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Indigenous Land Use Agreements as a Risk Management Tool: A View from the Resource Industry

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SUMMARY

The resource industry is increasingly recognising the value of social responsibility in achieving business success. Social responsibility is the cornerstone of community acceptance and community participation.

Incorporation of vehicles within legislation that enable partnerships to be formed with Aboriginal communities has been achieved under amendments to the Native Title Act 1993. The amendments introduced the widely accepted notion of indigenous land use agreements.

The resource industry, whilst not wholly embracing this concept has nevertheless shown its acceptance of a process which will enable it to address both its own needs and the needs of the communities affected by its operations.

The ILUA process is largely untested and has high costs attached. If an ILUA can be successfully negotiated there is no doubt social risks to industry will lessen. An ILUA will not always be the answer. Much will depend on the will of the parties, the area concerned and the community cohesion.

As with any largely untested process, ILUA's will not be embraced with open arms by industry and government. If parties realistically assess and plan the processes and look to the outcome they are likely to provide an increasingly utilised method of agreement.

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INTRODUCTION

The resource industry is on a steep learning curve in the realisation that social responsibility and engagement of local communities both in dialogue and actions relating to social and environmental issues is integral to their survival in the global market place. As Hugh Morgan, CEO of WMC Ltd recently said:

> "For a long time we treated … [fears that we would mindlessly deplete our national resources, and that we would be careless or worse with the environment] and other waves of community approval and disapproval as almost background noise. We were focused much more on the more immediate challenge of making a reasonable return for our shareholders. For the resource industry the overwhelming noise in our ears was the roar of rising and falling commodity prices — and in the last decade there has been much more falling and rising.
>
> In response to falling prices, we became more and more efficient. Usually these efficiency gains have been hard won, often bringing us into conflict with other sections of society who still believe that we are a very wealthy and profitable industry.
>
> More recently we have become more attentive to what others think about us. … The problem was that our view of ourselves was not as widely shared as we might have wished.
>
> One of the enduring and wholly admirable things about Australian society is the strong sense of community which is found here. Australia is certainly not unique in this regard. But there is here a very real sense of continuity; a contract between the generations if you like; in which jobs, economic opportunity, and prosperity play a very important role. The Australian resource industry has played a very important role in that intergenerational contract for more than 150 years and that, in my view, that is why Australian society and Australian culture is much more supportive of mining, and better informed about metals, than is the case in Europe or North America. We have in Australia a significant comparative advantage in this regard, and we should recognise it and nurture it.
>
> The issue before us has two streams to it. One stream is about the changes which have escalated in intensity and have been driven primarily from abroad, the other is about how we have responded to these changes. The international and the domestic are necessarily interconnected. Globalisation is not just about increasing transboundary capital flows and reducing trade barriers. It is also about the rapid movement of ideas and cultural upheavals."[1]

[1] Hugh M Morgan, "A Sustainable Minerals Industry — A New Era", 1999 Minerals Industry Seminar "Minerals: Underpinning our Future", Canberra, 2 June, 1999.

Investment in social responsibility has also been recognised by Shell which stated in *The Shell Report 1999*:

> "Social Investment reflects the desire of companies to ensure they are socially responsible and beneficial. At the same time it reflects these companies' self-interest to ensure that society is strong and healthy in a way that maximises the opportunity for business success. After all, business depends on a prosperous and healthy society for its own prosperity."[2]

Emerging realisation on the part of governments and the resource industry of the necessity for social investment leading to sustainability within the resource industry, coupled with the *Mabo*[3] and *Wik*[4] decisions and a "steadily growing confidence on the part of many communities that they can exercise control over the timing, direction and process of social … development by exerting their rights",[5] has lead the Australian Government to formulate a legislative response through amendments to the *Native Title Act* 1993 (Cth) (NTA).

These amendments introduced the concept of indigenous land use agreements (ILUAs) into statute. ILUAs were one of the changes that had wide ranging support from all participants in the native title debate because they were seen as a timely, cost effective and less risky approach to settling native title issues. The interest in using ILUAs has continued with both the resource industry and Aboriginal groups recognising their potential not only for addressing native title issues but, more importantly, dealing with issues of social responsibility and community partnerships. The NTA amendments were introduced on 30 September 1998 and the first ILUA agreement was registered in mid June 1999.[6]

In a practical sense, the statutory recognition for ILUAs means that it is now possible to negotiate and register agreements which will give statutory protection to, inter alia, all current and future resource development activities contemplated by the agreement. The "title or tenement granted cannot be challenged on the basis of native title

[2] "People, planet and profits and act of commitment", *The Shell Report 1999.*

[3] *Mabo v Queensland* (No 2) (1992) 175 CLR 1.

[4] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[5] Ian Thomson and Susan Joyce, "Mineral Exploration and the Challenge of Community Relations", PDAC Communiqu, Prospectors and Developers Association of Canada, May 1997.

[6] The agreement between Adelong Consolidated Gold Mines NL, the NSW Aboriginal Land Council and representatives of the Walgalu and Wiradjuri people in the Tumut and Adelong area of NSW is the first to be placed by the National Native Title Tribunal on the new Register of Indigenous Land Use Agreements.

