

Land, Rights, Laws: Issues of Native Title



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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

Indigenous Land Use Agreements (ILUAs) are often characterised as a positive aspect of the 1998 amendment process for native title holders. As ILUAs are being promoted and negotiated across the country, Lee Godden and Shaunnagh Dorsett examine some of the fundamental contractual principles that Indigenous groups should bear in mind. This paper examines the ILUA provisions and effects of Registration and discusses the ambiguity of the contractual status of ILUAs under this process. The authors point to intergenerational agreements and contractual remedies as the key issues requiring careful consideration by parties contemplating entering into ILUAs under the Native Title Act 1993 (Cth).

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The Contractual Status of Indigenous Land Use Agreements

Lee Godden and Shaunnagh Dorsett*

The 1998 amendments to the *Native Title Act 1993* (Cth) (NTA) saw the introduction of Indigenous Land Use Agreements (ILUAs) as a result of lobbying by stakeholders. Many parties (both Indigenous and non-Indigenous) recognise that mutually beneficial outcomes can result from a negotiated approach to native title. However, until now, one problem has been to ensure that the negotiations result in certainty for all parties. The ILUA provisions seek to give that certainty by providing that ILUAs are to take effect as contracts.

The general approach taken under the NTA is to regulate the procedural aspects of finalising and registering an ILUA, but to leave the content of the agreement and subsequent relationship of the parties to be decided by the parties themselves. It is obviously important

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that the parties themselves determine the content of the ILUA. Each agreement can then be tailored to the needs of the parties. In fact, ILUAs are already being used in a wide array of situations. ILUAs have the potential to be valuable tools in the management of land and water across many parts of Australia and to allow Indigenous peoples the opportunity to participate more fully in the protection and management of these areas. Given the contractual status of ILUAs, however, it is also important that parties take into account the applicability of general contractual principles to their agreement, carefully consider the nature of long term relationships between parties and make some provision for regulating relationships between the parties in the future. In addition, while much attention is directed to the initial formation and entry into agreements, parties also need to consider how best to deal with any conflict which may arise in the actual implementation of the agreements. In particular, Indigenous groups should recognise that the level of certainty offered by ILUAs may be higher for government parties and developers than for native title holders.

The ILUA provisions

One of the prime functions of ILUAs is the authorisation of future acts. ILUAs are particularly intended to provide security to parties who enter into agreements with native title holders relating to the doing of future acts, whether or not native title has yet been determined. Hence, the majority of the substantive statutory provisions dealing with ILUAs are located within the future acts regime of the NTA (Part 2, Division 3). Since the amendments, the future acts regime splits future acts into either valid or invalid acts, replacing the old designation of permissible and impermissible future acts. Any future act will only be valid if it is covered by one of the subdivisions of Division 3 (subdivisions B-P).¹ In particular, the Act provides that a future act will be valid if the parties to an ILUA consent to that act being done.²

Subdivisions B-D outline the various types of ILUAs, their legal effect and the procedural requirements that must be complied with in formulating an ILUA. There are three types of agreements contemplated under the Act:

- Body Corporate Agreements;
- Area Agreements; and
- Alternative Procedure Agreements.

Each differs on key issues: subject matter, parties, ³ registration procedures, and notification requirements. An excellent overview of each type of agreement is provided by Diane Smithin her 1998 CAEPR Discussion Paper on ILUAs.⁴ There are also some common elements to the types of agreements, however, in particular the provisions on contractual status and registration in the Register of Indigenous Land Use Agreements. The National Native Title Tribunal has issued a guide to ILUAs and has developed application forms to assist in the registration of various types of agreements. In addition, the Tribunal has placed examples of agreements on their internet site. While these provide useful examples of issues that should be taken into account when formulating an ILUA, care should be taken to modify these to take into account the

individual circumstances of each agreement.

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Effects of registration

While it is widely understood that ILUAs are contracts, the exact scope of the interaction of contractual principles and the statutory regime of the amended NTA is unclear. The NTA provides minimal guidance on important, practical aspects of the interaction.

