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The Indigenous Land Use Agreement as a Risk Management Tool: An Aboriginal Perspective

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SUMMARY

The Indigenous Land Use mechanism set out in the current Native Title Act seeks to allow the negotiation of binding and comprehensive agreements between native title holders and claimants and other parties over the use of land.

They are a flexible alternative to the often ponderous procedures of the National Native Title Tribunal and the Federal Court. They are not, however, a panacea. The greatest caution must be exercised by all parties concerned if they are to function as they were designed to do. Particular factors which need to be given close scrutiny are:

- *the identity of the most appropriate parties;*
- *the process of decision making within and between the native title parties;*
- *the role of Native Title Representative Bodies;*
- *the degree of understanding of the nature and consequence of the agreement being entered into.*

Unless these issues can be resolved to the satisfaction of the parties these agreements should not be entertained.

INTRODUCTION

The risk that Indigenous Land Use Agreements (ILUAs) seek to manage is the cost, uncertainty and delay of resolving the land use aspirations of Aboriginal interests, other land users including mining

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explorers and developers, and governments. The dispute resolution processes of the *Native Title Act* both in terms of the National Native Title Tribunal procedures and trials of native title determination applications in the Federal Court are seen to be slow, expensive and risky by all parties.

The ILUA has been little used to date but all the potential parties to such agreements routinely express considerable enthusiasm for the future of ILUAs in the native title context. In this paper I hope to discuss the grounds for that perceived enthusiasm and the reasons why I believe some of those expectations may be disappointed.

ILUAs under Subdivs B, C and D of Div 3 of Pt 2 of the *Native Title Act* 1993 (as amended) (NTA) were designed as a flexible mechanism by which native title holders and third parties, including governments, who had some existing or potential land use requirements for an area could reach agreements about those matters in a manner best suited to the particular circumstances of all the parties concerned. They are designed to allow for timely tailored and certain outcomes for all parties either as a final or interim resolution of actual or potential native title claims. The ILUAs represents a substantial elaboration of the Regional Agreement mechanism, particularly that set out in s 21(1)(b), of the 1993 NTA.

THE ILUA

It is useful at this point to provide a brief outline of the nature of the ILUA. The NTA offers three separate forms of ILUA. The essential elements of each of these are that when registered in the Register of ILUAs they have contractual effect between the parties and that all other persons holding native title in the area covered by the Agreement are bound in the same way.[1] If the Agreement deals with a future act or a class of future acts of a particular kind the act will be valid to the extent it effects native title[2] and compensation will be confined to that specified by the Agreement.[3] ILUA's need not be confined to dealing with future acts but can deal with all other matters which maybe related to the native title rights and interests of the holders.[4]

Subdivision B ILUAs or body corporate agreements must be confined to areas where there has been a native title determination or determinations over the whole area and consequently a registered

1 Section 24EA.
2 Section 24EB(2).
3 Section 24EB(4)-(6).
4 Section 24EC.

native title body corporate or registered native title bodies corporate for the whole of the area.[5] All these bodies must be parties to the ILUA as must be the relevant governments if the agreement makes provision for any extinguishment of native title rights and interests.[6] Otherwise any other party including government may be a party.[7] A Native Title Representative Body (NTRB) may be a party but if not, one of the NTRB's in the area must be informed of the intention to enter into the agreement.[8] The content of the agreement may be given for any consideration and subject to any legal conditions including the grant of a freehold estate.[9] The content of the agreement can be very broad.[10]

Subdivision C ILUAs or area agreements must not be made if there are registered native title body corporate or bodies corporate for the whole of the area. The parties must include all of the registered native title bodies corporate and registered native title claimants to any of the area and if none of the former exist either any person who claims native title or any.[11] Any of those in this later group may be parties in any event.[12] If there is provision for extinguishment the relevant government must be a party but may be so in any event together with any other party.[13] If the NTRB is not a party it must be notified[14] and may, under s 202(4)(e), certify the ILUA.[15] The consideration and conditions are the same as with subdivision B ILUAs.[16] Their content is almost identical save for a capacity to deal with Subdiv Q matters which deal with access to non-exclusive pastoral and agricultural leases prior to a determination of native title.[17]

