

APPENDIX 6

Types of ILUAs¹

Types of ILUAs

A6.1 The amended Act provides for three different types of ILUA over areas of land or water, and their registration with the National Native Title Tribunal:

- **Body Corporate Agreements**, which can be made where there is a registered native title body corporate (or registered native title bodies corporate) in relation to the whole area the subject of the agreement (Part 2, Division 3, Subdivision B);
- **Area Agreements**, which can be made in any other situation where there is not a registered body corporate in relation to the whole of the area the subject of the agreement (Part 2, Division 3, Subdivision C); and
- **Alternative Procedure Agreements**, which can be made in any other situation where there is not a registered body corporate in relation to the whole of the area the subject of the agreement, and where there is at least one native title body corporate in relation to the land or waters in the area or at least one representative Aboriginal/Torres Strait Islander body for the area (Part 2, Division 3, Subdivision D).

A6.2 ILUAs differ between the three types outlined above in relation to subject matter, identity of parties and registration procedures. Elements that all three types of ILUA hold in common however, include that:

- agreement can be given by native title groups for any consideration (including the freehold grant of land or other interests) and subject to any lawful conditions;

¹ The following draws from 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 Canberra December 1998, pp.2-10.

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

A6.3 The Act makes provision for the registration of ILUAs, and hence provides that if a future act is done pursuant to a registered ILUA, the future act will be valid (s.24EB(2)). This includes future acts already done (albeit perhaps invalidly) and those contemplated for the future. For example, if the grant of a mining lease should have been subject to the right to negotiate but was not, this could be remedied by the parties reaching agreement over its validation, subject to any conditions, and subject to a statement to that effect being included in its registration details.

A6.4 An ILUA cannot be used to validate intermediate period acts, which can only be validated by the regime of Division 2A. However, the amendments contained in s.24EBA allow for a Body Corporate Agreement or an Area Agreement (but not an Alternative Procedure Agreement) to be used to *change the effect* on native title of a validated intermediate period act. For example, a different effect on native title could be provided for by the terms of the agreement and by a statement to that purpose being entered on the Register of ILUAs.

Body Corporate Agreements (ss.24BA-BI)

Criteria

A6.5 For a Body Corporate Agreement (s.24BD) to be made there must be *one or more* registered native title bodies corporate (also known as Prescribed Bodies

Corporate and defined under s.253 of the Act) which hold native title to, or have been appointed to act for, the native title holders in relation to the *whole* of the area which is the subject of the agreement. In other words **these agreements can only be made after there has been a Federal Court determination of native title for the whole area the subject of the agreement** and a Body Corporate (or Bodies Corporate) established to hold in trust, or act as an agent for, the determined native title holders.

Content

A6.6 This type of agreement can be about (s.24BB):

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

Parties

A6.7 All registered native title bodies corporate in relation to the area *must* be parties. Any other person may be a party, including a representative body.

A6.8 Government *must* be a party if the agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act, or for changing the effect on native title of an intermediate period act. Otherwise it is not mandatory for government to be a party, though it *may* be.

A6.9 If there are any representative bodies for the area concerned but none of them is to be a party to the agreement, the Body Corporate *must* inform at least one of the representative bodies of its intention to enter into the agreement. The Body Corporate *may* also consult with any such representative bodies about the agreement (s.24BD). This does not mean that the representative body must agree to the Body Corporate Agreement, or even be consulted.

Registration

A6.10 Due to the unique nature of body corporate agreements, and in recognition of the fact that where a body corporate agreement is made, the Federal Court will have determined native title for the whole of the area, the registration requirements are more accelerated than for the other types of ILUAs. Accordingly, the following procedural requirements apply to the registration of body corporate agreements (ss.24BG-24BI):

- Subject to the agreement of the other parties to the agreement, any party may apply to the Registrar of ILUAs for its registration.
- The Registrar must notify (if they are not already a party to the agreement) the following: the Commonwealth Minister; the State Minister or Territory Minister for the State or Territory; any representative body for the area; any local government for the area covered by the agreement; any other person that the Registrar considers appropriate, having regard to the nature of the agreement; and the public.
- A one month cooling off period follows the notice given during which any party to the agreement may advise the Registrar that it

does not want the agreement registered. If no party gives such advice, the agreement will be registered.