Section 24 EA(1) of the NTA provides for the registration of ILUAs in the Register of Indigenous Land Use Agreements. It is this section which provides that ILUAs are to take effect as a contract, yet it is uncertain, given the unclear drafting of the provision, exactly what is the relationship between registration and the conferral of contractual status. It is worth setting out this section in full, as it is one of the key operative sections in the ILUA provisions. It provides that:

1. While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:
 - a. it were a contract among the parties to the agreement; and
 - b. all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

There are two possible interpretations of this section. First, it may provide that contractual status of agreements is conferred only upon registration. In this case, the phrase ‘apart from any effect [the agreement] might otherwise have’ is highly ambiguous. On the other hand, the phrase could be interpreted as confirming that on contractual status being conferred by s.24EA, common law contractual principles will then apply generally to the agreement.

Alternatively, the section may also be construed as simply acknowledging that a contract has been entered into at common law prior to registration. In this instance, registration merely confers by means of the NTA, certain characteristics on a class of contracts to be known as ILUAs.⁵

Thus, registration transforms a contract into an ILUA.⁶ The section, then, confirms that on registration certain consequences follow, most notably that in particular circumstances native title holders who are not parties to the agreement are bound by it. Therefore, the phrase ‘apart from any effect [the agreement] might otherwise have’ merely confirms the applicability of general contractual principles to the agreement. Further, the provisions relating to removal of the ILUA from the Register of Land Use Agreements could be used in order to strengthen this interpretation of s.24EA.⁷

The possibility of competing interpretations of s.24EA means that it is unclear exactly when an ILUA gains contractual effect. There is also an issue about agreements, which may not satisfy the common law test for formation of a contract. In such circumstances, presumably contractual remedies will only be available where registration confers the status of a contract upon the agreement. The answers to these questions have practical implications. For

example, if an ILUA only has contractual status on registration, what is the effect of removal of the agreement from the Register? Does it continue to have contractual force, or is that contractual force lost on deregistration?

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Some commentators argue that ILUAs lose their contractual status following de-registration.⁸

This would seem a commonsense approach in the majority of cases, given that there are only three grounds on which an ILUA can be removed: expiry, agreement, fraud/duress/undue influence (discussed below). In each case, presumably both parties no longer wish to be bound to the agreement. Against this argument, however, it should be noted that the section does provide that on removal from the Register 'the agreement will cease to have effect under this Act'. The words 'this Act' would seem to leave open the possibility that the contract may continue to exist at common law and that parties can enforce subsisting rights under the contract.

Consequences of registration

Several important consequences follow from registration. First, not only are the parties to the agreement bound by it, but also any other potential native title holder who may not have been identified at the time at which the agreement was made.⁹

This section overcomes perceived difficulties with agreements made under s.21 of the original, unamended NTA.

Section 21 made general provision for native title holders to enter into agreements with government by means of which they could surrender their native title rights and interests or authorise the doing of a future act that would affect their native title. Difficulties with s.21, however, arose when applied in areas where native title had not yet been determined. Agreements made under that section only applied to the contracting parties, leaving the possibility that future acts approved under the agreement could still be invalid as regards other unknown or disputing native title holders.¹⁰

Following the amendments to the NTA (with respect to both area agreements and alternative procedure agreements) anyone claiming to hold native title may object to the registration of the ILUA.¹¹ If they fail to object, and the ILUA is registered, the effect of s.24EA(1)(b) will be to bind them to the terms of the agreement, even if they were not parties to that agreement.¹² If they maintain their objection, the agreement cannot be registered. The aim of this section is to ensure the inclusion of all native title rights and interests in the area, providing certainty for the non-Indigenous parties to the agreement that the right people have been identified and reducing the possibility of dispute.

