Implementation of ILUAs

Administration

7.46 Issues surrounding the implementation of ILUAs have not received a great deal of attention, due in part to the fact that very few ILUAs have been registered since the introduction of the ILUA provisions. However, the administering provisions of an ILUA, once negotiated and registered, may entail difficulties. As the Attorney-General has pointed out:

... the success of an ILUA itself will depend on the capacity of all parties to fulfil their contractual duties and obligations. ... Entry into ILUAs is likely to place a burden on the native title parties in particular. Non-native title land users are likely to have obligations to native title holders under agreements only in respect of their particular interests. Native title parties are likely to have obligations under agreements in respect of a range of interest holders.⁵⁷

Another submission has made the point that a successful agreement will involve more issues than just native title:

... parties rarely see native title issues in isolation; native title is viewed in the context of broader land management and related

⁵⁶ *Native Title Act 1993* s.24EB(3). See also s.238 for a definition of the 'non-extinguishment principle'.

⁵⁷ Williams *The Hon D op.cit.*, p.10.

issues. Agreements that deal with these broader issues as well as with native title issues should be more acceptable to the parties and, therefore, have a greater chance of long-term success.⁵⁸

7.47 One submission has raised the problem that emerged following the surrender element of the Kaurareg determination. That is, the Native Title Register, under Part 8 of the Act, is not amended when native title land is surrendered under an ILUA, or extinguished for any other reason, such as in the case of compulsory extinguishment. This could lead to difficulties for persons searching the Register and finding that native title exists when it does not. The potential difficulty this could pose for conveyancing has been identified.⁵⁹

7.48 The Cape York Land Council has made the point that ILUAs that are overly complex in their provisions will be a concern for indigenous people, who are required to work with the agreement and rely upon it on a daily basis:

It was conceded by all parties that the degree of complexity would make it difficult to comply with the agreements without further regular assistance and advice from legal and other specialist advisers. Again, the major long term burden of interpretation and implementation of the agreement will fall on the native title holders and their representative body in terms of funding and resources.⁶⁰

Prescribed Bodies Corporate

7.49 In relation to the overall statutory framework for the recognition of native title rights and interests provided for by the Act, prescribed bodies corporate are afforded a central role in the effective holding and management of native title for and on behalf of native title holders.⁶¹ As stated in the commentary to the original *Native Title Act 1993*:

The Act recognises that native title rights are primarily group or communal rights. It is likely that a number of people will be able to

⁵⁸ Submission No 6, p.3.

⁵⁹ Submission No 2, p.9.

⁶⁰ Ibid, p.3.

⁶¹ Mantziaris C and Martin D *Guide to the Design of Native Title Corporations* National Native Title Tribunal 1999, p.11.

show that they possess native title rights to a particular area. Further, membership of the title holding group will inevitably change over time. To take this into account, the Act provides that native title will either be held on trust by a prescribed body corporate controlled by those who are the native title holders from time to time (see sections 56 and 57) or, alternatively, provides for a prescribed body corporate which will represent the native title holders and act as their agent (sections 57 and 58). These bodies corporate will provide a practical and legal point of contact for those who wish to deal with native title holders.⁶²

7.50 The Act sets out the procedure for determining which prescribed bodies corporate will serve the interests of native title holders. Section 55 of the Act provides that at the time of making a native title determination, the Federal Court must make several determinations, one of which is the determination of the prescribed body corporate for the group and whether the prescribed body corporate is to act as an agent for the native title holders, or as trustee. If claimants choose to hold native title directly, then an agent prescribed body corporate is required; it will merely manage the title on behalf of the community. If claimants wish it to hold the title on trust for the native title group, a trustee prescribed body corporate is necessary. If it is determined to be a 'trustee', the members of the native title group become the beneficiaries of the trust. The prescribed body corporate holds the title 'on trust' and directly manages the native title rights and interests.⁶³

7.51 Regulation 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* outlines the characteristics of a prescribed body corporate. Regulations 6 and 7 outline the functions both of prescribed bodies corporate that hold the native title on trust and those that act as agent for the native title holders.

7.52 Prescribed bodies corporate have certain statutory functions under the Act. Once one is registered on the National Native Title Register, it becomes a Registered Native Title Body Corporate.⁶⁴ Registered Native Title Bodies Corporate may enter agreements, be consulted, exercise procedural rights and accept notices

⁶² Commentary *Native Title Act 1993: Legislation with Commentary by the Attorney-General's Legal Practice* AGPS Canberra 1994, p.C11.

⁶³ Mantziaris C and Martin D 1999, op.cit., p.11.

