

CHAPTER 8

Conclusions

ILUA Objectives

The Need for Land Use Agreements

8.1 The *Native Title Act 1993* was designed to recognise and protect native title (s.10). In practical terms, however, the recognition and protection of native title can require considerable time and resources. If the majority of native title claims currently in the system proceed through the courts, it will take many years and cost millions of dollars before these claims are resolved.¹

8.2 In this environment, an efficient procedure for land management under the Act is required. It was clear from the outset, when the Act was first drafted, that land use agreements were a possible remedy to this problem. In that the original s.21 process had considerable deficiencies, the amended Act provided for Indigenous Land Use Agreements (ILUAs).

ILUAs

8.3 The implementation of the ILUA system was prompted by the perception that existing methods for resolving native title claims and competing land uses were too expensive and time-consuming. The Commonwealth Attorney-General stated in his Second Reading Speech:

In the government's view, insufficient support is given to resolving native title issues by agreement – often the speediest, lowest cost, and least divisive mechanism. The Bill therefore sets out a comprehensive framework for reaching consensual arrangements between the parties.²

¹ See for example Submission No 6, p.6.

² Attorney-General *Native Title Amendment Bill 1997*, Second Reading Speech, House Hansard 4 September 1997, p.7891.

8.4 At a national level, it is critical that equitable decisions on the rights of access to and use of land are delivered quickly, cheaply and with certainty for all involved. Where a process becomes too costly, it excludes many parties. Equally, when decision-making processes are too slow, or do not provide certain outcomes, it can stifle important land use decisions:

At the current rate, it could take over twenty years for the courts to deal with all these claims, costing the parties to the cases and taxpayers millions of dollars in court costs alone.

While this is happening, no one knows what the position is. People do not know what they can do with the land.³

8.5 These delays may result in major costs for local communities. For example, in Coober Pedy, there is a proposed mining development near the town, which offers up to five hundred jobs. The local community, including the indigenous community, was anxious to move quickly to finalise approvals, develop the necessary infrastructure and secure the opportunity.⁴

8.6 The South Australian Chamber of Mines and Energy notes that investment in exploration activity in the state has been dropping steadily and that 28 projects are being held up by native title claims. The Chamber claims that native title processes are:

Simply a cumbersome, clunky process that simply has not been able to deliver the sorts of outcomes in the time frames for commercial purposes that our industry requires.⁵

8.7 It is undeniable that native title claims themselves are time-consuming and make significant demands on resources. This, in contexts where development projects must proceed with efficiency. It is important to recognise, then, that in these

³ *Native Title Negotiations: a better way forward* June 2000, p.2 (attachment to NNTT Submission No 8).

⁴ Evidence, 17 April 2000, p.790.

⁵ Evidence, 19 April 2000, p.887; see also p.885.

cases the problem is not the native title claims *per se*, but the failure of decision-making processes to deliver what is needed. Accordingly, ILUAs were designed:

To provide a legally certain, procedurally straightforward and comprehensive agreements framework.⁶

Advantages of ILUAs: Current Experience

8.8 The ILUA system was developed after broad consultation and enjoyed widespread support at the time of its introduction in September 1998. ILUAs were seen to offer a practical, quicker and more cost-effective means of resolving competing land uses in the native title context at a local level. About three years of experience have demonstrated that ILUAs have the capacity to live up to their promise, with a number of agreements now registered, and many more in the process. The Tribunal commented:

It would appear likely that once a 'critical mass' of practice and precedent has been established, ILUAs will come to achieve the purposes of efficiency in respect of land management and inclusion of relevant parties to which they are directed.⁷

Nevertheless, it is also clear that certain issues have the potential to threaten the viability of the agreement process, and there is a corresponding need to fine-tune some aspects of how ILUAs are negotiated and set in place.

8.9 It seems that there are six major advantages to the use of ILUAs:

- legal certainty;
- lower cost;
- maintenance of good relationships between parties;
- detailed coverage of agreements;

⁶ Attorney-General *Native Title Amendment Bill 1997* Second Reading Speech, House Hansard 9 March 1998, p.781.