One issue that arises with respect to this section is that of the changing or dynamic nature of Indigenous communities. The NTA contemplates that ILUAs may be entered into for a specific time period. This is clear from the deregistration provisions which provide that the Registrar must remove the details of an ILUA from the Register of Indigenous Land Use Agreements on its expiry.¹³ It is not mandatory that they be made with respect to a specific time period, however, and in many cases ILUAs may not be. This raises issues of what may be called inter-generational equity. It is, of course, the communal group that is bound to the agreement, not individual members of the group. Hence, those who have not yet been born, and those who are minors at the time the agreement is entered into, will be bound as

members of the community by virtue of s.24EA(1)(b). This is an important consideration for communities contemplating entering an ILUA. Communities change over time, and an agreement entered into now may not reflect the views of the community in ten years time. For this reason, contracts may need to include expiry dates, or provisions for review or

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renegotiation of some terms in ILUAs to ensure that the agreement continues to reflect the wishes of the current native title holders.

Further, the ILUA provisions make no reference to the manner in which compensation payments or other money received under the ILUA are to be held. While under current native title arbitration arrangements provision is made for payments to be held on trust until claimants are proven to be holders,¹⁴ the ILUA provisions are silent on this matter. This raises issues not only as to the holding of monies pending determination of native title, but also questions as to the best manner by which communities can ensure fair distribution over time, in order that future members of the community who are bound by the ILUA also receive a share of any payments.

The second effect of registration is that future acts which are covered by an ILUA will be valid future acts as long as they comply with s.24EB or 24EBA. In order to comply with s.24EB, the ILUA must include a statement that the parties consent to the doing of the future act, that in any case in which that future act would normally require parties to go through the right to negotiate, that the right to negotiate is not intended to apply. Finally, the section also requires that if the future act contemplated is a surrender of native title, that the agreement include a statement to that effect. Section 24EBA allows for the validation of an invalid future act by way of an ILUA. As with other future acts, the non-extinguishment principle applies, with the exception of the situation where the act is the surrender of native title.¹⁵

Who is bound by an ILUA?

While s.24EA(1)(b) operates to bind all native title holders and potential native holders, regardless of whether they were identified at the time the agreement was entered into, there is no similar certainty for Indigenous groups with respect to developers or other grantee parties, such as the holders of pastoral leases or other interests. The Act makes no provision for the situation in which grantee parties change.¹⁶ For example, holders of mining or pastoral interests could assign or transfer their interests to a third party, or the interests could be taken over by mortgagees going into possession. In order to ensure the continued delivery of benefits over time, Indigenous parties may need to make sure that sufficient safeguards regarding possible third parties are in place when negotiating the terms of an ILUA. Further, at a very practical level, ensuring that persons taking over the rights and obligations of an ILUA are acceptable to Indigenous people is crucial to maintaining viable relationships between parties at the local level. In the absence of a provision such as 24EA(1)(b), third parties are simply not bound by the agreement under the common law doctrine of privity.¹⁷

Therefore, ILUAs may need, for example, to specify that any holder of a mining tenement ensure that potential assignees also agree to be bound by the ILUA prior to the assignment taking place. A term of this type is to be found in the common templates for the development of ILUAs, which are available from the Native Title Tribunal. Mortgagees exercising a power of sale, however, may cause particular problems and this should be kept in mind.

One useful mechanism may be for the government to make the agreement a condition of the granting of the interest, be it pastoral lease or mining tenement. Of course this can only be

done in those situations where the interest has not yet been granted and the government is willing. In Queensland, for example, both the Land Act 1994 (Qld) and the Mineral Resources Act 1989 (Qld) give the Minister wide powers to place conditions on the granting

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of interests. Each Act provides penalties for breach of condition, from monetary fines to forfeiting of the interest. A clause in an agreement which provides for specified damages or other penalty where the original lessee seeks to assign an interest but does not ensure that the potential assignee is acceptable to native title holders who are bound under the agreement may prove effective in safeguarding Indigenous peoples' interests. Template agreements available from the Native Title Tribunal provide a useful guide for developing a term of this nature.¹⁸ It may, however, be appropriate to specify the consequences of breach in the ILUA itself. In this instance, termination for breach may not be in the interests of any party.¹⁹ A more appropriate approach may be to provide an agreed damages clause under which damages could be paid to the native title holders as a consequence of breach by developers or others operating with the authority of the developer.

