

## CHAPTER 5

### Perceptions of ILUA Negotiations

#### *Introduction*

5.1 It is important to consider the perceptions that participants in the native title system have of the ILUA provisions and the negotiation process. The perceptions of the various participants involved in negotiations are not only a key means of identifying critical issues affecting the negotiation of ILUAs but those perceptions also have the potential to hamper or facilitate ILUA negotiations. For example, if there is a perception among indigenous groups that the ILUA provisions do not offer any advantages to native title holders then they may not be willing to enter into meaningful negotiations within the framework of the Act. Similarly, if non-indigenous parties consider the ILUA provisions do not provide them with the certainty they require, or are unduly complex, they may prefer to utilise other mechanisms within the future act regime.

#### *Commonwealth Government*

5.2 The Commonwealth Attorney-General's Department considers that:

... ILUAs provide a workable mechanism for achieving binding agreements with native title holders over any matter arising out of the existence (or possible existence) of native title, in particular where no determination of native title has yet been made.<sup>1</sup>

The Department further considers that the inclusion of the ILUA provisions has overcome a number of difficulties associated with the original section 21 of the Act including:

- uncertainty regarding whether the right to negotiate procedures would still apply to a grant authorised by a section 21 agreement;

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<sup>1</sup> Submission No 38, p.5.

- the risk that not all native title holders were parties to the agreement and the act authorised by the agreement may therefore be invalid;
- the difficulty associated with identifying appropriate indigenous participants where there was no determination of native title;
- the requirement to have the relevant government as a party; and
- the use of the provision being dependent on the attitude of governments to negotiating with native title holders.<sup>2</sup>

5.3 The Commonwealth has been directly involved in the negotiation process for ILUAs as a proponent. The Department of Defence is a major landowner with approximately 3 million hectares across the country. The Department has been involved in the negotiation of ILUAs in relation to Delamere and Bradshaw stations (in the Northern Territory) as well as Townsville (in Queensland) and at Twofold Bay (near Eden in New South Wales).<sup>3</sup> The Department gave evidence that:

Defence acknowledges that there are significant advantages if a voluntary agreement can be reached which enables necessary Defence projects to proceed. Defence also understands the need to respect any native title and, wherever possible, implement the non-extinguishment principle. The voluntary nature of agreements is attractive as it paves the way for ongoing collaborative relationships between parties for the future management of the land.<sup>4</sup>

### ***Aboriginal and Torres Strait Islander Commission***

5.4 The Aboriginal and Torres Strait Islander Commission (ATSIC) considers that it is too early to make an authoritative assessment of the workability of the ILUA provisions.<sup>5</sup> Nevertheless ATSIC considers that the introduction of the ILUA provisions was necessary and the balance of interests achieved in the provisions is fair. However, the provisions do not occupy the central position within the future act regime which was envisaged by ATSIC and the National Indigenous Working Group.<sup>6</sup> In particular, ATSIC considers that the validation of a range of future acts

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<sup>2</sup> Submission No 38, pp.8-9.

<sup>3</sup> Evidence, pp.NT273-274.

<sup>4</sup> Evidence, p.NT275.

<sup>5</sup> Submission No 19, p.5.

<sup>6</sup> Submission No 19, pp.8-10.

with provision for compensation and certain procedural rights for native title holders undercut the possibility of native title holders negotiating outcomes over a wide variety of activities.<sup>7</sup>

5.5 Under the Act it is envisaged that representative Aboriginal/Torres Strait Islander bodies ('representative bodies') would fund native title claimants taking part in negotiations. The South Australian Government's submission states that ATSIC has refused to provide funding to the Aboriginal Legal Rights Movement (ALRM) for the state-wide ILUA negotiation process and has instead preferred to fund litigation.<sup>8</sup>

ATSIC responded to this submission in evidence before the Committee:

I understand South Australia put submissions to you asking why we were not funding the ALRM to help them make an agreement. I put it very firmly that, if we were not spending \$1½ million on maintaining the position of indigenous people in South Australia in relation to their land against the South Australian government, we would have plenty of money to assist in the development of an agreement with the South Australian government. They are saying they can afford to be on both sides of the street; we cannot. At the moment the litigation is so significant that we must support the litigation.<sup>9</sup>

ATSIC considers that the lack of resources available to native title holders through representative bodies has contributed to only a small number of ILUAs being registered.<sup>10</sup>

### **State/Territory Governments**

#### *New South Wales*

5.6 The New South Wales Government advised that it has not had extensive experience in the negotiation of ILUAs. The State considers that the ILUA provisions are complex and that the negotiation of ILUAs is resource intensive. Its efforts to negotiate ILUAs would be assisted if the Commonwealth's offer to assist the State to

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<sup>7</sup> Submission No 19, p.9. See *Native Title Act 1993* Part 2, Division 3, Subdivisions G-K.