⁷ Submission No S5a.

- solutions at a local level; and
- flexibility.

These matters deserve comment.

Certainty

8.10 Registered ILUAs provide much greater certainty for all parties involved in native title claims, by ensuring that future acts agreed to under the ILUA are validated, without the need to determine whether native title exists.⁸ These agreements are also taken to be a final settlement of compensation for the future acts involved.⁹ The South Australian Government has commented that the major advantage of negotiating ILUAs is the certainty and enforceability provided under the Act:

The fact that the ILUA is a recognised instrument under the *Native Title Act*, and that an ILUA binds all persons holding native title in relation to any of the land even if they are not parties to the agreement, creates a level of certainty over other forms of agreement.¹⁰

And the Local Government Association of Queensland has confirmed:

The nature of ILUAs provide [sic] more certainty for Councils, who feel that negotiations towards an ILUA will legally bind all parties to the outcome.¹¹

Lower Cost

8.11 In general, negotiation between the parties, leading to a consensual settlement will always be less costly than pursuing resolution through the courts. The high cost of determining native title claims by means of litigation is well recognised. The South Australian Attorney-General commented:

⁸ *Native Title Information Paper No 4*, p.2.

⁹ *Native Title Information Paper No 4*, p.7.

¹⁰ Submission No 6, p.7.

¹¹ Submission No 7.

The government has estimated that at the current rate, it will take more than 20 years for all native title claims in South Australia to be determined through litigation. It is expected that each litigated claim is likely to cost the State around \$5million in litigation costs.¹²

8.12 In some cases the costs of negotiating an agreement between the parties can be reasonable. For example, the cost of the Cape York Heads of Agreement in 1997 for the Cape York Land Council was estimated to be in the vicinity of \$20,000. The negotiations over Crescent Heads for the Dunghutti people was estimated at \$46,860, while the Arakwal claim reached agreement after 12 months of negotiations costing \$15,193.¹³

8.13 Nevertheless, there are several examples of expensive litigation. It is estimated that ATSIC spent \$1.3 million on Stage 1 of the Miriuwung/Gajerrong claim and \$1.7 million on the Yorta Yorta claim, of which the major component was legal preparation and representation in court, requiring 101 days of opening addresses and hearing and 12 days of legal submission.

8.14 An ILUA may also be more cost effective than recourse to the future act regime, where the ILUA authorises multiple future acts.

Maintenance of Good Relations

8.15 A significant advantage of negotiated agreements is that they engage stakeholders in a positive dialogue, and avoid the antagonism of adversarial court proceedings. During public hearings, the Committee heard that the introduction of the Act has put back twenty years relationships between rural and Aboriginal communities, reflecting the costs of a legal and technical process.¹⁴

8.16 Given that the parties to the negotiations must continue to live as neighbours, it is particularly important that the process for resolving native title claims does not

¹² Submission No 6 Annexure 1, p.2.

¹³ Smith DE 'Indigenous land use agreements: the opportunities, challenges and policy implications of the amended Native Title Act' *Discussion Paper No 163* Centre for Aboriginal Economic Policy Research Australian National University Canberra 1998, p.16; see also Submission No 8, p.14.

¹⁴ Evidence, 17 April 2000, p.882.

result in such poisoned and hostile community relations.¹⁵ A successful ILUA process lays a more positive groundwork for future relationships between all the groups.¹⁶

Detailed Coverage of Agreements

8.17 Even where a court makes a determination on the existence of native title or other legal rights, the court cannot resolve the numerous practical issues which must be addressed.¹⁷ Justice Lee of the Federal Court has stated:

How concurrent rights are to be exercised in a practical way in respect to the determination area must be resolved by negotiation between the parties concerned.¹⁸

This point was also made by Rural Landholders for Co-existence:

Courts may determine that native title exists, but it is up to the parties to work out agreements on the practical details such as gates, roads or frequency of access to a lease.¹⁹

8.18 Invariably, negotiation will be necessary. Accordingly, it is desirable for parties to resolve issues early rather than attempt negotiation after a court finding, where it is likely to be hampered by some residue of ill-feeling and antagonism that can be associated with 'win/lose' litigation.