Status of future acts upon de-registration of an ILUA

One final question to consider in the context of the effect of registration is that of the status of any future act done under the terms of an ILUA if for any reason that ILUA ceases to have effect as a contract. It is unclear whether once a future act has been validated, it simply remains valid until the act comes to an end, for example the expiry of a mining tenement, regardless of whether the ILUA continues to be registered for the entire period. One reason for this lack of clarity is that, as mentioned earlier, the ILUA provisions focus on the point of entry into agreements and their registration. The provisions make little reference to anything that may occur with respect to that act in the future. A literal reading of s.24EB(1) and (2) may suggest that once validated, the act remains valid regardless of the status of the ILUA. If this is so, it has significant consequences for the Indigenous parties. If there is a once and for all time validation of a future act, that operates irrespective of whether any benefits are flowing to Indigenous groups under an ILUA, then Indigenous parties need to bear this in mind during negotiations. One possible exception may be where the court finds that the agreement is void at its inception (*ab initio*) because of fraud, duress or undue influence. In this case, presumably the native title parties never actually gave consent to the future act, as required under s.24EB. This may be particularly important where native title was surrendered as part of the agreement.

What is the extent of contractual remedies available to parties under an ILUA?

In discussing the possible range of actions that may be taken by parties to enforce an ILUA it is assumed that s.24EA preserves the operation of the common law to some extent by the phrase 'apart from any effect which [the agreement] would have other than...'. The question that then arises is whether the full range of contractual principles and means of taking action to obtain a remedy, applies to ILUAs? This issue has significant practical implications for the negotiation, pre-contractual phase of ILUAs, as well as for the post-registration implementation phase. The post registration period refers to the time during which the parties to the agreement must fulfil their obligations incurred under the agreement. During this phase, questions regarding the failure to meet obligations (breach), and the availability of the right to terminate or end the contract may arise.

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The pre-contractual phase

One important issue is the type and extent of contractual remedies available to parties in the pre-agreement phase of negotiations. The range of remedies depends on the interpretation to be given to s.24EA. The preferred interpretation is that s.24EA preserves the operation of the common law and hence the entire range of contractual remedies.

Problematically, s.199C(2) and (3) provide a limited range of circumstances in which the Federal Court can order the removal of an ILUA from the Register. This raises the possibility that parties are limited to the specific actions listed in that section: namely fraud, duress and undue influence. This would mean that s.199C(2) and (3) act as a qualification to the interpretation of s.24EA. Generally speaking, however, courts are most reluctant to exclude the operation of the common law without express statutory words to that effect.

The grounds in s.199C(2) and (3) for removal of the ILUA from the register are actions which typically operate for the protection of parties in a pre-contractual situation – especially where one party is at risk of being ‘exploited’ or otherwise dealt with unfairly.²⁰ Fraud, duress and undue influence operate within a relatively confined ambit. Consequently, remedies may only be available for a party to seek deregistration of an ILUA in somewhat extreme circumstances. This approach is consistent with the view that ILUAs have a prime function in providing ‘certainty’. For example, in a finding of duress there needs to be a threat of violence or other ‘illegitimate pressure’.²¹ Moreover it is unclear whether any action based on a finding of fraud must meet the common law test or that of equitable fraud. If the standard is that of equitable fraud it may constitute a wider basis for seeking to have an agreement de-registered than the restrictive, ‘deliberate or reckless wrongdoing’, required at common law.²²

Section 199C is silent as to whether a party can take action on other grounds, such as unconscionability. In Australian law, unconscionability is both an informing principle of a number of doctrines, and is itself a substantive doctrine. In many instances, unconscionability would offer a more expansive basis for seeking to have an agreement set aside than grounds prescribed under s.199C. The best-known, and in the present circumstances, potentially most useful part of unconscionability, is the Amadio-type situation, where the inequalities of bargaining position between parties to a contract are explicitly recognised. Specifically, the courts may provide a remedy:

whenever one party by reason of some condition or circumstance is placed at a special disadvantage vis a vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created...²³

Many Indigenous groups may be placed at ‘special disadvantage’ vis a vis other parties to an ILUA in terms of economic power and other resources.²⁴

Other traditional contractual principles such as mistake and misrepresentation could also be useful for parties seeking relief in respect of situations that arise in the pre-agreement phase. In addition, the application of contractual doctrines that require parties to negotiate in good faith is unclear.²⁵ If pre-contractual remedies are not confined to those listed in s.199C, then potentially a greater degree of protection is provided for Indigenous groups in the range of relief that is available.

