

## CHAPTER 6

### **Further Negotiation Issues**

#### ***Introduction***

6.1 Several important issues regarding the negotiation of ILUAs have arisen during the course of this inquiry. While ILUAs have generally received wide support, they still face significant impediments. The principal issues influencing the negotiation of ILUAs have included:

- willingness to negotiate;
- availability of financial and non-financial resources;
- expectations of the process;
- relationship between the parties;
- structure of negotiations;
- time available for negotiations; and
- the role of key institutions.

#### ***Willingness to Negotiate***

6.2 Negotiation, in the ILUA context like any other, is a dispute resolution tool that will not always be suitable for every situation. It is unrealistic to expect that all native title applications or land use issues can be resolved by this means.

6.3 Before effective negotiations can occur between parties, several preconditions must be met. There must be a commitment, or at least, readiness, by each party to enter into the negotiations in good faith; a desire to reach agreement, and an attendant preparedness to compromise. Where these are lacking, negotiation could be a waste of time. For example the CLC and the Alice Springs Town Council gave evidence regarding negotiations for an ILUA with respect to

management of the Todd River which the previous Northern Territory Government had failed to sign despite instructing its officials to negotiate the agreement.<sup>1</sup>

6.4 Parties may be unwilling to negotiate because they consider it is in their interests to await the outcome of legal proceedings. In explaining its decision not to mediate certain claims, the Western Australian Government states:

[B]ecause of the history of the Goldfields and the South-West, there is particular confusion over who the right owners or right claimants of the region are. There is a fundamental question over whether native title exists in respect of both the south-west and the Goldfields.<sup>2</sup>

6.5 Similarly AgForce's submission states that pastoralists would generally prefer to have a court determination which establishes whether native title exists before seeking to negotiate an ILUA to manage the interaction of native title holders and pastoral lessees' rights. Agforce suggests that negotiating ILUAs is not acceptable to many pastoralists in Southern Queensland who have a strong belief that native title has not survived because such negotiation entails an acknowledgment of native title.<sup>3</sup> In fact, however, many agreements leave open the question whether native title exists.<sup>4</sup> But the persistence of such a perception may be a factor affecting the willingness of parties to engage in negotiations.

6.6 The contrary (and equally inaccurate) perception, that entering an ILUA necessarily involved the extinguishment of native title, has to some extent hampered negotiations of the proposed state-wide ILUA in South Australia.<sup>5</sup>

6.7 In situations where parties do not consider their interests lie in reaching negotiated outcomes, attempts to resolve issues through the voluntary mechanism of ILUAs may be unrealistic. On the other hand, several witnesses indicated a strong commitment to seeking negotiated outcomes wherever possible. The Department of Defence gave evidence that it seeks to negotiate ILUAs if there is potentially a native

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<sup>1</sup> Evidence, pp.NT495-497,520-522.

<sup>2</sup> Evidence 16 September 1999, pp.NT600-601. See also Submission No 38, p.4.

<sup>3</sup> Submission No 22, p.2.

<sup>4</sup> Submission No 8b, p.21.

<sup>5</sup> Submission No 11, pp.3-4. See also Submission No 8b, pp.22-23.

title interest in an area even if no native title application has been lodged over the area. Further, where a native title application has been lodged, the Department does not assess the strength of the application as a basis for entering an ILUA.<sup>6</sup>

6.8 Rio Tinto Ltd went further by noting that:

... there are large areas of land where native title has been proven to be extinguished but where we still proceed with a voluntary agreement.<sup>7</sup>

An example of this is the Western Cape Communities Coexistence Agreement on Cape York which was reached in relation to an area where native title had been extinguished by previous tenures.<sup>8</sup>

6.9 Similarly, Shoalhaven City Council gave evidence that even where its legal advice suggested that native title did not exist it would seek to negotiate outcomes with interested indigenous groups.<sup>9</sup> In addition, CLC noted that some mining companies had continued to negotiate in relation to issues even where a legal interest had already been granted to the company as a result of the right to negotiate process. These companies undertook not to exercise their rights under the grant until they had reached an agreement with the native title holders.<sup>10</sup>

6.10 The motivation for parties adopting such an approach is (no doubt) to ensure the development of a strong and enduring relationship with native title groups.<sup>11</sup>

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<sup>6</sup> Evidence, pp.NT282-283.

<sup>7</sup> Evidence, p.NT249.

<sup>8</sup> Evidence, p.NT321.

<sup>9</sup> Evidence, p.NT334.

<sup>10</sup> Evidence, p.NT506.

<sup>11</sup> See for example the evidence of the Department of Defence that 'The voluntary nature of agreements is attractive as it paves the way for ongoing collaborative relationships between parties for the future management of land'. Evidence, p.NT275.

## **Resource Issues**

### *The Essential Problem*

6.11 The availability of resources to facilitate the negotiation of ILUAs is clearly a crucial issue.<sup>12</sup> The Tribunal's submission states:

Proponents and representative bodies bear much of the resource impost. The most crucial resource is affording the time to be involved in negotiations, to disseminate information and support adequate decision making processes. Having access to legal advice is another important resource issue.<sup>13</sup>

6.12 For effective negotiations to take place, at an absolute minimum there must be sufficient resources to bring all the parties together. In addition, there is generally a requirement for support from a variety of professionals. Depending on the particular negotiations, this may include assistance from lawyers, mediators, anthropologists, translators, industry specialists and historians.<sup>14</sup> Where such resources are not available, there is an increased likelihood that the negotiations will either not occur, will not result in agreement, will not include the right people, or will be unenforceable.