The registered ILUA gives Adelong Consolidated Gold Mines NL the go ahead to mine in the area for at lease 20 years without going through the right to negotiate. For local Aboriginal groups, the agreement provides shares in the company, employment opportunities, cultural heritage protection and environmental monitoring: *Media Release,* Attorney-General The Hon Daryl Williams AM QC MP, 22 June 1999.

invalidity and … the Aboriginal parties are contractually bound to support the project".[7]

There are three different types of ILUAs each of which, when registered, provide a binding contract between the parties. All native title holders within the area of the agreement are also bound by the agreement, even if they have not personally been party to the agreement.[8]

ILUA's may cover any matter concerning native title rights and interests[9] including:

- most types of proposed future development;
- compensation for any past, intermediate period act or future act;
- the relationship of native title rights and interests to other rights and interests in an area;
- how native title is exercised; and
- surrender of native title.

Importantly for balancing costs within the resource industry, ILUAs enable not only future acts and potential compensation issues to be addressed but also enable any or all matters concerning native title rights and interests in relation to the area to be addressed. A negotiated ILUA has the ability to set out rules and protocols for managing native title rights alongside other common law rights; something which a court determination is unlikely to do. Such an agreement allows the focus to be on the outcome rather than the process. Successfully concluded, such an agreement should cover all matters anticipated in relation to any native title rights and interests for the area concerned including provision of frameworks for making further agreements in relation to native title rights and interests.

CONJUNCTIVE vs DISJUNCTIVE AGREEMENTS

The issue of conjunctive versus disjunctive agreements is a perennial tension, not only between resource developers and indigenous groups but between larger resource developers and some junior exploration companies.

[7] "Aboriginal Agreements: Outline of General Matters for Consideration during Negotiations", prepared for the NSW Minerals Council by Blake Dawson Waldron, Lawyers.

[8] NTA, s 24EA.

[9] NTA, s 24BB for body corporate agreements, s 24CB for area agreements, s 24DB for alternative procedure agreements.

This tension was recognised as a major issue for the resource development industry under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (ALRA). Since mid 1987[10] agreements required that terms and conditions for both exploration *and* mining must be agreed by the land council, or be determined by a mining commissioner. Statutory time limits also govern the conduct of negotiations between the land councils and the resource developer.[11] The *Stockdale* decision in 1992 ultimately supported this interpretation by providing that disjunctive agreements were not allowed under the ALRA.[12]

Why the tension? From a resource developer's position it needs the certainty of knowing that successful exploration will lead to ongoing land access and approvals for development. Given that industry figures show only one in one thousand exploration projects leads to a development decision there is the view that exploration cannot be justified without certainty of development should it be the one in one thousand.

Averaging the budget for a single exploration project at between $300,000 to $500,000 per project per annum (the actual figures will depend on variables such as the statutory obligations, economic climate, the sequence of exploration events, the type of exploration, etc) this means expenditure of $1.2-2M is likely to occur over a four year exploration period before there is any real prospect identified. In anyone's language this is high risk expenditure.

On the other side of the coin, from the point of view of Aboriginal land owners (under the ALRA) or native title holders (as defined in the NTA),"disjunctive agreements … may be preferable, because they provide greater negotiation leverage at the mining stage".[13] I suggest that that this greater negotiation leverage would rarely be able to be used because so few exploration projects proceed to development. It follows therefore, that such a stance would deny these groups many of the benefits that would flow from pre-exploration negotiations. In addition, protracted pre-exploration negotiations which do not cover the resource development stage may simply not be worth anyone's while.

[10] Part IV of the ALRA deals with mining. Sections 40-48J were inserted by Act No 75 of 1987, with effect from 5 June 1987. It provides that there can be no exploration on Aboriginal land unless the Land Council and others first consent: see para 40(a), ss 42(6) and (8). An agreement on the terms and conditions of exploration must be entered into: see s 42(6)(c). Once all necessary consents are given, and an Exploration licence is granted, an explorer who seeks a mining interest in the land to mine that deposit, does not have to obtain consent to mine.

[11] ALRA, ss 41, 46, 48A. Also see P Kauffman, *Wik, Mining and Aborigines* (Southwood Press Pty Ltd, Sydney, 1998), p 22.

[12] *Northern Territory of Australia v Robert Tickner, Minister of State for Aboriginal Affairs, Northern Land Council, Nuralindji Aboriginal Corporation and Stockdale Prospecting Ltd* (1992) 81 NTR 1.

[13] P Kauffman, *Wik, Mining and Aborigines* (Southwood Press Pty Ltd, Sydney, 1998), p 22.

Exploration over an area where there is a conjunctive agreement in place is going to be a far less risky process for a resource developer than one where there is only a disjunctive agreement. Arguably, conjunctive agreements spread the risk and the rewards and distribution of the latter can provide earlier, tangible benefits to the Aboriginal communities whilst providing the platform for open dialogue.

