

CHAPTER 2

Land Use Agreements: History and Law

Developments in Land Use Agreements

2.1 Both prior to, and following, the *Mabo (No 2)*¹ decision on 3 June 1992, it was possible to negotiate common law agreements with native title holders. And, subsequent to the commencement of the *Native Title Act 1993* (the Act), land use agreements pursuant to that statute could be negotiated with native title holders. From January 1994, then, there were three main types of agreements that could be negotiated for the use of native title land. They were:

- common law agreements;
- native title determinations pursuant to the Act; and
- agreements pursuant to the Act's 'future acts' regime.

Some explanation of these types is necessary.

Common Law Agreements

2.2 Where parties have negotiated and reached agreement on a range of issues governing land use and access, it has always been possible to formalise the agreement by the normal legal method of contract or deed. For native title holders, this could always be done without reference to any of the provisions or requirements of the Act. Such formal agreements function like any other deed or contract under the law.

2.3 Now, a contract is a legally binding agreement between two or more parties. To be binding, the provisions of the agreement must be clearly ascertainable, and

¹ *Mabo v Queensland (No 2)* (1992) 75 CLR 1.

there must be valuable consideration (that is, a payment or benefit). The agreement may be in writing, but need not be.

2.4 A deed is a written agreement between two or more parties that transfers a right or creates an obligation. Unlike a contract, there is no requirement for consideration, but the document must comply with certain formalities (that is, it must be 'signed, sealed and delivered').

Native Title Determinations

2.5 The Act always allowed for the negotiation of agreements concerning land use. Under the original Act, where the National Native Title Tribunal (the Tribunal) had been advised that agreement had been reached, where such agreement was in writing, and where the Tribunal was satisfied that a determination would be within its powers, the Tribunal was required to make a determination in, or consistent with, the terms of the agreement (s.73 of the original Act). (Of course, this power of the Tribunal was rendered problematic by *Brandy*.²)

2.6 So, native title agreements that incorporated land use provisions were possible pursuant to the statute from the commencement of the original Act.

The Future Act Regime

2.7 Further, s.233 has provided that, generally speaking, a 'future act' is any act which significantly affects native title rights. And 'future acts' have always been permitted by the Act in specified circumstances.³

The 'Right to Negotiate'

2.8 In regard to proposed uses of land, certain types of 'future acts' attract the 'right to negotiate' provisions of the Act.⁴ Here the Act requires parties (including registered native title claimants) to attempt to reach a negotiated agreement. Where

² *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

³ For example, pursuant to s.26(2)(a) the 'future act' provisions do not apply to acts covered by indigenous land use agreements.

⁴ See (generally) *Native Title Act 1993* Part 2 Division 3 Subdivision P.

agreement has not been reached within six months, any of the parties may refer the matter for arbitration.

2.9 Where negotiations are successful the agreement can be formalised. Negotiations conducted under the 'right to negotiate' provisions differ in several important respects from other negotiations. They are subject to time limitations, they must be conducted 'in good faith', and only *registered* native title claimants and bodies corporate may be parties.

Section 21 Agreements

2.10 Further, the original s.21 of the Act provided that native title holders, in exchange for any consideration and subject to any conditions that may be agreed, could come to an agreement with a government to surrender native title rights and interests or to authorise any future acts that would affect their native title. Such agreements could be made on a local or regional basis.⁵

Problems

2.11 The 'right to negotiate' resided with registered native title claimants and bodies corporate. Nevertheless, for other native title holders, there was the option of agreements under s.21 to authorise future acts. So, why was a new land use regime necessary?

2.12 Experience demonstrated that there were three principal problems with the agreement provisions under the original Act. First, agreements only applied to the native title holders who were parties to the agreement, leaving the possibility that acts approved under the agreement would still be invalid in relation to other unknown or disputing native title holders subsequently making a claim:

It provided no mechanism for the validation of acts done under agreements where it subsequently transpired that not all native title

⁵ ATSIC *Proposed Amendments to the Native Title Act – Issues for Indigenous People* November 1996, p.23.

holders were parties. Until formal determinations of native title were made parties were reluctant to use s.21 agreements.⁶

2.13 Second, there was no express provision removing the need to comply with the 'right to negotiate' and other procedural requirements. It was therefore uncertain whether such a land use agreement would be effective in replacing the 'right to negotiate'.⁷

2.14 Third, state or territory governments were required to be parties to s.21 agreements. This derived from the common law requirement that native title could only be transferred by surrender to the Crown. However, this imposed an unnecessary limitation on the workability of agreements. From a practical perspective, participation by governments is not always necessary, and may frustrate and delay the process in cases where a government is unwilling to cooperate.⁸

Reforms to the Agreements Regime

The Concept of ILUAs

2.15 The limitations on the effectiveness of 'future act' agreements were recognised in a series of meetings of Indigenous and industry groups in early 1996, convened under the auspices of the Council for Aboriginal Reconciliation and the National Indigenous Working Group. These meetings reached broad consensus on an amended concept of agreements, termed Indigenous Land Use Agreements (ILUAs).⁹ The proposal for ILUAs was subsequently endorsed by the Commonwealth and incorporated into the 10 Point Plan (as 10. Agreements):

⁶ Bartlett R H *Native Title in Australia* Butterworths Sydney 2000, p.405.

