

## CHAPTER 3

### The Operation of ILUAs

#### ***Introduction***

3.1 While land use agreements other than ILUAs can be made, only ILUAs are agreed and registered in accordance with Division 3, Subdivisions B, C & D of the *Native Title Act 1993* (the Act).

3.2 Under the amended Act, ILUAs are envisaged as the principal means by which future acts are authorised. And a future act is defined in the Act to be an act that affects native title rights and interests:

It can be the making of legislation (after 1 July 1993) or an administrative act (after 1 January 1994), such as the grant of a mining lease, fishing licence, or a compulsory acquisition (ss.226 and 233(1)(a)). Leaving to one side the operation of the Native Title Act and other laws, it must affect native title (s.233(1)(c)). An act affects native title if it extinguishes native title rights or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (s.227).<sup>1</sup>

#### ***The Operation of ILUAs***

3.3 The statutory framework provided by Part 2, Division 3, Subdivision E for the registration of ILUAs accords benefits to ILUAs compared with other agreements that are not registered. Certain benefits flow to all parties to an ILUA that is registered<sup>2</sup>, and there are unique features of a registered ILUA that do not apply to an ordinary contract, or even to other agreements made under the Act. The key features that distinguish an ILUA from other agreements are the contractual force that is given to an ILUA upon registration; the ability of parties to validate future acts, settlement of compensation; and certainty for non-native title parties to ILUAs.

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<sup>1</sup> Australian Government Solicitor 'Commentary' *Native Title – Legislation with Commentary by the Australian Government Solicitor* 2<sup>nd</sup> ed Canberra November 1998, p.28. For a detailed discussion of the future act regime, see Appendix 5 of this report.

<sup>2</sup> *Native Title Act 1993* ss.24EA, 24EB, 24EBA, 199C.

3.4 To date, there has been only a small number of ILUAs registered. It is therefore arguably difficult to assess the success or otherwise of the intended benefits of ILUAs, compared with other agreements, both pursuant to the Act and those undertaken outside the Act's framework. Nevertheless, important questions arise from the operation of the statutory regime itself that warrant examination.

### *Contractual Force*

#### Departure from ordinary rules of contract

3.5 An ILUA has effect as a contract while registered (s.24EA). However, unlike an ordinary contract, an ILUA (while registered) is binding not only upon the parties to the agreement; it is also binding upon all persons who hold native title in relation to the land or waters covered by the agreement, regardless of whether those persons were parties to the agreement (s.24EA(1)(b)). The ILUA legislative framework therefore represents a departure from the common law doctrine of privity of contract; that is, that only parties to a contract may benefit from the terms of a contract, and conversely, that only parties to a contract are bound by its obligations.<sup>3</sup>

3.6 The binding effect of s.24EA is based upon the assumption that all actual and potential native title holders have had the opportunity to object to its registration. The implication of this provision is that successive native title groups in relation to an area that is the subject of an ILUA will be bound by the terms of the ILUA for as long as it remains registered. Importantly, only successors to the native title parties to an ILUA are bound for the duration of its registration; the Attorney-General's Department has highlighted, in relation to non-native title parties' successors, that 'this certainty is not reciprocal'.<sup>4</sup>

3.7 The Human Rights and Equal Opportunity Commission has noted that a fundamental principle upon which the native title agreement making process should be based is a '[r]ecognition that native title is a group right and that the inter-

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<sup>3</sup> For a discussion of the law of privity of contract, see Seddon N C & Ellinghaus M P *Cheshire and Fifoot's Law of Contract – Seventh Australian Edition* Butterworths Sydney 1997 Chapter 7. Also see the leading Australian High Court case *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

<sup>4</sup> Submission No 38, p.11.

generational aspect of the right must be protected'.<sup>5</sup> The issue of inter-generational equity is one that will need careful consideration by all parties to ILUAs if the current ILUAs being negotiated and registered are to be sustainable over successive generations of native title holders.

3.8 This issue is significant, given the types of ILUAs being submitted to the Registrar for registration. The Tribunal has provided advice that seven of the 39 active ILUAs (that is, those which have neither been rejected nor withdrawn) have a definite term. Of those seven, the fixed terms range from 20 to 99 years, and two of the agreements are expressed to be for the 'life of the project'.<sup>6</sup> The remaining 32 ILUAs, then, presumably provide that the agreement endures for an indefinite term.

3.9 D E Smith has pointed out that native title parties to ILUAs (in particular) need to keep in mind the binding effect of ILUAs and 'their intergenerational implications' when negotiating ILUAs, given the difficulties currently being faced by both traditional owners and the mining company Energy Resources in relation to the Ranger Mine in Kakadu National Park:

There, the highly public revisiting by a younger generation of traditional owners of the issue of consent by their parents to mining suggests that apparently workable and legally agreed solutions may become effectively unworkable when they are seen to take away from subsequent generations the right to speak for country in a way different to their parents and grandparents.<sup>7</sup>

3.10 There are avenues available to parties within the current framework to anticipate potential future disputes and ensure that appropriate provision has been made for such contingencies. Options suggested include the provision for shorter agreements, or where agreements are for a much longer term, to provide for the renegotiation of certain terms at various periods within the agreement.<sup>8</sup> Another

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<sup>5</sup> Submission No 36, p.3.