Tensions are exacerbated when junior explorers, anxious to proceed with their project, negotiate disjunctive terms which provide them with land access but set unrealistic precedents for future resource developers. The tensions may be able to be addressed by the 'halfway house' remedy in the NTA promoting the concept of frameworks for agreements relating to future mineral resource development should exploration be successful.

ILUA PROCESSES

Ideally, ILUAs are a flexible and effective mechanism which could lead to avoidance of delay and halt the litigation process. But being a new process, ILUAs have potential pitfalls that need to be recognised. Not least of these is to overcome what has turned out to be the process nightmare of the "right to negotiate" provisions in the NTA. Being able to overcome posturing and work together to a pragmatic and sensible outcome through an ILUA is the aim. If this could be fail safe there would be no doubt in my mind that the resource industry would be welcoming negotiations unconditionally.

However, the resource industry has recognised that successful negotiations of an ILUA need not only a considerable investment of time and resources, they often also require the provision of independent assistance for indigenous groups to be able to negotiate on an equal footing with industry and government parties. Parties proposing ILUAs need to be aware of the cultural differences and power differential between modern resource development practices and indigenous communities. But Aboriginal and government parties and their representatives also need to realise that the primary focus of the resource industry is to be profitable. I argue that it is unrealistic to expect the resource industry to bear all costs (and it follows, the risks) of the ILUA negotiation process. There is dedicated funding for native title purposes through the Commonwealth Government just as there are taxes and costs paid by the resource industry to State and Territory governments. Balance, independence and outcomes are far more likely when one party is not expected to bear all costs.

The continuity of representation and the participation of senior staff of the relevant organisations who are charged with decision making and who have the ability to negotiate an outcome, are vitally important to successful outcomes. Whilst the inclusion of such a team member or team leader does not necessarily do away with the need for independent facilitators or mediators, they do form a core part of a successful negotiation.

Many within the resource industry are also concerned that the ILUA process be as all encompassing as possible in order to make all relevant people part of the outcome, and also to have governments and other interest holders recognise the part that they need to play in a negotiated outcome. There may also be appropriate indigenous participants who are not, for one reason or another, native title applicants. Thomson and Joyce point out that "the community has a fear of being marginalised and an intense desire for information about what is going on".[14] Engaging all relevant parties in the process addresses these fears and provides a communication platform.

PAST AGREEMENTS

Dr Clive Senior in his paper, "The Yandicoogina Process: a Model for Negotiating Land Use Agreements", points out that although the Yandicoogina Agreement was concluded with an Aboriginal organisation representing three groups on whose land the project was to be developed:

> "The negotiations also had an impact on the region beyond the three groups which were directly involved in them. There was some tense speculation about the negotiations among the Aboriginal population of the Pilbara and rumours were rife about the type of deals which might have been done. This in turn brought pressure to bear on other negotiations that were being conducted in the Pilbara between Aboriginal groups and resource companies. The Yandicoogina process … was frequently discussed and seen as a model for other negotiations." [15]

[14] Thomson, op cit n 5.

[15] Dr Clive Senior, "The Yandicoogina Process: a model for negotiating land use agreements", *Land, Rights, Laws and issues of Native Title* (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islanders Studies, February, 1998), p 1.

TIMING

The ILUA process cannot be expected to be concluded in a short period of time. The 12 months of formal negotiations and nine months of writing and rewriting the Yandicoogina Agreement are generally regarded as a short period of time in the industry. The number and diversity of parties I propose be involved will undoubtedly extend the negotiation and conclusion period. Justice Robert French in his paper "Local & Regional Agreements" [16] notes that at the time of writing, the negotiation process for a Regional Agreement in Broome had been going on for three years and was not yet finalised. In the recently registered ILUA, mentioned above, agreeing the negotiation protocol took over three months. Having agreed the protocol, the mining agreement only took two weeks to finalise.[17] Hence, it is extremely important that time frames be recognised and taken into account in planning for any project. They will, of course, differ from area to area and from team to team.

It is also necessary for all parties to realise that not only are there pressures from the Native Title Future Act and Native Title Determination processes, but there are also government requirements for certain levels of expenditure and activity on tenements which, if not adhered to, could lead to compulsory forfeiture of the ground. Governments have yet to factor in native title and heritage procedures although they have shown some flexibility in not strictly adhering to "drop off" requirements.

There are a number of broad stages which need to be followed as outlined in Dr Senior's paper.[18]

Stage One: the Decision to Negotiate

This involves early planning including internal collection and analysis of information about the area of land and waters concerned, native title and other related issues, identifying interest holders of the land or waters concerned, recognition of other ancillary negotiations taking place in the general area, development of an appropriate corporate and government culture, and importantly, the active and obvious support of senior management. Depending on the area involved the early stages of data collection can take many months.

[16] Justice R French, "Local & Regional Agreements", *Land, Rights, Laws: Issues of Native Title* (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islanders Studies, August, 1997), p 4,

[17] Negotiation protocol for Agreement between the Walgalu and Wiradjuri People, the Tumut Brungle local Aboriginal Land Council and Adelong Consolidated Mines NL (1999) 3 AILR 121.