6.13 While the financial resources required to negotiate ILUAs obviously vary markedly depending upon the scope and complexity of the negotiations, parties representing a variety of different stakeholders have noted that the resources required are generally significant.<sup>15</sup> Nevertheless if the alternative is litigation, ILUAs will still present a more economic option.<sup>16</sup>

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<sup>12</sup> Submission Nos 1, p.6; 8b, p.16; and 19, p.13.

<sup>13</sup> Submission No 8a, p.17. See also Submission No 9.

<sup>14</sup> Submission No 8b, p.16. Senior C 'The Yandicoogina Process: A Model for Negotiating Land Use Agreements' *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper No 6 AIATSIS, February 1998, p.10.

<sup>15</sup> Submission Nos 10, p.1; 18, p.12; 23, p.16; 29, p.7; and 32, p.2. See also Smith D E 'Indigenous Land Use Agreements: New Opportunities and Challenges Under the Amended Native Title Act' *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper No 7 AIATSIS December 1998, p.11.

<sup>16</sup> Submission No 6, p.1. Evidence 19 March 1999, p.NT20; and 19 April 2000, p.NT848.

6.14 If the necessary resources are not available this can create tensions between the parties which may affect future attempts at negotiation. If groups are unable to resolve native title issues within a reasonable time, the resulting delays in decision-making and the potential loss of opportunities inevitably cause frustration.

6.15 Resource constraints are affecting the capacity of some parties to participate in ILUA negotiations. In particular the Committee has received evidence regarding the difficulties faced by representative bodies (and through them native title holders) and small local councils.

### *Representative Bodies*

6.16 The regime of representative bodies has been placed under significant pressures in the last three years.

6.17 First, representative bodies have been through a Commonwealth Government process of re-recognition. This process was time consuming and resource intensive and it created uncertainty for representative bodies and their staff. It thus hampered the efforts of representative bodies to progress other matters including ILUAs.<sup>17</sup> In addition, pending the completion of the re-registration process, many areas of Australia did not have a formally recognised representative body. This precluded certain types of ILUA; it also prevented bodies funded to carry out representative body functions from certifying agreements in the interim.<sup>18</sup> Indeed, there are still no recognised bodies in the south west region of Western Australia, the Australian Capital Territory or Tasmania.<sup>19</sup>

6.18 At the same time, the reduction in the number of representative bodies has created some transitional difficulties.<sup>20</sup> For example, in South Australia the three existing representative bodies have been reduced to one: the Aboriginal Legal Rights Movement.

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<sup>17</sup> Evidence, pp.NT149,251. See Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2000* HREOC 2001, pp.162-164.

<sup>18</sup> Submission No 8a, p.7.

<sup>19</sup> Evidence, p.NT361. Submission No 8b, p.5.

<sup>20</sup> Evidence, p.NT386.

This creates a number of problems. One is that it removes the corporate and long-term historical experience of Maralinga Tjarutja and Anangu Pitjantjatjara from the representative body debate. ... all three worked together, all three cooperated and were able to bring their different experiences to the debate. ALRM will now have the sole conduct of negotiations over amendments to legislation and so on.<sup>21</sup>

6.19 Second, representative bodies have committed a significant proportion of their resources to the re-registration of native title determination applications and mediation of intra-indigenous disputes. This has resulted in a significant amalgamation of applications. Registration is a threshold issue and ILUAs have accordingly taken a secondary priority for representative bodies.<sup>22</sup>

6.20 Finally, representative bodies have litigated native title applications in the Federal Court and the High Court in what could be described as an initial test case period which has required significant resources.<sup>23</sup> The Kimberley Land Council, for example, has sold assets and retrenched a fifth of its staff in order to be able to represent claimants in court cases.<sup>24</sup>

6.21 As a consequence of these factors, the Committee received evidence that many representative bodies are not in a position to promote ILUAs or generally deal effectively with future act issues within the timeframes envisaged by proponents. A wide range of stakeholders including several representative bodies raised this issue.<sup>25</sup> ATSIIC considers:

... the lack of resources available to the native title holders through the NTRBs is a factor in why few ILUAs have been registered and while the shortfall of such a significant dimension remains, the potential of the ILUA provisions to fulfil their purpose remains in doubt.<sup>26</sup>

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<sup>21</sup> Evidence, 19 April 2000, p.NT833.

<sup>22</sup> Evidence, 17 April 2000, p.791. See also Evidence, p.NT251.

<sup>23</sup> Evidence, p.NT446.

<sup>24</sup> Evidence, pp.NT389-391.

<sup>25</sup> Submission Nos 4, p.4; 12, pp.2-4; 19, p.13; 23, p.14, 24a, p.2; 25, p.3; 29, p.7; and 30, p.5. Evidence, pp.NT203,233,260,267,317,320,321,367,383-384,389-391. Evidence 16 September 1999, p.NT696.

<sup>26</sup> Submission No 19, p.13.