<sup>6</sup> Submission No 8b, p.3.

<sup>7</sup> Smith D E 'Indigenous Land Use Agreements: New Opportunities and Challenges under the amended Native Title Act' *Land, Rights, Laws: Issues of Native Title, Issues Paper No 7* Native Title Research Unit AIATSIS Canberra 1998, pp.13-14.

<sup>8</sup> Edmunds M and Smith D E *Members' Guide to Mediation and Agreement Making under the Native Title Act*, National Native Title Tribunal April 1998, p.93.

suggestion is that, given parties are unlikely to be able to predict the issues that will be important for successive generations at the time of making the agreement, parties should consider providing options within the ILUA to review the whole agreement.<sup>9</sup>

3.11 As noted earlier, successors in title to non-native title parties to an ILUA are not bound by the terms of an ILUA in the same way that successors to native title parties to an ILUA are. This means, for example, that if an ILUA is entered with a pastoral leaseholder and the lease is subsequently sold then the new leaseholder is not necessarily bound by the terms of the ILUA. Similarly a representative of the Wiradjuri and Walgalu groups who entered the first registered ILUA in relation to the Adelong Gold mine expressed his concern in relation to how the ILUA might be affected by the proposed sale of Adelong to another mining company.<sup>10</sup>

3.12 C Mantziaris and Dr Martin have considered this issue:

Whether obligations incurred by a private non-native title party (for example, the holder of a pastoral lease) under an ILUA in relation to a future dealing with native title can bind successors or assignees to that interest is a matter which remains unexplored in current practice. The question is whether restrictive covenants in the ILUA could be enforced against successors or assignees as covenants which 'run with the land'.<sup>11</sup>

3.13 C Mantziaris and Dr Martin assert that whether successors will be bound will depend upon a number of factors, including the specific terms of the ILUA, the nature of the interest in the land, and whether it is possible to register the native title rights or interests under the relevant Torrens registration system.<sup>12</sup> This is an issue that is likely to increase in importance as greater numbers of ILUAs become registered.

3.14 While the legislation does not provide that non-native title parties to an ILUA are bound by the terms of the ILUA for the duration of the registration, parties may

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<sup>9</sup> Submission No 38, p.12.

<sup>10</sup> Evidence, pp.NT287-288.

<sup>11</sup> Mantziaris C and Martin D *Native Title Corporations: A Legal and Anthropological Analysis*, The Federation Press 2000, p.254.

<sup>12</sup> Ibid.

themselves include specific provision within the agreement to that effect.<sup>13</sup> It has been noted that successors in title to non-native title parties to an ILUA may wish to be bound, in any case, by the terms of the ILUA, to ensure that they receive any benefits that flow from its registration.<sup>14</sup>

3.15 One submission has raised as a concern the limitations upon a State to agree to conditions in an ILUA. This limitation arises out of the fact that governments cannot bind themselves to making a particular decision under legislation (this is the administrative law doctrine against fettering discretion).<sup>15</sup>

3.16 One possible solution that has been proposed is for governments to legislate in relation to the obligations of government parties. Legislation to bind successive non-native title parties to ILUAs may also be considered as an option by a state or territory government.<sup>16</sup> The South Australian Government raised this issue in its submission and noted that:

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.<sup>17</sup>

3.17 The Attorney-General's Department has made the following comment in relation to this issue:

The easiest way to ensure that the successors in title of non-native title parties are bound by obligations under the agreement is for government which is (or will be) the grantor to impose appropriate conditions on the grant of the relevant title, and/or any future title proposed to be covered by the agreement (this may or may not involve legislation). This reflects the fact almost invariably, the non-native title parties to the agreement will derive their interest (in relation to which there could be 'successors') from the Crown and it is

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<sup>13</sup> Submission No 38, pp.11-12.

<sup>14</sup> Submission No 38a, p.2.

<sup>15</sup> Submission No 2, pp.3-4.

<sup>16</sup> Submission Nos 38, p.12; 38a, p.1.

<sup>17</sup> Submission No 6, p.4.

only the Crown that can impose any limitation on the terms of the grant consistent with the agreement.<sup>18</sup>

Where the relevant government is not a party to the ILUA, the Attorney-General's Department has suggested that non-native title parties should ensure that the government that will make the grant in relation to the ILUA is amenable to placing limitations on the grant, before entering into the agreement.<sup>19</sup>

3.18 Successors in title of non-native title parties to an ILUA are not bound as a result of the Act. Further, whether successors in title should be bound by the agreement is, appropriately, left to the parties and to relevant state or territory governments. Governments will, on the whole, be responsible for issuing grants of title to parties to an ILUA. They are able to make provision, either within the terms of the grant, or within legislation, about the obligations upon successors in title. This provides flexibility for parties when negotiating agreements. The Committee, accordingly, does not propose any amendments to the legislation on this point.