[18] Senior, op cit n 15, p 2 and those which resource developers have identified.

Interested parties need to be identified through land title searches, licence searches such as water licences, exploration licences, etc, native title claimants need to be identified through up to date copies of both claimant and non-claimant native title applications, and internally the company needs to decide on the area over which it will propose or agree to negotiate an ILUA.

I cannot emphasise how strongly I believe that pursuing an ILUA without real company commitment to resource the process and the outcomes, will prove to be counter productive. Those tangible benefits will only come about with active and fulsome support by senior management. I suggest that with full understanding the spirit will be there but the funds may not be for some time. One reason may be that it requires a quantum change in understanding of the ability to conduct one's business. The resource industry is in a period of high volume change. There is continuing pressure to reduce costs to stay competitive in the global market and along comes what is, for many, an unanticipated cost and uncertain outcomes. Some resource developers may consider the certainty of following the s 29 processes of the NTA are a better risk or may seek to negotiate an ILUA in parallel with following the s 29 procedures.

Another factor is that capital raising may commence several years in advance of a final decision to proceed with development. Factors such as ILUAs are in the "grey area" where they are seen as a new, unproved concept outside normal commercial parameters. Obviously education for all concerned parties about the potential benefits and uses of an ILUA is an answer — but to date this education has been attempted by theorists when what is needed is the voice of experience — practical "on-the-ground" experience by practitioners respected within industry and within Aboriginal communities. This will only come through successes in reaching ILUAs, so the cycle continues. I suggest that resource developers, governments and native title holders will see real benefits in ILUAs in some areas as the future act processes of the NTA continue to become further bogged down and the Federal Court processes escalate. To achieve this, however, requires a great deal more common understanding, commitment and realistic expectations from all parties.

Once an ILUA has been identified as an appropriate vehicle for agreement both for the area and the people concerned it is essential to process map a potential time line and associated costs of negotiation of an ILUA. Unless industry and/or governments and/or the Aboriginal representative body are able and prepared to commit to a certain level of give and take, the process should not be initiated. In my opinion government needs to be an integral player in the ILUA

process and should also bear a proportion of the costs. I will address the issue of costs later in this paper.

Stage Two: External Consultations

There needs to be establishment of contact with communities including indigenous communities, pastoral communities, urban and rural communities and other interest groups within the broad ranging area such as ATSIC, native title representative bodies, local government, industry bodies, etc.

Consultation needs to be continuous and consistent and ideally, include contact with groups such as the National Native Title Tribunal, local, State and federal politicians, government departments, as well as those groups identified as having interests in the immediate area. Second hand information has the tendency to distort or embellish issues. This is drawn out in Dr Senior's paper[19] where he noted that rumours were rife about the type of deals which might have been done in the Yandicoogina process. It is important to recognise that all interest groups need to be included within the consultation process and that consultation has to continue whether or not the groups are receptive. It may also be useful to canvas opinions from native title practitioners, non-government organisations or Aboriginal spokespeople, who may be able to offer counsel on how to proceed from a broad spectrum of opinion.

Ultimately, successful liaison comes through the indigenous groups who themselves have to work within a structure of full and free dispensation and negotiation within their own communities. That there are cultural differences and different motivators for each party must be understood. The fact that there are certain ways of consulting and negotiating with these groups needs to be recognised and accommodated. Usually that expertise is not held within the company and in all likelihood it will be necessary for experienced (and by this I again emphasise "on the ground" experience, not just theoretical experience) external consultants to be engaged. These independent consultants should not be the focus of the negotiations, rather, they should form part of the selected, ongoing negotiating team, which in the resource developer's case, will be spearheaded by an appropriately authorised person from senior management ranks.

Indigenous women play a significant role in decision making within their communities and are likely to also play a significant role in any negotiation process. Consideration needs to be given to including a woman in any negotiation team. Ideally, that woman will

[19] Ibid.

both understand issues from an indigenous point of view and understand the issues from government or industry's point of view.

Whilst the NTA as amended provides for sign off of ILUAs by representative bodies, it does not formally require that they be party to the negotiation of an ILUA. Many indigenous negotiating groups prefer not to consult through the government appointed representative bodies. If they choose not to consult through such a group, parties need to be aware of the potential for administrative difficulties arising under s 24CG(3)(b)(ii) of the NTA where *all* parties identified as holding or who may hold native title in relation to the area must authorise the making of the agreement. Authorisation is defined in s 251A of the NTA as either utilising a traditional process of decision-making or an agreed process by all the people who hold or may hold the common or group rights. In the absence of such agreement arguably *all* native parties must sign. The risk of not involving native title representative bodies with the potential for tardiness in the certification process together with these administrative difficulties would have to be weighed against the Aboriginal parties' desire not to have the representative body involved.