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

<sup>9</sup> Evidence, p.NT321.

<sup>10</sup> Submission No 19, p.13.

meet native title compensation payments were not skewed towards litigation based determinations. Nevertheless, the Government considers that ILUAs are an important option when considering an application for a determination of native title.<sup>11</sup>

### *Queensland*

5.7 The Queensland Government considers the ILUA provisions are generally workable and do not require any substantial amendment. While the State has found that agreements are difficult to finalise, it considers this to be a difficulty inherent in voluntary negotiation processes.<sup>12</sup> The State has been involved in the negotiation of a number of ILUAs of varying size and complexity. In general the ILUAs being negotiated in Queensland, with or without direct State Government involvement, fall into the following broad categories:

- ILUAs negotiated for community benefit (for example the Mackay Surf Life Saving Club and Mackay City Council gardens ILUAs).
- ILUAs which allow future development or grants of third party interests (such as the Small Mining Project ILUAs).
- ILUAs dealing with major projects (for example the Awoonga Dam ILUA).
- ILUAs negotiated in conjunction with a native title claim (such as the Kaurareg and Bar-Barrum ILUAs).<sup>13</sup>

5.8 The Queensland Government believes that the resources provided to representative bodies are inadequate.<sup>14</sup> Like the New South Wales Government, Queensland is concerned by the terms of the proposed Financial Assistance Agreement (Native Title) between the Commonwealth and the States. The State notes that the terms dealing with compensation under ILUAs act as a disincentive for the State to enter ILUAs with native title parties other than determined native title holders.<sup>15</sup> The State gave evidence that:

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<sup>11</sup> Submission No 34, pp.1,3-4.

<sup>12</sup> Submission No 24, pp.1,2. Evidence, p.NT178.

<sup>13</sup> Queensland Government *Indigenous Land Use Agreements in Queensland: 4 case studies* document tabled on 21 March 2001.

<sup>14</sup> Submission No 24a, p.2. Evidence, pp.NT180-181.

<sup>15</sup> Submission No 24a, p.2. See also Submission No 38, p.18.

The Commonwealth will not assist the states in relation to native title compensation unless there is an approved determination of native title. They will only waive that requirement if, at the time the agreement was reached, it was impractical to require that there be a determination of native title.<sup>16</sup>

The State goes on to note that the cost of pursuing a determination of native title does not fit the Commonwealth's criteria of 'impracticability.' Further in the absence of a native title determination, the Commonwealth requires 'credible evidence' which is effectively what the Federal Court would require to establish that native title exists.<sup>17</sup>

### *South Australia*

5.9 The South Australian Attorney-General has advised that:

... once all necessary legislation is in place, the Government views ILUAs as the best way of resolving outstanding native title issues in this State ... ILUAs represent a much less costly and quicker alternative to litigation, and allow a more flexible process and more innovative resolution of the issues.<sup>18</sup>

5.10 When native title claims are lodged with the Federal Court, management committees are appointed by the claimants. Notably:

... almost all the State's Native Title Management Committees, which represent the great majority of native title claimants in South Australia, agreed to enter into ILUA negotiations on matters of State-wide application as one group, with the ALRM's Native Title Unit to act as a facilitator for the negotiations.

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The outcome of this meeting is a strong signal that native title claimants, as well as the South Australian Government, SAFF and

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<sup>16</sup> Evidence, p.NT180.

<sup>17</sup> Ibid.

<sup>18</sup> Submission No 6, p.1. See also Evidence 19 March 1999, p.NT20.

SACOME, see the ILUA negotiations as being preferable to litigation in resolving native title issues.<sup>19</sup>

(SAFF is the acronym for the South Australian Farmers Federation; and SACOME is the South Australian Chamber of Mines and Energy.)