Similarly, the Queensland Local Government Association has found that in many cases representative bodies are unable to participate in negotiations because of other commitments, or a lack of resources:

An increase in resources to all parties involved in the resolution of native title matters will have a positive effect on Councils who are attempting to negotiate with NTRBs and traditional owner groups.<sup>27</sup>

6.22 The Attorney-General's Department notes in its submission that additional funding of \$19.8 million has been provided in the 2001-2002 budget to representative bodies, the Tribunal, the Federal Court and the Attorney-General's Department. Of that \$19.8 million, only \$2.9 million will be provided to ATSIC's native title program.<sup>28</sup> Indeed, that \$2.9 million is not being distributed to the (up to) sixteen recognised representative bodies but is being managed by ATSIC to implement a national capacity building program for representative bodies and to target determinations by the courts of three nationally significant native title applications.<sup>29</sup>

6.23 ATSIC gave evidence that this additional funding will make a positive difference. However, ATSIC considered the resources available to representative bodies was still inadequate.<sup>30</sup> According to the *Review of Representative Bodies 1999* report ('the Love-Rashid Report') commissioned by ATSIC:

... workloads of NTRBs are significantly higher than allowed for by present funding.<sup>31</sup>

The Love-Rashid Report found that funding in the 1997-98 financial year was approximately 70 percent of what was required for representative bodies to

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<sup>27</sup> Submission No 7.

<sup>28</sup> Submission No 38, p.35.

<sup>29</sup> Aboriginal and Torres Strait Islander Commission 'Additional Funding for Native Title' *Native Title Fact Sheet 1/2001* May 2001, p.2.

<sup>30</sup> Evidence, p.NT317. See also *Aboriginal and Torres Strait Islander Commission Annual Report 1999-2000*, pp.122-123.

<sup>31</sup> Rashid M *Review of Native Title Bodies 1999* Aboriginal and Torres Strait Islander Commission March 1999, p.1.

discharge their statutory functions.<sup>32</sup> The increase in funding of \$2.9 million in the 2001-2002 budget is the first increase in native title funding to ATSIC since the 1995-96 financial year.<sup>33</sup>

6.24 The inadequacy of the resources provided to representative bodies has an impact on both native title holders and proponents. For example, the Minerals Council of Australia has remarked:

The ... question is one of resources for representative bodies who are on the other side of the negotiating table. This is a serious issue, particularly when a representative body has a number of potential agreements to negotiate. Often the resources, which in many cases are not just financial resources but having the appropriately trained and qualified people, are scarce and in many cases the negotiating process ends up becoming an expensive one for the company that is involved.<sup>34</sup>

6.25 In the absence of other sources of funding, representative bodies are increasingly approaching proponents or state governments to fund their participation in negotiations. A representative of ATSIC noted that:

What we are seeing is an interesting trend: the other party to an agreement often very willingly moves to ensure that resource imbalance is not there.<sup>35</sup>

Rio Tinto Ltd and the Australian Pipeline Industry Association made similar comments to the Committee in their submissions about the increasing trend of native title parties requesting monetary assistance from proponents to negotiate ILUAs.<sup>36</sup>

6.26 The Queensland Government gave evidence that it often facilitates negotiations by paying the venue hire and catering costs of meetings. In relation to major negotiations, the State extends funding if there are ongoing negotiations and

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<sup>32</sup> Ibid, p.72.

<sup>33</sup> Aboriginal and Torres Strait Islander Commission 'Additional Funding for Native Title' *Native Title Fact Sheet 1/2001* May 2001, p.2.

<sup>34</sup> Evidence, p.NT233.

<sup>35</sup> Evidence, p.NT322.

<sup>36</sup> Submission Nos 18, p.12; and 23, p.13.

pressing reasons to reach an agreement.<sup>37</sup> Similarly the South Australian Government has provided funding to ALRM to assist the negotiation of the state-wide framework agreement. The South Australian Government considers this to be an unreasonable burden on the State.<sup>38</sup>

6.27 The funding of participation by representative bodies in negotiations places them in a difficult position. The Executive Director of the Kimberley Land Council explained his concerns about accepting funding from proponents:

We are left in the position of having to ask those resource companies to provide the funds in order for us to fulfil our statutory obligations ... That is just not right in that, on the one hand, we are dealing with a company on a commercial basis to talk about settling an agreement and, on the other hand, our hands are tied behind our backs ...<sup>39</sup>

6.28 The acceptance of funding from proponents can also hamper the negotiation process by creating a perception amongst the native title group that the independence of the representative body has been compromised.<sup>40</sup> The expectation that proponents will meet these costs may also generate ill will among smaller proponents who cannot afford to pay.<sup>41</sup>

6.29 Further, ATSIC's submissions note that it has received legal advice that representative bodies cannot legally recover the costs of performing services which could be characterised as merely performing their functions under the Act. Nevertheless, and according to ATSIC's last submission, there remains considerable uncertainty in this matter. Once the uncertainties are clarified, there may be a need to consider amendments to the Act to enable representative bodies to recover some costs in appropriate circumstances.<sup>42</sup>

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<sup>37</sup> Evidence, p.NT186.

<sup>38</sup> Submission No 6, p.8.

<sup>39</sup> Evidence, pp.NT391-392. See also Evidence, p.NT264.

<sup>40</sup> Submission No 6, p.8.

<sup>41</sup> Submission No 1, p.8.

<sup>42</sup> Submission Nos 19, p.13; and 19c.