Likewise, whilst there is potentially a role for the National Native Title Tribunal (NNTT), it is not necessarily an integral part of the process. It would seem that utilisation of the services of the NNTT would be worth while. In discussions with Doug Young[20] about the Century Agreement[21] he commended the involvement of the NNTT for providing a structure and authority to the negotiations which had previously been absent. He considered that the NNTT's authority was sufficiently respected by the negotiating parties to enable a negotiating protocol to be established. NNTT members oversaw adherence to the protocols and provided direction to the meetings.

Although experience and anecdotal evidence has shown that representative bodies established under the NTA are not always representative of all groups within the native title area their statutory powers need to be recognised. Pitfalls in not negotiating with the representative body may be that the representative body is more reluctant to "sign off" on any ultimate agreement which may then lead to tensions between those parties who want a recognisable body with whom to negotiate and those Aboriginal groups who do not have confidence with the appointed representative body for the area.

[20] Doug Young is a partner with Blake Dawson Waldron, Lawyers and is based in Brisbane. He currently acts for the Century Zinc project and inter alia, provides native title advice to the Minerals Council of Australia, the NSW Minerals Council and the Queensland Minerals Council.
[21] Agreement between the Waanyi People and Century Zinc Ltd in 1997 in respect of the Century Mine at Lawn Hill in Queensland.

Stage Three: Beginning the Negotiation Process

Generally, initial negotiations with actual Aboriginal native title applicants is preferable. This shows due respect and gives the group direct information. It also lets the Aboriginal groups identify what they expect from the process prior to commencing. There is little point in governments or resource developers decreeing that certain outcomes are to be negotiated when such things are not wanted by the Aboriginal groups or other parties. Funds devoted to what resource developers consider worthwhile may well be funds expended without purpose. However it is important for future formal negotiations for the Aboriginal parties to clearly understand where their aspirations or requests simply will not be met by the resource developer or government party. If a request is totally unable to be considered that must be clearly and unequivocally stated so as to reduce the risks of parties feeling their expectations have not been met at a later point in time. If it is a factor which is going to be of great influence to the outcomes it may be appropriate to put the issue to one side and deal with those matters which can be agreed. If substantial agreement can be reached on other issues, those which have previously been stalling points may be able to be dealt with more flexibly. Alternatively, if it is integral to the negotiations and there is no common ground that should be recognised and the negotiations terminated.

Any issues the native title group may have with representative bodies or other parties can be assessed and factored in. It is, however essential that the Aboriginal parties understand that there are a myriad of other consultations occurring with parties who may seek quite different outcomes. It is also important that the native title claimants understand that there are legal requirements which require contact or consultation with some parties they may prefer the resource developer not deal with.

Language issues also need to be considered — English is not necessarily going to be the language of choice for the negotiations, although, if it is not the finalisation process may take much longer as in many instances there will not be comparative English words for the Aboriginal language used when translating the agreement to English.

Prior to the commencement of any formal negotiation, there needs to be established ground rules within a protocol form of negotiations. The protocol needs to ensure reasonable quality bargaining power, safeguard privacy, control access to the media and, importantly, systemise a process for reporting back to the wider indigenous community and all other affected communities. It may be at this point

involvement of the NNTT would be beneficial to provide the authority and experience to obtain workable agreement.

Properly conducted, the negotiations will be a much longer and more encompassing process than some would like. But they will fail to be effective unless due process is followed and all appropriate people are consulted. As Dr Senior points out:

> "The Elders' view of negotiation was that it was something to be disposed of as quickly as possible, so that benefits could be obtained without delays. They fact that they did not universally appreciate a necessity for broad based consultation, proved to be an issue of continuing tension throughout the process. … The Elders were forced to accept that even though the project caused them no particular heritage or cultural concerns, they could not proceed in such an important matter without more widespread discussion and general community backing…. The Elders wanted to remain in control of the process, but as it developed they became increasingly frustrated at their inability to participate at the level that their status warranted."[22]

Early in the negotiation process the parties, ideally, need to concentrate on the less controversial issues, so that confidence can be gained in both the process and in each other as a party. It is important, however, that the process continue and the momentum of negotiations be maintained so that even if there are sticking points in the negotiations, all parties are increasingly committed to successful outcomes, even when the more difficult issues arise. As previously noted, sticking points should be set aside to be revisited later when progress on other issues has occurred and may render these sticking points less important. Each issue needs to be agreed and signed off before moving on to the next issue. It is the sum of these individual "agreements" which form the drafting instructions for the formal agreement. That formal agreement should not be drafted until the negotiations have been completed so as to reflect the whole agreement. It is essential that parties are not sidelined from the substantive negotiations by legal fine tuning.