5.11 It is currently anticipated that there will be a state-wide agreement which will set out a framework for action and further agreement at local and regional levels:

The State-wide agreement will also set out the best way to establish more effective processes for decisions about issues that affect most or all native title claims. Such an agreement could be registered as an "alternative procedure" ILUA.<sup>20</sup>

Further, it is envisaged that the state-wide agreement will be supported by a number of local ILUAs, and standard industry ILUAs.

These more specific ILUAs will provide template agreements for the resolution of particular local issues, and could be adopted with little or no change to suit a particular circumstance.<sup>21</sup>

5.12 While it is expected that South Australia will negotiate various state-wide ILUAs, it also considered that some 'fact-specific' ILUAs will be finalised to deal with specific development proposals. For example an ILUA regarding the development of a marina at Port Vincent has been negotiated with the Narungga Native Title Management Committee. Additionally, talks are being held about the management of specific national parks, improvements to the Aboriginal heritage protection scheme and other specific issues.<sup>22</sup> The National Native Title Tribunal is closely informed of progress in these matters. A protocol has been developed between the State Government and the Tribunal to address their respective roles:

The Tribunal is required to continue with its registration and mediation functions in relation to native title claims but has agreed, where

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<sup>19</sup> Submission No 6, p.2.

<sup>20</sup> Submission No 6, p.3.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

possible, not to pursue active mediation of registered claims as long as they are being addressed productively through the ILUA process.<sup>23</sup>

5.13 The State expressed its concern to the Committee in February 2001 regarding the time required to prepare notices of the ILUA. Notices took six to eight weeks to prepare and the primary reason appeared to be that the Tribunal had only one geo-spatial unit to prepare the maps required for notification.<sup>24</sup>

5.14 The Registrar of the Tribunal gave evidence in August 2001 that the Tribunal had increased the staffing of the geo-spatial unit substantially in the last financial year and established a subsection of the unit in Brisbane. He stated that the time required to prepare notices and subsequently process the registration of ILUAs was around five weeks. The Registrar said the Tribunal would strive to reduce this to less than a month.<sup>25</sup>

### *Victoria*

5.15 Eight ILUAs have been negotiated in Victoria three of which had been registered by 20 July 2001.<sup>26</sup> ILUAs have been used for the validation of future acts and the resolution of native title applications and deal with a range of issues from sandstone quarries to skateboard parks.<sup>27</sup> ATSIC gave evidence that a framework agreement to simplify agreement-making in relation to native title issues, at the regional or community level is also well advanced.<sup>28</sup>

5.16 The Victorian Government considers that:

... the ILUA provisions offer a flexible process for resolving native title issues in a relatively informal manner, and provide a reasonable degree of certainty for Government and industry parties seeking to carry out future act activities.

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<sup>23</sup> Submission No 6, p.4.

<sup>24</sup> Submission No 6a.

<sup>25</sup> Evidence, pp.NT544-545.

<sup>26</sup> Submission No 8b Attachment A, p.1.

<sup>27</sup> Evidence, p.NT297. Submission No 13.

<sup>28</sup> Evidence, p.NT320.

The State considers that the legislative provisions, especially as they relate to authorisation and certification, are overly complicated.<sup>29</sup>

### *Western Australia*

5.17 The previous (Court) Western Australian Government indicated that it was involved in the negotiation of five ILUAs.<sup>30</sup> As at 20 July 2001, only two ILUAs from Western Australia had been lodged for registration with the Tribunal.<sup>31</sup> There is evidence however that a number of agreements have been negotiated under the right to negotiate provisions or outside the framework of the Act.<sup>32</sup>

5.18 The Government stated that its clear preference was:

... that agreements designed to modify the impact of the Native Title Act (eg future act provisions) or to endorse particular claimants over any other potential native title claimants should be registered as ILUAs.<sup>33</sup>

The basis for this preference was that:

An agreement reached outside the [Act] cannot deliver the same level of accountability and certainty as an agreement registered under the Act. Agreements outside the [Act] are not subject to a process of independent assessment and public scrutiny and may not provide a structured and independent means ... of dispute resolution.<sup>34</sup>

5.19 The new (Gallop) Government in Western Australia has indicated that it will:

... vigorously promote and sponsor the negotiation of ILUAs ... [and] will particularly promote and assist agreements which will support

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<sup>29</sup> Submission No 13.

<sup>30</sup> Submission No 3, p.2.

<sup>31</sup> Submission No 8b Attachment A, p.1.

<sup>32</sup> Submission Nos 3, p.1; and 5, p.2.