Intersection of common law contract and s.24EA

3.19 A more fundamental question arising from the registration provisions is the intersection of the common law of contract, and the terms of s.24EA in relation to registered ILUAs. Commentators have noted that the words of s.24EA create a certain amount of ambiguity:

... [w]hile it is widely understood that ILUAs are contracts, the exact scope of the interaction of contractual principles and the statutory regime of the amended NTA is unclear ... [including] whether the full range of contractual principles and means of taking action to obtain a remedy, applies to ILUAs.<sup>20</sup>

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<sup>18</sup> Submission No 38a, p.1.

<sup>19</sup> Ibid.

<sup>20</sup> Godden L and Dorsett S 'The Contractual Status of Indigenous Land Use Agreements' *Land, Rights, Laws: Issues of Native Title, Issues Paper No 1* Native Title Research Unit AIATSIS Canberra 2000, p. 3. See also Neate G 'Indigenous Land Use Agreements: Some Legal Issues' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, pp.3,6.

3.20 The provision appears open to several different interpretations.<sup>21</sup> Nevertheless, the Attorney-General's Department has made the following comment about the legislative intent of s.24EA:

The expansion of the contractual effect of ILUAs and the specific conditions upon which ILUAs may be de-registered ... was not intended to displace any remedies that may be available for contracting parties under the common law.<sup>22</sup>

And, further, during evidence before the Committee:

I do not see that anyone would exclude normal contract law from those ILUA provisions unless there was an express indication it was intended to be excluded, and it certainly has not been.<sup>23</sup>

3.21 However, the effect of this interaction between ss.24EA, 199C and common law contract principles raises interesting questions.

3.22 The first issue that arises is the implication for parties of the fact that contractual force is conferred upon an ILUA on registration. In particular, the issue takes on greater importance for parties if an agreement fails registration:

Legal opinion varies as to whether the contract would nevertheless still apply to the signatories as ordinary contractual conditions (though presumably not with the same statutory binding effect on non-signatory native title persons), or whether an implied term of the contract as an ILUA is its specificity to the statutory context (in other words, its contractual validity fails upon the failure of its registration).<sup>24</sup>

3.23 In relation to possible deregistration of an ILUA, the Attorney-General's Department has made the following comment:

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<sup>21</sup> Godden L and Dorsett S op.cit., p. 3; Neate G op.cit., p.3.

<sup>22</sup> Submission No 38, p.12.

<sup>23</sup> Evidence, p.NT248.

<sup>24</sup> Edmunds M and Smith D E op.cit., p.86.

The expanded contractual effect of an ILUA continues only for the duration of registration, although, upon deregistration, the agreement may continue to have contractual effect under the general law.<sup>25</sup>

3.24 One submission highlights the confusion that exists about the intersection of contractual status and the validation of future acts. The Australian Local Government Association has noted that local governments are concerned:

... whether a future act can proceed before the registration of an ILUA is finalised. The NTA (Cth) is silent on this matter and it is presumed that the common law relating to contracts would apply.<sup>26</sup>

3.25 The validity of a future act attaches to registration of an ILUA. Parties choosing to proceed with a future act before registration take the risk that the ILUA will fail registration, with consequent invalidity of any future act done.

3.26 To overcome these difficulties parties can agree upon the outcomes should registration fail, and clearly spell these out within the terms of the ILUA itself.<sup>27</sup> A prudent course of action for parties would be to draft clauses within the ILUA that provide that the substantive elements of the ILUA do not begin until registration of the ILUA occurs.<sup>28</sup> This will provide parties with the requisite protection should the registration fail. In addition, parties may wish to provide that any benefits that will be provided under the ILUA are conditional upon registration.<sup>29</sup>

3.27 Alternatively, some parties make it a practice to ensure that the elements of a valid contract are in place prior to registration, so that in the event that the agreement fails registration, the agreement would still have contractual force:

The usual principles affecting contracts should ... be fulfilled — whether the ILUA takes the form of a contract supported by consideration or takes effect as a Deed. Where registration

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<sup>25</sup> Submission No 38, p.11.

<sup>26</sup> Submission No 4, p.6.

<sup>27</sup> Edmunds M and Smith D E *op.cit.*, p.86.

<sup>28</sup> Submission No 18, p.10.

<sup>29</sup> See for example *Commonwealth Principles Applied in the Negotiation of ILUAs*, tabled 1 June 2001, paragraph 5.

problems do emerge it is important for the parties to be able to at least fall back on contractual arrangements.<sup>30</sup>

3.28 A second issue is the extent to which registration will cure defects that may be present in the formation of the agreement prior to registration. The Attorney-General's Department has outlined that:

Once an agreement is registered, and for the duration of its registration, it is deemed to be a contract between the parties irrespective of whether it would have operated as such under the general law.<sup>31</sup>

3.29 Indeed, the Tribunal Registrar has commented that:

... [c]ontractual status is created where, in some instances, the general law would not allow the contract.<sup>32</sup>

3.30 Neither the Attorney-General's Department nor the Registrar expand upon instances where the general law might not allow a contract. The extent to which an agreement will be enforced 'as if it were a contract' remains as yet unexplored in practice. It would seem that for matters that go to the formation of a contract such as offer and acceptance, consideration, intention to create legal relations and certainty of terms<sup>33</sup>, registration would cure any deficiencies that might be present in relation to an absence of one or more of these elements.