THE MEETINGS

Once negotiations begin, meetings cannot be expected to be run on the same basis as negotiations would be run within the normal commercial framework we lawyers tend to work within. Tensions and emotions are bound to play a part. It is important that each negotiating team have the ability to select their team and be present

[22] Senior, op cit n 15, p 6, Stage 3 — Formal Negotiations.

whenever the issues affect them. Because industry and government have a greater ability to travel distances, it is wise to acquiesce to indigenous groups in selection of the venue. Cost is a factor which I will discuss later. As negotiations normally revolve around the area of land or waters under claim, it makes sense that that is the area where the negotiations are conducted. Generally, mediation sessions can be held over two day periods and, as Dr Senior points out, "Momentum was maintained by ensuring there were no more than two or three weeks between meetings".[23]

At the end of each meeting, an agenda and specific responses, positions and tasks need to be agreed for the next meeting. Sessions may need to be rearranged to allow attendance on cultural matters. If there are elderly people within the negotiating teams, the negotiations may need to be slowed down or be more flexibly organised to recognise the different needs of aged people. Likewise, negotiators for indigenous or pastoral groups may have employment, business or other negotiating commitments which need to be taken into account. Pastoralists' business is seasonal just as indigenous cultural adherence is often seasonal. Match that with government expenditure commitments, weather conditions and board reports and it becomes a priority juggling act for resource developers. I suggest juggling become a required qualification because it is the ability for key people to recognise and accommodate the differences that will effect a successful outcome. These matters need to be understood and agreed within the protocol at the commencement of discussions, otherwise it is likely that misunderstanding and frustration will result which could undo the good relations developed during the negotiation process.

The shared experience of participation in a negotiation that steadily moves toward a successful outcome is immeasurable. Negotiations are likely to set the scene for future communications between the parties which for a resource project may mean several decades of working in the communities with whom the original negotiations have been concluded. Those successful negotiations and an ultimate win/win outcome sets the perimeters for living and working together and the respect flowing from this coexistence cannot be underestimated.

Stage Four: Finalisation

Once a memorandum of understanding has been reached, the actual agreement must be drawn up to reflect not only the terms reached but also to meet the requirements of the NTA as amended or

[23] Ibid, p 11.

the various applicable State native title regimes and other relevant legislation. Throughout the drawing up of any such agreement, there needs to be a continuation of representation from the interested parties and the drafting process needs to be understood by open feedback and communication within the communities.

The NTA sets out a process by which informed consent is obtained from Aboriginal signatories and by which the agreement is brought to the attention of other potential native title holders. This process itself takes a minimum of three months and needs to be built in to this strategy and planning for any projects. Industry may look to sponsoring a member of each of the negotiating teams to travel among the affected communities and to other interest holders explaining the agreement, the process and the outcome. If no other native title claimants emerge, the statutory process can be continued and ultimately the agreement can be registered.

COSTING ILUA NEGOTIATIONS

So ILUAs sound like the solution parties have been seeking since 1994 but what do they really cost? The cost will depend upon many factors. One of the main problems with respect to costing ILUA negotiations is that the ILUA itself is only a recent innovation. The cost of negotiations do not take into account what is ultimately agreed by way of compensation, some of which may be offset by costs which parties would have had to spend in any event. However, there are some precedents set by negotiations conducted prior to the introduction of the ILUA by the NTA amendments in 1998. Industry can draw on these precedents to give us some idea of the projected costs. These costs need to be compared with the likely costs of Federal Court litigation of the claimant Application for Native Title Determination plus costs of negotiating repetitive future acts and the ensuing compensation through the right to negotiate process plus potential compensation payments after a successful determination of native title. Alternatively, the Federal Court Determination process may continue and parties may continue to be involved in the process. It may be that claimants for native title determination see a final determination as necessary to have their status acknowledged or that some moneys are held in trust for those finally determined to hold native title. Whatever the situation it is likely that costs will be less if there is an enduring ILUA in place.

One of the problems with the precedent agreements discussed in this paper is that they were largely negotiated in connection with existing ore bodies. In those cases the resource developer and the

claimant's representatives had a good idea of the value of the potential prize and were able to make a meaningful evaluation of the relative benefits of securing the agreement with the affected indigenous people. Most were negotiated prior to the NTA amendments and thus did not have to take into account many of the issues which now arise.

One example of negotiations which took place prior to the NTA resulting in an agreement after the NTA was the McArthur River Agreement.[24] This agreement resulted in the Commonwealth Government purchasing a neighbouring cattle station for the Gurdandji people, Commonwealth Government funding for mine employee training and MIM Holdings Ltd (MIM) providing some economic opportunities for the Gurdandji, Yanyuwa, Marra and Garrawa people. These opportunities came to fruition by way of a barge transport contract awarded to a joint venture between Burns Philp Shipping Ltd and the Aboriginal and Torres Strait Islander Commercial Development Corporation. The latter party would systematically transfer its interests to local Aboriginal people. Although there were costs met by MIM for the negotiations it is notable that there was little direct cost to MIM in provision of compensation. This agreement was conducted following many years of experience by all of the parties with the operation of the ALRA.

Another example of an agreement relevant to this paper is the Woodcutters Agreement.[25] Woodcutters mine is situated on Northern Territory Crown land but is surrounded by Aboriginal land (under the ALRA). As well as the transfer of the mine leases to the traditional owners at the conclusion of the mining operations the agreement included production and base metal price based payments, employment and training opportunities and environmental protection. The traditional owners in return agreed not to file a claimant application for native title determination over the mine site.[26]

These agreements were entered into by parties with many years of experience in working with the ALRA. There are other agreements which have been successfully concluded outside the Northern Territory such as two gas pipeline agreements which have been concluded post NTA in Victoria[27] providing for cultural heritage

[24] Gurdandji Yanyuwa, Marra and Garrawa and MIM Ltd agreement, March 1994 relating to the McArthur River Mining Joint Venture in the NT.