<sup>33</sup> Submission No 3, p.5.

<sup>34</sup> Ibid.

Indigenous community and economic development on a long term or sustainable basis.<sup>35</sup>

The State Government established a technical taskforce to examine ways to speed up the processing of mining, exploration and land title applications in areas where native title may survive. The discussion paper produced by that taskforce was released for comment on 1 August 2001.<sup>36</sup> The Government has also reviewed the guidelines for negotiation of native title determinations and agreements ('the Wand Review') and sought public comment on draft negotiation guidelines.<sup>37</sup>

### *Tasmania*

5.20 On 21 September 2000 the Premier of Tasmania, the Hon Jim Bacon MHA, advised the Committee that:

I am unable to offer any comments in relation to the use of ILUAs as my Government has not been involved in negotiating an agreement under the *Native Title Act 1993*.<sup>38</sup>

### *Northern Territory*

5.21 The previous (Burke) Northern Territory Government did not make a submission to the inquiry. However, the Territory has concluded an agreement with the Northern Land Council (NLC) and the Central Land Council (CLC) in relation to the Alice Springs to Darwin railway. The parties chose to enter that agreement under section 21 of the Act (as it stood prior to the 1998 amendments) rather than the ILUA provisions.<sup>39</sup>

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<sup>35</sup> *Native title: agreement not argument*, <http://www.ministers.wa.gov.au/policies/Native%20Title.pdf>, undated, p.4.

<sup>36</sup> Ripper, The Hon E 'Mining law change would boost exploration: taskforce' *Government of Western Australia Media Statement* 1 August 2001, p.1.

<sup>37</sup> Wand P and Athanasiou C *Wand Review of Western Australian 'General Guidelines – Native Title Determinations and Agreements'* [http://www.ministers.wa.gov.au/ripper/Native\\_Title.htm](http://www.ministers.wa.gov.au/ripper/Native_Title.htm), undated.

<sup>38</sup> Submission No 14.

<sup>39</sup> Evidence, p.NT460.

5.22 CLC gave evidence that the previous Northern Territory Government was generally unwilling to enter ILUAs and has rendered no assistance to parties where agreements have been reached.<sup>40</sup> In addition CLC stated that the Territory's procedures in relation to the administration of the backlog of mining tenement applications did not encourage negotiation. In particular, applications in a particular geographic area or which form part of the program of a particular mining company are not being notified at the same time.<sup>41</sup> NLC gave evidence that the manner in which notification was being carried out was causing similar difficulties in its region.<sup>42</sup>

### *Australian Capital Territory*

5.23 The Australian Capital Territory Government did not make a submission to the inquiry. The Territory, however, has entered an agreement with native title claim groups regarding the granting of a special Aboriginal lease for 99 years over Namadji National Park. This is an agreement under section 86F of the Act which deals with agreements that result in the withdrawal or amendment of native title applications rather than an ILUA.<sup>43</sup>

### **Local Government Authorities**

5.24 The Australian Local Government Association (ALGA) confirmed that it:

... welcomes the insertion of these [ILUA] provisions as they increase the range of options available to local Councils for resolving native title matters.<sup>44</sup>

ALGA advised that the provisions relating to agreements have been strengthened by the 1998 amendments to the Act:

The fact that they can be used to ensure the validity of acts affecting native title is a positive feature. The negotiation of agreements will be

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<sup>40</sup> Evidence, p.NT497. Submission No 30, p.3.

<sup>41</sup> Submission No 30, pp.3-4.

<sup>42</sup> Evidence, pp.NT447-448.

<sup>43</sup> *Agreement between the Australian Capital Territory and ACT Native Title Claim Groups*, <http://www.act.gov.au/government/department/cmd/comliaison/Indigenous/ATSIagreement.html>, 30 April 2001.