⁶⁴ *Native Title Act 1993* s.253.

on behalf of the native title holders or beneficiaries; they are also recognised as proper parties to ILUAs. Prescribed bodies corporate will therefore be the main vehicle by which native title rights and interests will be administered:

The [Native Title (Prescribed Body Corporate)] Regulations establish a regime under which decisions concerning the management of native title rights and interests by the common law holders will be taken through the registered native title body corporate. The registered native title body corporate becomes the entity that speaks for and makes decisions on matters concerning the native title in dealings with public authorities and members of the public other than the common law holders themselves.⁶⁵

7.53 Indeed, the Western Australian (Court) Government's guidelines about native title agreements provide that one of the conditions of the Government entering into an ILUA is the establishment of a body corporate, before the Government will enter an agreement.⁶⁶

7.54 The Commonwealth Attorney-General has made the following remarks about the resourcing of prescribed bodies corporate:

Prescribed bodies corporate will therefore carry a significant responsibility in negotiating agreements on behalf of native title holders after a determination of native title has been made. They will also have an important role in administering the affairs of native title holders, including responding to the obligations placed on native title holders under agreements. ... Given the importance of prescribed bodies corporate it is important that they are able to carry out the functions and obligations that are imposed on them under agreements, as well as those imposed under the Native Title Act and the prescribed body corporate regulations.⁶⁷

7.55 The Western Australian Aboriginal Native Title Working Group raised the issue of resourcing of prescribed bodies corporate as one that needs attention if agreements are going to work beyond the negotiation and registration phase:

⁶⁵ *State of Western Australia v Ward* [2000] FCA 191 at para 197.

⁶⁶ Submission No 3, p.4.

⁶⁷ Williams The Hon D *op.cit.*, p.11.

... the capacity to manage those agreements is a major issue. One would have thought that, given the need to be consistent with the principles that are within the common law in regard to what native title is, and recognising native title, the administration of processes beyond agreements needs to be facilitated with that level of consistency so that it is an inclusive process and there is the capacity to get informed consent when one is actually dealing with agreements or dealing with matters that arise as a result of agreements whether it be for access, for use or some commercial activity. That needs to be a capacity to uphold the other end of that agreement from the indigenous perspective to be able to manage efficiently so that the benefits that can be derived under those agreements are enjoyed by the community of native title holders.⁶⁸

7.56 The Tribunal in its submission, also identifies the need for adequate resourcing and training for indigenous people to adequately perform their functions and meet their obligations.⁶⁹

7.57 C Mantziaris and Dr Martin raise a significant issue about the conflict in functions that may occur for a prescribed body corporate that is appointed to distribute benefits under an ILUA and its other functions. They argue that the terms of an ILUA may provide for the prescribed body corporate to distribute benefits under that ILUA in a way that conflicts with distribution mechanisms that may be in place for native title related benefits derived outside an ILUA:

Some ILUA benefits may flow directly to nominated native title group members, whilst other benefits may require the corporation to ascertain a distribution mechanism by reference to the system of traditional law and custom.

7.58 Further, they point out that:

Particular problems may emerge where a native title trustee corporation is expected to manage native title related benefits that flow directly to the members of the native title group under an ILUA, alongside benefits that flow directly to the corporation qua trustee. In the context of many contemporary groups, knowledge and understanding of the differences between distribution mechanisms under each benefit stream within the native title group cannot be

⁶⁸ Evidence, p.NT367.

⁶⁹ Submission No 8b, p.18.

assumed. This may cause perceived discrepancies in the distribution mechanism to become the focus of disputes about the ability of the corporation to represent the group and corporate processes.⁷⁰

7.59 The Committee considers that parties should be mindful of issues such as the potential conflict between a prescribed body corporate's obligations under a native title determination, and those under an ILUA. Provisions should be drafted to anticipate possible future difficulties as part of the ILUA, such as review clauses, or clauses that accommodate a possible future native title determination.

7.60 The Committee is also of the view that adequate resourcing and appropriate training for prescribed bodies corporate to sufficiently perform their functions and meet their statutory obligations is imperative for the effective long term sustainability of ILUAs. This training should cover matters such as directors' duties, accounting procedures and land management.

Enforcement of Agreements

7.61 Problems can occur in the implementation stages on a number of different fronts as well. Representatives of the Wiradjuri Council of Elders gave evidence to the Committee that shares that had been promised as part of the Adelong Gold mine agreement have not yet been distributed to the members of the group. Also, this agreement, the first indigenous land use agreement signed after the 1998 amendments, concerns an area of land now subject to a claim on behalf of the Ngunnawal people which has been registered. There is confusion on the part of the Wiradjuri Council of Elders as to how this affects their agreement.⁷¹

7.62 NSW Aboriginal Land Council has also given evidence in relation to this issue and stated that:

... in an ideal world, we would like a post agreement section within the land councils to service those clients, because we find that we get the agreement done and then we are all off at the next

⁷⁰ Mantziaris C and Martin D *Native Title Corporations: a Legal and Anthropological Analysis* Federation Press 2000, p.256.