Breach and termination of an ILUA

The NTA is largely silent about the consequences that will follow where one or more parties to an ILUA cannot fulfil the obligations that comprise the terms of the agreement. Generally speaking, basic contractual principles relating to breach of terms of a contract, and any consequent rights to terminate/end the agreement, apply to ILUAs.²⁶ Breach is the term for the situation where one or more parties to the agreement cannot or will not carry out their obligations under the agreement.²⁷ The most common remedies that a court will order for breach of agreement are damages and termination. As a preliminary measure, parties also may seek an injunction to prevent further breaches. Again, it is suggested that courts would be most reluctant to exclude these avenues for parties to take action in the absence of an express statutory direction or an express term of an agreement to that effect. Some potential issues with regard to breach and termination of agreements are considered below.

Breach

The issues surrounding a determination that breach has occurred are complex and must be related to the specific agreement and factual circumstances in question. Rather than attempt to provide an exhaustive account, a hypothetical example is used to clarify some issues in relation to breach. For example, where an ILUA is in place and registered, what if one party fails to make specified employment positions available where those positions constitute part of the benefits (consideration) that native title holders have received in return for the validation of the granting of a mining tenement? In contract law, dependent upon on a finding of fact, such a failure to carry out the agreed action by one party constitutes a breach of contract. Generally the remedy that a party can obtain for breach of a contractual term is one of damages.²⁸ Damages are monetary compensation that places the non-breaching party in the position they would have been if the contractual term had been performed by the other party. In a range of situations this compensation may be inadequate for Indigenous groups.²⁹ In the example above, the provision of employment opportunities may be more important to the native title holders than any monetary damages. In certain circumstances it may also be possible for the party not in breach to seek a court order for specific performance of the agreement.³⁰ Thus, the ability to take action to enforce the terms of agreement or to seek compensation for breach is central to the enforcement provisions of common law contracts. It is also central to ensuring that native title holders/Indigenous groups are able to participate fully in the management of land and waters with which they have a special affinity. While the availability of legal action for breach of contract is certainly possible (where ILUAs are deemed to have full contractual effect), many problems may still exist at a practical level in obtaining a remedy. Common difficulties are the cost and delay in obtaining relief.

When developing an ILUA, therefore, it is important to consider in some detail the types of actions by parties that may render a party in breach of their obligations under the agreement. Where possible terms should be developed which put in place measures to avoid potential breaches. Further, as a form of ‘risk planning’, it is important to ensure that the consequence of a breach for the breaching party is clearly stated. Another possibility is the inclusion of dispute resolution or arbitration clauses as part of the agreement. This approach may seem to be negative in that it focuses on what ‘might go wrong’. On the other, hand it can also be seen to deliver a certain power to parties to manage their economic, social and cultural relationships at a local level and to plan for contingencies into the future.

Termination refers to the right of a party to end the contract as the result of the failure of other parties to meet fundamental obligations under the agreement. In some cases, contracts will specify that termination is available where certain circumstances arise. Even where the contract does not specifically provide a right of termination, it is available in any case at common law. The right to terminate is an important means of ensuring compliance with the rights and obligations of parties to an agreement. Moreover, it is an important bargaining tool in ensuring that native title holders receive the benefits they are entitled to under any agreement. If the statutory ILUA scheme under the NTA is held to preclude the right to terminate or a particular agreement contains a 'no termination' clause, it could adversely affect the relative bargaining position of Indigenous groups. Obviously, before Indigenous groups surrender any rights at common law to terminate agreements, careful consideration should be given to the potential effect of such surrender. An example can clarify some of the issues.

