A review of the effectiveness of indigenous land use agreements

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Abstract
Indigenous land use agreements (ILUAs) are an important mechanism under the Native Title Act 1993 (Cth) by which Indigenous people may enter voluntary negotiations with other entities to receive significant economic and cultural benefits. Despite this potential, the economic benefits ILUAs have brought to Indigenous communities have been limited. The extent of effectiveness of ILUAs will be evaluated, specifically in relation to economic benefits.

To the extent that ILUAs have not been effective, the structural issues in the negotiation process that weaken the position of Indigenous communities will be discussed. This includes identifying the systemic advantages proponents may have in the negotiation process, and the effect of this disparity on economic outcomes.

The legislative changes that may be made to the ILUA regime to increase the leverage of Indigenous communities will be explored. This involves a consideration of the existing negotiation rights of Indigenous people, and discussion of how ILUA regime can be improved. The specific research question will be “How can the ILUA negotiation process be reformed to improve economic development in Indigenous communities?”. Fundamentally, the ILUA regime will be considered as a conceptually sound mechanism for economic development, which requires legislative reform to create more consistent economically beneficial outcomes.

Keywords: Aboriginal and Torres Strait Islander peoples, native title, indigenous land use agreements, economic development
Introduction

Since being introduced in the amendments to the *Native Title Act 1993* (Cth) (NTA) of 1998, indigenous land use agreements (ILUAs) have had the potential to significantly improve the economic conditions of Indigenous communities and native title holders. In the interim years, approximately 1173 ILUAs have been registered across Australia.\(^1\) Despite this, the expected economic benefits have yet to substantially materialise.

This paper will provide a background to the ILUAs, and the native title regime more broadly. The economic impact ILUAs have had on Indigenous communities will then be discussed. The structural considerations that prohibit the maximisation of the economic outcomes from ILUAs will be considered. Several proposals for reform, including a statutory review body, best practice principles and regime reform, will be critiqued. Finally, it will be concluded that the effectiveness of ILUAs is linked to the efficacy of the native title regime as a whole, and more comprehensive reform is likely to be necessary to create positive change.

The ILUA regime and Native Title

ILUAs are voluntary agreements under the NTA, made between Indigenous groups and other parties relating to native title matters.\(^2\) The NTA is not prescriptive as to the contents of ILUAs, which may address any scope of issues relating to native title. Generally, ILUAs relate to the approval of the use of the land for various activities, as well as prospective or

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2. Part 2, Division 3, NTA.
retrospective approval for various future acts. The nature of negotiations under and ILUA are also not prescribed, and is generally at the discretion of the parties.

Statutory regime

Practically, there are two avenues by which Indigenous groups may apply for a grant of native title. The first is by a litigated claim in the Federal Court. As of 2014, only 36 claims have been determined in the Federal Court, with some cases lasting up to 18 years. The court process is generally associated with considerable cost, delay and inconvenience to all parties involved. Secondly, parties may apply for a consent determination, where traditional owners and the relevant interested parties (such as proponents, governments or individuals) may agree on the terms of a written agreement granting specific native title rights to the claimant group. The Court may then make orders as per the terms of the written agreement where it is satisfied it is appropriate to do so. Consent determinations are generally regarded as preferable, as cost and delay are significantly reduced. As of 2014, 229 consent determinations had been registered in Australia.

Once an Indigenous group lodge a claim with the Native Title Tribunal they become entitled to the right to negotiate when third parties intend to undertake certain activities on the area subject to the claim. Potential future acts include construction of

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6 Section 87A, NTA.
8 Subdivision P, Part 2, Division 3, NTA.
telecommunications, agriculture, fishing, infrastructure or mining facilities.\(^9\) If specific future acts are undertaken the right to negotiate may apply, which includes the right to be notified, lodge objections, be consulted, heard by an independent party and seek compensation for any loss of native title rights and interests.\(^10\) ILUAs are often negotiated to validate certain future acts, subject to conditions as agreed between the parties. ILUAs can be negotiated in conjunction with consent determinations, effectively allowing for traditional owners to have their consent determinations approved in exchange for their agreement on various projects or future acts.\(^11\)

### Results

It is not in dispute that there remains to be a significant disparity in the economic conditions between Indigenous and non-Indigenous Australians.\(^12\) Given this, it is necessary to consider how ILUAs have contributed to the economic position of Indigenous people. While the outcomes of ILUAs vary depending on the specific agreement, very few agreements provide substantial benefits to Indigenous people and the regime has not been conducive to tangible improvements in most communities.\(^13\) The general perception of Native Title Representative Bodies is that the percentage received by Indigenous communities only represents a small fraction of the total project value and does not constitute a meaningful recognition of their