Solutions at a Local Level

8.19 There is a real advantage in providing structures that allow local communities

¹⁵ Neate G *The effectiveness of ILUAs as a risk management tool: a mediator's perspective*, p.2.

¹⁶ SA Attorney-General Press Release, 28 November 1999; see also Submission No 1, p.2.

¹⁷ 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.4.

¹⁸ Lee J *Ward v Western Australia* (1998) 159 ALR 483 at 639 (the Miriuwung-Gajerrong case). See also Submission No 8, p.15.

¹⁹ Rural Landholders for Co-existence *Talking Common Ground – Negotiating Agreements with Aboriginal People* November 1998, p.12.

to develop their own solutions at the local level.²⁰ There is:

A developing recognition that the resolution of native title issues lies very much in the hands of individuals who, after all, are in the best position to make voluntary agreements which protect their interests. ... Courts and Parliaments can only ever address the broad issues or legal principles – they are not in a position to settle the localised, daily issues of living side by side.²¹

According to Rural Landholders for Coexistence:

This flexibility allows people on the ground to take control of the outcomes – to move them away from the courts, to move them away from lawyers, to move them away from politics, to decide amongst themselves the way things should be done and, once they have decided, to ensure that nobody can come along and upset them.²²

8.20 The wide subject matter that ILUAs may cover offers significant potential advantages for communities, who can incorporate into the agreements elements relating to the provision of jobs, improved infrastructure or better services. These are issues that are not covered by court based native title determinations, and yet are of great importance to indigenous communities.²³ Further, structures of native title agreement that offer negotiation at a local level also have the capacity to act as a means of strengthening rural communities through cooperation and shared interest:

[T]here are more things that unite people living in regional Australia than those that divide it. ... to turn the tide on regional decline, alliances between Aboriginal and other Australians are essential.²⁴

8.21 In the longer term, pursuing negotiation and sharing goals helps to develop a spirit of understanding and cooperation, which can play an important part in building stronger and more cohesive rural communities. An agreement based system is

²⁰ Neate G *op.cit.*, p.4.

²¹ Submission No 8, p.12.

²² Rural Landholders for Co-existence *op.cit.*, p.13.

²³ NNTT *Native title negotiations: a better way forward*, p.4.

²⁴ Rural Landholders for Co-existence *op.cit.*, p.13.

therefore fundamentally more suited to the wider needs of the communities than adversarial systems.

Flexibility

8.22 The South Australian Government considers that the ILUA regime pursuant to the Act provides flexibility to resolve native title issues outside of the adversarial process within the courts. Further, that Government has found that ILUAs provide the flexibility to deal with native title issues in a more 'holistic' manner.²⁵

Emergent Issues

8.23 Several other issues have emerged in relation to the implementation of ILUAs:

- development and refinement of precedents;
- the status of ILUAs under the common law of contract;
- risk management; and
- the role of government as a party to ILUAs.

These represent issues that may become significant as greater experience is developed with ILUAs.

Development and Refinement of Precedents

8.24 It is important that negotiating parties have access to a full range of precedents upon which to base their agreements. These precedents should cover all relevant issues for negotiation and cover the formalities necessary for registration under the Act.

8.25 If negotiated agreements are to have legitimacy with their signatories and provide a genuine basis for agreement between the parties, they must be clearly understandable. A tension may develop between a document drafted by the parties, and one which reflects the legal technicalities necessary for an agreement to be

²⁵ Submission No 6, p.4.

registered. Precedents can therefore play an important role in finding a balance between these two requirements. For this reason, it is important that negotiating parties have access to a full range of precedents, and that the precedents are provided in plain English and where necessary, translated into some indigenous languages.²⁶