Consider an agreement, which provides that the non-native title party will comply with procedures to protect sensitive cultural heritage places within the grantee's area of operation, such as a mining site. The agreement also contains a clause stating that no party may terminate the agreement. Over time, perhaps due to financial pressures, the grantee is no longer able to comply with these provisions and sensitive sites are despoiled. Arguably in this situation, since the grantee is in breach of fundamental obligations under the agreement, a right to terminate the agreement by the Indigenous party would arise but for the operation of the 'no termination' clause. While the Indigenous group could still seek monetary compensation, such compensation may be inadequate to protect sensitive land or waters. Communities may prefer to terminate the agreement. Further, without the possibility of termination, a party may decide that breaching the agreement is financially preferable to actually complying with the terms of the agreement. For example, a developer may weigh up the cost saving benefits of desecrating a site against the cost of paying compensation for breaching the agreement and determine that the former course of action is preferable. Without the threat of termination of the agreement, an Indigenous group would have little recourse against a developer who repeatedly made the decision to breach the agreement and pay compensation, apart from rather cumbersome avenues such as seeking an injunction from a court.

The above discussion of termination is predicated on the preferred view that s.24EA does not exclude the operation of the common law in favour of a more restrictive statutory regime under the NTA. The alternative view of the registration and de-registration provisions of the NTA, is that the right to terminate at common law may be over-ridden by provisions which only allow de-registration of an ILUA in specified circumstances. In support of such a position, one of the supposed benefits of the ILUA process is that it can provide certainty and a workable outcome within short time frames, and with less expense for all parties. Allowing parties the right to terminate an ILUA other than in accordance with statutory mandated procedures for de-registration could mitigate against a 'certainty of outcome'. Therefore, if it were found that the provisions of the NTA are such as to confine the rights of parties to those listed under the Act, then parties may be limited to a right to deregister an agreement on the grounds listed (for example fraud, duress and undue influence).

Conclusion

There are obvious advantages to leaving the content of ILUAs for the parties to determine. Each agreement can be designed to meet the needs of the parties and the circumstances in

which the agreement arises. This process can then deliver a more local solution within the overall, generic framework of the NTA. Conversely, it does need to be remembered that these agreements will be governed in part by general contractual principles. Without advocating the introduction of overly legalistic language, this situation when coupled with the fact that the NTA makes little reference to the post-registration operation of ILUAs, means that native title holders must be aware of the framework in which ILUAs will be enforced and be care to safeguard their interests. In particular, when negotiating the specific terms of an ILUA, native title holders should consider; inter-generational issues, the position of third parties such as assignees, the consequences of a breach of the agreement and whether a ‘no- termination’ position, while promoting certainty in some aspects, may be detrimental to the ability of native title holders effectively to enforce obligations.

Consideration of the issues raised above will assist in ensuring ILUAs achieve the outcomes that are desired by all parties to the agreements.

* The authors would like to thank Justin Malbon and Geoff Airo-Farulla for discussing with them some of the issues canvassed in this paper. Any responsibility for inaccuracies, however, remains with the authors.

1. Section 24AA(2).

2. Section 24AA(3), s.24EB.

3. The issue of parties to an ILUA is in itself a complex topic and outside of the scope of this paper. Readers should note, however, that particular legal issues arise in respect of the imposition of contractual obligations on unincorporated bodies. For example, while it is the entity that becomes bound to the agreement in the case of an incorporated body, representatives of unincorporated associations may be personally liable for any contractual obligations entered into on behalf of the unincorporated associations.

4. D. Smith, *Indigenous Land Use Agreements: The Opportunities, Challenges and Policy Implications of the Amended Native Title Act*, Discussion Paper, Centre for Aboriginal Economic Policy Research (CAEPR), No. 163/1998; in this series see also D. Smith *Indigenous Land Use Agreements: New Opportunities and Challenges under the Amended Native Title Act*, Regional Agreements No. 7/1999.

5. Presumably this is what other commentators have referred to as the statutory validation of agreements, see L. Macmillan and E. Wensing, ‘Local Government - Working With Native Title’, (1999)4 *Local Government Journal*, p. 120.

6. Notably, there is no section requiring the registration of contracts. Hence parties are free to enter into contracts, but must register them in order to transform them into ILUAs.