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*Resources for Local Government*

6.30 Some local councils, particularly in Queensland and Western Australia where there is a number of remote councils with small budgets, face particular resource difficulties in relation to native title negotiations.<sup>43</sup> The Australian Local Government Association's submission states that:

Local Councils often do not have the appropriate resources, technical or financial, to develop binding agreements. Local Councils generally have fixed budgets with little freedom to allocate resources to negotiating agreements. Many Councils are increasingly turning to the Federal Attorney-General's Department for assistance in these matters.<sup>44</sup>

The Attorney General's Department notes that the 1998 amendments to the Act made this assistance:

... more broadly available to non-native title parties by removing the statutory requirement to assess 'hardship' and extending the kinds of native title matters in relation to which assistance was available.<sup>45</sup>

6.31 Cook Shire Council's submission is that while the funding available through the Attorney-General's Department has enabled the Council to participate in native title negotiations (including the negotiation of 26 ILUAs) it does not meet all of the Council's costs. Indeed the Council expects to expend an additional \$55,000 between April and August 2001 on items such as wages and survey work. Given the Council's small rate base, the Council states that it will need to reconsider its involvement in the ILUA process unless it can obtain additional funding to meet these types of costs.<sup>46</sup>

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<sup>43</sup> Evidence, pp.NT17-18,240.

<sup>44</sup> Submission No 4, p.8. See also Evidence, p.NT173.

<sup>45</sup> Submission No 38, p.33.

<sup>46</sup> Submission No 33, pp.2-3.

6.32 Similarly Bauhinia Shire Council gave evidence that the Council did not have sufficient funds to negotiate an ILUA in relation to a proposal to build a dam to secure a more reliable water supply for Rolleston.<sup>47</sup>

### *Non-Financial Resources*

6.33 The resources required for land use negotiations are not just financial: they include expertise in native title and skill in negotiating. For example where there is a strong working relationship between the negotiating parties, the principal need may be legal assistance to draft agreements which meet the requirements of the Act:

We can do the face-to-face talk with the people because we know them and they know us. We have a good understanding with them. But getting down to the legalities and the technicalities, yes, we do need some help.<sup>48</sup>

6.34 As noted in Chapter 4, there is a shortage of professionals with experience in dealing with native title matters. For example Gurang Land Council gave evidence that it had experienced difficulty engaging suitably qualified lawyers to fill advertised positions.<sup>49</sup> Similarly the Western Australian Aboriginal Native Title Working Group stated that it was difficult for representative bodies to engage experienced staff who have any real knowledge of the Act and its procedures.<sup>50</sup> The Tribunal President expressed this difficulty:

... the second is the ability to engage people with appropriate technical expertise so that even if one has sufficient money, one may not be able to readily obtain expert advice...<sup>51</sup>

6.35 The Attorney-General's Department noted that this is not a problem limited to representative bodies:

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<sup>47</sup> Evidence, pp.NT101-103.

<sup>48</sup> Evidence, 17 April 2000, p.NT799.

<sup>49</sup> Evidence, p.NT151.

<sup>50</sup> Evidence, p.NT378.

<sup>51</sup> Evidence, p.NT539.

There is a very small native title bar, there is a limited number of anthropologists and there are very few people who are competent, and this cannot be fixed over night.<sup>52</sup>

6.36 As noted above, ATSIC has received increased funding of \$2.9 million this financial year which will in part be used to fund a national capacity building program to improve the administrative and financial management skills of representative body staff.<sup>53</sup> While this is a welcome initiative, it is not a solution to the broader problem of the shortage of professionals with experience in native title matters.

6.37 In the longer term, part of the solution to this problem may lie in ensuring representative bodies are large enough and have sufficient security in relation to funding to provide a career path for anthropologists, lawyers and other professionals.<sup>54</sup>

6.38 Capacity building is not only an issue for professional advisers but also for the participants in negotiations. For example a legal officer of the Mirimbiak Nations Aboriginal Corporation stated in evidence that:

The process has only been going for three years. I have been working with a particular group and I can see how their expertise is growing with each agreement that they negotiate – they know more, they know what the parameters are, they know how to deal with proponents and they become more articulate. It is an empowering process.<sup>55</sup>

6.39 Similarly, proponents gain confidence, skills and knowledge through the successful negotiation of agreements. The Queensland Government's submission notes:

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<sup>52</sup> Evidence, p.NT251.

<sup>53</sup> Aboriginal and Torres Strait Islander Commission 'Additional Funding for Native Title' *Native Title Fact Sheet* 1/2001 May 2001, p.2. Submission No 38, pp.33,37.

<sup>54</sup> Evidence, p.NT450.

<sup>55</sup> Evidence, p.NT299.

It is also likely that the processes will become more streamlined as more agreements are reached and relevant parties learn more about approaches to agreements and the requirements for registration.<sup>56</sup>

### **Resources Summary**

6.40 There is overwhelming evidence that representative bodies are not receiving adequate funding to enable them to assist the negotiation of ILUAs within the timeframes proponents require or prefer. While some proponents have been in a position to provide resources to enable the negotiation process to take place, others (including small miners and remote shire councils) are not able to do so.

6.41 In addition, those smaller proponents face their own resource problems. While some are accessing funding assistance through the Attorney-General's Department, this does not meet all of their costs and this can hamper the participation of those parties in negotiations.

6.42 In relation to non-financial resources, such as the availability of suitably experienced professionals and the negotiation skills of the parties themselves, organisations such as ATSIC and ALGA are involved in initiatives directed at building the capacity of participants in the native title process. It also seems likely that these issues will gradually diminish over time as more and more parties successfully negotiate agreements.