8.26 While the Tribunal has been building a collection of such precedents, available on its website, it has been suggested that this effort should be widened.²⁷ The Committee notes that standard ILUAs have been developed as part of the Small Mining Project in Queensland.²⁸ A standard access agreement in relation to pastoral properties accompanied the Nharnuwangga, Wajarri and Ngarlawangga determination in Western Australia.²⁹ The South Australian Government is also developing local and industry specific standard form agreements.³⁰

Status of ILUAs under the Common Law of Contract

8.27 Several academic writers have questioned the relationship of ILUAs to the common law of contract.³¹ Under the Act, ILUAs are deemed to be a new type of enforceable contract, yet it is unclear to what extent parties will be able to draw on common law doctrines such as unconscionability and the requirement to negotiate in good faith in addition to the provisions of the Act.³²

8.28 Equally, it is unclear the extent to which common law contractual remedies apply. Damages may be an inadequate remedy for indigenous parties to an ILUA, and in some cases, the right to terminate may be important:

²⁶ Submission No S5a, p.17. See also Evidence, 19 April 2000, p.900.

²⁷ Submission No 1, p.7.

²⁸ Queensland Government *Indigenous Land Use Agreements in Queensland: 4 case studies* document tabled on 21 March 2001, p.4.

²⁹ *Clarrie Smith v State of Western Australia* [2000] FCA 1249.

³⁰ Submission No S5a, p.17; see also Evidence, 19 April 2000, p.900.

³¹ Godden L and Dorsett S 'The Contractual Status of Indigenous Land Use Agreements' *Land, Rights, Laws: Issues of Native Title* Vol 2 Issues Paper No. 1 AIATSIS Canberra September 1999; Smith D '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 Canberra December 1998.

³² Godden L and Dorsett S op.cit., p.7.

Communities may prefer to terminate the agreement. Further, without the possibility of termination, a party may decide that breaching the agreement is financially preferable to actually complying with the terms of the agreement.³³

Whether a general common law right to terminate exists will therefore depend on whether a strict or narrow approach is taken to the interpretation of s.24EA in relation to the operation of the common law of contract.

8.29 A further question arises in relation to non-indigenous successors to an ILUA agreement. While all native title parties in relation to an area of land or waters subject to an ILUA are bound by the ILUA even where they are not parties to it, the enforceability of ILUAs against the successors in title to non-indigenous parties relies on the contractual terms of the agreement:

The Act makes no provision for the situation in which grantee parties change. For example, holders of mining or pastoral interests could assign or transfer their interest to a third party, or the interests could be taken over by mortgagees going into possession.³⁴

8.30 The South Australian Government may address this limitation through legislation to support ILUAs it negotiates:

... [An ILUA] does not bind a future lessees or registered proprietor of land, or future explorer or developer. State legislation may be required to ensure that such persons are aware of ILUAs over land in which they are interested, and are bound by their terms.³⁵

8.31 The common law may also have continuing relevance where parties mistakenly fail to comply with the complexities of registration requirements. Parties may instead seek to rely on contract law to enforce obligations made under the agreement if registration fails.³⁶

³³ Godden L and Dorsett S op.cit., p.9.

³⁴ Godden L and Dorsett S op.cit., p.5.

³⁵ Submission No 6, p.4.

³⁶ Submission No 1, p.8.

8.32 Many of these questions will be resolved by the courts over time, as test cases are brought forward. Nevertheless, parties to ILUAs and those drafting precedent agreements, should be aware of these issues and incorporate terms that reduce the uncertainty and the need for a court to determine such questions.

Managing Risks

8.33 The President of the Native Title Tribunal has pointed out that even after the amendments, there remain risks for the parties negotiating agreements.³⁷ These include:

- negotiation with the wrong group;
- an objecting party preventing registration; or
- removal from the Register by operation of s.199C, after which the agreement would cease to have legal effect.

8.34 The Tribunal advises parties to minimise these risks by wide-scale advertising and effective consultation with local groups, leading to principled negotiations carried out in good faith.