3.31 The Attorney General's Department's submission goes further and states that the intent of the legislation is that normal contractual remedies will apply to an agreement that is registered, even if it would not have received the force of law as a contract prior to registration.<sup>34</sup>

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<sup>30</sup> Submission No 1, p.8.

<sup>31</sup> Submission No 38, p.11.

<sup>32</sup> Doepel C 'Indigenous Land Use Agreements: Notification and Registration' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, p.2. See also Mantziaris C and Martin D *op.cit.*, p.251.

<sup>33</sup> For a discussion of these elements of contract law, see Seddon N C & Ellinghaus M P *op.cit.*, chapters 3, 4, 5 and 6.

<sup>34</sup> Submission No 38, p.16.

3.32 The ambiguity of the provision raises the question whether registration will give to an agreement the status of a contract that would not normally receive recognition as a contract because matters such as estoppel, unconscionability, mistake or misrepresentation were operative during its formation. It would seem unlikely that Parliament would intend such an outcome. However, in the absence of clarification of s.24EA, it is difficult to see that such an interpretation by a court, however unintended, would not be possible.

#### *Future Act Validation*

3.33 A unique feature of the ILUA regime is the validity that registration confers upon future acts. Future acts covered by an ILUA will be valid if they comply with ss.24EB and 24EBA: namely, the details of the agreement provided to the Registrar must include a statement of authorisation by the native title holders to the doing of the future acts in question (with or without conditions), and a statement specifying that the right to negotiate is not intended to apply to those particular acts. If there is an agreed effect on native title, a statement to that purpose must also be included.

3.34 ILUAs provide to proponents the ability to negotiate once, and have a series of future acts validated, as long as the ILUA remains registered. Giants Reef Mining Limited stated in its evidence to the Committee:

... our agreement is registered, stamped and lodged with the department and covers for 25 years any tenement applied for — even ones that do not now exist. Because tenure is a moving thing — because you halve, you drop, you surrender, you reapply — all of these would have been future acts and each one would have then taken another negotiation. This one is clearly for 25 years, with a right to negotiate another 25 years.<sup>35</sup>

3.35 The Federal Court may order (pursuant to s.199C) the Registrar to remove an agreement from the Register if the Court is satisfied that fraud, undue influence or duress were applied. Furthermore, the Court, on application by a party, may make an order for compensation against the person who committed the fraud, undue

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<sup>35</sup> Evidence, p.NT514.

influence or duress, made payable to any party to the ILUA who suffered loss or damage as a result of its removal from the Register (s.199C(4)).

3.36 The Attorney-General's Department has confirmed in its submission that if a Court orders the removal of an ILUA from the Register on the grounds of fraud, undue influence or duress, any future act done while the contract was registered will nevertheless be valid:

If an ILUA were to be removed from the register and the parties had agreed to a series of future acts that would occur over time, the removal of the ILUA from the register would mean that the future acts done after the removal would not be valid under that ILUA. But that would not invalidate all the future acts that had already been done, except in exceptional circumstances.<sup>36</sup>

3.37 The Explanatory Memorandum to the *Native Title Amendment Bill 1997* confirms this interpretation:

If an ILUA is removed from the Register, it no longer has contractual effect. The ILUA will not validate any future acts contemplated by the agreement if they take place after the ILUA is deregistered. Future acts which have already taken place under the agreement will remain valid.<sup>37</sup>

3.38 And the Tribunal President has noted that removal from the Register:

... will probably not retrospectively invalidate the agreement or invalidate future acts that have already been done under the agreement.<sup>38</sup>

3.39 As noted earlier, it has been asserted that the ILUA provisions are not intended to displace ordinary contractual remedies. If a party to an ILUA has available to it the entire range of common law actions in contract, the question about the remedies a court could order becomes crucial.

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<sup>36</sup> Evidence, p.NT247. See also Submission No 38, p.16.

<sup>37</sup> *Native Title Amendment Bill 1997 Explanatory Memorandum*, pp.242-243.

<sup>38</sup> Neate G op.cit., p.23. See also Evidence, p.NT247.

3.40 The legislation is clear about what happens if an ILUA is deregistered — the ILUA no longer has the particular contractual effect conferred upon it by the legislation.<sup>39</sup> However, the situation is less clear in the circumstance where an ILUA no longer has contractual effect (for example, as a result of the operation of the common law of contract) but remains registered because none of the matters that require the Registrar to remove the details of the ILUA from the Register can be established.

3.41 Section 199C outlines the specific circumstances in which an ILUA can be deregistered. Given that a party may be able to pursue the entire range of contractual remedies in relation to an ILUA, a party may conceivably find itself in the situation where it has the option available to it to rescind or terminate a contract, yet is unable to have the ILUA deregistered because of the limited circumstances in which the Federal Court can order the Registrar to deregister an ILUA.<sup>40</sup>

3.42 A literal reading of the section would suggest that the ILUA, in such a circumstance, would, by remaining registered, retain its contractual force, despite any deficiencies that may be established pursuant to the common law of contract.

