

**Indigenous land use agreements:
the opportunities, challenges and policy implications
of the amended Native Title Act**

D.E. Smith

No. 163/1998

**ISSN 1036-1774
ISBN 0 7315 2598 1**

Ms Diane Smith is a Research Fellow at the Centre for Aboriginal Economic Policy Research, Faculty of Arts, The Australian National University.

Table of Contents

Summary	iii
Acknowledgments.....	v
Introduction.....	1
ILUAs: an overview of the final amendment provisions.....	1
Body Corporate Agreements: the amendment provisions (ss.24BA-BI).....	3
Area Agreements: the amendment provisions (ss.24CA-CL).....	4
Alternative Procedure Agreements: the amendment provisions (ss.24DA-DM).....	6
The effect of ILUA registration	7
ILUAs: assessing the potential opportunities and advantages	8
Consensual agreements.....	8
Certainty.....	9
Flexibility.....	10
Content and area coverage.....	10
Recognising indigenous rights and interests.....	11
The parties to an ILUA	12
Litigation v agreement	14
ILUAs: assessing the potential challenges and limitations	15
Willingness	15
Issues facing indigenous parties	15
The role of NTRBs.....	16
The role of government.....	17
Registration and objection processes.....	18
The economic challenges.....	18
Uncertainty.....	19
Summary: opportunities and challenges	20
Conclusions.....	21
Appendix 1.....	22
References.....	23
Notes.....	26

Summary

The provisions for Indigenous Land Use Agreements (ILUAs) under the Native Title Amendment Bill 1997 offer a significant opportunity to address the diverse land-use concerns of indigenous Australians, resource developers, government and other stakeholders. They also provide a practical statutory pathway into the agreement process by affording a wide range of mechanisms and procedural options for:

- ‘side’ or ancillary agreements to the claim mediation process;
- negotiated settlements;
- future act agreements;
- land access and use agreements;
- co-management or partnership agreements; and
- framework, process and heads of agreements.

They can be local or regional in their geographic coverage, operate as stand-alone or sequential to other agreements, and cover specific or multiple purposes. These characteristics should provide a practical foothold into the unknown territory of regional agreements, enabling a practical conceptualisation of how such agreements might be secured.

The ILUA provisions offer a set of agreement-making mechanisms which are relatively user-friendly and potentially afford parties with:

- flexibility;
- greater legal certainty and enforceability;
- improved post-agreement implementation; and
- the development of preferred processes more attuned to cultural, social and economic realities.

They have the potential to be:

- cost efficient and timely;
- sustainable;
- inclusive in their potential coverage of issues and parties; and
- productive of workable and just outcomes based on a practical interpretation of co-existence.

The potential challenges and disadvantages include:

- the certification difficulties associated with identifying all persons with native title rights and interests entitled to be a party to an agreement, and the related difficulty of gaining their authorisation;
- the possible procedural complexity related to the objection process;
- the variable organisational role and increased workload responsibilities of Native Title Representative Bodies, and their future relationship with Prescribed Bodies Corporate; and
- the continuing oppositional behaviour of key stakeholders. New Federal Government taxation proposals may also act as a disincentive to the agreement process and increase transaction costs associated with the negotiation of agreements.

Most important amongst the challenges to parties in obtaining equitable, just, timely and durable outcomes will be the need to:

- develop effective, professional Native Title Representative Bodies with high levels of negotiating skills and the organisational capacity to provide certification;
- overcome the debilitating effects of intra-indigenous conflict which will always prove inimical to agreement;
- secure the active engagement and policy support of governments at all levels; and
- ensure adequate and co-ordinated levels of funding for all potential indigenous and other parties.

Acknowledgments

A number of people have contributed greatly to early drafts of this paper, including staff from the National Native Title Tribunal, on whose behalf an early short version of this paper (providing a statutory overview) was prepared and delivered to an AIC Conference on 'Working With Native Title and Reaching Agreement' in Brisbane, 29 April–1 May 1998. In particular, I would like to thank Stephen Sparkes (Legal Section) and Anita Fields (Research and Information Section) from the Perth Tribunal office for their assistance with, and comments on, the first draft of that Tribunal paper for the AIC Conference.

A subsequent expanded research paper which examined a range of policy issues and economic factors was prepared within CAEPR and delivered at a CAEPR seminar on 10 June 1998. At that seminar, valuable discussion of the potential policy and program implications of these agreements contributed to the final revisions of this paper. For their helpful assistance, I would like to thank staff from the Parliamentary Joint Committee into Native Title and the Indigenous Land Fund who provided relevant submissions made by the public on the ILUA amendments; and staff from the Native Title and Land Rights Branch of the Aboriginal and Torres Strait Islander Commission (ATSIC) who provided aggregate estimated costs for certain major native title claim litigation and negotiated agreements.

I would also like to thank Paul Burke from the Native Title and Land Rights Branch, ATSIC and Mary Edmunds, then Director of Research at the Australian Institute and Torres Strait Islander Studies for their helpful comments as readers of this final paper, and also Jon Altman as discussant at the seminar. Linda Roach and Hilary Bek provided careful editing and Jennifer Braid provided layout.

Introduction

In the four years since the passage of the *Native Title Act 1993* ('the Act'), many stakeholders in the native title arena, including indigenous Australians and their representative organisations, governments, industry and other landowners, have struggled to understand exactly how mutually-beneficial, negotiated agreements can be achieved without contentious litigation. Critical to their considerations has been the question of how native title rights and interests can be exercised, and how those rights and interests will relate to existing Commonwealth, State and Territory Government systems of land use and management.

To date there have been a few examples of progress in different contexts, including:

- the Hopevale Native Title Agreement now determined by the Federal Court (National Native Title Tribunal 1998);
- the Process Agreement between the Quandamooka Land Council and the Redlands Shire Council (Quandamooka Land Council 1997);
- the Cape York Heads of Agreement (Cape York Land Council 1996); and
- the partnership agreements made by the Rubibi Working Group in Broome (Commonwealth of Australia 1998; Jackson 1996).

A variety of agreements (including some of the above) are also being developed outside the umbrella of the Act because of the lack of appropriate statutory provisions and processes.

Indigenous Australians, resource developers and governments have highly variable, but genuine land use concerns. The provisions for Indigenous Land Use Agreements (ILUAs) proposed under the most current Native Title Amendment Bill 1997 ('the Bill')¹ offer a significant opportunity to address those diverse concerns, providing an enhanced statutory pathway to facilitate and support the native title agreements process.

This paper provides an overview of the proposed statutory framework for ILUAs and presents an assessment of the potential advantages and opportunities, as well as the potential limitations of the proposed framework. In doing so, the paper highlights a range of policy implications and challenges which are likely to arise as parties engage in developing and implementing ILUAs.

ILUAs: an overview of the final amendment provisions

The amendments provide for three different types of Indigenous Land Use Agreements over an area² of land or water and their registration with the National Native Title Tribunal:

- Body Corporate Agreements (Part 2, Division 3, Subdivision B);
- Area Agreements (Part 2, Division 3, Subdivision C); and
- Alternative Procedure Agreements (Part 2, Division 3, Subdivision D).

The primary differences between each type of ILUA are the:

- subject matter of the agreements;
- identity of the parties;
- procedures for registering the concluded agreement;
- procedures for objecting to the registration of an agreement; and

- notification requirements.

All three types of Agreement have in common that:

- agreement can be given by native title groups for any consideration (including the freehold grant of land or other interests) and subject to any conditions;
- any persons may request assistance from the National Native Title Tribunal ('the Tribunal') in making agreements, not just actual or potential native title holders;
- an application for registration of each type can be made in writing by any of the parties to the Registrar of ILUAs, but it must be with the agreement of all parties and be accompanied by a copy of the ILUA and any other prescribed documentation; and
- under most recent amendments (s.199C(3)), the Register must remove the details of an ILUA from the Register (thereby removing its force of contract) when the Federal Court, on application by a party or the relevant NTRB, orders its removal on the grounds that a party was induced to enter the agreement by reason of fraud, undue influence or duress by another person.

The most recent amendments to the Native Title Act have made important additions. First, they make it clear that all three types of ILUA may cover future acts (or a class of such acts) that have already been done or which might be done in the future, and which may be invalid because of provisions about native title in the *Native Title Act 1993*. For example, if the grant of a mining lease should have been subject to the right to negotiate but was not, then this could be remedied by the parties reaching agreement to its validation, subject to any conditions, and subject to a statement to that effect being included in its registration details. An agreement which dealt with compensation, access and other issues could meet these conditions. The non-extinguishment principle applies to validating invalid future acts unless the ILUA includes a statement that all parties agree to the surrender of native title. The government to which the invalid future was attributable, and any party who may become liable to pay compensation in relation to the future act must be parties to the agreement.