Subdivision D ILUAs or alternative procedure agreements must not provide for extinguishment of any native title rights or interests.[18] There must be at least one registered native title body corporate or one NTRB for the area included as a party.[19] All registered native title bodies corporate, all NTRBs and all relevant governments must be parties.[20] Any registered native title claimant, person who claims to

5 Section 24B(t), BD(i).
6 Section 24ED(2)
7 Section 24ED(3).
8 Section 24ED(4).
9 Section 24BE.
10 Section 24BB, s 24BB(f) in particular.
11 NTRB, s 24C(1).
12 Section 24ED(4).
13 Section 24CD(5) and (6).
14 Section 24CD(7).
15 Section 24CG(3).
16 Section 24CE.
17 Section 24CB(g).
18 Section 24DC.
19 Section 24DD(2).
20 Section 24DE(2) & (B).

hold native title or any other person may be parties.[21] Consideration and conditions are the same as with the Subdiv B and C ILUAs.[22] The content of the Agreement may refer to Subdiv Q matters as can a Subdiv C agreement, but unlike both Subdiv B and C agreements, it may not make reference to changing the effects of s 22B on intermediate period acts.[23] Unlike Subdiv C agreements, Subdiv D agreements need not be certified or authorised.[24]

The sorts of ILUAs that will be the focus of the discussion in this paper will be confined to Subdiv C and D largely because the intent of this paper is to explore the possibilities of reaching agreements which will general be negotiated in circumstances where the achievement of a determination is not, at least immediately, necessary in order to facilitate the development of a functioning agreement.

THE NATIVE TITLE ENVIRONMENT

It seems clear from those native title determinations made to date, in particular, those of Lee J in *Miruwung Gajerrong*[25] and Olney J in *Croker Island*[26] that determinations of native title rights and interests held by the native title holders will be expressed at a high level of generality. Such a level of generality may be found inconclusive and unsatisfactory by most parties and demands a process of further and more specific negotiation between the native title holders and other stakeholders in order that there be any clear understanding of how those determined native title rights and interests will coexist with any other non-native title rights and interests that may be held by third parties. This will be so, even where it is explicit in the determination that the coexistent rights and interests of third parties (for example, those of pastoral lease holders) are found to prevail over those of the native title holder. On a broader level it will be imperative to the long term interests of all parties that any rights and interests held by native title holders are woven into the legislative fabric of the relevant jurisdiction. Such a process will ensure both efficiency of operation of effected existing laws and the speedy legitimisation of such native rights and interests in the eyes of bureaucrats and their customers. In these circumstances a Subdiv B ILUA constitutes an ideal instrument for the realisation of such a purpose.

[21] Section 24DE(4).
[22] Section 24DF.
[23] Section 24BB(ab) & 24CB(ab).
[24] Section 24DH-DL.
[25] *Ward v Western Australia and NT* (1998) 159 ALR 483.
[26] *Yarmirr v Northern Territory* (1998) 156 ALR 370.

In some jurisdictions State government and native title claimants have recognised the enormous importance of this part of the native title process. In these instances, which have to date been confined to those claims whose bona fides cannot be seriously challenged, the parties have sought to pre-empt the process by entering into such negotiations prior to any serious negotiations about consent determinations of native title or the referral of applications to the Federal Court.

In these cases, the parties seek to utilise Subdiv C or D ILUAs. The advantages that such arrangements present are that, against a background of a relatively predictable determination of native title either by consent or as a decision of the Federal Court, the parties can reach agreement that any native title rights and interests which may exist will be exercised subject to the contents of the ILUA. This allows the parties to enter into very wide ranging agreements indeed, using the provisions of s 24CE or s 24DF and s 24EA(3) allow them to forge comprehensive agreements which, where required, can disapply the application of state laws and facilitate the grant of novel forms of tenure which most appropriately reflect the interests of the native title holder and those other parties who use or may seek to use the land for various purposes.