⁷ ATSIIC *Proposed Amendments to the Native Title Act 1993 – Issues for Indigenous People*, p.23. See also Submission No 38, p.8.

⁸ Bartlett R H *op.cit.*, p.405.

⁹ ATSIIC *Proposed Amendments to the Native Title Act 1993 – Issues for Indigenous People*, p.24.

Measures would be introduced to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery.¹⁰

And all of the proposals were incorporated in the *Native Title Amendment Act 1997* (most of) which came into effect in September 1998.

2.16 The negotiation of an ILUA, then, would depend neither upon the determination of native title nor the registration of a claim.

Legislation for ILUAs

2.17 According to the Tribunal:

An indigenous land use agreement or ILUA is an agreement made between people who hold or claim to hold native title over a particular area and other people, organisations or governments about the use of land and waters in that area.¹¹

And ILUAs now have been authorised by means of three legislative instruments:

- *Native Title Act 1993*, Part 2, Division 3, Subdivisions B, C and D
- *Native Title (Indigenous Land Use Agreements) Regulations 1999* r. 6, 7, 8
- *Native Title (Prescribed Bodies Corporate) Regulations 1999* r. 9(2)

2.18 It is important to emphasise, however, that a negotiated ILUA is only one of several ways in which to ensure that future acts over native title land are valid.

¹⁰ 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, p. 1.

¹¹ National Native Title Tribunal *Indigenous Land Use Agreements: Guidelines for Registration* November 2000.

ILUAs Compared with Other Agreements

2.19 Having indicated the nature of ILUAs, it may be useful to register some points concerning what they are not. The first point to note is that the ILUA regime exists alongside of the native title determination provisions of the Act. Put another way, ILUAs are not a substitute for determinations of native title.¹²

Native Title Determinations by the Federal Court

2.20 A native title claim is registered pursuant to s.61 and Part 7 of the Act. And following the 1998 amendments to the Act, the final determination whether or not native title exists is made by the Federal Court pursuant to ss.94A and 225.

2.21 Where the claim is contested, it goes through the normal litigation process of the court. However, the court encourages parties to negotiate to reach agreement. Where such an agreement is reached, the court can make an order making the terms of the agreement binding on the parties, known as a consent order (s.87). Thus, while the agreement is reached by negotiation, the agreement is binding by reason of the authority of the Federal Court order. (The potential difficulties consequent upon *Brandy* were resolved.) Such agreements can include land use provisions.

Common Law Agreements

2.22 Further, while an ILUA may amount to a common law agreement, a common law agreement about land use is not necessarily an ILUA. The key difference between the two is that a contract or deed is only enforceable by parties to the agreement. This means that where parties conclude a native title agreement within an area, other native title claimants in that area are not bound by the agreement. By contrast, an ILUA is binding on parties to the agreement and on all other native title holders in relation to the area pursuant to s.24EA.

¹² Submission No 38, p.5.

2.23 ILUAs have only been able to be negotiated and registered since the 1998 amendments took effect. That is, ILUAs are agreed pursuant to Division 3 of Part 2 of the (amended) *Native Title Act 1993*. Accordingly, earlier land use agreements, such as that concerning the Century Zinc mine at Lawn Hill in Queensland, were not able to benefit from the ILUA regime.

2.24 Further, ILUAs can only be negotiated between native title groups and others. Nevertheless, an ILUA is not necessarily a native title agreement. It is possible for ILUAs to not make mention of the recognition of native title. As in common law agreements, they can include a clause to the effect that native title is neither acknowledged nor denied. The Tribunal President has stated:

... many indigenous land use agreements that are registered by the registrar contain a clause which neither accepts nor denies the existence of native title.¹³

Present Use of ILUAs

2.25 The Tribunal has confirmed that ILUAs are now being used for a variety of purposes, the most common being the validation of 'future acts'. Of these the majority concern mining proposals (including exploration), or local development and infrastructure such as transport corridors or tourist developments. In addition, ILUAs are being negotiated about access to country by native title determination applicants; for the co-management of national parks; use of sea resources; development of local government areas; co-existence of rights on pastoral leases; and the settlement of issues arising out of claim determinations.¹⁴ The following are either in negotiation or have been successfully negotiated:

- a state-wide protocol for South Australia;
- freehold land grants in the Northern Territory;

¹³ Evidence 6 August 2001, p.NT538.

¹⁴ Submission No 8.

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- a protocol agreement between the Cape York Land Council, peak bodies and the State of Queensland;
 - the Chevron pipeline project from landfall at Cape York to the city of Brisbane;
 - a tourism boardwalk at Port Douglas;
 - an extension to a yacht facility in Victoria; and
 - the erection of a surf life saving club on the beach in Mackay.¹⁵

Importantly, the Tribunal has advised that anecdotal evidence indicates that in practice most ILUA negotiations concern the authorisation of future acts.¹⁶

2.26 Since the inception of the ILUA inquiry in early 1999, the Committee is now able to reflect on this extensive experience of ILUA negotiation. The advice of many practitioners about their experiences in ILUA negotiation has been of significant assistance to the Committee in the conduct of the inquiry.

¹⁵ Ibid.

¹⁶ Submission No 8a.