<sup>44</sup> Submission No 4, p.4.

easier than following the future act processes in the *Native Title Act 1993* (Cth) or complementary State/Territory legislation.<sup>45</sup>

5.25 The Local Government Association of Queensland has emphasised the need for the State Government to support local councils throughout their attempts to develop ILUAs:

The State has assisted with initial discussions, but [has] stepped away from the process prior to parties feeling confident enough to continue discussions unassisted. In these cases, Councils do not feel comfortable continuing with the discussions without the assistance of specialised staff with experience in ILUA negotiations and have resorted to other means, such as compulsory acquisition to undertake activities on land subject to native title.<sup>46</sup>

5.26 Many local government bodies have now become involved in negotiations on ILUAs. Some have taken the initiative to commence discussions with native title claimants to develop a framework for dealing with future act and indigenous heritage matters within their boundaries.<sup>47</sup> Other councils, such as Mackay and Cairns City Councils, have entered ILUAs which ensure the validity of particular future acts.<sup>48</sup> Torres, Herberton, and Mareeba Shire Councils have negotiated ILUAs in association with consent determinations of native title which deal broadly with the interaction between native title rights and council infrastructure and activities.<sup>49</sup>

5.27 Several councils gave evidence to the Committee that they were experiencing difficulties negotiating ILUAs. Winton Shire Council has pursued a non-claimant application in tandem with ILUA negotiations due to delays in progressing an agreement in relation to pastoral reserves surrounding the town.<sup>50</sup> The Council gave evidence that a motel had been built in a flood prone area as all the alternative

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<sup>45</sup> Submission No 4, p.4.

<sup>46</sup> Submission No 7.

<sup>47</sup> Submission No 6, p.6. See also Submission No 4, p.8.

<sup>48</sup> Submission No 4, p.5.

<sup>49</sup> National Native Title Tribunal *The Kaurareg People's Native Title Determinations: Questions and Answers* May 2001, pp.8-10 and *The Bar-Barrum People's Native Title Determination: Questions and Answers* June 2001, p.8.

<sup>50</sup> Submission No 20. Evidence, pp.NT116,118-119,123.

sites were affected by native title. The motel was subsequently inundated.<sup>51</sup> Similarly Bungil Shire Council gave evidence that after experiencing difficulties negotiating an ILUA, the Shire opted to alter the route of a sewerage pipeline to avoid a crown reserve which may have been subject to native title. The Shire subsequently decided to compulsorily acquire native title rights in an area which is to be used for a residential subdivision in Injune.<sup>52</sup>

5.28 Some Queensland councils gave evidence that they had difficulty identifying the relevant native title group in part because of overlapping native title applications or disputes within the group.<sup>53</sup> There was also evidence that some councils did not have a pre-existing relationship with native title groups in their area and it appears that this is a factor hampering negotiations.<sup>54</sup>

5.29 ALGA notes that there are several factors contributing to the small number of registered ILUAs entered between local government and native title holders including:

- the relative newness of the ILUA provisions;
- limited knowledge and understanding within local government regarding the ILUA provisions;
- some state governments not actively promoting agreements;
- some representative bodies not being in a position to promote agreements or deal effectively with future act issues because they have been pre-occupied with other matters; and
- the high level of misunderstanding regarding native title which persists in local communities and which affects the willingness of councils to enter agreements.<sup>55</sup>

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<sup>51</sup> Evidence, pp.NT116-117.

<sup>52</sup> Evidence, pp.NT35-37.

<sup>53</sup> Evidence, pp.NT58,79.

<sup>54</sup> Evidence pp.NT123,165,172.

<sup>55</sup> Submission No 4, p.4.

For some councils the resources, both financial and technical, required to negotiate agreements also presents a difficulty.<sup>56</sup>

### **Industry Bodies**

#### *Minerals and Petroleum*

5.30 There is a wide diversity of views both within and across different industries regarding ILUAs. Some, like the Minerals Council of Australia, have a varied approach:

ILUAs provide one potentially positive avenue for reaching agreements with indigenous communities, within the constraints of the Native Title Act. However ILUAs are not a panacea, and there are many circumstances where their use is currently neither practical nor appropriate.<sup>57</sup>

The Minerals Council notes that experience to date indicates that the negotiation of ILUAs is expensive and time-consuming. Furthermore, representative bodies normally have insufficient resources to enable them to engage effectively in negotiations. Minerals companies are therefore obliged to provide funding to representative bodies to enable negotiations to occur.<sup>58</sup>

5.31 SACOME, which is representing the minerals and petroleum industry in the South Australian framework negotiations, believes that negotiation is the most appropriate mechanism to address native title. The Chamber considers that:

... the place for the native title legislation (Commonwealth Native Title Act and the alternative South Australia Native Title Scheme) is to provide a clear and proper context in which negotiations can take place.<sup>59</sup>

5.32 In contrast, the Association of Mining and Exploration Companies Inc cautioned in late 1999 that ILUAs were proving more difficult to conclude than first

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<sup>56</sup> Submission Nos 4, p.8; and 33, pp.2-3. Evidence, pp.NT72,102-103.