### **Expectations**

6.43 One of the recurring themes that the Committee has encountered has been that parties often approach ILUA negotiations with expectations that simply cannot be met. The Tribunal notes:

... if parties start out with expectations about what ILUAs can achieve that are too high, both sides can become disillusioned with a consequent deterioration in the relationship between them.<sup>57</sup>

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<sup>56</sup> Submission No 24, p.2. See also Evidence, p.NT238.

<sup>57</sup> Submission No 8a, p.7.

Similarly the Attorney-General's Department pointed out in evidence that:

ILUAs are being weighed down with all sorts of expectations that they are not really, capable ... of meeting ... [I]t really is a matter of parties making a realistic judgement about what the other party is capable of giving. That might include expectations about how long a contract or negotiations might take to be resolved.<sup>58</sup>

6.44 The Central Queensland Land Council pointed out in evidence that many proponents are not aware of the size of the native title group and what is likely to be involved in negotiating an ILUA with that group, especially given that its members may reside in a number of different locations.<sup>59</sup> It seems likely that this lack of understanding contributes to the frustration some proponents experience when agreements are not negotiated quickly.

6.45 The expectations of native title holders may similarly cause difficulties. The North Queensland Miner's Association notes that its attempts to negotiate an ILUA were initially hampered by publicity surrounding the agreement reached in relation to the Century Zinc mine, and in particular what was described as a \$60 million package for the native title groups affected by the mine and the pipeline. The Association considers that this publicity created unrealistic expectations amongst native title groups in relation to the compensation which could be negotiated under the proposed ILUA with small miners and temporarily caused the negotiations to collapse.<sup>60</sup>

6.46 Clearly this issue will be of declining significance over time. The expectations of all stakeholders will become more realistic as they develop experience negotiating agreements and are able to draw on a deeper well of experience amongst their peers.

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<sup>58</sup> Evidence, p.NT244.

<sup>59</sup> Evidence, pp.NT196-198,203.

<sup>60</sup> Submission No 37, p.4. See also Evidence 16 September 1999, p.NT708.

## **Building Relationships**

6.47 K Muir notes that the process of agreement making is about establishing relationships:

The important consideration is how that relationship is formed, is it on the basis of mutual respect, truth/trust and a genuine desire to bring about change?<sup>61</sup>

The willingness to develop such a relationship is vital if parties are to successfully conclude agreements. One factor which therefore complicates ILUA negotiations is that many parties are endeavouring to negotiate ILUAs for the first time and often have no established relationship with the other parties to the negotiations.

6.48 A Tribunal member recently pointed out that:

Many of the parties in native title litigation have never met before and have no existing relationship. This is particularly the case when the native title parties are negotiating with public servants representing either the Commonwealth, State or relevant local authorities or employees of statutory authorities.<sup>62</sup>

This is also true of the negotiation of many ILUAs. Bungil Shire Council gave evidence that the native title claimants did not live within the Shire and that this was a difficulty which prevented the Council negotiating an agreement with the claimants:

None of the council officers, employees or councillors knows them personally to go and talk to them. ... It would be much more advantageous for the council if they lived in our own community and were part of the community, part of the decision making process all the way along.<sup>63</sup>

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<sup>61</sup> Muir K 'Indigenous Land Use Agreements: Agreeing to Change the Future' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, pp.2-3. See also Submission No 8b, p.13.

<sup>62</sup> Sosso J 'Mediation and Native Title Determinations' paper delivered at *Negotiating Country: Native Title Forum 2001* 1-3 August 2001, p.5. See also French J 'Local and Regional Agreements' *Land, Rights, Laws: Issues of Native Title* Regional Agreements Paper No 2 AIATSIS August 1997, pp.6-7.

<sup>63</sup> Evidence, p.NT37.

6.49 Equally, where parties have some established relationship this may present obstacles to reaching agreement if the history of interactions between the parties has created an atmosphere of mistrust. An example of this is raised in Dr Davies' submission which states that the support of the South Australian Government for the ILUA process has generated widespread suspicion of ILUAs amongst claimants since the State is viewed as working against the Act and undermining the protection of native title.<sup>64</sup>

6.50 In relation to addressing the impact of past interactions between local government and indigenous people, ALGA noted in evidence:

[Councils] have concentrated on the relationships they need to have with the Aboriginal community. Often they do widen out beyond native title matters. In fact, what often happens is that native title matters get set aside and the longstanding issues get put on the table.<sup>65</sup>

Further, a consultant to local government has noted:

Local councils ... no longer have a choice about whether they will have a relationship with Aboriginal people in the town. The choice they have is about the quality of that relationship and whether those relationships enrich and strengthen their local communities or whether they continue to be fraught with tension and disharmony.<sup>66</sup>

6.51 There is clearly no simple, quick or easy means of fostering relationships between native title holders and non-native title parties which encourage the resolution of land use issues through agreement. The Attorney-General's Department notes in its submission that:

The NTA has instituted negotiation and agreement as the new model of interaction between indigenous and non-indigenous people. Building up trust, understanding and mutual aspirations – a culture of

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<sup>64</sup> Submission No 11, p.3.

<sup>65</sup> Evidence, p.NT24.