3.43 In the case of other grounds (such as unconscionability, mistake or a fundamental breach of an essential term of a contract) that could be established under contract law to provide parties with a remedy of rescission or termination, it is strongly arguable that the Federal Court would be precluded from ordering the Registrar to deregister an ILUA because Parliament has specified the circumstances where a Federal Court may make such an order.

3.44 Further, although ordinary contractual principles apply to ILUAs, s.199C limits the operation of the remedies available to parties who successfully establish fraud, undue influence or duress. For example, under the ordinary rules of contract, a finding that a contract is affected by fraud, undue influence or duress may entitle the innocent party to the remedy of rescission. This means that the innocent party can elect to set aside the contract from the beginning. However, and importantly for

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<sup>39</sup> *Native Title Act 1993* s.24EA(1).

<sup>40</sup> *Native Title Act 1993* ss.199C(2), (3).

indigenous parties to ILUAs, the future act, if it has been done, will be valid despite later removal of the ILUA from the Register. So in the case of s.199C, the Act implicitly restricts the remedy available to parties in relation to fraud, undue influence and duress to termination, rather than rescission, of the contract.

3.45 It has been suggested that the inclusion of s.199C(3) is intended to dissuade parties from engaging in fraud, undue influence or duress in the negotiation of ILUAs.<sup>41</sup> However, given the likely effect of s.199C outlined above in relation to the validation of future acts done while the agreement was registered, it is arguable that the section provides a more limited disincentive for parties to engage in such conduct than the remedies usually available at common law.

3.46 It is the view of the Committee that the legislation needs to be amended to clarify the interaction between ordinary contractual principles and the provisions relating to registration and deregistration of ILUAs.

3.47 First, s.24EA should be amended to provide that the intention of Parliament in conferring contractual status upon registration of an agreement that would not necessarily otherwise have had the force of contract is intended to cure the absence of any element necessary to the formation of a contract *only* and is not intended to exclude the operation of the contractual remedies of rescission and termination.

3.48 Second, it considers that a more general provision within s.199C to replace subsection 199C(3) that provides that the Court can order the Registrar to remove the details of the ILUA from the Register in the situations where a contract, through the operation of the common law, has lost its contractual effect, for whatever reason. This would serve to clarify the current uncertainty surrounding the status of an ILUA that no longer has contractual effect by virtue of the operation of the common law of contract but nevertheless remains registered on the Register of ILUAs.

#### *Settlement of Compensation*

3.49 Substantial legal certainty is provided to governments and resource developers by the fact that agreement by native title claimants or holders to an ILUA

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<sup>41</sup> Smith D E *op.cit.*, p.9.

covering future acts can be given for any consideration, including payment of compensation. Those 'negotiated' compensation payments are taken to constitute a final settlement of compensation for the future acts involved.

3.50 Compensation for future acts covered by an ILUA is generally limited to what is in the agreement. However, native title holders who were not entitled to compensation under the agreement (for example, a person who is later found to hold native title, but was not entitled to any benefits under the earlier registered agreement) may apply for compensation in the usual way under Division 5. This exception does not apply to persons represented by the registered body corporate under a body corporate agreement, or those persons whose authority was obtained for an area agreement.<sup>42</sup>

3.51 Dr Edmunds and D E Smith have noted that:

The extent of certainty provided by the Act in respect to this agreed compensation for any past, intermediate or future act is that, upon registration of the agreement, a 'restriction' on further compensation to certain parties for the same act applies. The native title holders who are parties to the agreement will not, subsequently, be entitled to any other compensation for the same acts. The compensation they receive for a past, intermediate or future act will be restricted to the compensation they agreed to under the registered ILUA. Agreed compensation for past, intermediate or future acts covered by an ILUA is generally taken to constitute a final settlement of compensation for the acts involved.<sup>43</sup>

3.52 The Committee has received evidence from both Indigenous and non-Indigenous parties<sup>44</sup> about the benefits of these compensation provisions. The Gurang Land Council has identified, as an advantage of ILUAs, the ability of:

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<sup>42</sup> See also *Native Title Amendment Bill 1997 Explanatory Memorandum*, p. 89. See also Australian Government Solicitor, *op.cit.*, p.28; Submission No 38, p.13. Also *Native Title Act 1993* ss.24EB(4), (5), (6) and (7), and 24EBA(5). Neate G *op.cit.*, p.21; Mantziaris C and Martin D *op.cit.*, footnote 59, p.252.

<sup>43</sup> Edmunds M and Smith D E *op.cit.*, pp.86,87. See also *Native Title Act 1993* ss.24BE, 24CE, 24DF (consideration) and ss.24EB(4), (5) and (6). Submission No 38, p.13; Mantziaris C and Martin D *op.cit.*, p.252.

<sup>44</sup> Evidence, p.NT515.