Further at s 24EA(3) the NTA explicitly authorises the passage of additional legislative Acts which re-enforce the obligations of the parties. In the Western Australian context the mechanism that is proposed to be used is a State Agreement Act, originally designed to protect a bargain between the State and major resource developers by ensuring that any future parliament could only absolve itself of its obligations at what was hoped to be a prohibitively high cost. In the native title context the State Agreement Act is being adapted to recognise existing rights in a mutually convenient form rather than create new but highly contingent rights in order to facilitate major investment. Crucially a State Government may modify the operation of state law by using such legislation with a view to allowing the recognition of native title rights and interests of a particular character without having to resort to blanket amendment of the relevant legislation.

None of these agreements have been finalised as yet, despite several years of fairly intense negotiations, however, it can readily be imagined that they offer an attractive alternative to the existing mire for resource developers. In my experience the major focus of government in negotiating these arrangements is that component happily known as the Mining Access Regime. This is where the bargaining is hardest, most complex and most fruitful. Essentially the parties start from the mutual recognition of the existence of the Right

to Negotiate provisions of Subdiv P of the NTA and move forward trying to improve on its procedural mechanisms, marry its requirements into the relevant State legislation, ensure access on reasonable conditions, ensure the preservation of areas of significance and provide an equitable system of compensation provision to the native title holder. Once this has been achieved to the mutual satisfaction of the parties the ILUA may include a statement disapplying the effect of Subdiv P to the area. It may also allow for the disapplication of provisions of relevant state legislation such as that relating to mining and petroleum. I believe that the existence of such initiatives is relevant to the wider concerns of resource developers across Australia.

The sorts of agreements I have described above are currently being developed in the remotest parts of Australia where there are a few affected parties other than potential resource developers and the outcome of the process is to be the vesting of an exclusive tenure of one description or another in the native title holder, if they do not already hold such a tenure. However, it is my view that the sorts of Mining Access Regimes which form part of the proposed agreement and their attendant ILUA, with minimal adaption, could form a practical basis for more narrowly focused ILUAs in areas where native title holders or claimants cannot realistically expect possession of the land to which they lay claim. If this prospect is to be advanced it needs a joint approach to the problem by resource developers and State Governments. Such an approach would in many respects address the issues I now wish to raise that currently confront any resource developer in dealing with the sorts of situations they typically encounter on the ground in areas they seek to explore or exploit.

The mechanism of the ILUA was created largely at the instigation of the National Indigenous Working Group, during the course of the protracted negotiations that lead to the amendment of the original NTA 1993. To a certain extent they were born of the frustration of all parties at the failure of the NTA to produce tangible results for any of the parties. These frustrations were rooted in three essential causes. Firstly, there was a failure of State Governments to engage with and work within the confines of the NTA. Secondly, there were the many legal uncertainties that attached to the operation of the Act in practice, such as the powers of the Registrar to accept applications and the level of "good faith" to demonstrated in negotiations under the old Subdiv B of Div 3 of Pt 2 of the NTA. Thirdly, and partly due to the two earlier factors, many areas of particular importance to resource developers have become plastered with large numbers of mutually hostile overlapping native title claims, with whom, as all

must be accommodated, it is almost impossible to hold a coherent dialogue, let alone reach any form of agreement.

THE UNCERTAINTIES

The question that now needs to be addressed is how the ILUA mechanism can assist in the resolution of these difficulties. It should be noted at the outset that it is now clear that the new Registration Test under s 190A will not deliver the cull of overlapping claims that many, including many indigenous parties, expected. By the simple procedure of avoiding any overlapping claimants, overlapping claims can maintain their registration and continue to complicate the Right to Negotiate process.

In my experience the most profound frustrations of governments and miners who deal with native title claimants relate to situations where there are one or more of the following factors at play:

(a) mutually hostile overlapping claimants;
(b) no readily identifiable or reliable representative of a claimant group;
(c) unreal expectations of reasonable outcomes or levels of appropriate compensations or;
(d) an inability or refusal to properly participate in the native title process.

It is my contention that the ILUA mechanism as currently structured, and seen in the context of the existing NTA, offers little prospect of relieving those frustrations. In those areas where most, if not all, of the above factors do not exist the use of an ILUA of one form or another is probably, at least in the medium term, by far the best means of resolving differences and developing a mutually acceptable partnership in land use. But these are precisely the areas that probably least need the ILUA mechanism because they would be likely to reach much the same result within the prescribed timeframes by simply utilising the mediation and negotiation procedures set out elsewhere in the NTA. The successful utilisation of the ILUA process is dependent on the resolution of the four frustrations set out above, but the ILUA instrument cannot solve these problems of itself.