[25] Agreement between the Finniss River Land Trust, the Northern Land Council and Normandy Mining Ltd in July 1995 in the NT.

[26] These examples and several others are outlined in Paul Kauffman's book, *Wik, Mining and Aborigines*, op cit n 13.

[27] Agreement between Mirimbiak Nations Aboriginal Corporation and NSW Aboriginal Land Council with BHP Petroleum Ltd and West Coast Energy Australia Ltd in eastern Victoria and a further agreement between Mirimbiak Nations Aboriginal Corporation and the Victorian Government and GasCor.

protection, employment and training for local indigenous people and also dealt with native title rights and interests. There have also been numerous other agreements concluded in Western Australia and South Australia dealing with the future act provisions of the NTA.

Whilst not always possible at an exploration stage, often a resource developer will consider it is in its best interest to commence negotiating an ILUA at that stage for the reasons set out earlier in discussing conjunctive and disjunctive agreements. The resource industry party needs to be aware that to many in the indigenous community, a junior explorer and a resource developer are "indistinguishable and appear equally rich [and] powerful".[28] The scope of this paper does not allow me to examine the risk/reward evaluation that needs to be made in connection with exploration projects. I would simply point out that if an ILUA is to be negotiated at an exploration stage, then a cost/benefit analysis will be much more difficult to undertake. Nevertheless, a well considered and constructed ILUA concluded prior to or during the exploration phase can provide certainty for both parties.

Some of the key issues and costs associated with negotiating an ILUA are as follows.

RESOURCE DEVELOPER'S COSTS

I will deal first with the costs likely to be incurred directly by the resource developer. These cost estimates are based on a hypothetical exploration project in the WA Goldfields where there are five native title claimant groups. The estimates contain salary components. Obviously there will be large variances in costs depending on the number of parties involved, the location of the project, the make-up of the negotiating team and the location of the eventual negotiations.

If we look at the various stages contemplated earlier in my paper there are several layers of potential costs for the resource developer. Stage one involves the decision to negotiate. Initial stages in making this decision require data collection which include transfer charges from internal service groups, charges for external searches to such bodies as the State Land Titles offices, the NNTT, the Federal Court registry and various mining registries.

The second part of stage one is the development of an internal business case and determining negotiation strategies to support negotiation of an ILUA. This would include research and meeting costs, presentation costs for preferred professional assistance

[28] Thomson, op cit n 5.

including travel, accommodation, and professional fees and generally internal travel expenses for personnel not based at the meeting venues.

Many of the second stage potential costs will depend upon the location of the resource developer's corporate office and the distance that office is from the project area. It will also depend on the number of parties involved. External consultation requires physical visits to each party or affected interest holder. This will usually occur on a low key basis largely to make contact, introduce the concept of an ILUA, assess party's expectations and informally begin development of a relationship. Costs will include flights, vehicle hire, fuel, accommodation, provision of maps, salaries, etc.

As previously noted, in most cases, it is highly unlikely that the negotiations will be held in the home city of the developer. Rather, it is likely that they will be held at, or close to, the area which will be subject to the ILUA. In most cases this may actually be the cheapest option for the developer and government parties as it is likely that the Aboriginal group will have the greater number of people that it wants to attend meetings — particularly in the early stages. It is also likely to accommodate pastoralist parties. The initial stage will be negotiation of the negotiation protocol.

The following activities are likely to require resource developer funding:

1. Travel and accommodation of the negotiating team to and from the site chosen for negotiation.
2. Meeting costs — meals, venue hire, equipment hire.
3. The services of external advisers including legal, commercial and experts in community issues.

Once the negotiation protocol has been established the formal negotiations commence. The length of time for these negotiations will very much depend on the success of the earlier external consultations and the relationship building. I estimate that a durable, encompassing ILUA could not be negotiated in under 10 meetings of two days each. It would, in my opinion be more likely to take up to 20 meetings. The same type of costs as set out above will be applicable.

The fourth and final stage of drawing up the agreement, advertising costs, final meetings costs to execute documentation, registration fees, stamp duty, etc will again depend on a number of variables. My estimate does not take into account the potential situation under s 24CG(3)(b)(ii) of the NTA outlined above.

Whilst actual costs are an "unknown" as they will depend on the area and the parties involved, they could realistically exceed an annual exploration budget of up to $.5M.

Compare this with the exploration budget for the first two years as outlined above and you will gather that negotiation of an ILUA over a two year period may well absorb over 50 per cent of the exploration budget. Coupled with government rents and other indirect expenditure commitments there is little left to actually explore.

These are the main direct charges that will be incurred. There may be a myriad of other incidental charges such as the supply of materials for use at meetings, "tucker money", fuel costs for indigenous negotiators, etc, although these are likely to be small and relatively insignificant in the scheme of things.