<sup>66</sup> Submission No 39, p.3. See also Evidence, p.NT29.

consensus – upon which successful and lasting agreement is founded, takes time.<sup>67</sup>

### **Structure of Negotiations**

6.52 Another important consideration for parties seeking to negotiate land use agreements is how to structure the negotiations.

6.53 The Committee has heard from shire councils in remote parts of Queensland and Western Australia who have faced difficulties negotiating agreements for projects in their regions. The Australian Local Government Association pointed out that those councils typically have relatively small populations and limited resources.<sup>68</sup> In some cases, a number of the traditional owners of the area live in regional centres some distance from the shires concerned. In these circumstances, the cost of negotiating an ILUA in relation to a particular project could well exceed the cost of the project itself.<sup>69</sup>

6.54 In Queensland, for example, the Blackall Shire proposed to construct a walkway adjacent to a river bank. Following initial discussions with the native title holders, the Shire understood that the cost of heritage clearance would exceed the proposed budget for the entire project. In the circumstances, an ILUA has not been negotiated and the Shire is proceeding with compulsory acquisition of the native title rights.<sup>70</sup>

6.55 Mirimbiak Nations Aboriginal Corporation, the representative body for Victoria, recommended an approach which includes native title holders in the local government planning process from the outset rather than after significant planning work had occurred in relation to developments. The memorandum of understanding between Port Phillip Council and local indigenous groups such as Ngwala

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<sup>67</sup> Submission No 38, p.43.

<sup>68</sup> Evidence, p.NT240.

<sup>69</sup> Submission No 24, pp.2,4-5.

<sup>70</sup> Evidence, pp.NT72-73.

Willumbong Cooperative, the Wurundjeri Tribe Council and the Bunurong language people embodies this approach.<sup>71</sup>

6.56 Another example is the agreement between Redland Shire Council and Quandamooka Land Council Aboriginal Corporation.<sup>72</sup> A study undertaken as part of the agreement seeks to provide a framework for the resolution of numerous planning and management issues on North Stradbroke Island:

While it remains necessary to consider how each proposed project or development will impact on native title, a more holistic approach is also possible that seeks to integrate indigenous concerns more directly at the forward planning scheme stage.<sup>73</sup>

The Tribunal similarly notes:

ILUAs provide the opportunity for proponents to include many separate approvals/authorisations for individual projects in a single agreement, rather than going through a number of future act processes.<sup>74</sup>

6.57 This approach may cause difficulties where proponents wish to progress particular matters pending finalisation of a broader agreement. For example the Ord River District Cooperative Ltd gave evidence regarding the frustration it was experiencing in seeking to negotiate for an agreement with KLC in relation to the development of Green Swamp to grow sugar cane.<sup>75</sup> KLC gave evidence that this project was part of the Ord Stage 2 project which involved a number of individual proposals which it was seeking to negotiate collectively.<sup>76</sup>

6.58 Similarly the Broome Shire Council, after entering an interim agreement with native title holders in 1996, has been unable to progress agreements regarding

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<sup>71</sup> Evidence, p.NT302. At <http://www.alga.com.au/equity.htm>.

<sup>72</sup> Submission Nos 4, p.8; and 7, p.3.

<sup>73</sup> Dorsett S and Godden L 'The Interaction of Planning Law and Native Title' *Environmental and Planning Law Journal* Volume 17 No. 5 October 2000, p.377. See also Evidence, p.NT540 and Submission No 6, p.6.

<sup>74</sup> Submission No 8a, p.13. See also Evidence, 3 July 2000, p.NT1005.

<sup>75</sup> Evidence, pp.NT402-412.

<sup>76</sup> Evidence, pp.NT427-433.

planning issues in Broome.<sup>77</sup> In part, it appears that this is because of the insistence of the native title holders that a general framework agreement regarding native title issues should be reached with parties including the State Government. The Western Australian Aboriginal Native Title Working Group gave evidence that the insistence on a framework agreement was founded on the need to take a more efficient approach than separately negotiating projects and activities with individual proponents.<sup>78</sup>

6.59 As already mentioned, the South Australian Government, ALRM, SAFF and SACOME are developing a state-wide framework agreement. The South Australian Government considers that this approach not only allows the more efficient resolution of native title issues but also has the flexibility to deal with broader issues of concern to the parties.<sup>79</sup>

6.60 The experience of Giants Reef Mining Ltd (already discussed) is another example of how agreements can be structured to avoid the multiple negotiation of similar issues. The Managing Director of Giants Reef described this agreement as providing continuity of tenure and certainty. In his view the agreement provided a less expensive and more time efficient means of obtaining land access than going through the due process of the native title legislation for each tenement.<sup>80</sup> The agreement enables exploration and mining tenements to be granted and the development of discoveries to proceed without the need for further negotiations.<sup>81</sup>

6.61 Similarly, Striker Resources NL entered a conjunctive mining and exploration agreement with the Balangarra people prior to the introduction of the ILUA provisions.<sup>82</sup> The company notes that the agreement provides it with security in the

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<sup>77</sup> Evidence, pp.NT349,352-354.

<sup>78</sup> Evidence, pp. NT373-374.

<sup>79</sup> Submission No 6, p.3.

<sup>80</sup> Evidence, pp.NT512.

<sup>81</sup> Evidence, pp.NT514-515.