It is important to have some understanding of the genesis of the current impasse which seems to exist in some areas of the country. My involvement has been largely confined to the Central Desert and the Goldfields of Western Australia and my remarks may be coloured by that partial experience but, I believe, they may have a more general relevance.

Contrary to the general view of the NTA it does not and could never have intended to comprehensively address the issue of the larger scale dispossession of Aboriginal people from their land over the last several hundred years. Rather it recognises and legitimises that dispossession while simultaneously recognising the continued existence of those rights and interests which escaped extinguishment. The land where native title continues to exist is that land which was either surplus to requirements or the uses to which it were put did not require exclusive possession. Where such land existed and its owners, or their successors as sanctioned in accordance with traditional law, continued their connection with that land by practising their traditional law and customs, their rights and interests are recognised by the common law as being the native title holders.

IDENTIFYING THE PARTIES

Despite the astonishing resilience of Aboriginal cultural and family structures, the difficulties of maintaining the requisite connection with the land, in areas where it was in use by others ranging from farmers, to pastoralists to miners, was, and is, immense. Nevertheless, in vast areas across Australia from the cities to the desert they have managed to keep those attachments alive, visceral and resilient, but not without cost and damage which can lead to confusion, resentment, and internecine rivalries. The modern manifestation of this process of dispossession and its consequent cultural erosion is seen in the phenomenon on overlapping claims. I should qualify that last sentence by saying that lineal boundaries are utterly foreign to Aboriginal culture, and just as one language blended into the next, there were no certain frontiers between self-contained nuclear groups in traditional Aboriginal society. Therefore the precise parameters demanded by the NTA will always be problematic, and almost of necessity, arbitrary. Similarly, given the complexity of the systems of land tenure that existed in traditional Aboriginal society, particularly in desert regions, the precisely specified, objectively determinable claimant group will always remain problematic and contribute to the confusion and frustration of all parties with the processes of the NTA.

Nevertheless, overlapping claims are recognised as a major problem which arise from confusion and inadequate understanding of the NTA process by all parties, not least being the various parties to the overlapping claims. I do not accept that the simple amalgamation of a given constellation of such claims into a single claim is the

incontrovertible good that it is often portrayed to be. Superficially such a solution may appear an ideal prerequisite to the negotiation of an ILUA but while it appears to resolve most of the problems faced by those who have to cope with the difficulties of dealing with overlapping claimants mere amalgamation may render the agreement extremely fragile and unstable. Unless a third party can be satisfied that the amalgamation has a basis in traditional law and that all of the members of the claimant group have a requisite connection to the claimed area, the negotiation of an ILUA with such a group would be most unwise. Nothing short of a independent and comprehensive anthropological report endorsing the amalgamation would be sufficient.

In this sense the interests of third parties and the responsibilities of NTRBs begin to converge. While an ILUA will ensure the validity of acts done under its terms it does not insulate the parties from the consequences of instability and division which will ensue if the agreement has been made with some whom have no entitlement. Similarly those who have been excluded may be bound by the agreement and forced to look to the native title parties for redress or the NTRB for its possibly negligent certification but the long-term consequences cannot be avoided. Similarly, if the NTRB is aware of exclusion of claimants or inadequate authorisation it cannot certify or when notified will be bound to raise objection to any proposed registration of the ILUA.

In my view the more painstaking path of identifying discrete areas with overlapping membership will prove far more fruitful. In this manner significant areas may be covered by a single ILUA or a series of identical and interrelated ILUAs which ensure that the terms and conditions can be negotiated with the appropriate traditional owners and the benefits of any relevant compensation targeted more precisely and effectively. Such a practice also allows the greatest level of effective accommodation of individuals or groups of native title holders who may have been overlooked in the process of negotiation and registration.

There are, no doubt, instances where native title claims are opportunistic and mercenary in motivation but they are rarely baseless. The fault will usually lie in the inappropriate extension of boundaries which may be equally motivated by a misguided view of seniority and the demands of reciprocity. Such claims can generate a burning resentment, not so much born of an objection to the appropriation of the benefits of the right to negotiate and the consequent flow of compensation, but the violation of the rules of who has traditional authority to speak for country.