<sup>57</sup> Submission No 10, p.1. See also Evidence 12 March 1999, pp.NT74,85.

<sup>58</sup> Submission No 10, pp.1-2.

<sup>59</sup> Submission No S33 to s.206(d) inquiry, 19 April 2000, p.4.

envisaged primarily as a result of intra-claimant disputes.<sup>60</sup> While for its part, Rio Tinto Ltd has signed five major mine development agreements since 1996. None of these agreements have been registered as ILUAs to date largely as a result of the complexities associated with achieving registration.<sup>61</sup> On 13 September 2001 the Tribunal announced the signing of ILUAs between the Kalkadoon people, the Queensland Government and a number of mining companies including MIM Holdings Ltd. The ILUAs allow about 90 exploration licences to be granted in an area near Mt Isa.<sup>62</sup> MIM Holdings Ltd stated:

The agreement signed today demonstrates the value of settling land access issues by negotiation, and is a testament to the goodwill and commonsense of the Kalkadoon representatives.<sup>63</sup>

5.33 The Queensland Boulder Opal Association represents a number of small opal miners and was a party to the Opalton ILUA and a right to negotiate agreement discussed in Chapter 4 of this report. The Association noted that the nature of opal mining is such that mining leases tend to be smaller and are worked out within weeks or months.<sup>64</sup> The Association's primary concern centred on the length of time required to finalise a second ILUA over the region. The second ILUA would cover mining and exploration tenement grants over ten years and aim to give the industry long-term stability.<sup>65</sup>

5.34 The North Queensland Miner's Association, which also represents a number of small miners, expressed similar frustration regarding the time taken to finalise ILUA negotiations. The Association notes that small miners face particular difficulties under the future act regime as their leases are worked out in relatively short periods of time. They are also not in a position to offer significant

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<sup>60</sup> Submission No S28 to s.206(d) inquiry, 16 September 1999, p.3. Evidence, 16 September 1999, p.NT723.

<sup>61</sup> Evidence, p.NT232. Submission No 23, p.4.

<sup>62</sup> National Native Title Tribunal Press Release 01-68, 13 September 2001 *Kalkadoon Agreement Offers Certainty and Cultural Protection*.

<sup>63</sup> MIM Holdings Ltd Information Release 13 September 2001 *Kalkadoon Agreement Clears Way for Exploration in North-West Queensland*.

<sup>64</sup> Evidence, p.NT129.

<sup>65</sup> Submission No 21.

compensation as an incentive for native title groups to enter agreements.<sup>66</sup> Nevertheless with the cooperation of the Queensland Government, the Tribunal and the North Queensland Land Council, the Association believes it has negotiated a framework which will resolve native title issues for small miners in North Queensland for the next 30 years. Thirteen native title groups have indicated agreement in principle to sign ILUAs within this framework and four agreements have been signed.<sup>67</sup>

5.35 Giants Reef Mining Ltd gave evidence regarding the ILUA it has concluded with the CLC over 7500 sq km around Tennant Creek. The agreement provides for mining, exploration and related activities for 25 years. The agreement also deals with protection and rehabilitation of the environment and protection of native title rights including sacred sites. The company considers that the terms of the agreement are commercially sound in light of the continuity of tenure and certainty the agreement provides.<sup>68</sup>

5.36 In reference to the negotiation of ILUAs covering mining projects, the Tribunal's submission notes its impression:

... that the mining industry in particular seems to have embraced ILUAs as a very practical vehicle for obtaining the permits they require.<sup>69</sup>

This has been the Committee's impression throughout the inquiry.

### *Utilities*

5.37 The Australian Pipeline Industry Association notes that ILUAs are a relatively new mechanism which have not been used extensively by the industry to date.<sup>70</sup> The Association states:

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<sup>66</sup> Submission No 37, pp.2-5.

<sup>67</sup> Submission No 37, pp.3-4,6.

<sup>68</sup> Evidence, p.NT511.

<sup>69</sup> Submission No 23b, p.11.

<sup>70</sup> Submission No 18, p.5.