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9 See subdivision G-M, Part 2, Division 3, NTA.
10 Anne Hewitt, *The right to negotiate: where and when does it apply?*, University of Adelaide, 4.
13 Australians for Native Title and Reconciliation (ANTR), Submission to the Minister of Families, Housing, Community Services and Indigenous Affairs, *Leading practice agreements: maximising outcomes from native title benefits*, November 2010, 8.
interest in the land. This is reinforced by findings that the outcomes of ILUAs are often not meaningful, positive or equitable, and often fail to provide Indigenous communities with ability to negotiate access to land, social and environmental management or infrastructure development.

**Issues affecting ILUAs**

Given the complexity of the native title regime and issues affecting Indigenous people generally, there are many contributing factors that prevent ILUAs from consistently creating significant economic benefits. Two key factors are outlined below.

*Power imbalance*

As the economic benefits conferred by ILUAs is highly dependent on the outcomes of the negotiation, power imbalance within the negotiation process can severely reduce the effectiveness of ILUAs. Indigenous groups often suffer from a comparative lack of bargaining power, as proponents or governments create a circumstance where Indigenous groups must either accept a sub-optimal agreement or refuse the agreement. If the Indigenous groups are to refuse the agreement, the proponents are unlikely to consent to a native title determination, and the only other mechanism to enforce or realise their rights to the land is

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S Pradhan

through legal proceedings. Given the time, effort and costs associated with this, Indigenous groups feel pressured to agree to ILUAs that may not be sustainable.

Attitudes of Proponents

The effectiveness of ILUAs has been found to be contingent on the attitudes of proponents during and after the negotiating process, with ILUAs being less effective where proponents do not meaningfully engage with the expectations of claimants. Failing to recognise the breadth of the involvement of claimants is relatively widespread, as companies often view preparatory works and project planning as a technical exercise independent of native title considerations. Further, there are currently no provisions in ILUAs to protect claimants where the proponent’s plans change after the ILUA is negotiated, which can minimise effectiveness in the long-term.

Reform

To date, the ILUA process is yet to be significantly reformed since its introduction. It has been suggested that to properly address the issues noted above, significant reform of the process is required. The predominant discussion of reform is contained in the discussion paper, “Leading practice agreements: maximising outcomes from native title benefits”, which raised the possibility of a statutory reform body and creation of a statutory review

18 Howard-Wagner, above n 14.
22 Nicholas Duff, ‘Reforming the Native Title Act: Baby Steps or Dancing the Running Man?’(2013) 17(1) AILR 56.
body and assessment against leading negotiation practice principals. These two reforms will be examined, as well as possible changes to the connection requirements.

**Increased oversight**

As several of the issues above stem from the voluntary agreement of native title parties into sub-optimal arrangements, a potential solution suggested is to expand the jurisdiction of the Federal Court, Native Title Tribunal or other review body to allow a review of if the terms of ILUAs are sustainable and equitable. The statutory body proposed in the Discussion Paper would not have a veto power over the commercial terms of the arrangement, but would ‘review the sustainability of the benefits packages, not their quantum’.²⁴ It is unclear how the statutory body would have a substantive effect on the issues raised above given that it would not have the power to alter arrangements or intervene. As a result, the predominant function of a body of this kind is more properly characterised as information gathering rather than review.²⁵

Even if the statutory body had a more active role in overseeing ILUAs, difficulties may arise in assessing if agreements were equitable and sustainable. The Court currently makes determinations as to if an order is ‘appropriate’ under s 87(1A) of the NTA, which involves considering the negotiation process, issues considered, and if the argument is realistic.²⁶ However, determining if an ILUA provides “sustainable” benefits may be more difficult as quantifying the quantum of compensation that would be fair and sustainable may be an inherently subjective exercise. The NTA already bestows a similar function upon

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²⁴ Ibid.
courts, as parties can make applications under section 50(2) or 61 to claim compensation for any loss, diminution, impairment or other effect on native title. The NTA provides relatively little guidance as to how the valuation should occur, except to say that at a maximum it must be the amount that is payable for the compulsory acquisition of the land in freehold, and that the compensation must be on ‘just terms’. To date there has been no judicial discussion on the valuation of the land on ‘just terms’ in the context of native title, and if other factors such as the loss of future rights or non-economic loss must be factored into the settlement. These issues may also affect the assessment of sustainable compensations in ILUAs, which cover similar subject material to the extinguishment of certain rights on native title land. As such, the effectiveness of a statutory body to review if the amount of the compensation under an ILUA is suitable may be limited. However, this proposal may have value in collecting and centralising information as to the nature of benefits bestowed under ILUAs.