An ILUA cannot be used to validate intermediate period acts which can only be validated by the regime of Division 2A.³ However, important recent amendments contained in s.24EBA allow for a Body Corporate Agreement or an Area Agreement (but not an Alternative Procedure Agreement) to be used to change the effect on native title of a validated intermediate period act. A different effect on native title can be provided for by the terms of the agreement and by a statement to that effect being entered on the Register of ILUAs. As it stands, a validated intermediate period act under s.22B may completely extinguish native title, or partially extinguish or suppress it. This amendment enables parties to establish a different outcome to that stipulated in s.22B, if the parties enter into a Body Corporate or Area Agreement which stipulates the agreed nature of the changed effect. The government to which the intermediate future act was attributable, and any party who may become liable to pay compensation in relation to the future act, must be parties to the agreement. The amendment does not provide that parties can agree to change the validation of an intermediate period act, only its effect on native title.

The key characteristics of the three types of ILUAs, as proposed under the Bill, are reviewed below.⁴

Body Corporate Agreements: the amendment provisions (ss.24BA-BI)

For Body Corporate Agreements to be made there must be registered native title bodies corporate (as defined under s.253 of the Act) for the *whole* of the area which is the subject of the agreement. This type of agreement can be about (s.24BB):

- the doing of future acts (singly, multiply or in classes);⁵
- dealing with future acts that have already been done (including validating them) other than intermediate period acts;
- changing the effect on native title of a validated intermediate period act;
- withdrawing, amending or varying native title claim applications;
- the relationship between native title and other rights;
- the manner of exercise of native title and other rights and interests;
- extinguishing native title by surrender to the relevant government;
- compensation for past, intermediate period or future acts; and
- any other matter concerning native title rights and interests.

Body Corporate Agreements (s.24BD) can only be made if there are one or more registered native title bodies corporate (also known as Prescribed Bodies Corporate) which hold native title to, or have been appointed to act for, the native title holders in relation to the *whole* of the area to be covered by the agreement. In which case, the registered body corporate⁶ can make such an agreement with any other person. Government *must* be a party if the agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act, and *may* be a party otherwise.

The most recent amendments to the Bill, under s.24BD, now also provide that if there are any Native Title Representative Bodies (NTRBs) for the area concerned and none of them is to be a party to the agreement, that the Body Corporate *must* inform by notification at least one of the Representative Bodies of its intention to enter into the agreement, and *may* also consult with any such Bodies about the agreement. This does not mean that the Representative Body must agree to the Body Corporate Agreement or even be consulted.

The procedural requirements for these agreements reflect the fact that native title has been determined and holders identified. Accordingly, for the agreement to be registered (ss.24BG–24BI):

- any party may apply to Registrar of ILUAs within the Tribunal for its registration, if all other parties agree;
- the Registrar must notify the public and certain persons if they are not parties; for example, all relevant governments and NTRB; and
- there follows a cooling-off period of one month during which any party may advise it does not want the agreement registered; otherwise it will be registered.

Under newly amended s.24BI, the Registrar must not register the agreement if a Native Title Representative Body for any area covered by the agreement advises the Registrar within one month of notice (s.24BH) that it was not notified of the agreement by the Body Corporate and the Registrar is satisfied that the notification requirement was not complied with.

Area Agreements: the amendment provisions (ss.24CA-CL)

Area Agreements (s.24CD) can be made in any situation other than where there are registered native title bodies corporate for the *whole* area subject to the proposed agreement; in which case the agreement would properly be a Bodies Corporate Agreement.

Area Agreements can be made about the same wide range of matters as a Body Corporate Agreement (including the validation of invalid future acts other than intermediate period acts, and changing the effect on native title of intermediate period acts (s.24CBaa and ab)). Additionally, an Area Agreement can be made about any matter concerning the statutory access rights conferred by Subdivision Q (s.24CB); namely, rights of access to certain persons with registered native title claims to lands or waters covered by non-exclusive agricultural and pastoral leases. Again, agreement may be given for any consideration and on any conditions, including grant of interests in land (s.24CE).

Area Agreements may cover land or waters where native title has not yet been determined. Parties to an Area Agreement *must* include a newly defined class of persons referred to as the ‘native title group’ (defined in s.24CD(1), (2), (3)). This group includes, where they exist, all registered native title claimants and registered native title bodies for any of the area to which the agreement relates. In this situation, any other person who claims to hold common law native title, but does not have a registered claim, may also be a party; as may a Native Title Representative Body.

If there are no registered native title claimants or registered bodies corporate for any of the area, then the ‘native title group’ consists of one or more of the following: any NTRB for the area and any person who has a common law claim to native title in relation to the area.

Government *must* be a party if the agreement provides for extinguishment by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act, and *may* be a party otherwise. Any other person *may* be a party.

The most recent amendments to the Bill, under s.24CD, now also provide that if there are any Native Title Representative Bodies for the area concerned and none of them is to be a party to the agreement, that a person in the ‘native title group’ *must* inform by notification at least one of the Representative Bodies of its intention to enter into the agreement, and that a person in the ‘native title group’ *may* also consult with any such Bodies about the agreement. This does not mean that the Representative Body must agree to the Area Agreement or even be consulted.

For an Area Agreement to be registered:

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

There is an additional requirement for registration of Area Agreements given the expanded range of native title interests who may potentially be a party; namely, the application for registration must state that it has been made with the authority of all actual or potential native title holders for the area. Two alternative mechanisms (24CG(3)) are established for gaining such authorisation, and the conditions listed in s.24CK or s.24CL must be satisfied before agreement is registered.

The first mechanism is that there be certification (in writing) by an NTRB of the application for registration of an agreement. NTRBs are given new statutory functions covering this responsibility (ss.202(4)(e); 202(8); 202(9); 202A). A NTRB can only certify an Area Agreement if it is satisfied that all reasonable efforts have been made to identify all persons who hold, or may hold, native title and that they have authorised the making of the agreement. If the area encompasses the jurisdiction of more than one NTRB, then all NTRBs need to certify the agreement if it is to be certified under this procedure. It is not mandatory for an NTRB to certify an application for the registration of an agreement.

The second mechanism is via a statement being made by all the parties to the agreement and included with the application for registration of the agreement. That statement must be to the effect that all reasonable efforts have been made to identify all persons who hold, or may hold, native title and that they have authorised the making of the agreement. Those reasonable efforts must include consulting with all NTRBs for the area subject of the agreement. A further statement must also be included which briefly sets out the grounds why the Registrar should be satisfied that these conditions have been met.

The definition of ‘authorise’ (s.251A) underlying both these alternative mechanisms for registration specifies that if the persons claiming or holding the common or group native title rights utilise decision-making processes operating under ‘traditional laws and customs’, then those processes must be complied with in order to secure their consent or authorisation to the making of the agreement. Otherwise, their authority must be given in accordance with any process of decision making agreed upon and adopted by the native title group.

Consideration of objections to this type of agreement are tailored to the above alternative procedures for obtaining certification for its registration. Where the agreement has been certified by the NTRB and there is an objection to its registration by a person/s claiming to hold native title, in order for it to be registered, the Registrar must be satisfied that, despite the objection, the NTRB provided certification in accordance with its statutory requirements under s.202(8). Because any registered native title body corporate, if it exists, is required to be a party, this effectively means that in order for the Registrar to register the agreement, all persons determined to hold native title (who are represented by such bodies corporate) will need to agree to the terms of the agreement.

The Registrar must be satisfied that all requirements relating to the identification and authorisation by all actual or potential native title holders have in fact been met. In considering these matters the Registrar must also consider any information provided by a NTRB or others. If any of those conditions are not met, the agreement must not be registered.

If the agreement has not been certified by a NTRB, but rather by inclusion in the application to register of a statement by the parties, the Registrar cannot register the agreement unless he/she is satisfied that the following persons are parties:

- all registered native title claimants and registered bodies corporate in relation to the area; and
- any persons who lodged a native title claim during the three-month notification period.