... parties ... to reach up front agreement about compensation without the need to establish the existence of native title as a pre-requisite.<sup>45</sup>

3.53 The Western Australian Aboriginal Native Title Working Group outlined to the Committee that in relation to compensation, options other than monetary payment are important to Indigenous people:

... it is not just about money; it is about the return of lands to people and their control and management over those lands and their responsibilities in relation to it.<sup>46</sup>

3.54 Rio Tinto Limited has identified the compensation issue as one of the advantages of the ILUA framework:

Compensation may be finalised under an ILUA and accordingly cannot be revisited by the lodgement of a compensation application after a determination of native title has occurred. With appropriate drafting, once a title has been validly granted pursuant to the provisions of an ILUA, the title will be protected from claims for compensation beyond that provided for in the ILUA, even if the ILUA is subsequently deregistered.<sup>47</sup>

3.55 One of the difficulties that parties have experienced in relation to compensation is the contrasting expectations about amounts of compensation that should be included within the ILUA.<sup>48</sup>

3.56 The Government of South Australia has noted the lack of precedents established by the courts in relation to levels of compensation payable for acts affecting native title. This has proved to be a difficulty for the Government in negotiating appropriate amounts of compensation within an ILUA. It has noted that as a consequence, all compensation payments made in ILUAs are required to be

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<sup>45</sup> Submission No 25, p.2.

<sup>46</sup> Evidence, p.NT374.

<sup>47</sup> Submission No 23, p.11.

<sup>48</sup> Submission No 37, p.4.

matters of commercial negotiation, rather than matters based upon 'objective criteria':

In addition, if a native title claim group agrees to a future act but the resulting ILUA does not recognise native title, any sum paid to the native title claimants is in the nature of consideration for entering into the agreement rather than compensation for the extinguishment of native title. If at a future date it is determined that native title did exist and has since been extinguished by the future act, it is not clear whether the consideration that has already been paid will be treated as sufficient compensation for the extinguishment, or whether an additional amount is payable as compensation.

3.57 The Government's position therefore has been to be cautious about paying large amounts of consideration at the time of agreement of ILUAs. As a consequence, the Government has noted that it faces the dilemma that native title parties are unlikely to enter an ILUA unless an amount is paid that is equivalent to an amount of compensation that would be paid for extinguishment of native title rights and interests.<sup>49</sup>

3.58 Native title parties to an ILUA have expressed confusion about the requirements of the Act in relation to the preservation of their compensation entitlements under an ILUA. The Cape York Land Council has stated that it is aware of:

... a number of ILUAs negotiated in other areas, where native title holders have entered into ILUAs consenting to future acts and, in ignorance of the effect of the provisions of s.24EB, failed to make provision for compensation for the effect of the future acts on native title. The Applicants considered that a mere reservation of compensation entitlements (as suggested by some of the other parties) would be insufficient to enable claims for compensation for their consent under the ILUAs to specified future acts.<sup>50</sup>

3.59 The Attorney-General's Department however, has stated that:

... parties may expressly provide in the ILUA that benefits received under the agreement are not compensation, and that compensation

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<sup>49</sup> Submission No 6, p.5.

<sup>50</sup> Submission No 2, pp.5-6.

is to be determined at a later date (for instance following a determination of native title in favour of the native title parties).<sup>51</sup>

3.60 The Attorney-General's Department has made the comment that while parties may not wish to specify an amount of compensation with the terms of the ILUA prior to a determination of native title, an option available to them is to include the *principles* upon which compensation will be paid:

For instance, ILUAs which the Commonwealth is involved in negotiating provide that compensation is to be decided either by agreement between the parties, or by determination by the Federal Court or another court of competent jurisdiction at the option of those claiming compensation, applying ... the principles set out in Division 5 Part 2 of the NTA.<sup>52</sup>

3.61 In relation to the issue of compensation and governments, the Tribunal has remarked that responses from individual governments vary:

New South Wales will not agree to compensation unless it is satisfied of the native title party's connection to the area on the basis of credible evidence. The Commonwealth will not agree to compensation unless there is a native title determination in place. However, governments understand the difference between compensation for impairment and consideration for the deal, and this may remove a rather large obstacle to entering into ILUAs involving provision of benefits to the native title group.<sup>53</sup>

3.62 It would appear that the benefits of an ILUA in relation to compensation are favourable for both native title and non-native title parties. ILUAs provide parties with scope for far greater creativity in terms of ensuring that compensation for native title parties is appropriate and meets the particular needs of the group, rather than being limited to monetary payments only.

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<sup>51</sup> Submission No 38a, p.2.

<sup>52</sup> Ibid.

<sup>53</sup> Submission No 8a, pp.1-12.

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*Certainty*

3.63 The intention of Parliament has been, through the combined effect of the ILUA registration process, future and past act validation, the possible statutory consent to the surrender of the right to negotiate, the associated settlement of compensation, together with the certification, authorisation and binding of all native title holders to the agreement, to provide substantial legal certainty for all parties to an ILUA.

3.64 The Committee has received mixed views from native title and non-native title parties about the relative advantages and disadvantages of ILUAs. One submission has noted that it considers all the statutory advantages of ILUAs to benefit non-native title parties, to the exclusion of native title holders. The perception of some native title holders is that while native title holders are bound by statute following registration as long as the ILUA remains registered and future acts are valid regardless, the remedies that are available to native title parties are contractual only, and do not include such remedies as invalidity of tenement or revival of native title rights.<sup>54</sup>

3.65 The Western Australian Aboriginal Native Title Working Group, in its evidence before the Committee, has similarly argued:

If the ILUA is registered — and one would hope that those agreements will always be complied with — the developer gets their title up-front. They have their interest and it is secured through other means because it is made validly under the Mining Act or whatever, and the ILUA validates it and says it works. But, if the agreement is breached later on, the native title holders are left to standard contractual remedies in the courts to prove breach and damages, and so forth, whilst the developer has their title and can march along their merry way.<sup>55</sup>

3.66 Conversely, the submission from Agforce, an organisation representing Queensland pastoralists and graingrowers, has noted the opposite:

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<sup>54</sup> Submission No 5, p.2.