While not considered in the Discussion Paper, reform could implement a more substantive review function to address the inequality of bargaining power. Notably, under the native title legislation ILUAs may be removed from the register if fraud, duress or undue influence were present. This creates a high threshold test of unfair treatment that must occur for an ILUA to be invalidated, and is unlikely to be applicable to the issues raised above. Section 199C and has rarely, if ever, been successfully argued in relation to an ILUA. While the NTA clearly specifies that ILUAs have status as a contract, the application of the unconscionability doctrine is unclear and has similarly never been applied in court. A

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27 Section 51A, NTA.
28 Section 53, NTA.
30 Section 199C, NTA.
31 Section 24EA, NTA.
The nature of the common law unconscionable bargain doctrine is fundamentally that contracts may be set aside where one party has a special disability that prevents them from making a judgment as to their best interests, which is known by the stronger party and results in an unfair and unreasonable transaction. The main issue with unconscionability is that the doctrine does not necessarily extend to the circumstances raised above. Notably, a mere inequality of bargaining power or pressing need for one party will not constitute a special disability where the person is still able to make a judgment about their best interest.

The analysis above indicates that the issue with ILUA negotiations is not necessarily a lack of understanding of capacity of traditional owners when negotiating ILUAs (although this may occur in some instances), but an incentive structure that encourages the negotiation of short-term benefits and relatively little financial compensation. The doctrine of unconscionability does not cater to this circumstance, as the Court’s conception of “good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests”. Accordingly, the doctrine of unconscionable transactions may also be relatively inapplicable, as proving a lack of capacity on behalf of claimants to judge their best interests is still a relatively high threshold test. Additionally, the unconscionability doctrine generally attracts the remedy of voiding the contract, which is unlikely to be preferable. As such, it is likely to be unsuitable as a mechanism of review.

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34 Australia and New Zealand Banking Group Ltd v Karam [2005] NSWCA 344 [60], [100].  
Good faith and negotiation requirements

Another suggested reform is to introduce negotiation requirements in the ILUA process, in order to prevent sub-standard agreements from being formed. While the exact form of the requirements are unclear, options for reform include applying the ‘good faith’ negotiation requirement to ILUAs or creating a set of legislative criteria for ILUA negotiations.

Parties are required to negotiate in ‘good faith’ under the future act regime. The exact requirements of this framework are not specified by the NTA and have been subject to consideration by the Federal Court and Native Title Tribunal, which have found as follows:

- The requirement to negotiate in good faith will be given its natural and ordinary meaning, and is directed at the party’s conduct and state of mind.
- There are no requirements to reach a certain stage of negotiation, or to negotiate in a particular way.
- It is insufficient to ‘go through the motions’ with a rigid or predetermined position.
- Indications of ‘bad faith’ which contravenes the requirement includes adopting a rigid non-negotiable position, failure to communicate, failure to make counter-proposals, or a tendency to shift positions at the end of negotiations.

There are several limitations found in relation to the requirements of good faith in the right to negotiate process, particularly being that the grantee party does not have to make reasonable substantive offers or concessions to reach agreement. The indicators above create a high threshold test, as an absence of good faith was found in only 4 out of 30 cases before the Native Title Tribunal prior to 2012. This has led to the perception that the

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36 Section 31(1)(b), NTA.
37 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, [20].
38 Ibid, [37].
39 Ibid [24].
40 *Western Australia v Taylor* (1996) 134 FLR 211.
42 *Strickland & Anor v Western Australia* (1998) 85 FCR 303.
43 Burnside, above n 41, 6.
negotiation requirements are being satisfied in a tokenistic way, and do not lead to genuine engagement by proponents.\textsuperscript{44}

Applying the requirements of good faith to the ILUA regime may create some recourse for native title parties that suffer from problematic tactics in negotiation, which cause unfavourable economic benefits under ILUAs. However, to apply the good faith principles to the ILUA regime would require the requirements to be substantially altered. This is primarily because the current indicators focus on issues that prevent an agreement from being reached in the first instance, rather than subversive tactics within negotiations itself. However, requirements such as being willing to engage in counter-offers and not having a rigid negotiating position would be applicable to ILUAs.