The aim in these ILUA procedures is to obtain a comprehensive inclusion of all native title rights and interests in relation to the area; providing added certainty for other parties that all the right native title persons have been identified, and reducing the possibility of vexatious claims and disputes. Accordingly, any potential native title holder who wishes to object to this type of agreement is expected to appropriately express their objection by exercising their right to lodge a native title claim (which would have to pass the proposed new threshold test for acceptance and registration of native title claims (Aboriginal and Torres Strait Islander Commission (ATSIC) 1997)). They would then have to become parties to the agreement before it could be registered. If they then choose not to become a party to an agreement and maintain their objection to it, the agreement cannot be registered.

Alternative Procedure Agreements: the amendment provisions (ss.24DA-DM)

Alternative Procedure Agreements can be made in any situation other than where there are registered native title bodies corporate for the *whole* area subject to the proposed agreement; in which case the agreement would properly be a Bodies Corporate Agreement.

An Alternative Procedure Agreement can be made about the same wide range of matters as an Area Agreement (s.24DB), with four important variations and exceptions:

- it may similarly provide for the validation of invalid future acts (other than intermediate period acts), but cannot provide by way of validation conditions for the extinguishment of native title ;
- it may additionally be used to provide a framework for other agreements about native title rights and interests;
- because it is not a requirement that native title holders are parties, it *must not* provide for extinguishment of native title (s.24DC); and as a consequence of that,
- it may not be used to provide for changing the effect on native title of intermediate period acts.

Parties to this type of agreement (s.24DE) include a differently defined ‘native title group’ than for Area Agreements. For an Alternative Procedure Agreement, the ‘native title group’ (24DE(2)) is defined to consist of all (where they exist) registered native title bodies corporate *and* all NTRBs in relation to the area covered by the agreement. Every relevant government *must* be a party. Any native title claimant or other person claiming to hold native title to the area subject to the proposed agreement *may* be a party; as *may* any other person.

Indigenous consent to an agreement may be given for any consideration and on any conditions, including the grant of interests in land (s.24DF).

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

- any party may apply to Registrar of ILUAs within the Tribunal for registration if all other parties agree;
- the Registrar must notify the public and certain persons if they are not parties; for example, the relevant governments and NTRB; and
- there follows a three-month period allowed for objections and new native title claims to be registered.

Any person claiming to hold native title in the area may lodge an objection to this type of agreement on the grounds that it would not be fair and reasonable to register it. There are three conditions (s.24DL), one of which must be met before this type of agreement is registered. These conditions relate to whether objections have been made and have merit. This process may require the Tribunal to hold an inquiry into whether it would be fair and reasonable to register the agreement having regard to:

- the content of the agreement;
- the effect of the agreement on any native title rights and interests (e.g. whether the agreement would unfairly inhibit the enjoyment of those); and
- any benefits provided for under the agreement to current (including actual and potential) and succeeding native title holders, including the way in which benefits are distributed and their compensatory adequacy.

Any party to such an inquiry may appeal the Registrar's decision in the Federal Court.

The Bill also allows for new regulations to be made for alternative registration provisions for Alternative Procedure Agreements to those under s.24DH-DL.

The effect of ILUA registration

The effects of registration of any of the three types of agreement (Part 2, Division 3, Subdivision E) are significant.

Importantly, an ILUA has effect as a contract while registered (s.24EA) and all persons who hold native title are bound, even if not parties (actual and potential native title holders have had the opportunity to object to its registration), in the same way as the registered native title bodies corporate or the native title group, as the case may be.

Future acts covered by an ILUA which comply with s.24EB and newly amended s.24EBA will be valid; namely, the details of the agreement provided to the Registrar must include a statement of consent to the doing of the future acts in question (with or without conditions), and a statement specifying that the right to negotiate is not intended to apply to those acts. If there is an agreed changed effect of suppression, surrender or extinguishment of native title, a statement to that effect must also be included.

The most recent amendments (s.199C(3)) afford further protection for parties by tightening the grounds upon which details of an ILUA can be removed from the Register (and thereby removing its statutory validation). Parties are also dissuaded from

operating in a manner which might induce another party (including by fraud, undue influence or duress) to enter into an agreement, by an amendment enabling the Federal Court to make an order for compensation against the person who committed the fraud etc. Such a compensatory payment may be payable to any party to the ILUA who will suffer loss or damage as a result of its removal from the Register (s.199C(4)).

Further substantial legal certainty is provided to governments and resource developers by the fact that agreement by native title claimants or holders to an ILUA covering future acts can be given for any consideration, with the general principle being that those negotiated 'considerations' are taken to constitute a final settlement of compensation for the future acts involved. Compensation for future acts is generally limited to what is in the agreement. However, native title holders who are not entitled to compensation under the agreement (e.g. a person later found to hold native title, but not entitled to any benefits under the earlier agreement) may apply in the usual way under Division 5. This latter exception does not apply to persons represented by the registered body corporate under a Body Corporate Agreement, or those persons whose authority was obtained for an Area Agreement.

ILUAs: assessing the potential opportunities and advantages

In June 1996 a national indigenous and industry working group sponsored by the Council for Reconciliation reached fundamental agreement on a number of matters related to improving the fairness and workability of the Act. The working group issued a joint statement which outlined, as its first clear preference, that 'Voluntary agreements are the preferred first option for resolving indigenous land use issues and native title claims' (Council for Aboriginal Reconciliation 1996). The National Indigenous Working Group (NIWG) (NIWG 1997: 13) subsequently refined this earlier model and submitted proposals to the Commonwealth Government which, they argued, provided for a 'flexible, simple, efficient and certain alternative to the costly claim-based processes contained under the NTA'.

The final point of the Howard Coalition Government's 'Ten Point Plan' refers to the amendment provision for ILUAs, which have clearly incorporated many of the Working Group's proposals, and similarly argues for the considerable benefits to be obtained from legally certain, voluntary agreements (Commonwealth of Australia 1997). Indeed, there appear to be considerable opportunities and advantages attached to the ILUA provisions. As to which type of ILUA is preferable for what purpose, that will depend upon their different statutory characteristics and relative merits as revealed when parties engage in the ILUA process. Certain potential advantages are immediately apparent and these are canvassed below.

Consensual agreements

ILUAs are essentially 'instruments of consent' (Commonwealth of Australia 1996: 141); their content, duration and implementation are up to the people actively involved to decide upon. Parties do not have to develop an ILUA; nor do they have to register it, but can resort to other methods of supporting an agreement if they prefer (for example, as a common law contract).

The consensual nature of the ILUA process gives potentially greater control to parties over the process and outcomes, enabling them to play a more constructive role in negotiations and to 'sculpt' the nature of the relationship between native title and other interests in a practical way. Also, on the basis of the historical experience of both the land rights and native title arena, the shared commitment to negotiated outcomes will arguably facilitate better post-agreement relations between indigenous people and the wider community, than do judicial or arbitrated determinations.

Certainty

An ILUA does not require that native title be bartered or exchanged for other benefits; the non-extinguishment principle applies to native title (except where extinguishment is agreed to). Extinguishment by surrender of native title, or surrender of the right to negotiate, can only occur when an agreed statement to that effect is included within an application for registration of the agreement by the parties. Recent amendments also enable parties to specifically provide for changed effects on native title from those stipulated for intermediate period acts.

An agreement could also reserve finally concluded legal positions between the parties about the existence of native title; could expressly state that certain matters are not dealt with, or that the agreement does not intend to permanently impair or extinguish native title. In other words, parties do not have to feel they are giving away important or currently uncertain legal rights at a stage when they might nevertheless want to agree upon other, immediately actionable matters and want to secure legal certainty for that agreed outcome (French 1996: 24; French 1997a, b). Furthermore, recent amendments afford a degree of retrospective certainty to be created by enabling future acts which may have been invalid to be validated by agreement. This can be done in circumstances where the parties need not agree that native title exists, or that the act is possibly invalid and could have affected native title, but they may nevertheless want to enter into an ILUA in order to provide certainty.

The combined effect, then, of ILUA registration, future act validation, possible consents to the surrender of the right to negotiate, and the associated settlement of compensation, together with the certification, authorisation and binding of all native title holders to the agreement, is to provide substantial legal certainty for all parties to an ILUA. At the discretion of the parties, further negotiated guarantees may also be included within an ILUA to provide for any other kind of certainty (for example, in the form of agreed conditions which bind potential assignees or mortgagees in possession of a mining or pastoral lease to the beneficial terms of an agreement; which indemnify resource developers for any future legal actions brought by native title holders that would threaten their financial arrangements; or which provide for future independent arbitration and dispute resolution procedures regarding the terms of the agreement).