<sup>55</sup> Evidence, p.NT364.

The problem with ILUAs for most pastoralists is that they will not offer any value other than to deactivate a substantial encumbrance on native title (at least for a time). ... we do not believe that many mainstream pastoral landholders will negotiate ILUAs unless there is a substantial and immediate benefit to them in so doing.<sup>56</sup>

3.67 This view has been echoed by a submission to the Committee's inquiry by the Northern Territory Cattlemen's Association.<sup>57</sup> That submission does however concede that a possible advantage of an ILUA in the future might be where an individual pastoralist wishes to undertake a future act under the Act and would, in such a circumstance, find an ILUA useful.

3.68 The Tribunal has noted that parties to an ILUA are not required to concede the existence of native title. The question whether native title exists is a matter for the parties. In particular, the Tribunal points out that pastoralists are not required to give up any of their rights through an ILUA, either before or after a determination of native title. Indeed, the Tribunal has noted that:

To date, by far the majority of ILUAs have left the question of whether native title exists open – to be dealt with at a later date, perhaps by the parties or by the Federal Court.<sup>58</sup>

3.69 It is the Committee's view that certainty has indeed been achieved by the provisions for non-native title parties. It is not that clear that the same certainty has been given to native title parties under the legislation. However, through careful drafting of the terms of the ILUA itself, parties can provide a measure of certainty to the native title parties to an ILUA.

### ***The Role of the Tribunal and Alternative State Bodies***

3.70 The framework for ILUAs contemplates involvement on the part of the Tribunal and Alternative State Bodies in the ILUA process. When requested by any of the persons making an ILUA, the Tribunal or a recognised State or Territory body may assist parties in negotiating the agreement (ss.24BF, 24CF, 24DG).

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<sup>56</sup> Submission No 22.

<sup>57</sup> Submission No 28.

<sup>58</sup> Submission No 8b, p.21.

Additionally, for area and alternative procedure agreements, the Tribunal or recognised State or Territory body may, at the request of the parties, assist in negotiating with the person making an objection to the registration of, the agreement 'with a view to having the objection withdrawn' (s.24CI(2), s.24DJ(2)).

3.71 The role of the Tribunal includes the functions of the Registrar in registering and deregistering ILUAs.<sup>59</sup> The Registrar of the Tribunal is required to establish and maintain the Register of Indigenous Land Use Agreements (the Register of ILUAs).

3.72 The Committee has received evidence that the assistance of the Tribunal has been beneficial to parties in relation to administrative assistance given to parties, including the facilitation and chairing of meetings, the recording and distributing to parties details of discussions, the follow-up of parties to ensure tasks had been performed, convening relevant meetings, and assisting with such matters as the preparation and distribution of documentation and maps.<sup>60</sup>

3.73 Nevertheless, the Cape York Land Council has outlined some of the limitations of the Tribunal in relation to the functions conferred upon it by the Act.<sup>61</sup> In particular, they consider that:

The lack of cultural awareness of the NNTT's mediators generally is of great concern, and no doubt limits the assistance the NNTT is able to provide to the ILUA and native title process.<sup>62</sup>

### ***The Role of Native Title Representative Bodies***

3.74 Representative bodies are given varying roles in ILUAs, ranging from representation and certification through to direct participation as a party.

3.75 Representative bodies may become a party to an ILUA (in comparison, for example, to the right to negotiate procedure where they can not be a negotiating party and are limited to their representative role). If it is to be a party to an ILUA, a

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<sup>59</sup> *Native Title Act 1993* Part 2, Division 3 and Part 8A.

<sup>60</sup> Submission No 2, p.6.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

representative body *must* as far as practicable consult with, and have regard to the interests of persons who hold, or may hold, native title in relation to the land or waters in that area (ss.202A, 203BH). If it is not to be a party, at least one representative body in the area covered by the agreement must be notified of the agreement by the prescribed body corporate or a person in the native title group before the agreement can be registered.

3.76 The Federal Court has identified a representative body's primary function as:

To facilitate the researching and making of applications for determinations of native title by individuals or groups from among Aboriginal peoples or Torres Strait Islanders and the giving of assistance to such individuals or groups in connection with negotiating indigenous land use agreements (s.202(4)(a) and (c)).<sup>63</sup>

And one commentator has observed:

The unwritten burden which the Act places on NTRBs [native title representative bodies] is the responsibility to synchronise the requirements of Indigenous and non-Indigenous law in relation to native title applications.<sup>64</sup>

The way in which NTRBs manage the competing demands of the regime will have implications of a legal, political and cultural nature in relation to NTRB constituents, government and the wider community.<sup>65</sup>

3.77 An important function of representative bodies relates to their role in relation to area agreements where they are called upon to certify the application for registration in writing (ss.202(4)(e), 203BE). Certification by a representative body must be made to the Registrar with a statement setting out the grounds for it being of the opinion that all native title holders have been identified and have authorised the making of the agreement. The alternative is for the parties themselves to state that

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<sup>63</sup> *Harris v Great Barrier Reef Marine Park Authority* [2000] FCA 603 (11 May 2000) at para 24.

