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Indigenous Land Use Agreements- An Overview

by Graeme Neate

Among the significant amendments to the [Native Title Act 1993](#) (Cth) ('the NTA') in 1998 were the provisions for Indigenous Land Use Agreements ('ILUAs'). Those provisions replaced the provisions in the repealed [section 21](#) for limited forms of agreement involving native title-holders but not claimants.^[1]

An ILUA is an agreement, entered into under the Act, concerning an area of land or water where native title has been determined to exist or where it is claimed that native title exists.^[2] When an ILUA is registered under the Act, it is legally binding between all native title-holders and the other parties to the agreement. The three types of ILUA specified in the Act are:

1. body corporate agreements^[3], which are made for areas where native title has been proved to exist);
2. area agreements^[4], which are made where there are no registered native title bodies corporate for the whole area, and may deal with a range of future acts and access to non-exclusive agricultural and pastoral leases; and
3. alternative procedure agreements^[5], which may be made where there are no registered native title bodies corporate for the whole area. They may also provide a framework for making other agreements about matters relating to native title rights and interests.

It is important to stress that ILUAs are voluntary; no one is required to enter an agreement just because they wish to use land that may be subject to native title. Those who could benefit from a negotiated ILUA include people who want to: do things on the land which are inconsistent with native title; or

- upgrade his or her interest in the land; or
- exercise native title rights and interests on land where other people have legal rights.

However, if agreement is not desired or cannot be reached by the parties, there are usually other processes under the Act to ensure that land use and management can proceed with certainty. For example, the regime for the doing of various future acts (such as the grant of certain mining rights) is set out in detail in other parts of the Act. Whether they are negotiated before or after a determination of native title,^[6] the main benefits of ILUAs are the flexibility of their content and the legal certainty which follows their registration.

Subject Matter

The Act sets out the different circumstances in which each type of agreement is appropriate, what matters each form of agreement can cover, who the parties may be and so on.

The Act provides that any type of ILUA may be about one or more of the following matters in relation to an area:

- of particular future acts, or classes of future act;^[7]
- particular future acts (other than intermediate period acts), or classes of future act (other than intermediate period acts) that have already been done;^[8]
- withdrawing, amending, varying or doing any other thing in relation to a native title or compensation application in relation to land or waters in the area;^[9]
- the relationship between native title rights and interests and other rights and interests in relation to the area;^[10]
- the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;^[11]
- compensation for any past act, intermediate period act or future act.^[12]

However, this list is not exhaustive, and some other matters may be covered by each type of ILUA. There are also limits on what can be done under different forms of ILUA. For example, a body corporate agreement or an area agreement may provide for the extinguishing of native title by the surrender of native title rights and interests to the Commonwealth, a State or a Territory.^[13] An alternative procedure agreement, however, must not provide for the extinguishment of any native title rights or interests.^[14]

Agreement may be given for any consideration or payment (including the grant of land) or none at all, so long as that payment does not contravene any law. Similarly, an ILUA may be subject to any conditions, other than conditions that contravene any law.^[15]

Parties

The Act sets out in detail who must and who may be a party to each type of ILUA. Who the parties to an ILUA are will depend on what the agreement is about and whether native title has been determined to exist in the area which the ILUA affects. (See Table 1, p () herein).

If the Commonwealth, a State or a Territory is a party to a registered ILUA, the Act does not prevent the Commonwealth, State or Territory from passing legislation or doing any other act to give effect to any of its obligations under the ILUA. [\[16\]](#).

Registration and Certainty

The Act sets out the process for registration. In summary:

- Any party to an ILUA may, if all of the other parties agree, apply in writing to the Native Title Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements. [\[17\]](#).
- The Registrar must give notice of the ILUA to any of the persons and bodies specified in the Act who are not parties to the agreement and must also notify the public. [\[18\]](#).
- The Registrar must register the ILUA if certain conditions are satisfied and must not register the ILUA in other circumstances specific to each type of ILUA. [\[19\]](#). If all procedures and conditions required under the regulations and the Act are complied with, the ILUA must be registered. [\[20\]](#).