Flexibility

Another potential advantage of the ILUA provisions is their flexibility. An ILUA can be developed to be implemented in stages or tagged to sequential future agreements. To varying degrees, all three types of ILUAs, but particularly the Alternative Procedure Agreement, offer the opportunity to develop preferred alternative processes and frameworks. For example, at any stage of a claim mediation, or in respect to particular land-use or future act negotiations, this form of ILUA could be used to uniquely:

- develop a Heads of Agreement listing a future timetable and substantive issues for continuing negotiation;
 - specify codes of practice and benchmarks to be used for negotiating, implementing and monitoring the components of an agreement; and
 - provide a framework and processes for making other agreements.
- Any of these might include procedures and criteria for:
- good faith negotiation;
 - meeting arrangements, including location and composition;
 - establishing and maintaining the mandates of native title spokespersons;
 - establishing and gaining the authorisation of the native title group;
 - the role of negotiating teams and their legal representatives;
 - the mechanisms for obtaining variations to component processes or stages;
 - dealing with issues of confidentiality;
 - information exchange and the role of the media;
 - the preferred involvement of government and NTRBs; and
 - cost-sharing and minimisation arrangements.

The future effectiveness and durability of an agreement will be influenced by the extent to which its terms and conditions have been fully and clearly communicated to all persons who have native title rights and interests. The drafting of an ILUA would not need to be legally or technically cumbersome, and more effective cross-cultural communication of its terms and conditions could be enhanced by the use of plain English and indigenous language translations.

Content and area coverage

A distinct advantage of the ILUA provisions is that they appear to cover a far wider range of land-use matters than those currently given statutory support under the Act, and they can operate along a continuum from local and small-scale, to regional and multipurpose, depending on the parties and their relevant concerns.

An ILUA covering larger regional or sub-regional areas, and dealing with common-form issues that recur in negotiations and mediations across that region (such as the use of inland waters, coastal resources, management of national parks, heritage issues, access to pastoral lands, town planning and rates (Meyers and Muller 1996: 7-15; French 1997a: 35), has the potential to:

- reduce separate future act negotiations to a cohesive, related negotiation process;
- reduce contended issues under mediation across a number of native title claims;
- reduce delays and costs;
- establish benchmark negotiation or mediation procedures across a region;

- deliver more regionally consistent outcomes; and
- minimise unwelcome fragmentation of land-use and management (whether that fragmentation be cultural or administrative).

Presumably these would be recognised as important benefits by all parties.

From the regional perspective, the potential advantage of an ILUA for resource developers would be in undertaking wider negotiations with *all* the relevant indigenous interests for a major resource development, as opposed to conducting the area and claim-specific negotiations currently required under the right to negotiate (Appendix 1 lists the key differences between the current right to negotiate procedure under the Act and the amendment provisions for ILUAs). The benefits of a more inclusive regional approach were acknowledged by the mining company, Century Zinc Limited, at the time the Century Mine negotiations were transferred in mid-1996 from a regional negotiation process to the more tightly defined right to negotiate procedure under the Act. The latter procedure has a geographic focus on the specific area covered by mining future acts and, therefore, on the particular native title claimant groups. As a result, many Gulf region Aboriginal interests who had been centrally involved in the negotiations between 1993 and 1996 were marginalised from the final stages of the process and from ultimate participation in many of the economic benefits which flowed from the agreement (Blowes and Trigger 1998).

For indigenous parties, participation in an ILUA dealing with multiple claims or future acts for land traditionally owned by the same cultural bloc, or by groups with shared cultural imperatives, would enable them to assert a united voice and achieve appropriate and consistent outcomes. For both State and local governments, the regional or sub-regional ILUA could facilitate the practical recognition and exercise of native title in a manner compatible with State government systems of land management and administrative procedures.

On the other hand, the advantage of a local and specific-purpose ILUA is that it is more likely to be manageable, feasible, and targeted to particular outcomes. Indeed, those very characteristics might enable local-area ILUAs to act as building blocks, providing a practical pathway for sequential local agreements to be developed whose cumulative effect could be described as a form of regional agreement. Certainly, the evolution of local agreements developed by the Rubibi Working Group in Broome suggests they can have such a multiplier effect (Kimberley Land Council 1997: 991-4; Commonwealth of Australia 1998: 82).

Recognising indigenous rights and interests

ILUAs may potentially provide for a fuller consideration of indigenous concerns and views about 'country'. For example, components of an ILUA could be developed to:

- specify preferred indigenous organisational structures for land use and management;
- specify preferred indigenous mechanisms for decision-making and representation; and
- incorporate indigenous land use and management practices.

Importantly, the ILUA provisions widen the native title parties from those persons with registered native title claims and holders represented by Prescribed Bodies

Corporate, to all indigenous interests with a common law native title claim to land. The effect is to enable a more comprehensive consideration of all indigenous rights and interests in land, in a manner which more appropriately reflects the group and inter-related basis of traditional land tenure systems, and which pragmatically recognises the increasing diversity of legislatively-defined indigenous interests in land across the different States and Territories.

For example, if one were to approach the ILUA provisions creatively, there is no reason why they could not be used:

- to facilitate agreement *between native title claimants or holders*—affording a potentially valuable mechanism within overlapping claim mediation and negotiation contexts;
- *between several bodies corporate* formed in relation to a single native title determination over an area of land, in order to establish a beneficial future working relationship between them in respect to land use and management; or
- to formalise a proposed land use relationship *between native title claimants or holders and other Aboriginal people* differently defined under State land rights legislation; for example, with ‘traditional owners’ under the *Aboriginal Land Rights (Northern Territory) Act 1976*, or with land owners and so-called ‘historical’ peoples defined under Queensland and New South Wales State legislation.⁷

The parties to an ILUA

An important advantage of the ILUA provisions in comparison with current agreement criteria under the Act is the wider coverage of who can be a party. The involvement of some parties is mandatory; others may participate according to their relevant interests.

First, as noted above, the statutory recognition of various indigenous parties is significantly expanded beyond registered claimants and holders. There are also interesting possibilities for the wider inclusion of indigenous agencies as parties to an ILUA; for example, ATSIC and its relevant Regional Council, or the Indigenous Land Corporation might be parties where warranted, providing potentially valuable program support to an agreement. Indeed, the current review of ATSIC (1998) acknowledges the potential for its greater involvement in native title agreements and recommends the ATSIC Board establish relevant policy guidelines for its future participation.

Second, a much needed amendment provision is that NTRBs may become a party to an ILUA, compared to the current right to negotiate procedure where NTRBs cannot themselves be negotiating parties and are confined to representative duties on behalf of native title claimants (see Smith 1997; Appendix 1). If it is to be a party, a NTRB must, ‘as far as practicable consult with, and have regard to the interests of persons who hold, or may hold, native title in relation to the land or waters in that area’ (s.202A). If it is not to be a party, recent amendments mean that at least one NTRB in the area covered by the agreement must be notified of the agreement by the Body Corporate or a person in the ‘native title group’ before the agreement can be entered onto the Register. The recent amendments also encourage greater consultation (though this is not mandatory) between indigenous parties entering into an agreement and NTRBs, when the latter are not parties.

NTRBs may also continue to represent native title parties in ILUAs; though presumably that representative role will take a secondary place if there are Prescribed Bodies Corporate managing land on behalf of native title holders. The Alternative Procedure Agreement, in particular, should enable a greater institutional indigenous involvement (for example, by NTRBs and bodies corporate) in negotiating agreements, potentially facilitating the development of benchmark best-practice procedures and consistency in negotiations within their statutory regions. Conceivably, a stronger indigenous corporate role in negotiations could enhance the possibility of delivering more equitable outcomes from the distribution of negotiated benefits within regions.⁸

Third, there are advantages associated with the varying role of government in the three types of ILUAs. For some stakeholders, an advantage of a Body Corporate Agreement or an Area Agreement is that government does not have to be a party (though it does in an Alternative Procedure Agreement, or where extinguishment has been authorised). In other words, agreements can be reached directly with the resource development industry, which has generally shown itself to be more pragmatically inclined to negotiate.

On the other hand, there are advantages in having government directly involved; both for government and for other parties. The Bill retains the Act's original Preamble statement that:

governments should, where appropriate, facilitate negotiation on a regional basis between ... parties concerned in relation to: (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and (b) proposals for the use of such land for economic purposes.