<sup>64</sup> Summerfield T 'The Native Title Representative Body Regime: A site of cross-cultural tension and political vulnerability' *Indigenous Law Bulletin* March 2000, p.11.

<sup>65</sup> *Ibid*, p.12.

these processes have taken place. These functions are discussed further in chapter 4 of this report.

3.78 The amended Act gives to representative bodies the following functions:

- facilitation and assistance;
- certification;
- dispute resolution;
- notification;
- agreement making; and
- internal review.<sup>66</sup>

3.79 One submission has identified the central role that representative bodies play in the ILUA process:

All alternative procedure agreements must include the relevant representative body/bodies as a party/parties. Area agreements must be certified by a representative body unless the parties themselves undertake the onerous task of satisfying the Native Title Registrar that (among other things) all potential native title holders have been identified and properly consulted. Without adequate resourcing of representative bodies, the negotiation of ILUAs will be delayed, or the registration of ILUAs made less likely.<sup>67</sup>

3.80 In its submission, Rio Tinto Ltd identified the following elements it considers a representative body requires to adequately and expediently perform its functions in relation to ILUAs:

- the confidence and trust of the people they are representing;
- the ability or capacity to resolve intra-indigenous disputes, especially in relation to disputes around claim boundaries;
- technical resources to engage and negotiate with proponents on behalf of native title holders or claimants about proposed developments; and

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<sup>66</sup> *Native Title Act 1993* s.203B(1).

<sup>67</sup> Submission No 23, p.14.

- adequate resourcing.<sup>68</sup>

3.81 Rio Tinto Ltd also considered that representative bodies have the following shortcomings:

- (i) a lack of staff continuity in key positions;
- (ii) a perceived lack of accountability to all groups purportedly represented;
- (iii) internal disputation and politicking [sic];
- (iv) a perception that representative bodies suffer from conflicts of interest with regard to, among other things, the resolution of intra indigenous disputes; and
- (v) an inability or unwillingness to engage with proponents about proposed developments in a timely and efficient manner.<sup>69</sup>

And D E Smith argued that:

The resources and skills needed by Representative Bodies to undertake functions related to ILUAs will be considerable. The lessons learnt by land councils in the Northern Territory have direct relevance to these matters (see Smith and Finlayson 1997). Over a period of 20 years, land councils in the Northern Territory, have had to undertake substantial field research to identify all traditional owners for inclusion in land claims and resource development negotiations under the *Aboriginal Land Rights (Northern Territory) Act 1976*.<sup>70</sup>

3.82 The Central Queensland Land Council Aboriginal Corporation has highlighted the difficulties for representative bodies in meeting their statutory obligations given their resourcing, and given that ILUAs are voluntary agreements:

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid pp.14-15.

<sup>70</sup> Smith D E op.cit., p.10.

The capacity of representative bodies and their constituents to engage in ILUA negotiations has and is likely to continue to limit the speed at which ILUA negotiations can take place.<sup>71</sup>

Nevertheless, D E Smith argued that a benefit of the 1998 amendments to the Act was the inclusion of the provision that representative bodies may become a party to an ILUA.<sup>72</sup>

3.83 It is clear therefore that representative bodies, under functions given to them under the amended Act, have a central role to play in the facilitation of ILUAs. The Act does not appear to require amendment in relation to the functions of representative bodies. Those outlined in the legislation appear to be appropriate to the role and responsibilities of representative bodies. The central issue that has been raised in evidence and numerous submissions before the Committee concerns adequate resourcing of representative bodies. Chapter 6 of this report provides a more detailed discussion of the resourcing required for representative bodies to properly dispense with their functions.

### **Summary**

3.84 The clear intention of the ILUA regime established pursuant to the amended Act is to provide flexibility to resolve issues about the use of native title land outside of the adversarial court process.<sup>73</sup> It is clear from the Committee's review of the statutory framework that amendments to the statute are now desirable. The Committee's recommendations for amendments to the Act would clarify some of the current uncertainty surrounding the status of ILUAs and their relationship to the common law of contract.

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<sup>71</sup> Submission No 12, p.3.

<sup>72</sup> Smith D E op.cit., p.10.

<sup>73</sup> Submission No 6, p.4.

**Recommendations**

- 1. That, firstly, section 24EA be amended to clarify the circumstances and matters of fact regarding defects that do not of themselves affect the contract status of an ILUA; that secondly, the section be amended to clearly outline the grounds for and means by which a party can seek termination of the registration of an ILUA. (para 3.47)**
  
- 2. That section 199C be amended to broaden the grounds which the Federal Court may consider in ordering the Registrar to remove an ILUA from the Register. (para 3.48)**