Once it is registered on the Register of Indigenous Land Use Agreements, the ILUA has effect (in addition to any effect it may have apart from the Act) as if:

- it were a contract among the parties to the ILUA; and
- all persons holding native title in relation to any of the land or waters in the area covered by the ILUA, who are not already parties to the ILUA, were bound by the ILUA in the same way as the registered native title bodies corporate, or the native title group, as the case may be. [\[21\]](#).

No other person is bound by the ILUA. [\[22\]](#).

Assistance for People Who Want to Negotiate an Indigenous Land Use Agreement

People may ask the National Native Title Tribunal or a recognised State/Territory body for assistance in negotiating the agreement. [\[23\]](#). That assistance will be non-financial and may take the form of a member of the Tribunal being involved in the negotiations. They may also ask the Commonwealth Attorney-General for assistance in relation to negotiating the agreement, or any inquiry, mediation or proceeding in relation to the agreement. [\[24\]](#). Financial assistance is available to cover the legal and other costs of individuals, partnerships, small businesses, local government bodies, other organisations, incorporated bodies and unincorporated bodies, in line with guidelines that came into effect on 30 November 1998. Such assistance, however, is not available to persons who hold or claim to hold native title in relation to the area covered by the agreement, [\[25\]](#), as their funding is to come through representative bodies or ATSIC.

A representative Aboriginal/Torres Strait Islander body for the area covered by the agreement may, if requested to do so, assist the relevant individuals or groups by representing them in negotiations and proceedings relating to an ILUA. [\[26\]](#). The representative body may become a party to an ILUA. [\[27\]](#). Before becoming a party, a representative body must, as far as practicable, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area. [\[28\]](#).

The various forms of assistance should help to remove or reduce the perceived or actual imbalances in the respective bargaining powers of some parties to an agreement.

Risks in Negotiating an Indigenous Land Use Agreement

Although there are benefits in having a registered ILUA, there are potential risks involved in negotiating one. The three main risks are that:

- The non-native title parties will negotiate with people who claim to have native title but are not native title holders.
- When the parties apply to have the ILUA registered (and so get legal certainty and enforceability for the agreement), a person or group will successfully object to the registration and so frustrate the outcome negotiated by the parties.
- At some stage after the ILUA is registered it will be removed from the Register (because, for example, other persons are determined to hold native title), and the agreement will cease to have effect.^[29]

There are some ways of minimising the risk that an ILUA may not be registered or, once registered, may be removed from the Register.

It is important to:

- ensure that all people who should be parties to the agreement are involved in the negotiations;
- ensure that all parties are adequately resourced so that agreements can be properly negotiated;
- set realistic time frames for negotiating agreement;
- ensure that the agreement contains a structure for its implementation (including the resolution of disputes about its implementation).

Two steps might be taken to try to ensure that all the people who should be a party to the ILUA are involved in the negotiations.

- It may be useful to advertise before negotiations start that there is a proposal to negotiate an ILUA and invite people who consider that they should be a party to the negotiations to be involved.
- The representative Aboriginal/Torres Strait Islander body (or bodies) for the area to be covered by the agreement should be informed of the agreement and, where appropriate, should represent people in the negotiation or become a party. In the case of area agreements, the representative Aboriginal/Torres Strait Islander body will usually need to certify, in writing, applications for registration within its area. The certification process should reduce the risk of objection to the ILUA.^[30]

ILUAs provide a significant means of resolving a range of native title issues in practical and long lasting ways. If parties ask, the Tribunal will assist them to negotiate agreements and will provide information about what needs to be done to ensure an ILUA can be registered.

^[1] In *Western Yalanji v Pedersen & Ors*, QG6002 of 1996, the respondents to a native title application consented to a determination of native title in consideration of the native title holders authorising certain future acts by executing agreements under s 21.