The ILUA provisions of the Act should afford pipeline owners the opportunity to achieve co-existence with legitimate native title claimants and to ensure a certainty of tenure.<sup>71</sup>

The Association is concerned by the open-ended timeframe for negotiations and notes that linear infrastructure faces particular difficulties in such negotiations since it obviously crosses the country of a large number of traditional owner groups.<sup>72</sup>

5.38 The Association's members are often asked to fund the other side of the negotiation in relation to land access issues. While pipeline developers are not averse to meeting reasonable costs, the Association considers the costs of negotiating ILUAs are not reasonable in a commercial sense at present and should be met by the Commonwealth and/or state governments. The Association believes the costs of negotiation will gradually decline, as transitional issues such as the definition of indigenous parties to the negotiation are progressively resolved.<sup>73</sup>

5.39 Telstra has concluded nine ILUAs, five of which are registered. It is also in the process of negotiating a number of other agreements. These agreements address matters outside the scope of a native title determination with native title holders or secure access to land for new telecommunications infrastructure outside the process of settling a native title claim. Telstra's submission notes that:

... ILUAs are costly resource intensive and time consuming ... Telstra recognises that this is to some extent unavoidable. There are a number of contributing factors including the voluntary nature of agreements, the lack of precedent agreements and limitations on native title holders and Representative Bodies to actively participate in ILUA negotiations.<sup>74</sup>

### *Agriculture*

5.40 Turning to primary industry, AgForce is a peak body representing Queensland pastoralists and grain growers. AgForce's submission notes that the

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<sup>71</sup> Submission No 18, p.7.

<sup>72</sup> Submission No 18, pp.6,9.

<sup>73</sup> Submission No 18, p.12.

<sup>74</sup> Submission No 32, pp.1-2.

use of ILUAs by pastoral land holders has not been common.<sup>75</sup> Similarly the Northern Territory Cattlemen's Association notes that:

... ILUAs might become a useful tool in the management of Native Title in some instances, but the members of the [Association] have little experience with their use to date.<sup>76</sup>

In part this appears to be because of an erroneous perception that entering an ILUA would require pastoralists to concede the existence of native title prior to a court determination of native title.<sup>77</sup> AgForce, the Northern Territory Cattlemen's Association and the Pastoralists' and Graziers' Association of Western Australian believe that a further issue is that ILUAs do not generally offer pastoralists any substantial benefit, as most pastoralists are not in the position of seeking validity for a future act such as an upgrading of tenure.<sup>78</sup>

5.41 The peak body representing South Australian farmers has a markedly different perspective. As noted above, SAFF is participating in the negotiation of a state-wide framework agreement in South Australia:

We have been strongly in support of the process, as we believe it will deliver certainty, save very much on the costs and the time for settling some of these issues. Whilst ILUA is a voluntary process, we will be actively encouraging farmers to embrace the concept.<sup>79</sup>

### **Representative Bodies**

5.42 Virtually all of the representative bodies indicated that they did not have sufficient resources to assist the negotiation of ILUAs within the timeframes desired or required by proponents.<sup>80</sup> For example, Central Queensland Land Council said that its resources would only allow it to hold annual meetings of native title groups for

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<sup>75</sup> Submission No 22, p.1.

<sup>76</sup> Submission No 28.

<sup>77</sup> Evidence, pp.NT83-84. Submission No 22, p.2.

<sup>78</sup> Submission Nos 22, pp1-2; and 28. Evidence, pp.NT89,437; and 13 April 1999, pp.NT184-185.

<sup>79</sup> Evidence, 19 April 2000, p.NT872.

<sup>80</sup> Submission Nos 2, p.2; 25, p.3; and 29, p.7. Evidence, pp.NT148-150,197,301,338,342,365-367,383-384,388-398; and 19 April 2000, pp.NT868-869.

the purpose of authorising agreements within its region. Where proponents wished to pursue agreements more quickly, the Land Council was seeking to recover the costs of doing so from the proponent.<sup>81</sup> The Western Australian Aboriginal Native Title Working Group, which is a federation of Western Australian representative bodies and ATSIC representatives, noted that its members were also seeking to recover negotiation costs from proponents.<sup>82</sup>

5.43 Furthermore the Cape York Land Council considers that its limited funding placed the Kaurareg native title holders at a serious disadvantage in negotiations with the Queensland State Government, Torres Shire Council and the two corporate parties regarding ILUAs to accompany the Kaurareg native title determination.<sup>83</sup>