The ILUA amendment provisions seek to provide incentives to secure such government engagement. For example, involvement in the ILUA process would enable State Governments to develop and implement a more systematic, policy-based approach to the recognition of native title based on practical resolutions of land-use and management (French 1996: 22). Active State government participation could facilitate better administrative co-ordination and a more harmonious 'fit' between different State statutory regimes and the Act. Under the most recent amendments, governments would also be able to pro-actively use ILUAs to negotiate agreement to the validation of previously invalid future acts (other than intermediate period acts); thereby obtaining greater certainty in future land management and use.

Currently, lack of legislative harmony impedes the making of agreements or feasible conditions for the doing of future acts (see National Native Title Tribunal arbitral case *Re Koara People 1996* (Koara No. 1) 132 FLR 73; and National Native Title Tribunal arbitral case *Re Koara People 1998* (unreported Koara No. 2) (Sumner, Smith and McDaniel 1998: 51-53)). Furthermore, if government is a party, it could bring to bear additional statutory support by the enactment of separate legislation or the amendment of existing legislation in order to specifically facilitate the implementation of an agreement. The involvement of local governments would enable native title to be strategically incorporated into town planning and local economic development; as has been the case in the Rubibi partnership agreements with the Broom Shire Council (see

Jackson 1996; Sullivan 1996; Australian Local Government Association (ALGA) 1998).⁹

Litigation v agreement

Finally, but not least, is the matter of costs. It is clearly unrealistic to expect that all native title matters will be resolved without litigation. Courts offer 'principled answers to particular problems' (French 1996: 21) and test-cases provide much needed legal clarification and precedent. But they do not often provide practical resolutions.

Furthermore, the cost of litigation is proving significant in the area of native title and, given the overseas experience, is likely to escalate. In regard to long-running native title claims which have had substantial court litigation, ATSIC estimates it has allocated \$1.3 million on the Mirriwung/Gajerrong claim (stage 1) and \$1.7 million on the Yorta Yorta native title claim, of which the major component has been legal preparation and representation in court. It should be remembered that these amounts do not include the litigation costs incurred by any of the other parties.

It has been argued that ILUAs will be more cost-efficient and likely to produce more durable outcomes than litigation (see Council for Aboriginal Reconciliation 1996; Commonwealth of Australia 1996, 1998; National Indigenous Working Group 1997). For example, the potential for parties to negotiate settlement of compensation for invalid and other future acts may conceivably avoid drawn-out and expensive litigation about such matters. Some cost comparisons can be made with current negotiated agreements which tend to confirm this potential, including:

- the cost of the Cape York Heads of Agreement (1997) for the Cape York Land Council which has been estimated by Noel Pearson to be in the vicinity of \$20,000;
- ATSIC grant funding to the New South Wales Aboriginal Land Council (the NTRB) for the relatively short native title negotiations over Crescent Heads for the Dunghutti people which is estimated at \$46,860;
- the Arakwal claim reached agreement after 12 months of negotiations costing \$15,193; and
- the West Coast Exploration Agreement between the Aboriginal Legal Rights Movement (the NTRB in South Australia), five claimant groups and 14 mining companies which cost the NTRB \$160,000.

This is not to say that the agreement process for an ILUA will be cost-neutral—they are not a new 'drive-by' form of agreement to be bought as a package deal off the shelf. However, by their very nature, they should encourage parties to beneficially explore cost-sharing and cost-minimisation arrangements. The Rubibi Working Group has recently referred to the intensive workload of meetings and consultations involved in securing local agreements with the Broome Shire Council, resource developers and the Western Australian State Government. In its first half-year of operation in 1995, the Rubibi Working group had close to 200 meetings with other parties (Kimberly Land Council 1997: 5676). But as the Broome agreement process evolved, some cost-sharing arrangements were able to be mutually explored.¹⁰

ILUAs: assessing the potential challenges and limitations

ILUAs will not provide a magic formula for agreement making. If parties are to achieve feasible and sustainable agreements under the amendment provisions, they will need to be aware of the practical limitations and potential policy challenges involved. While these will only become fully apparent in practice, certain issues can be identified now.

Willingness

ILUAs will face the same ‘moral hazard’ (McKenna 1995) obstacle currently experienced in many native title processes; namely, the reluctance of some stakeholders to step aside from their politicised and unproductive strategic behaviour in order to engage in negotiation and compromise. ILUAs will not be achieved without good faith negotiation and compromise.

Issues facing indigenous parties

A number of critical challenges will also face indigenous people. First, while the ILUA provisions in the 1997 Bill foreshadowed the fact that ‘consultation’ with indigenous groups to gain their approval for resource development and other land-use projects is no longer sufficient, and that they should participate in the agreement-making process on an equal footing, the more recent amendments of mid-1998 suggest that the process of ‘consultation’ is being reasserted by government as an adequate replacement to ‘negotiation’. Of the two processes, consultation is by far the lesser in terms of the leverage, control and recognition it gives to indigenous rights and interests.

Second, if native title groups are to fully participate on a more equal footing in agreement negotiations, they may be required to explain, systematise and perhaps compromise their native title rights and identity to an unprecedented degree. The possibility of gaining significant benefits and recognition of rights via agreements may result in indigenous concerns and areas of knowledge being re-contextualised and appropriated into various mainstream forums (Merlan 1997: 7; Smith and Finlayson 1997a: viii). The Director of the Central Land Council recently described this dilemma for Aboriginal groups involved in native title economic development as ‘walking the knife-edge of assimilation’.¹¹

Third, when substantial native title rights and interests are at stake or surrendered in an ILUA, and when future act compensation could be fully settled by agreement, there will be considerable pressure on the native title group to ensure they obtain full and fair compensatory treatment under the terms of an ILUA. There are no provisions requiring ILUA monies or other beneficial payments to be held in trust until claimants are proven to be holders (as there is under current native title arbitration arrangements). The onus will be on the native title group and those organisations representing them to ensure that all potential holders and claimants are comprehensively identified and included within the agreement process, and that distributive equity of benefits is ensured (both within the group and over time). These twin issues have been the source of significant conflict between indigenous groups in the context of both native title and land rights claims. They have also been the cause

of seemingly successful agreements progressively becoming unworkable (see Altman and Smith 1994; Altman 1997; Smith and Finlayson 1997b).

Fourth, endemic intra-indigenous dispute will always prove counter-productive to negotiating agreements (Smith and Finlayson 1997b). If agreements require authorising consent from all native title claimants or holders—some of whom are in dispute—in many situations agreement will simply be impractical.

The role of NTRBs

NTRBs have varying roles in ILUAs, ranging from representation and certification through to direct negotiation, all of which will raise workload, resourcing and operational competency issues. An important function relates to their proposed role in Area Agreements where they are called upon to certify the application for its registration in writing (s.202(4)(e), s.203BE).

Such a certification cannot be given by the NTRB unless it is ‘of the opinion’ that ‘all reasonable efforts have been made to ensure that all the persons who hold or may hold native title in relation to land and waters in the area covered by the agreement’ have been identified’, *and* that ‘all of the persons so identified have authorised the making of the agreement’ (202(8)). NTRB certification must be made to the Registrar with a statement briefly setting out its grounds for the above opinions. The alternative is for the parties themselves to state that these processes have taken place. In either case, the Registrar will have to be satisfied that those requirements have been met.

An NTRB may well be reluctant to provide such certification if it has not been involved from the very beginning in the meetings and negotiations forming the agreement process. Without such involvement, a NTRB choosing to certify an agreement could find itself in the position of having to initiate a new round of consultations and research to verify that all the native title group has, in fact, been identified and included in the agreement, and to verify the authorisation procedure used and its outcome. The failure of the amendments to provide for a mandatory representative role for NTRBs in this form of agreement, and more generally, may serve to undermine the timely implementation of the critical certification stage, and diminish the representative mandate and the much-needed professionalisation of many NTRBs.

What might constitute ‘reasonable effort’ and authorisation remains to be practically determined by NTRBs in their field consultation methods, and will undoubtedly be assessed by the Registrar if there are objections at the registration stage (s.24CK(2)(c)). There are a few precedents for the certification and authorisation processes referred to under Area Agreements. The Mt Todd Agreement in the Northern Territory between the Jawoyn and Zappopan mining company is often cited as a successful negotiation in which Aboriginal people provided certainty and security to the agreement by giving the company a series of substantial guarantees in which:

- key claimants signed a deed of adoption of the agreement and agreed to the surrender of native title;
- a formal meeting was convened by the Northern Land Council to vote on the matter;
- the Jawoyn Association agreed not to act for any other group claiming native title in the area;

- the Association indemnified the mining company for any losses arising from assertions of land rights or native title over the land; and
- the Jawoyn gave undertakings not to assist proceedings by any Jawoyn that would threaten the company's financial arrangements for the project.