In practice it can prove extraordinarily difficult to unravel a series of overlapping claims for the purpose of reaching an agreement between the various parties because of complexity of the levels of motivations for their initial lodgment. Objectively, some claims are lodged and maintained in the face of reasonable proposals for rationalisation on grounds which are largely illogical from a western legal and tactical perspective. If such circumstances the resolution of these competing and mutually hostile claims may be only resolved by litigation in the Federal Court.

There are, however, means by which such apparently intractable problems can be overcome. Those means require the involvement of an impartial and experienced broker, as between the competing claimants. The NTA envisages that this role is the domain of the relevant NTRB.[27] To date the capacity of NTRBs to assume this crucial function has been hampered by both the circumstances of their own elevation to this role and the lack of resources and experienced staff. Nevertheless, I believe that it is essential that these bodies be involved in any process which may lead to the negotiation and registration of an ILUA. When used in combination with the mediation skills of the National Native Title Tribunal they present the best chance of realising the potential of the ILUA mechanism. Unlike the National Native Title Tribunal they owe no allegiance but to the claimants and to the NTA. I will make some comments below concerning the essential conditions that need to be in place before this promise can be realised.

It is inherent in any attempt to engineer an ILUA under Subdivs C or D of the NTA that it may not be necessary for registered or unregistered native title claimants to proceed to a determination of native title. It may, in practice, prove wise to do so in order to protect the claimants from further hostile claims or to deal with matters that are left unaddressed by the ILUA, but it is not mandatory. This fact should not, however, be seen as an encouragement for the parties to uncritically accept the existing overlapping status quo. To prematurely enshrine the rights and interests of a party with dubious claims in the terms of an ILUA is to invite future dissension and uncertainty. Equally in practice, to obtain registration on the Registrar of ILUA will require the involvement of all currently interested parties. Before an agreement is entered into every avenue of resolution of intra-indigenous disputes must be explored with the assistance of both the NTRB and the National Native Title Tribunal. While the uncritical amalgamation of claims as a means of such resolution is injudicious, it presents an alternative along with the delineation of discrete non-overlapping claims with overlapping memberships as another. A further, less palatable, option may be to

[27] Sections 202(6) & 203BE(3).

leave the claims as they are, and express the ILUA as excluding any party that is unsuccessful in later determination litigation. In this way the third party miner or government may not know the final native title parties to the agreement until the resolution of the litigation but they will know the terms of land use access in any event. The difficulty, of course, is that the non-native title parties may still be required to become embroiled in the litigation process.

The situation in relation to overlapping claims is not unrelentingly gloomy. Much of the current predicament was precipitated by the chaotic commencement of the operation of the NTA in 1994 and 1995. In that period there was both great expectation in the Aboriginal community and a vacuum of co-ordinated resources. NTRBs did not exist or were non-functional in may parts of the country and ATSIC responded to the clamour for action by handing out money to individual claimant groups, without great scrutiny, on an ad hoc basis. By the time the situation began to stabilise the seeds of our current discontent had been sown and taken root. Since then all the players have slowly come to terms with the best means of dealing with the realities of the native title era and commenced to creatively engage with it. Some progress has been made in reducing the number of overlapping claims and that trend should continue. But statistical reduction can never be seen as an end in itself.

REPRESENTATION AND DECISION MAKING

Any potential agreement which is to form the basis of a registerable ILUA must address the issue of the representation and decision making process of the native title parties. There must be clear lines of communication between the native title parties and other parties and there must be a clear process of decision making between the various native title parties.

It will not generally be appropriate for an NTRB to act as the decision-maker although they may be the best body to act on behalf of the parties and act as a clearing house for communication and logistical matters. There needs to be clear understanding of the communal nature of native title and the need for consultative mechanisms which are as inclusive and comprehensive as possible. It is not necessary to make explicit what process of indigenous decision making is to be adopted. It should as closely resemble the traditional process as is consistent with the dynamics of interaction between the different indigenous parties to the ILUA. Where there are registered native title bodies corporate or entities created for the purpose of entering ILUAs by claimants these issues will be addressed in their

constitutions or rules. Where there is a need for the various entities representing native title parties to reach mutual agreement it may be appropriate to specify particular processes for the resolution of matters that cannot be reached by consensus.