<sup>82</sup> Submission No 35. Evidence, pp.NT423-425,433.

event of a discovery that becomes commercial. In other words mining can commence without the need for renegotiation.<sup>83</sup>

6.62 It is clear that there are efficiencies to be gained in the negotiation of broad, long-term agreements or 'framework' agreements such as the Giants Reef/CLC and Redland Shire/Quandamooka Land Council agreements. It would be less efficient to negotiate an ILUA in relation to each new project or activity in an area which may affect native title. Nevertheless, a balance needs to be found so that negotiations do not deal with such a wide range of parties, issues and geographic areas that the successful negotiation of an agreement is unlikely.

### ***Time Available for Negotiations***

6.63 As discussed in Chapter 4, the Committee received some evidence of agreements being reached within short timeframes; but in general the negotiation and registration of ILUAs is a protracted process. Some parties have also expressed concern that there is no guarantee that their negotiations will ultimately be successful.<sup>84</sup>

6.64 Of course all commercial negotiations occur against the background that the parties may not reach agreement despite their best efforts and, indeed, despite investing considerable time and resources.<sup>85</sup> ILUAs are not unique in this. The Queensland Government, for example, has acknowledged that ILUAs are difficult to finalise but considers that this is an inherent difficulty in any voluntary negotiation process that is not limited by legislative time limits or restrictions.<sup>86</sup>

6.65 Equally, and as with other negotiations, it is likely that the participants will be increasingly invested in reaching agreement:

As the process continued, a feeling of mutual respect gradually developed as individuals were able to share the common experience of participating in negotiations. It is also true to say that as the

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<sup>83</sup> Submission No 35, pp.1,2.

<sup>84</sup> Submission Nos 10, p.2; 18, p.9; and 23, p.5.

<sup>85</sup> Evidence, p.NT243.

<sup>86</sup> Submission No 24, p.1.

process continued individuals, having devoted so much time and energy to the negotiations, became increasingly committed to the notion of a successful outcome.<sup>87</sup>

6.66 There have been several calls for the Act to be amended to restrict the time allowed for negotiating and concluding ILUAs.<sup>88</sup> What is envisaged by some are provisions similar to the time constraints already present in the right to negotiate regime under the Act. Alternatively Rio Tinto's submission suggests that:

... negotiation requirements under the right to negotiate or compulsory acquisition processes should be waived if the proponent has already made efforts to enter an ILUA with the native title party and the good faith requirements have been met.<sup>89</sup>

6.67 Nevertheless, the view put by the Commonwealth Attorney-General's Department concerning the rationale for the lack of time restraints is persuasive. The Department considers that such proposals are fundamentally at odds with the voluntary nature of ILUAs and likely to interfere with the negotiation process rather than encourage agreements. Further:

... [w]here a goal of the third parties or governments is expeditiousness and certainty of outcome in relation to future acts, they may use the future act processes under the NTA. The future act provisions contain general procedures to ensure that future acts are done validly. Native title holders are provided with procedural rights subject to short time frames for negotiation or consultation and provision for arbitral determinations if necessary.<sup>90</sup>

6.68 Both the Tribunal and the Attorney-General's Department have noted the difficulties associated with establishing a legislative timeframe for the negotiation of ILUAs given the wide variety of agreements under negotiation.<sup>91</sup> Furthermore, the fundamental rationale behind the ILUA provisions is to establish a framework to allow parties to reach voluntary agreements which they can be confident will have

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<sup>87</sup> Senior C *op.cit.*, p.11.

<sup>88</sup> Evidence, p.NT349. Submission Nos 10, p.2; and 18, p.6.

<sup>89</sup> Submission No 23, p.5.

<sup>90</sup> Submission No 32, pp.30-31. See also Evidence, p.NT238.

<sup>91</sup> Submission Nos 8b, p.23; and 38, p.31. Evidence, p.NT244.

binding effect, as an alternative to other processes established by the Act. Given this argument, it would be incongruous for the Act to provide mandatory timeframes.

### ***The Role of Key Institutions***

6.69 Institutional players in the native title process including the Tribunal, governments and representative bodies, have important roles in relation to the negotiation of ILUAs.

#### *The National Native Title Tribunal*

6.70 The Committee received varying evidence regarding the role the Tribunal is playing in the negotiation of ILUAs. The Cape York Land Council's submission notes in relation to negotiation of the Kaurareg ILUAs that:

The assistance provided by representatives of the NNTT was extremely helpful in an administrative sense. ...

Although we believe that the process would have been longer and more costly for all concerned without that assistance from the NNTT, we note ... it was ultimately clear that the NNTT had no ability to ensure or insist that parties complied with agreed processes or timeframes.<sup>92</sup>

6.71 By contrast, CLC gave evidence that the Tribunal had not given any substantive assistance in relation to the negotiation of agreements in the Northern Territory.<sup>93</sup> NLC expressed broader concerns regarding the Tribunal's mediation role and considers that the negotiation of agreements is fundamentally the role of representative bodies.<sup>94</sup>

6.72 This disparity in views could well reflect the history of the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act 1976*. As a result of that

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<sup>92</sup> Submission No 2, p.6. See also Evidence, p.NT250.

<sup>93</sup> Evidence, p.NT505.