But it must be remembered that those guarantees were able to be provided and delivered by the Jawoyn because they had been involved, over many years, in numerous negotiations about the use and management of their lands; had been represented by an experienced land council, and had participated in critical land claims under the ALRA which provided them with comprehensive documentation of their group membership and identity.

The land councils in the Northern Territory, over a period of more than twenty years, have had to undertake substantial field research to comprehensively identify all traditional owners for inclusion in land claims and sign off resource negotiations under the *Aboriginal Land Rights (Northern Territory) Act 1976*. For major development projects, the Northern Land Council (NLC) estimates a minimum of 100 days of anthropological research is needed for such an identification process (Land Council staff pers. comm.; see also ATSIC 1995: 58). The Land Councils in the Northern Territory also standardly conduct wide-ranging consultations with traditional owners involving numerous meetings in order to disseminate information and gain ongoing instructions and informed consent. The NLC now tries to obtain written agreement signatures from traditional owners. In cases where disputes are entrenched, especially if these have to do with authority to speak for country, the NLC has been reluctant to provide guarantees that all Aboriginal parties agree. These examples from the Northern Territory of the workload and organisational skills required for high-powered negotiations have direct relevance to the challenges which will face NTRBs in facilitating ILUAs; for similar negotiating, operational, research and legal experience are sorely lacking amongst many other NTRBs.

To facilitate timely and durable agreements and increased professionalisation and negotiating effectiveness within NTRBs, it is arguable that NTRBs should:

- have a statutory mandate to facilitate all types of agreement;
- have a monopoly representative responsibility under the NTA in each region;
- have sole responsibility for funding native title claims and negotiations;¹² and
- be fully accountable to all native title claimants and holders within their jurisdictions (ATSIC 1995).

NTRBs will need adequate levels of resources to undertake the new workloads entailed by the ILUA provisions and, perhaps more importantly, they will need to quickly develop the professional skills and administrative capacities required to facilitate such agreements. However, while the Bill proposes substantial accountability requirements for NTRBs, it fails to provide them with the mandatory functions necessary to reinforce their jurisdictional legitimacy and credibility.

The role of government

If State Governments have developed a 'central agency' approach to native title, they could facilitate much-needed co-ordination of State legislative, policy and program support for the ILUA process. If not, they could easily jeopardise or hinder the process. For example, if government is not a party, a registered ILUA will not fetter

government action against it; as seen with the Cape York Heads of Agreement which failed to gain the necessary involvement of the previous Queensland Coalition State Government. Unfortunately, the active engagement of many State and Territory Governments in native title mediation and negotiation prior to the amendments has been highly variable and slow in developing.

Registration and objection processes

Registration for the three types of ILUAs entails different processes with regard to supporting documentation required, notification periods, objection procedures, and the role of various parties.

How objections to registration of an agreement will be administratively dealt with by the Tribunal remains to be seen and may require, for Area or Alternative Procedure Agreements, the Tribunal to hold a form of inquiry. If ILUAs are to be workable in terms of their timeliness, cost effectiveness and equity, there need to be clear objection and assessment criteria which minimise the possibility of delay through administrative inquiry procedures. In any of these objection processes, the Tribunal may assist parties in negotiations, though what such assistance might consist of, other than mediation, remains to be determined.

The economic challenges

A number of economic factors may negatively impinge, at both policy and implementation levels, upon the capacity of the ILUA amendment provisions to streamline and facilitate the agreement-making process.

The first of these factors relates to new taxation proposals for native title recently announced by the Commonwealth Government; in particular, the treatment of payments made by way of compensation to native title holders or claimants. It seems likely that the Cape Flattery Silica Mine decision (see *Cape Flattery Silica Mine Pty Ltd v. the Commissioner of Taxation for the Commonwealth of Australia*, 9 July 1997) will apply, so that payments made by non-native title parties by way of compensation for the ‘temporary impairment or suspension’ of native title under an ILUA will be tax deductible in the hands of the person making the payment over the period of impairment.

The Commonwealth’s proposed tax treatment of all such payments received by native title groups, including those received by way of an ILUA, will be to tax all such receipts (irrespective of the form of the payment) via a withholding tax applied at the rate of 4 per cent. Such a withholding tax system is likely to operate as a disincentive to the agreement process, leading to cost transfer strategies by native title groups who may strategically attempt to pass the tax liability back onto other parties during the agreement phase of an ILUA as an ‘on-cost’ to any negotiated payments.

The second challenge to the development of ILUAs will be how to ensure all stakeholders are adequately funded to negotiate. The amendments have expanded funding available from Legal Aid and Family Services to cover financial assistance to persons who are, or intend to become, a party to an ILUA (s.183). Departmental

guidelines for that assistance have recently been revised to extend eligibility to incorporated and unincorporated bodies including local governments.

If governments are serious about the need to negotiate timely and cost-efficient agreements, then the issue of funding for indigenous parties to participate in ILUAs will also need to be considered further. Currently, ATSIC funding for native title is allocated via NTRBs and focuses primarily on claimants and holders. It is expected that native title parties will seek funding from ATSIC, not Legal Aid and Family Services.

If this new agreement process is to be effectively implemented, ATSIC will need to extend its national native title policy and program guidelines. It is likely to need additional program funding to cover the expanded workload of NTRBs. The wider cross-section of indigenous persons able to participate as parties in ILUAs (such as common law holders of native title, Prescribed Bodies Corporate, NTRBs, traditional owners and other categories of indigenous land owners defined under State legislation) will mean ATSIC will be faced with a broader range of requests for funding assistance than is currently the case. It would be consistent with ATSIC's existing national native title guidelines to require requests by parties for ILUA funding to be co-ordinated through NTRBs.

One possible option for addressing the funding requirements for ILUAs in a more co-ordinated and equitable fashion may be for governments to set up State Negotiating Funds (see also O'Fairchellaigh 1996: 219). The budgets for these could be secured from a proportion of the licence and lease fees and royalties obtained by the States from resource development. An incentive for States to establish these Funds (apart from the benefit of avoiding funding duplication and encouraging cost-minimisation) their contributions could be matched by the Commonwealth; for example, by redirecting equivalent income to the Fund as obtained from the new native title withholding tax.¹³ In such circumstances, State Negotiating Funds could be accessible to all eligible parties (indigenous and non-indigenous) wishing to negotiate an ILUA and, as with the Rubibi example, could be applied for in concert by key parties as a funding package.

Finally, a durable ILUA will only be achieved if the cost of its implementation is built into its terms. Experience in Australia and overseas has shown that worthwhile agreements quickly become unsustainable and hotly contested if implementation costs and responsibilities have not been assigned within the terms of the agreement itself.

Uncertainty

While the amendments go a considerable way to providing for legally certain for many stakeholders and for durable agreements, some areas of uncertainty remain. When registered, an ILUA has contractual force which means it will be subject to limitations of enforcement by and against non-native title third parties to the agreement. Issues of future assignment and mortgagee possession of mining leases the subject of an ILUA may affect whether future holders of such leases will be bound by contract to the native title group in the same way as the current mining lease holder. In cases where agreements encompass the exercise of native title rights and interests in respect to mining, exploration or pastoral leases, the involvement of State Governments may well be a prerequisite if agreement conditions about the operation

of those leases are to 'run' with the lease (for example, if agreed conditions about the operation of a mine are to continue to be effective over time and with possible changes in company ownership of the mining lease) (see Sumner, Smith and McDaniel 1998).

Furthermore, the issue remains as to whether an ILUA will be able to bind native title holders over the generations. This is not just a legal matter, but represents an important cultural consideration for native title parties as well. Though ILUAs could have such a binding effect, depending on how the native title group is defined within the agreement, it would be wise to be mindful of the current lessons facing the mining company Energy Resources Australia and traditional owners in relation to the Jabiluka Mine in Kakadu National Park (Kakadu Region Social Impact Study 1997). There, the highly public revisiting by a younger generation of traditional owners of the issue of consent to mining suggests that apparently workable and agreed solutions may become unworkable when they are seen to take away from subsequent generations the right to speak for country in a way different to their parents and grandparents (Brennan 1997).

Also currently unclear (both for purposes of party participation, certification and authorisation processes), is the status of persons in the native title group who are minors or, at the time, are not legally competent in the agreement process.