5.44 Some representative bodies have expressed reservations regarding the ILUA provisions and indicated that they generally seek to negotiate agreements outside the Act. For example, the Goldfields Land Council (GLC) advised the Committee that it had not utilised the Act's ILUA provisions. GLC's reasons for not utilising ILUAs included the complexity of registration requirements and the lack of statutory advantages to native title parties from ILUAs.<sup>84</sup>

5.45 NLC also indicated that its preference was to negotiate agreements outside the Act. According to NLC this provides greater certainty at the time of execution and prevents duplication of functions by the Tribunal. Nevertheless, NLC acknowledges that broader regional agreements (as opposed to single-venture agreements) may be best conducted within the ILUA framework.<sup>85</sup>

5.46 Cape York Land Council's submission notes the considerable frustration it experienced (together with native title holders) in the process of negotiating the Kaurareg ILUAs. Frustration in that instance, however, was related as much to the native title claim process as the ILUA process. The Land Council was concerned

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<sup>81</sup> Submission No 12, pp3-4. Evidence, pp.NT196-198.

<sup>82</sup> Evidence, p.NT362.

<sup>83</sup> Submission No 2, p.2.

<sup>84</sup> Submission No 5. See also Evidence, pp.NT362-363.

<sup>85</sup> Submission No 29, p.7

that the native title holders were the only party with a real interest in obtaining an expeditious outcome to the negotiations and that other parties sought to use the ILUA process as a means of bringing issues into the native title mediation forum that were only indirectly related.<sup>86</sup>

5.47 Nevertheless, a number of representative bodies appear to be utilising the ILUA regime extensively. CLC has negotiated five major ILUAs in relation to mining and exploration dealing with a collective area of over 23,000sq km.<sup>87</sup> As already discussed, ALRM is seeking to negotiate a state-wide framework agreement with the South Australian Government, SAFF and SACOME which is likely to be implemented through a number of state-wide and local ILUAs.<sup>88</sup>

5.48 In addition, the Queensland Indigenous Working Group, which represents Queensland representative bodies and ATSIC, recently finalised a state-wide framework agreement with the Queensland Government to deal with the backlog of mining exploration permit applications in the State. It is intended that the framework agreement will be implemented through area agreements entered between the State and individual native title groups.<sup>89</sup>

5.49 Mirimbiak Nations Aboriginal Corporation gave evidence that it had been involved in the negotiation of eight ILUAs. The Corporation noted that the notification and registration of ILUAs was time-consuming and presented a problem for proponents seeking to develop business propositions. Where time was a critical consideration, the Corporation would consider advising groups to use an ordinary contract rather than an ILUA.<sup>90</sup>

5.50 The New South Wales Aboriginal Land Council gave evidence that it had assisted the negotiation of a number of agreements both before and after the 1998 amendments of the Act. The Land Council noted, in relation to the Eastern Gas

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<sup>86</sup> Submission No 2, pp.2-3.

<sup>87</sup> Submission No 30, p.2.

<sup>88</sup> Evidence, 19 April 2000, pp.NT848-849,868.

<sup>89</sup> Beattie The Hon P *Hansard of the Queensland Parliament* 7 August 2001, p.2214. See also Evidence, pp.NT147-148.

<sup>90</sup> Evidence, pp.NT297,300.

Pipeline negotiations carried out before the amendments, that the ILUA provisions would have assisted the negotiations by defining what was required for the authorisation of the agreement and by allowing the agreement to validate the necessary future acts.<sup>91</sup>

### ***Summary of Perceptions***

5.51 After three years experience in the operation of the new provisions, stakeholders have varying views of ILUAs. Some regard ILUAs as an effective and useful mechanism for negotiating interests in land. Most acknowledge that the provisions are an improvement on the original section 21 of the Act in that there is greater certainty for proponents and no longer a requirement for the Commonwealth, or a state or territory government to be a party to the agreement.

5.52 Virtually all parties consider that the negotiation of ILUAs is resource intensive and is rarely completed quickly. Many parties noted that some of the difficulties they were currently experiencing were either inherent to the process of voluntary negotiation or were the result of issues which are likely to be mitigated over time (for example the lack of precedent agreements and difficulties identifying the native title group).

5.53 Some parties consider that the ILUA provisions, especially those relating to authorisation, certification, notification and registration of agreements, are overly complex and time-consuming. As a result, some parties are opting to negotiate agreements outside the framework of the Act.

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<sup>91</sup> Evidence, pp.NT337-338.