⁷¹ Evidence, pp.NT287,344.

agreement and they are not getting serviced properly. But that again is a resource issue.⁷²

7.63 One commentator has noted that in order for an ILUA to be sustainable over a long period of time, issues such as breach of obligations and dispute resolution will need to be addressed within the terms of the agreement itself. It is suggested within that submission that conditions that form part of the agreement may be an effective way to achieve this objective.⁷³

7.64 Mechanisms within the ILUA for monitoring ongoing progress and for effective communication between parties are essential for the durability of an ILUA. It has also been noted that the issue of assigning beneficial terms and conditions over the life of the agreement needs to be considered when drafting agreements.⁷⁴

Education and Servicing of ILUAs

7.65 The issue that has arisen in relation to the Adelong Gold mine agreement highlights the need to ensure that the terms of the ILUA and what the native title holders' expectations about the benefits under the ILUA are the same, and that the structures are set up so that the benefits can be distributed to the native title holders in an expedient and efficient way.

7.66 Some commentators have described the important aspects that are critical to the successful implementation of an agreement:

A serious lack of information and education aimed at the members about what the Land Use Agreement is all about has led to a lot of misinformation, confusion and false expectations. The flow on effect of this is in the operations of the organisation where it has led to a lot of time wasting, angst and disappointment for both members and staff alike.⁷⁵

⁷² Evidence, p.NT344.

⁷³ Edmunds M and Smith D *Members' Guide to Mediation and Agreement-Making under the Native Title Act* National Native Title Tribunal April 1988, p.86.

⁷⁴ Ibid, p.93.

⁷⁵ Jackson Q 'You've signed the agreement. Now the real work begins!' paper delivered at the *Native Title Training Course* Sheraton Hotel 25-26 May 2000, p.3.

7.67 One commentator has highlighted the importance of ensuring that the parties to the agreement are aware of what benefits they are entitled to from the agreement. This requires information and education that provides parties with an understanding of the agreement, how it will be implemented, and what their particular rights will be.⁷⁶

7.68 The Pasminco Century Project agreement serves as an example of some of the measures that can be established early in the agreement to ensure that the agreement remains sustainable over a long period of time. A particular set of structures and resourcing arrangements were put in place early on. These:

... provide a framework within which core concerns of the native title groups can be addressed over the expected 20 year life of the project.⁷⁷

7.69 Examples of the structures implemented in relation to that agreement include the establishment of an employment and training committee, an indigenous development benefits trust and a development company.⁷⁸

Summary

7.70 The Committee is of the view that the registration provisions for ILUAs contained within the Act provide a fair and workable balance between the needs of parties to complete commercial transactions, and the need to ensure indigenous interests have been adequately secured; this is the case, given that, upon registration, an ILUA binds all native title holders in relation to the area the subject of the agreement. The Committee notes that it can often be frustrating for parties to wait another (possible) 5 months following completion of what may have been an extended period of negotiation: however the need to ensure that all native title holders and potential native title holders have had the opportunity to respond and (if required) object to the ILUA is considered to be a necessary safeguard of the rights

⁷⁶ Ibid, p.4.

⁷⁷ Martin D F 'Deal of the century? A case study from the Pasminco Century Project' *Indigenous Law Bulletin* Vol 4 Issue 11 April/May 1998, p.5.

⁷⁸ Ibid.

of those indigenous persons that will be bound by the terms of the agreement.

7.71 In relation to possible improvements to the Act, the Committee considers that amendment should be made to the Act to give to the Tribunal the statutory function of assisting (if required) with the resolution of disputes that may arise following the registration of an ILUA. An amendment to clarify how amendments to ILUAs are to be made is also an imperative.

7.72 Issues that have arisen to date concerning the implementation of ILUAs such as enforcement, education and servicing of agreements appear to be matters that will best be dealt with by parties themselves within the terms of the ILUA itself. To this end, the Committee considers that all parties to ILUAs will benefit from thoughtful consideration of the issues and the longer term implications of the terms of individual ILUAs.

7.73 It is recommended that funding and training for organisations that will have responsibility for administering ILUAs on behalf of native title holders will need to become a priority if ILUAs will have the ability to be sustainable over time.

Recommendations

5. That the *Native Title (Notices) Determination 1998* be amended to require the Tribunal, where possible, to notify the indigenous community about the proposed registration of an ILUA by way of advertisement on local indigenous radio or television programs. This would be in addition to the current requirement that the Tribunal advertise in relevant newspapers. (para 7.24)

6. That the Act be amended to grant to the Tribunal powers to assist with dispute resolution (following registration of an ILUA) in circumstances where relevant parties to the ILUA request it. (para 7.33)

7. That the Act be amended to include a provision that shows how an amendment can be made to a registered ILUA. (para 7.42)

8. That prescribed bodies corporate receive adequate funding to perform their statutory functions and that they receive appropriate training to meet their statutory duties. This training to include directors' duties, accounting procedures and land management. (para 7.60)