Summary: opportunities and challenges

The amendment provisions for ILUAs encompass a wide range of mechanisms for making agreements over land, including what are called 'side' or ancillary agreements to the claim mediation process; negotiated settlements; future act agreements; land access agreements; co-management or partnership agreements; and framework, process or heads of agreements. They can be local or regional in their geographic coverage, operate as stand-alone or sequential to other agreements, and cover specific or multiple purposes. With such characteristics, they afford a more certain foothold into the unknown waters of regional agreements, providing a welcome concretisation of how such agreements might be progressively developed.

The ILUA provisions offer a set of agreement-making mechanisms which are relatively user-friendly and potentially afford parties with: flexibility; greater legal certainty and enforceability; improved post-agreement implementation; and the development of preferred processes more attune to cultural, social and economic realities. They have the potential to be cost efficient and timely; sustainable; inclusive in their potential coverage of issues and parties; and to be productive of workable and just outcomes based on a practical interpretation of co-existence.

The potential challenges and disadvantages which might hinder the full realisation of those advantages and opportunities include: the certification difficulties associated with identifying all the persons with native title rights and interests entitled to be a party to an agreement, together with the related difficulty of gaining their authorisation; the possible procedural complexity related to the objection process; the variable organisational role of NTRBs and their future relationship with Prescribed Bodies Corporate; and the continuing oppositional behaviour of key stakeholders. New Federal Government taxation proposals may also act as a disincentive to the

agreement process and increase transaction costs associated with the negotiation of agreements.

Most important amongst the challenges for parties in obtaining equitable, just, timely and durable outcomes will be the need to:

- develop functionally effective, professional NTRBs with high levels of negotiating skills and the organisational capacity to provide certification;
- overcome the debilitating effects of intra-indigenous conflict which will always prove inimical to agreement;
- secure the active engagement and support of governments at all levels; and
- establish adequate and co-ordinated levels of funding for all potential indigenous and other parties.

Conclusions

There have been significant statutory limitations to current agreement-making mechanisms under the *Native Title Act 1993*. Both judicial decisions and the Act are silent on the vital question of the practical ways in which native title can be exercised on the ground, and how the relationship between native title, public land laws and private rights can be managed. It is precisely in respect to resolving these practical aspects of co-existence and the diversity of land interests involved that ILUAs have much to offer.

There has been widespread support for the amendment provisions for ILUAs. In March 1998, it was reported that the New South Wales State Minister for Land and Water Conservation, Mr Amery, was to seek Cabinet's 'general endorsement' of the wider use of agreements to cover dealings on land (*Sydney Morning Herald* 21 April 1998, p.1). In the same week, Shell Australia Chairman, Mr Roland Williams, noted that his company is 'a strong advocate of voluntary agreements' and that such agreements afford 'in the long term, the best route to effectively balance competing interests in land' (*The Australian* 21 April 1998, p. 24). Parliamentary Joint Committee inquiries into the Amendment Bill have also noted the general industry and indigenous endorsement for the enhanced agreements process.

However, if negotiated agreements such as ILUAs are to be timely, workable, cost-effective and fair—and arguably an agreement will not *be workable* unless it is seen to *be just* by all participating parties—then there will need to be more than assertions of good intentions. The process will need:

- to demonstrate a practical commitment to legal and cultural pluralism;
- to be facilitated by adequate funding; and
- co-ordinated policy support and active engagement by State and Commonwealth Governments and by industry.

Under the *Native Title Act 1993*, native title claimants were able to assert substantial leverage via the right to negotiate and claim application processes to bring previously reluctant stakeholders to the negotiating table. While the ILUA provisions may prove invaluable in dealing with the inter-relationships between land use, resource development and native title, there may be little remaining leverage for native title parties, and little incentive for governments and developers to negotiate such agreements, if the new native title legislation also results in greater statutory extinguishment of native title and a significant dismantling of the right to negotiate.

Appendix 1. Key differences between the right to negotiate under the *Native Title Act 1993* and new amendment provisions for Indigenous Land Use Agreements

Characteristic	Right To Negotiate	ILUAs
Content:	Future act/s over claimed native title land	Future act/s Claims Compensation Native title procedures
Geographic area:	Future act area	Any relevant area
Time frame:	Statutory minimum 4-6 months	No statutory time frame
Notification:	Initiates the process of objection & RTN	Finalises the process of objection & registration
Negotiation:	Compulsory	Voluntary
Mediation:	Mandatory if requested	‘Assistance’ if requested
Arbitration:	Compulsory if no agreement	Voluntary
Good faith:	Compulsory	Voluntary/inherent
Statutory Parties:	3 Mandatory: <ul style="list-style-type: none"> • Claimants/Holders • Grantee party • Government party 	Mixed mandatory/voluntary: <ul style="list-style-type: none"> • All the Native Title Group • Prescribed Bodies Corporate • Government • NTRBs • Any other persons
Agreement:	s.34 lodged with NNTT <ul style="list-style-type: none"> • has contractual force • does not bind all claimants in the future act area 	Lodged with NNTT Register <ul style="list-style-type: none"> • has contractual force • binds all native title group for area covered by agreement
Inquiry:	Arbitral inquiry based on: <ul style="list-style-type: none"> • s.39 criteria 	Objection inquiry based on: <ul style="list-style-type: none"> • certification • authorisation • fair & reasonable criteria
Native title:	Individual/communal	Communal/group

References

- Aboriginal and Torres Strait Islander Commission (ATSIC) 1995. *Review of Native Title Representative Bodies 1995*, ATSIC, Canberra.
- Aboriginal and Torres Strait Islander Commission (ATSIC) 1997. *Native Title Amendment Bill 1997: Issues for Indigenous Peoples*, ATSIC, Canberra.
- Aboriginal and Torres Strait Islander Commission (ATSIC) 1998. *The Review of the Operation of the Aboriginal and Torres Strait Islander Commission Act 1988*, Report to the Minister for Aboriginal and Torres Strait Islander Affairs, ATSIC, Canberra.
- Altman, J.C. 1997. 'Fighting over mining monies: the Ranger Uranium Mine and the Gagudju Association', in D.E. Smith and J. Finlayson (eds) *Fighting Over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Altman, J.C. and Pollack, D. 1998. Northern Territory Land Rights Review: Financial Aspects, unpublished confidential report to John Reeves QC for the Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Altman, J.C. and Smith, D.E. 1994. 'The economic impact of mining moneys: the Nabarlek Case, Western Arnhem Land', *CAEPR Discussion Paper No. 63*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Australian Local Government Association (ALGA) 1998. *Working □ Out Agreements. A Practical Guide to Agreements Between Local Governments and Indigenous Australians*, ALGA, Canberra.
- Blowes, R. and Trigger, D. 1998 (Forthcoming). 'Negotiating the Century Mine Agreement: issues of law, culture and politics', in M. Edmunds (ed.) *Regional Agreements: Key Issues in Australia, Case Studies*, Vol. 2, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Brennan, F. 1997. 'Submission' to *The Native title Amendment Bill 1997*, *Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, 1998, Parliament of the Commonwealth of Australia, Senate Printing Unit, Parliament House, Canberra.
- Cape York Land Council 1996. Cape York Land Council, Cattlemen's Union of Australia Inc., Australian Conservation Foundation, The Wilderness Society and ATSIC Peninsula Regional Council: Cape York Heads of Agreement, unpublished background report by the Cape York Land Council, Cairns, 5 February 1996.
- Commonwealth of Australia 1996. Native Title Report, July 1995-June 1996, Report of Mr M. Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Canberra.
- Commonwealth of Australia 1997. *The Ten Point Plan. The Federal Government's response to the Wik Decision*, prepared by Senator, the Hon. Nick Minchim, Parliamentary Secretary to the Prime Minister, Canberra, June 1997.