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

Area Agreements (ss.24CA-CL)

Criteria

A6.11 Area Agreements (s.24CD) can be made in any situation *other* than where there are registered native title bodies corporate for the *whole* area subject to the proposed agreement. Area agreements therefore can be made in circumstances where the question of the identity of the native title holders for the area concerned has not been resolved. In other words, **Area Agreements may cover land or waters where native title has not yet been determined.**

Content

A6.12 Area Agreements can be made about the same subject matter as a Body Corporate Agreement, and in addition, can be made about any matter concerning rights conferred by Subdivision Q (s.24CB); namely, rights of access to certain persons covered by registered native title claims to non-exclusive agricultural and pastoral leases. Again, agreement may be given for any consideration and on any conditions, including the grant of interests in land (s.24CE).

Parties

A6.13 All registered native title bodies corporate and registered native title claimants for the area must be parties. These are referred to in the legislation collectively as 'the native title group' (see s.24CD(1), (2) and (3)). Any other indigenous persons who assert that they hold common law native title, but do not have a registered claim, *may* also be parties; as may a representative body.

A6.14 If there are no registered native title claimants or registered bodies corporate for any of the area, then the 'native title group' consists of *one or more* of the following:

- any representative body for the area; and
- any person who claims to hold native title in relation to the area.

In other words, **this type of agreement can be made *before* there are any native title claims lodged or registered over the area**, with Indigenous people who assert a common law claim to native title for the area.

A6.15 If the agreement provides for extinguishment by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act, then Government must be a party. Otherwise it is not mandatory for government to be a party, though it may be. Any other person *may* be a party.

A6.16 If there are any representative bodies for the area of land concerned and none of them is proposed to be a party to the agreement, then a person in the native title group must inform, before entering into the agreement, at least one of the representative bodies of its intention to enter into the agreement. A person in the 'native title group' *may* also consult with any such Bodies about the agreement (s.24CD). However, the legislation does not require that the representative body must agree to the Area Agreement or even be consulted.

Registration

A6.17 For an Area Agreement to be registered:

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

A6.18 As one commentator has noted, the additional requirements for registration of an Area Agreement are due to the greater range of native title parties who may be bound by an ILUA. Therefore, the requirement that an application for registration of an Area Agreement include a statement that it has been made with the authority of all actual and potential native title holders for the area concerned 'amounts to an informed consent provision'.²

Certification by Native Title Representative Bodies

A6.19 The Act provides for two alternative mechanisms that can be used to provide such authorisation (s.24CG(3)).

A6.20 The first possible mechanism is to have all representative bodies for the area the subject of the agreement provide a written certification of the application for registration (s.24CG(3)(a)). representative bodies are given new statutory functions covering this responsibility (s.202(4)(e)). It is important to note that a representative body is not required under the Act to provide certification.

A6.21 If it chooses to do so however, s.202(8) of the Act requires that the representative body must be of the opinion that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the land or waters in the area covered by the agreement have been identified, and that all those identified have authorised the making of the agreement. In addition, it must also state its grounds or reasons for being of the opinion that those particular requirements have been met (s.202(9)).

Authorisation Statement by the Parties

A6.22 The second possible mechanism if a representative body does not certify an agreement (for whatever reason), is for the parties to the agreement to include a statement with the application for registration of the agreement (s.24CG(3)(b)). That statement must be to the effect that all reasonable efforts have been made (including by consulting all representative bodies for the area) to ensure that all actual and

² Edmunds M and Smith D E *Members' Guide to Mediation and Agreement Making under the Native Title Act* April 1998, p.81.

potential native title holders in relation to the area have been identified and that they have authorised the making of the agreement.

A6.23 Further, a statement must also be included which sets out the grounds on which the Registrar should be satisfied that those requirements have been met (s.24CG(3)(b)(ii)).

The Authorisation Process

A6.24 Section 251A of the Act provides a definition of 'authorise' in relation to persons holding native title in relation to land or waters covered by an ILUA. The section provides that 'authorise' in this context has two meanings, dependent upon whether there is a mandatory traditional decision-making process.

A6.25 If there is a process of decision-making under the traditional laws and customs of those who hold the common or group rights comprising the native title, then that decision-making process must be complied with by the persons who authorise the making of the agreement for there to be valid authorisation for the purposes of s.251A.

A6.26 If there is no such process, then the persons who hold or may hold the common or group rights comprising the native title must agree to, and adopt, a decision-making process in relation to the making of the agreement or things of that kind, and then follow that process in relation to authorising the particular agreement (s.251A(b)).

Objections to Registration of Area Agreements

A6.27 Objections to the registration of area agreements will be different depending upon whether the agreement was certified by the representative body, or whether it was authorised by the parties to the agreement.