^[2] See [Native Title Act 1993](#) (Cth) ('the NTA') [ss 24AA-24EC, 199A-199F](#). These provisions were inserted with effect from 30 September 1998. In specified circumstances, any person who claims to hold native title in relation to land or waters may become a party to an area agreement ([s 24CD\(2\)-\(4\)](#)) or an alternative procedure agreement ([s 24DE\(4\)](#)). Such a person need not have made a native title determination application under the NTA. For discussion of issues relating to such agreements see Mary Edmunds (ed) *Regional Agreements: Key Issues in Australia*, 1998 AIATSIS Native Title Research Unit; Diane Smith, *Indigenous Land Use Agreements: the opportunities, challenges and policy implications of the amended Native Title Act*, 1998 CAEPR Discussion Paper No 163/1998.

[3]. NTA [ss 24BA-24BI](#).

[4]. Ibid [ss 24CA-24CL](#).

[5]. Ibid [ss 24DA-24DM](#).

[6]. For a judicial suggestion that negotiated agreements may be necessary after a determination is made see *Ward v Western Australia* [1998] FCA 1478; (1998) 159 ALR 483 at 639.

[7]. NTA [ss 24BB\(a\)](#), [24CB\(a\)](#), [24DB\(a\)](#). Future acts are acts which extinguish native title or are inconsistent with the continued existence, enjoyment or exercise of native title rights and interests: see definitions of 'future act' (NTA [s 233](#)) and 'affects' (NTA [s 227](#)). A future act will be valid if the parties to ILUAs consent to the future act being done. A future act (other than an intermediate period act) that has already been done invalidly may also be validated as a result of an ILUA: NTA [s 24AA\(3\)](#).

[8]. NTA [ss 24BB\(aa\)](#), [24CB\(aa\)](#), [24DB\(aa\)](#). Intermediate period acts are or can be validated only under Division 2A of the NTA.

[9]. Ibid [ss 24BB\(b\)](#), [24CB\(b\)](#), [24DB\(b\)](#).

[10]. Ibid [ss 24BB\(c\)](#), [24CB\(c\)](#), [24DB\(c\)](#).

[11]. Ibid [ss 24BB\(d\)](#), [24CB\(d\)](#), [24DB\(d\)](#).

[12]. Ibid [ss 24BB\(ea\)](#), [24CB\(ea\)](#), [24DB\(ea\)](#).

[13]. Ibid [ss 24BB\(e\)](#), [24CB\(e\)](#).

[14]. Ibid [s 24DC](#).

[15]. Ibid [ss 24BE](#), [24CE](#), [24DE](#).

[16]. Ibid [s 24EA\(3\)](#).

[17]. For body corporate agreements: NTA [s 24BG](#), Native Title (Indigenous Land Use Agreements) Regulations 1998 reg 4. For area agreements: NTA [s 24CG](#), Native Title (Indigenous Land Use Agreements) Regulations 1998 reg 5. For alternative procedure agreements: NTA [s 24DH](#), Native Title (Indigenous Land Use Agreements) Regulations 1998 reg 6.

[18]. NTA [ss 24BH](#), [24CH](#), [24DI](#).

[19]. Ibid [ss 24BI](#), [24CK](#), [24CL](#), [24DL](#).

[\[20\]](#). Ibid s 24DM.

[\[21\]](#). Ibid s 24EA(1).

[\[22\]](#). Ibid s 24EA(2).

[\[23\]](#). Ibid ss 24BF, 24CF, 24DG, 108(1B).

[\[24\]](#). Ibid s 183. Guidelines for who qualifies for financial assistance are available from the Attorney-General's Department.

[\[25\]](#). Ibid s 183(6).

[\[26\]](#). Ibid s 202(4)(c)(iii).

[\[27\]](#). Ibid s 202(4)(f).

[\[28\]](#). Ibid s 202A.

[\[29\]](#). Ibid ss 24CG(3), 24EA(1), 24EB(1)(b), 199C.

[\[30\]](#). Ibid ss 24CG, 202(4)(e).

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