- Commonwealth of Australia 1998. *The Native Title Amendment Bill 1997, Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, Parliament of the Commonwealth of Australia, Senate Printing Unit, Parliament House, Canberra.
- Council for Aboriginal Reconciliation (CAR) 1996. Outcome on Agreements, unpublished report from the Native Title Stakeholders meeting, CAR, Canberra, 16 June 1996.
- French, R.S. 1996. 'Pathways to agreement', in G.D. Meyers (ed.) *The Way Forward. Collaboration and Co-operation 'In Country'*, National Native Title Tribunal, Perth.
- French, R.S. 1997a. 'The National Native Title Tribunal and the Native Title Act, agendas for change', in G.D. Meyers (ed.) *Implementing the Native Title Act. The Next Step: Facilitating Negotiated Agreements*, National Native Title Tribunal, Perth.
- French, R.S. 1997b. 'Local and regional agreements', *Land, Rights, Laws: Issues in Native Title, Regional Agreements Paper No. 2*, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Jackson, S. 1996. *When History Meets the New Native Title Era at the Negotiating Table. A Case Study in Reconciling Land Use in Broome, Western Australia*, North Australia Research Unit, The Australian National University, Darwin.
- Kakadu Region Social Impact Study 1997. *Report of the Aboriginal Project Committee*, Supervising Scientist, Canberra, June 1997.
- Kimberly Land Council 1997. 'Evidence', submitted to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Hansard, 6 October 1997: 991-4.
- Merlan, F. 1997. 'Fighting over country: four commonplaces', in D.E. Smith and J. Finlayson (eds) *Fighting Over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Meyers, G.D. and Muller, S. 1996. 'An overview of Indigenous Land (and Resources) Use Agreements', in G.D. Meyers (ed.) *The Way Forward. Collaboration and Co-operation 'In Country'*, National Native Title Tribunal, Perth.
- McKenna, S.L. 1995. 'Assessing the relative allocative efficiency of the *Native Title Act 1993* and the *Aboriginal Land Rights (Northern Territory) Act 1976*', *CAEPR Discussion Paper No. 79*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- National Indigenous Working Group (NIWG) 1997. 'Co-existence—negotiation and certainty. Indigenous position in response to the Wik decision and the government's proposed amendments to the Native Title Act 1993', paper prepared by the NIWG, April 1997.
- National Native Title Tribunal 1998. 'Native Title Determination: Hopevale Agreement', Application Number QC96/15, compiled by the National Native Title Tribunal, Brisbane registry, Brisbane.

- O'Fairchellaigh, C. 1996. 'Indigenous land use agreements: achieving negotiated outcomes', in G.D. Meyers (ed.) *The Way Forward. Collaboration and Co-operation 'In Country'*, National Native Title Tribunal, Perth.
- Quandamooka Land Council Aboriginal Corporation 1997. Native Title Process Agreement, unpublished report by the Quandamooka Land Council Aboriginal Corporation and the Redlands Shire Council, Brisbane, 14 August 1997.
- Smith, D.E. 1997. 'From humbug to good faith: negotiating the right to negotiate under the *Native Title Act 1993*', in D.E. Smith and J. Finlayson (eds) *Fighting Over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Smith, D.E. and Finlayson, J. 1997a. 'Introduction', in D.E. Smith and J. Finlayson (eds) *Fighting Over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Smith, D.E. and Finlayson, J. (Editors) 1997b. *Fighting Over Country: Anthropological Perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.
- Sullivan, P. 1996 (Editor). *Shooting The Banker*, North Australian Research Unit, The Australian National University, Darwin.
- Sumner, C. Smith, D.E. and McDaniel, M. 1998 (unreported). *Western Australia v. Evans and Sons of Gwalia (& Mt Edon Gold Mines, and Cottee and Townsend, Re Koara People 1998)* (Koara Stage 2), Native Title Future Act Arbitral Determination, National Native Title Tribunal, Perth.

Notes

1. A variety of amendments have been proposed to the Bill, the most current being the so-called 'Harradine amendments' which were incorporated in the final passage of the Bill in July 1998. This paper covers the most recent, up-to-date amendments in the final Bill.
2. The word 'area' has its ordinary meaning and can include any area of land or water.
3. An 'intermediate period future act' is one which the Amendment Bill validates and which took place on or after 1 January 1994, but on or before 23 December 1996, and would otherwise have been invalid to any extent because it fails to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title. These acts are defined in s.232A and various categories are defined in s.232B.
4. The various Explanatory Memorandum 1997 attached to the Native Title Amendment Bill 1997 provide excellent summaries of the main characteristics and inter-relationship between the ILUA amendment provisions and existing sections of the Act (see the Australian Parliament House listing of all current Commonwealth Bills at their InterNet Web Site address: <http://www.aph.gov.au/parlinfo/billsnet/main.htm>).
5. The *Native Title Act 1993* defined a range of future government actions over land called 'future acts' (ss.226, 227 and 233) in which there is a presumption of effect upon the native title to that land. It then allowed for specific 'permissible future acts' (s.235) by government to proceed on claimed native title land, on the basis of a form of 'freehold equivalent test'; that is, if the act could be done by governments on freehold title land, then it can also be done on native title land. In general, permissible future acts do not extinguish native title; the acts can be done and prevail over the existing native title for the duration of the act, after which native title rights and interests again have full effect (s.238(8)).

A statutory right was provided to native title claimants and holders in the Act to negotiate over certain permissible future acts before they can legally take place. Permissible future acts which attracted the right to negotiate included the following (s.26(2)):

- the creation or variation of a right to mine, including exploration, prospecting and quarrying;
 - the variation and extension of the period of a mining right, except where the variation or extension is a legally enforceable right; and
 - the compulsory acquisition by government of native title land where the purpose is to transfer rights or interests to a party other than government;
 - the Amendments Bill 1997 has proposed far-reaching changes to the right to negotiate including its coverage of future acts and procedural framework (see Commonwealth of Australia 1996, 1998; ATSIC 1997).
6. A registered native title body corporate means a prescribed body corporate whose name and address are registered on the National Native Title Tribunal

Register under s.193(2)(D)(iii) or s.193(2)(D)(iv). Amended s.57 refers to determination of a Prescribed Body Corporate and its functions under regulation. Section 59 states that regulations may prescribe the kinds of bodies corporate that may be determined under ss.56 and 57.

7. In the Northern Territory, an ILUA between native title holders and traditional owners in relation the same or adjoining areas of land might provide a valuable mechanism for co-ordinating potentially overlapping land ownership interests. In particular, such an agreement might afford a practical mechanism for resolving the complex intersection of land use and management issues arising out of the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Native Title Act 1993*, and as suggested by the decision of the full Federal Court in *Pareroultja v Tickner* 1993, 117 ALR 206.
8. Procedures for the distribution of beneficial payments (whether monetary or non-monetary) *within* the native title group which is a party to an ILUA, could be laid down by the terms of the agreement itself, or implemented via agreed processes to be co-ordinated by a NTRB or Prescribed Body Corporate. Section 58(c) of the Bill proposes that regulations for Prescribed Bodies Corporate include the function of holding on trust, or performing functions in relation to compensation obtained by holders for future acts affecting native title. A NTRB could conceivably also be given such a role under an ILUA, or a new structure representing claimants could be established within the terms of an ILUA, specifically to handle agreement monies and other payments (e.g. similar to Northern Territory royalty associations). The Registrar's role in assessing objections to an Alternative Procedure Agreement on the basis of the distribution and compensatory adequacy of such agreement benefits suggests that the native title parties involved would do well to stipulate transparent and equitable distributive mechanisms within the terms of an ILUA.
9. The agreements secured to date by the Rubibi Working Group (RWG) with the Shire Council include the development of a shopping centre and an aqua culture park; a joint partnership project dealing with government development and town planning which recognises Aboriginal land use and heritage protection issues within the town; and the formation of a committee of the Shire with RWG participation to create a coastal park over land and waters which have Aboriginal, conservation and recreational value. A framework agreement has also been established with the Western Australian State Government containing the transfer of land to Aboriginal people and the exclusion of the future act regime from the town site (Kimberley Land Council 1997: 991-4; Commonwealth of Australia 1998: 82).
10. For example, as a result of the Interim Agreement signed between the Broome Shire Council and the RWG on 1 May 1996 a joint approach was made to the Commonwealth resulting in a \$150,000 grant for a 'partnership' project under the Local Government Development Program.
11. See Tracker Tilmouth's paper 'Northern Territory perspective: the development of pastoral properties in a coherent way' (unpublished) delivered at the AIC

Conference on *Doing Business With Aboriginal Communities*, Alice Springs, 24-26 February 1998.

12. Given the large number of current incorporated indigenous organisations and the likely increase in those as Bodies Corporate begin to form under native title determinations, there are strong cost-effective and efficiency grounds for arguing that NTRBs should continue to maintain co-ordination, at a regional level, of funding to native title holders and bodies corporate, not just to native title claimants.
13. Income equivalents could be paid in at rates similar to the amounts obtained by the Commonwealth Government after it introduced a mining withholding tax in 1978 in respect of mining operations on Aboriginal land in the Northern Territory. In the Northern Territory, the withholding tax is payable as a final tax on distributions of mining royalty equivalents from the Aboriginals Benefit Reserve (previously the Aboriginals Benefit Trust Account). Over the period of 1978-1994, the tax has totalled approximately \$18 million (Altman and Pollack 1998).