A6.28 If the agreement was certified by the representative body, and there is an objection to its registration made in writing by a person who claims to hold native title that is not withdrawn, then the following applies.

- The Registrar must be satisfied that the representative body satisfied its requirements under paragraphs 202(8)(a) and (b).

- All persons determined to hold native title will need to agree to the terms of the agreement, due to the requirement that any Registered Native Title Body Corporate, if it exists for the area subject to the agreement, is required to be a party.³
- the Registrar must be satisfied that requirements relating to the ‘identification of, and authorisation by, all actual or potential native title holders have been met’⁴ before the agreement can be registered. In making this decision, the Registrar must also take into account any information provided by the persons making the objections and the representative body that certified the application.

A6.29 If the agreement was not certified by the representative body, but rather the application for the registration of the agreement was accompanied by a statement from the parties stating that the agreement had been authorised, then the Registrar must be satisfied that all registered native title claimants and registered bodies corporate in relation to the area are parties to the agreement, as well as any persons who lodged a native title claim during the three-month notification period and had that claim registered.

Alternative Procedure Agreements (ss.24DA-DM)

Criteria

A6.30 Alternative Procedure Agreements can be made in any situation other than where there are registered native title bodies corporate for the whole area subject to the proposed agreement. In particular, these agreements are intended to cover situations where the area to be the subject of the agreement is a large one, and where it is impractical to expect that all persons who hold native title in relation to the area have been identified and have authorised the agreement.⁵

Content

A6.31 An Alternative Procedure Agreement can be made about the same wide range of matters as an Area Agreement (s.24DB). There are however important differences that distinguish an Alternative Procedure Agreement:

³ Edmunds M and Smith D E op.cit., p.83.

⁴ Edmunds M and Smith D E op.cit., p.83.

- the agreement may establish a framework about the way that other agreements will deal with native title rights and interests (including alternative procedures); and
- the agreement must not provide for extinguishment of native title (s.24DC), nor may it be used to change the effect on native title of intermediate period acts, due to the fact that it is not a requirement of an alternative procedure agreement that all native title holders become parties.

Parties

A6.32 Parties to an Alternative Procedure Agreement (s.24DE) include a differently defined 'native title group' than for Area Agreements. Section 24DE provides that all persons in the native title group must be parties to an Alternative Procedure Agreement, as must every relevant government. The 'native title group', for this type of agreement, is defined to be all registered native title bodies corporate in relation to the land or waters in the area and all representative bodies for the area (s.24DE(2)).

A6.33 Any registered native title claimant and any other person claiming to hold native title to the area subject to the proposed agreement *may* be a party. In other words, for this type of agreement, registered and common law claimants are not mandatory parties to the agreement; representative bodies are. A representative body is required, as far as practicable, to consult with and take into account the interests of all actual and potential native title holders in relation to the land or waters in the area the subject of the agreement, before they are able to become a party (s.202A).

A6.34 Any other person may be a party. As is the case with Body Corporate and Area Agreements, Indigenous consent to an agreement may be given for any consideration and on any conditions, including the grant of interests in land (s.24DF).

Registration

A6.35 For an Alternative Procedure Agreement to be registered (ss.24DH-24DM):

⁵ Australian Government Solicitor, 'Commentary' *Native Title – Legislation with Commentary by the Australian Government Solicitor* 2nd ed, Canberra November 1998, p.30.

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

A6.36 Any person claiming to hold native title in the area may lodge an objection to the agreement on the grounds that it would not be fair and reasonable to register it. A person making such an objection does not have to lodge a native title claim (unlike the requirement for area agreements). Section 24DL sets out 3 conditions, *one* of which must be satisfied before an alternative procedure agreement can be registered. If none of the conditions are satisfied, the Registrar must not register the agreement.

A6.37 The conditions relate to whether objections have been made and whether those persons who make objections satisfy the Registrar that it would not be 'fair and reasonable to register the agreement', having regard to:

- the content of the agreement;
- the effect of the agreement on any native title rights and interests; and
- any benefits provided under the agreement to current native title holders, (whether or not identified at the time the agreement is made⁶) and their successors, including the way in which benefits are to be distributed.

A6.38 Section 24DM provides that new regulations may be made for alternative registration provisions to those under s.24DH-DL.⁷

⁶ *Native Title Act 1993* s.24DL.

⁷ *Native Title Act 1993* s.24DM.