It cannot be forgotten that the reaching of decisions about land use amongst communal owners of land or groups of communal owners of land is always a complex matter. It involves issues which frequently go well beyond the objective consequences of the immediate land use proposal. Any time limits to be set for the making of such decisions need to be sensitive to these factors. The focus of the non-native title parties should be on the certainty of reaching an outcome in the process not the means of reaching it. The focus of the native title parties, where there is more than one, must be on identifying and refining the traditional process of decision making they share in a manner that will facilitate consensual decisions in their best interests. The very process of determining the means of decision-making they agree to adopt may have the effect of engendering recognition of the mutual and complimentary interests they share. This recognition is essential to the long-term prospects of the success of the ILUA. The more authentic the process the less the likelihood of subsequent dissension and dispute. Whatever the legal effect of an ILUA it is in the interests of all parties that the process of decision making be as harmonious as possible and the decision be as widely endorsed as is practicable.

Depending on the nature of the agreement it may be prudent to consider the inclusion of non-native title holding Aboriginal persons as parties to the agreement. This will of course require the consent of the native title parties, but if the agreement contemplates projects of any magnitude which are likely to have significant effects upon, or attract substantial benefits to, the wider community, it is a matter worth closely considering.

There also needs to be a clear understanding on the part of third parties that the spokespersons for many native title parties may not be the same people who are most significant in the process of decision making. It is often the older, non-English speaking people who will make the final decisions based on information provided to them by such spokespersons. Third parties meddle in this process at their peril.

THE ROLE OF NTRBs

Whatever the specific requirements for the involvement of NTRBs in the ILUA process may be, ranging from notification to certification, their practical involvement is critical to the long-term success of these arrangements. The amended NTA introduces a fundamental change in the nature of the NTRB which may lead to a transformation of the role they play in the native title process. Under the old NTA an NTRB was required to be a body that was broadly representative of Aboriginal people and Torres Strait Islanders in the area.[28] Under the amended NTA the equivalent sections requires the Minister to be satisfied that an NTRB will satisfactorily represent native title holders or possible native title holders in the area [29] and will be able to consult effectively with Aboriginal and Torres Strait Islanders who live in the area.[30] This latter provision makes the distinction between native title holders and those Aboriginal persons or Torres Strait Islanders who do not hold or claim to hold native title but are resident in the area.

The apparent purpose for this significant change is to move the NTRB away from the broad community/political group model towards an organisation squarely focused on the delivery of services to a particular client base. The wisdom of this move is open to debate. In the course of the so-called "re-recognition process", under Div II of Pt 2 of the NTA, which the Minister is currently required to complete by 30 October 1999, he will no doubt impose this new focus and its attendant organisational priorities on those existing NTRBs who pass muster and any new bodies he may recognise.

The certification functions of NTRBs in relation to ILUAs are onerous.[31] They require that the body be satisfied that all reasonable efforts have been made to identify all persons who hold native title and that all these persons have authorised the claim. The notion of authority is addressed in the NTA at s 251A.

NTRBs may certify Subdiv C ILUAs although there is no provision to certify a Subdiv D ILUA. Even in the case of Subdiv C ILUAs it is not mandatory. However, given the local knowledge and expertise that may reside in the local NTRB, the opportunity to utilise the resources by mining companies seeking to ensure that all relevant parties have been included and have given informed consent, where formal certification is not sought, should not be lightly overlooked. Of course, if the relevant NTRB is not possessed of this local

[28] Section 202(3)(a).
[29] Section 203AD(1)(a).
[30] Section 203AD(1)(b).
[31] Section 203BE(5).

knowledge or expertise or is in conflict with the relevant claimants it can only serve as a hindrance to successful outcomes.

The consequences of entering into an ILUA are significant and long term and the statutory framework from which they emerge is complex. It is critical that all parties enter into the agreement with a clear understanding of their rights and responsibilities under the agreement. An NTRB can play a vital role in explaining these consequences to the native title parties.