7. Section 199C provides a clarifying note. It states that:

If the details of an agreement are removed from the Register, the agreement will cease to have effect under this Act from the time the details are removed: see subsection 24EA(1) and paragraph 24EB(1)(b).

This note leaves open the possibility that the agreement will still subsist as a common law contract, even after deregistration. What will be lost are those particular attributes of ILUAs,

which are specifically conferred by the registration process under the NTA, not the general contractual status.

8. Macmillan and Wensing, op cit.

9. Such persons may include native title claimants, unidentified members of the group of native title holders and minors.

10. ATSIC, *Detailed Analysis of the Native Title Amendment Act 1998*, revised edition, October 1998, www.atsic.gov.au.

11. The grounds on which objections may be made are contained in ss.24DI(2)(d) and 24CH(2)(d)(ii) respectively. No objection is possible with respect to a Body Corporate Agreement as this is a post-determination agreement. Hence, native title holders have already been identified.

12. This position is further clarified by s.24EA(2), which provides that:

To avoid doubt, a person is not bound by the agreement unless the person is a party to the agreement or a person to whom paragraph (1)(b) applies.

Thus, persons subsequently identified as native title holders will be bound by the agreement, even though they may not have been identified, or even in existence, at the time the agreement was entered into.

13. Section 199C(1)(c)(i).

14. D. Smith, CAEPR Discussion Paper, op.cit., p.17.

15. Section 24EB(3).

16. Here grantee parties refer to those who are granted interests under various statutes, for example the holders of a lease under the *Land Act 1994* (Qld) or a mining interest under the *Mineral Resources Act 1989* (Qld).

17. For a discussion see N. Seddon and M. Ellinghaus, *Cheshire & Fifoot's Law of Contract*, Seventh Australian Edition, ch. 7.

18. See, for example, National Native Title Tribunal, Common Templates, - Future Act Agreements, Draft Future Act Mining Agreement, clause 15, which provides that the Grantee party will not assign a mining lease without the consent of the native title party, with such consent not to be unreasonably withheld having regard to a number of factors such as the prior record of the proposed assignee in their dealings with Indigenous peoples and the consent of the assignee party to enter into an agreement with the Native Title Party subject to terms and conditions consistent with the existing agreement. Templates are located on the NNTT site at www.nntt.gov.au.

19. See detailed discussion below.

20. The pre-contractual phrase relates to any conduct in the time period leading up to the contract coming into existence. Usually during this time there will be a series of discussions and negotiations to clarify the respective rights and obligations of the parties should the agreement come into effect.

[21.](#) Seddon and Ellinghaus, op.cit. p. 523.

[22.](#) For a discussion of the parameters of equitable fraud, see *ibid* p. 555. See also generally G. Dal Pont and D. Chalmers, *Equity and Trusts in Australia and New Zealand*, Law Book Company, 1996, pp. 148ff.

[23.](#) *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, p. 462.

[24.](#) Nonetheless it should not be suggested that indigenous groups will routinely fall into the category of ‘special disadvantage’ nor that the existence of special disadvantage is sufficient to invoke unconscionability principles. See generally, *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

[25.](#) Good faith is a developing area of the law. In some cases, statute may specifically provide that negotiations must be undertaken in good faith. An example of this is s.31(1)(b) of the NTA. Further, a requirement that parties undertake their contractual obligations in good faith may be implied at general law. An obligation of good faith will take different forms in different circumstances.

[26.](#) For an example, terms which expressly deal with the ability of a party to terminate the agreement and to seek damages for breach see, National Native Title Tribunal, Common Templates, - Future Act Agreements, Draft Pastoral Lease Grant Agreement, clause 13.

[27.](#) For a discussion, see Seddon and Ellinghaus, op. cit., pp. 321-324.

[28.](#) Normally the breach must have ‘caused’ loss to the other party before damages are available, see generally Seddon and Ellinghaus, *ibid.*, p. 796.

[29.](#) See discussion of termination below.

[30.](#) An order for specific performance is when the other party is required by the court to perform the obligations under the agreement. While employment contracts are generally not specifically enforceable, there is no reason why a general clause in an agreement providing for the creation of employment opportunities could not be specifically enforced.

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