<sup>94</sup> Evidence, pp.NT446-450,452-455.

legislation, the Territory has well established land councils with an history of negotiating agreements on behalf of traditional owners.<sup>95</sup>

6.73 In any event, the Tribunal notes that its involvement in assisting the negotiation of ILUAs is discretionary and occurs only at the request of parties. In general that assistance relates either to requests for information regarding the uses of ILUAs and their advantages and disadvantages; or requests to assist the parties to break an impasse by providing a neutral facilitator.<sup>96</sup>

### *Governments*

6.74 One of the primary advantages of the ILUA regime over the original section 21 of the Act is the removal of the requirement that the Commonwealth, a State or Territory Government be party to the agreement. Governments need not be a party to ILUAs (apart from alternative procedure agreements) except where the agreement involves the surrender or extinguishment of native title.<sup>97</sup>

6.75 One submission suggests that in some cases inappropriate government involvement may cause delays and unnecessary expense:

Given that the NTA no longer requires the involvement of the State or the Commonwealth except for ILUAs which do not involve a surrender of native title, it is important that Government bureaucracies at both Commonwealth and State level take a non-interventionist approach in ILUAs which do not substantively involve Commonwealth or State interests.<sup>98</sup>

6.76 Nevertheless it is clear that governments have a major influence in the outcomes of ILUA negotiations, and this influence may be an enabling or inhibiting factor. The Attorney-General's Department notes that:

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<sup>95</sup> Evidence, pp.NT497-498.

<sup>96</sup> Submission No 8b, p.24. Evidence, p.NT533.

<sup>97</sup> Submission Nos 1, p.2; and 38, p.10. *Native Title Act 1993*, ss.24BD(2), 24CD(5), 24DE(1), 24DE(3).

<sup>98</sup> Submission No 1, p. 9.

Governments can play a major leadership role by setting an example to others in the community in the use of ILUAs and other agreements, as the preferred method of resolving native title issues.<sup>99</sup>

6.77 In contrast, ALGA states:

... some State Government policies on how Councils should respond to native title matters is having a strong influence on responses by Local Government, especially where the State is intricately involved in relation to the transfer of tenure to the Council. ... In some situations the States are requiring Councils to follow the future act processes when the claimants or the relevant NTRB may be willing to negotiate agreements.<sup>100</sup>

ALGA further noted in evidence that:

In Western Australia, in particular, up until more recently – and I think it is probably still largely the case – local government feel so bound by the state government’s position of opposing all the native title claims or wanting to contest every one of them, that none of the councils feel that they have any freedom to develop indigenous land use agreements on anything ...<sup>101</sup>

6.78 Some parties see the involvement of relevant governments as being necessary to ensure broader issues of concern to indigenous peoples are addressed through the negotiation process.<sup>102</sup> For example the Western Australian Aboriginal Native Title Working Group indicated that ILUAs offered little to native title holders, in terms of compensation, return of lands or involvement in land management unless the State Government was a party to the agreement.<sup>103</sup>

6.79 Despite the fact that there is no longer a legislative requirement for the Commonwealth, a State or Territory Government to be a party to *all* voluntary agreements under the Act, it is clear that the attitude of these governments has a significant impact upon the willingness of other stakeholders to enter ILUAs.

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<sup>99</sup> Submission No 38, p.25.

<sup>100</sup> Submission No 4, p.6.

<sup>101</sup> Evidence, p.NT17.

<sup>102</sup> Evidence, pp.NT258-259.

<sup>103</sup> Evidence, p.NT374.

### *Representative Bodies*

6.80 The critical role which representative bodies play in assisting the negotiation of ILUAs cannot be overstated.<sup>104</sup> This is a result not only of the statutory requirements for representative bodies to participate in certain types of ILUAs, but also of the practical difficulties proponents will face seeking to identify and negotiate with native title holders without assistance from representative bodies, especially prior to determinations of native title.<sup>105</sup>

6.81 The financial and non-financial resource difficulties faced by representative bodies have already been discussed at length. In the Committee's view the resolution of these difficulties is a prerequisite to ensuring that the ILUA provisions fulfil their potential of providing a flexible alternative to other processes under the Act.

### **Summary**

6.82 A number of the issues which are affecting the capacity of parties to negotiate agreements are not susceptible to resolution through changes to the legislative framework or the provision of additional financial or technical assistance. Where parties are simply unwilling to negotiate, these matters are not the issue. Where there is such willingness, it still takes time for parties to develop a relationship which is conducive to agreement-making. Furthermore, for the successful completion of agreements, there is no substitute for experience in negotiating native title matters. Over time, parties do develop negotiation expertise and a raft of model agreements, which result in more streamlined negotiations.

6.83 Nevertheless, evidence to the Committee consistently raised the issue of resources. It is clear that the negotiation of ILUAs is being hampered in part by the inadequacy of the resources provided to representative bodies. Some smaller proponents also face significant resource pressures. While the funding available through the Attorney-General's Department is enabling some parties to participate in

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<sup>104</sup> Submission Nos 8a, p.7; and 23, p.14.

<sup>105</sup> Evidence, pp.NT26,452-453.

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negotiations, there is evidence that parties still face difficulties meeting all of the costs incurred as a consequence of the ILUA process.

### ***Recommendations***

**3. That the Attorney-General's Department review the Guidelines for Provision of Financial Assistance by the Attorney-General in Native Title Cases to ensure non-native title parties are receiving adequate assistance to facilitate their participation in the negotiation of ILUAs. (para 6.83)**

**4. That more financial resources should be made available to native title representative bodies for the negotiation of ILUAs. (para 6.83)**