It is trite to say that there is a prevalent view that many NTRBs have proven dysfunctional to date. There is undoubtedly justification for this view. I believe that this situation has developed from three factors. Firstly, many bodies were never appropriate vehicles for NTRB status because of their institutional histories. Secondly, even where they were appropriately selected they have, like all other parties in the process, found it difficult to understand and fulfil their roles in an environment of legislative and judicial uncertainty. Thirdly, and mostly importantly, they have been grossly underfunded.

The recognition process and the stabilising legislative framework should address the first two factors satisfactorily but I fear that there is little will in the Commonwealth Government to addressing the last. I hasten to add that I, as an employee of an NTRB, am not engaging in special pleading. I am quite open to any proposal to change the system so long as it ensures that Aboriginal people continue to have access to the resources reasonably necessary for them to participate in the processes established by the NTA. However, after exhaustive consideration the Commonwealth Government has maintained and enhanced the roles of NTRB as well as exposing them to the highest level of organisational scrutiny and accountability. I believe that all governments and most other experienced parties would strongly agree that the role of the NTRB is pivotal to success of the NTA.

Even where there is no direct involvement by an NTRB in an ILUA either as a party or a certifying body, it will remain, in the absence of alternative funding provided by another party to the ILUA or funds generated by some enterprise sanctioned by the agreement, the only sources of resources that will enable the native title parties to properly perform their obligations under the ILUA. In practice this ensures that, other than in exceptional circumstances, the NTRB will have a significant involvement in the medium to long term.

A recent report commissioned by ATSIC and undertaken by a major legal firm and a large accounting firm, which to date has not been formally released, states categorically that most existing NTRBs are not performing to an acceptable standard both from the point of

view of Aboriginal people and the broader community. It attributes much of this failure to the gross underfunding of NTRBs. On its modelling, which does not take full account of the expanded obligations of NTRBs to come into effect subsequent to the re-recognition process, ATSIC needs to double the amount of funding it currently provides to NTRBs globally if they are to be able to reach a satisfactory level of performance. ATSIC has indicated it will struggle to maintain existing funding let alone find the resources to reach the level the report deems necessary. The point is that the existence of dysfunctional NTRBs will only serve to aggravate the existing situation and make the entire NTA process, and particularly the delicate and difficult negotiations which must found an ILUA all the more difficult, bewildering and frustrating. All parties need to ensure that this sort of scenario is avoided and in the current circumstances the best place to start is to make it clear to the Commonwealth Government that they must fund the statutory process it has created to a workable level.

EXPECTATIONS

The general dispossession of Aboriginal people and the gradual realisation that the NTA would only address that issue in very limited circumstances has caused great consternation in many Aboriginal communities across Australia.

However, in my experience, limited as it may be, most native title claimants and potential ILUA parties have begun to understand the limits of the rights they have been reluctantly granted. They will of course, and should be encouraged to do so, seek to maximise any advantage to them in any particular circumstance. The ILUA is designed to regulate that process of bargaining, thus it is essential that the design of the mechanism is understood precisely by all parties. Most of the Aboriginal people I represent have little prospect of benefiting from the third party use of their land other than through mining and they know it. Many are enthusiastic proponents of exploration and mining activities. They require control over access to the land, the capacity to exclude mining or exploration from areas of significance and genuine participation in the flow of benefits from the project.

Many miners complain that it is unreasonable of traditional owners to expect payment for access to areas for exploration, particularly low level exploration. This is understandable but ignores the nature of traditional land holding systems and the centrality of reciprocity to that system. It also ignores the tenuous grip Aboriginal people have

had on any capacity to control access to their land. Once an ILUA has been negotiated which gives native title parties an unprecedented security over their land there may be room for change. On the other hand, where agreements are conjunctive, in the sense that they address the issue of access for both exploration and mining finally, at an earlier stage, the added security given to the miner may well be worth the frequently minimal price.

CONCLUSION

The ILUA is an untried tool. Properly negotiated it will work effectively and predictably in the interests of all the parties to it. The dilemma confronting potential parties to such an agreement, is that in order for a sustainable ILUA to be created they must address and resolve the intractable problems that have confronted them in the past. To enter an ILUA without properly addressing these issues risks perpetuating current problems and building instability into the system. Ultimately ILUAs are a development to be cautiously embraced.

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