8.35 Parties also face the possibility that considerable time and money may be invested into the negotiation process with no outcome. For example, the North Queensland Electricity Board reports that lengthy consultations with indigenous groups over construction of a powerline between October 1997 and September 1998 cost \$178,000, including sitting fees, air transport, food and accommodation, but failed to achieve any positive result.³⁸

8.36 The extent of these risks in practice remains to be seen. However, perceptions of these risks will play an important part in the decisions of parties entering negotiations. If ILUA negotiations come to be regarded as high risk and

³⁷ Neate G *op.cit.*, p.14.

³⁸ Submission No S19, p.8. The Kimberley Land Council reported a similar experience negotiating with the WA Government over the Garijari claim. Three years of negotiation failed to resolve the matter, which then proceeded to litigation. Evidence, p.113.

likely to end without result, parties will not be prepared to invest the considerable resources necessary to make effective negotiations possible.

The Role of Government

Education

8.37 Given the nature and purpose of ILUAs, it is important that their virtues become well known and appreciated. In this regard, all levels of government, and some other relevant authorities, have significant roles to play. The ALGA commented that:

... there is scope for the Federal and some State Governments to play a greater role in developing an awareness of the role and scope for agreements in the native title context, as well as in relation to their facilitation.³⁹

Influence

8.38 The ALGA has identified State Governments as being able to exercise a considerable degree of influence over local government's willingness to develop ILUAs.⁴⁰ Clearly, it is difficult to legislate to require this kind of encouragement for ILUAs. But the potential for encouragement in the development of ILUAs ought to be accepted by State/Territory governments.

Cooperation

8.39 ALGA has also drawn attention to the need for State Governments to deliver on outcomes:

In some situations the State has offered to provide assistance or given a commitment to do certain things either in the process of negotiations or afterwards, and some State Governments have failed to deliver on its (sic) commitments.⁴¹

³⁹ Submission No 4, p.6.

⁴⁰ Submission No 4, p.7.

⁴¹ Ibid.

Again, it is not possible to legislate at this level. But governments need to appreciate that this kind of behaviour tends to discourage the negotiation of agreements.

Recommended Statutory Amendments

8.40 In the course of this inquiry, several suggestions were made in regard to further amendments to the *Native Title Act 1993*. The following amendments would improve the ILUA regime.

ILUAs as Contracts

8.41 The interaction between ILUAs and the common law of contract is unclear. In particular the operation of the normal contractual remedies of rescission and termination may be excluded by s.24EA. The Committee considers that an amendment to the Act is required to clarify that the contractual status given to an ILUA upon registration only cures the absence of any element necessary to the formation of a contract.

8.42 If ILUAs are subject to normal contractual principles, another area of uncertainty arises. There is a difficulty in relation to the status of an ILUA that has lost its contractual effect by operation of the common law yet remains registered. Section 199C specifies the particular circumstances in which the Registrar can deregister an ILUA. The circumstances specified by the Act do not cover the field in terms of matters which may lead to the termination or rescission of a contract. As a result ILUAs could remain on the register even though they had lost contractual effect. The Act should be amended to allow the Registrar to deregister an ILUA in those circumstances.

The Tribunal

8.43 The Tribunal has pointed out that the Act does not currently provide for the Tribunal to assist parties to resolve disputes arising under a registered ILUA. The Committee agrees that the Act should be amended to give the Tribunal this function where the parties request assistance.

8.44 The CYLC and Rio Tinto have noted that the registration provisions for ILUAs do not clarify how ILUA amendments should be handled. The CYLC commented:

It may be 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.⁴²

8.45 The Committee agrees that the Act should be amended to specify the ways in which an amendment to a registered ILUA can be made. Consideration should be given to providing different processes for amendment depending upon the type of amendment proposed.

Summary

8.46 The Committee is encouraged by evidence of the growing use of the ILUA regime by parties to cooperatively address land use issues. Apart from the minor amendments suggested above and the resource issues confronting both native title and non-native title parties, it is clear that the statutory framework supporting ILUAs is able to deliver consensual, certain and flexible outcomes for parties.

Senator Jeannie Ferris

Committee Chair

⁴² Ibid, p.9.