As the lack of specificity in relation to the precise nature of the good faith requirements has previously caused significant uncertainty,\textsuperscript{45} it may be more practical to incorporate elements of it into ‘best practice’ negotiation requirements that apply specifically to the negotiation of ILUAs. Negotiation guidelines have previously been discussed, with the content including procedural negotiation requirements, specific clauses to be incorporated in ILUAs and the provision of sustainable benefits to effected parties.\textsuperscript{46} The potential benefit is that these proposals may set a uniform standard of expectations for claimants, and easy access to guidance as to best practice requirements for all parties. This may be particularly significant in allowing Indigenous communities to gain an understanding of what ILUAs should include. Notably, principles with legislative force would provide recourse to Indigenous communities where the negotiation process or substantive contents of ILUAs are not compliant with the best practice standard.

\textsuperscript{45} Mark Gregory, Alisha Maharaj-MacLean and Leonie Snepp, “‘Good Faith’ Negotiations Under the Native Title Act” (2009) 28 Australian Resources and Energy Law Journal 133, 134.
\textsuperscript{46} Item 6, Schedule 1, Native Title Amendment (Reform) Bill 2011 (Cth).
However, such reform may not be suitable in the context of the ILUA regime. There is a risk that the minimum standards are construed by proponents as benchmark standards, effectively lowering the overall negotiation standards.\(^{47}\) A further issue may be that the ‘best practice’ standard is inherently tied to the specific context, and given the wide variety of issues that may be encompassed by an ILUA, strict legislative standards may be unsuitable and unable to effectively regulate ILUAs nationally.\(^{48}\) Further, as the principles would have legislative force, the increased oversight of government agencies may be construed as extensive interference by government into free negotiations.\(^{49}\) As such, reforms of this kind are unlikely to be suitable.

**Structural Reform**

While not a direct alteration to the ILUA negotiation process, change to the structure of the native title system more generally may be likely to improve the effectiveness of ILUAs. As discussed above, the fundamental inequality in bargaining power between proponents and native title parties is exacerbated by the difficulty of the court process. This is because when native title parties are aware that the court process is not a viable mechanism of gaining native title rights, they become dependent on negotiation-based procedures such as consent determination or ILUAs. Accordingly, proponents are able to further reduce concessions to native title parties, who are much more likely to accept the proposal given that they are unlikely to be left with any native title rights if the proponents cease negotiating.

\(^{47}\) AIATSIS, above n 25, 7.
\(^{48}\) Ibid.
\(^{49}\) ANTR, above n 13, 9.
The court system is afflicted by some barriers that are unlikely to be circumvented by legislative reform, such as exorbitant cost and delay. However, lowering the threshold by which native title claimants must prove connection to the land may make granting native title claims more achievable. Under the current section 223(1), native title parties must prove that they have a connection with the land or waters through traditional customs or laws that is “substantially uninterrupted”,50 and have had a continuous existence and vitality since sovereignty.51

These requirements have been found to be restrictive, as they do not allow for customs to develop.52 Specifically, it requires customs to be static, even where Indigenous communities are affected by inevitable cultural change from colonisation or organic change over time.53 Section 223 could be amended to clarify that customs and laws can develop, adapt or evolve. As the requirements also create difficulty in procuring evidence, as it is often costly and inconvenient to locate evidence of connection from the pre-sovereign period,54 allowing for evolution may ease the evidentiary burden. Reducing the standard of connection that must be proved to access native title rights is one type of reform that make the court process marginally more accessible for Indigenous groups and, as such, create a stronger bargaining position within the ILUA process.

Conclusion

On the above analysis of the effect of ILUAs on Indigenous communities, it is apparent that the ILUA regime has not fulfilled its potential to create substantial economic development.

50 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [89].

51 Ibid, [47]


53 Ibid, 141.

54 Ibid, 76.
While increased statutory oversight and the creation of best practice negotiation principals may create some recourse for communities, the risk of further convoluting the ILUA process with ill-fitting legal requirements is likely to outweigh the potential benefits. Creating a more accessible native title regime as a whole by broadening the connection requirement of section 223 could increase the negotiating power of Indigenous groups, even if the change is marginal. However, regardless of the changes that may be made to the ILUA regime, the problem of disadvantage in Indigenous communities is likely to persist as long as they continue to be under-resourced, not have access to sufficient information or expertise, and in a more vulnerable negotiation position by virtue of the difficulty of recognising native title rights. As the reduced effectiveness of the ILUA regime is likely to be reflective of the systematic issues within Indigenous communities, these issues must also be considered for economic development to occur.

55 Howard-Wagner, above n 14, 110.