I have not costed in cost estimates for any party other than the resource developer's team and the independent facilitator. The costs of a facilitator/mediator will depend upon the training and profile of the person selected. The costs associated with the facilitator/mediator have the potential to be quite large because of their importance in the process and the necessity to be at every meeting be it intra party or between the parties. Of course, costs are almost impossible to predict without some knowledge of the complexity and length of the negotiations but costs in the vicinity of $1500 per day for a person of sufficient standing, experience and skill, should not be unexpected. This does not include the travel, accommodation and out of pocket expenses that would also be incurred by the facilitator/mediator. The resource industry and government parties should expect and factor in these facilitator/mediator costs.

FUNDING ABORIGINAL PARTIES

I am not aware of any ILUA negotiations (or for that matter, negotiations of agreements which pre-date the ILUA) where the developer did not fund at least some portion of the costs of the indigenous people concerned. Such costs will often be an agreed, capped amount. Crucial to limiting these costs will be an agreement, usually reached at the same stage as the parties agree a protocol for the ILUA negotiation, limiting the number of people that make up the ILUA negotiating team and as a consequence or in the alternative limiting the nature or quantity of costs that will be met. There may need to be some dispensation for public meetings that may be necessary, however limits on the number of people attending

meetings will not only prevent costs "blow outs" but will prevent frustration and ineffectiveness.

Following is a list of costs which may arise in connection with the funding of Aboriginal parties:

1. Sitting fees — in my opinion, these fees should be avoided. I understand that in many cases, they have been avoided such as with the earlier mentioned Yandicoogina Agreement. I would encourage this in order to avoid costs additional to the final negotiated costs and so as to ensure a timely and effective negotiating process. If sitting fees were to be paid and the number of participants not limited, it may well not be worthwhile pursuing an ILUA.

2. Travel and accommodation costs — depending upon the location of the negotiations, these may be limited. However, there may be occasions when people other than the core negotiating team from the indigenous people will need to attend and there will be some costs associated with this attendance. Because it is crucial that there remain continuity of representation this aspect of costs will be likely to be high.

3. Legal/commercial advisers — it is likely that the developer will be asked to fund the provision of independent advisers. Putting aside for the moment the question of the prudence of providing these advisers so as to ensure a "level playing field", these costs may be as considerable as will costs associated with the provision of the resource developer's own advisers. In my opinion, independence is more assured when funding for such advisers is met through normal ATSIC or government funding processes as outlines earlier in this paper.

The above discussion makes no comment upon the consideration that may eventually be payable by a resource developer pursuant to an ILUA. Of course, precedents have already been set for this and I do not believe it is the scope of this paper to discuss those levels of compensation. They will inevitably vary from project to project and from ore body to ore body. Only time will tell whether each will have precedent value for the next. To date most publicised agreements have revealed the type of consideration for the agreement without revealing the quantum.

ISSUES OF COHESION BETWEEN ABORIGINAL GROUPS

The NTA has encompassed cultural issues of land and water rights in legislation which is not sufficiently malleable enough to reflect the real and enduring connection to land held by many Aboriginal people. Working within such a regime which requires group cohesion, evidentiary threshold tests and delineation of boundaries of land responsibility sits uneasily with many people. Others use the opportunities which the legislation presents them in ways which many see as opportunistic — nowhere more strongly evidenced than in the Western Australian Goldfields where there have been up to 22 different claimant applications for native title determination over one resource development.

The Aboriginal groups have at times formed uneasy truces in order to meet legislative requirements. The cohesion between group members is rarely assured. In such cases it is really too difficult to form enduring contractual alliances and ILUAs are unlikely to be a suitable vehicle for moving forward in such areas.

CONCLUDING THE ILUA CASE

In conclusion, it seems likely to me that the costs of negotiating a full ILUA are likely to be considerable even in relation to a straightforward negotiation involving only one indigenous group or native title claimant. The major difficulty with the ILUA is to decide exactly when to start negotiating it. There are those that would argue that formal ILUA negotiations should not commence until the ore body is reasonably well defined. However, this does not take into account the commercial advantage that the developer forgoes by delaying commencing ILUA negotiations until that point. Of course, the counter-argument is that once you have some idea of the prize, then real consideration can be given to the sharing of that prize with the indigenous people. This is very much a philosophical argument that cannot be addressed here. Regardless the negotiation costs are high and clearly absorb a high proportion of the exploration budget but do provide a risk management tool which gives confidence in the event of exploration leading to development.

The risks to resource developers and governments in entering into an ILUA with a party whose internal stability is in question is high and it is unlikely expenditure would be justified in these situations. Each situation needs to assess the balance between the commercial imperatives of ongoing resource development and subsequent social

sustainability and the ability to administer and apply an agreement which cannot be guaranteed. Underlying the success of any ILUA is that parties understand and are prepared to abide by the contractual relationships that will be formed by such an agreement. This success will only flow from cohesion between the parties entering into the agreement. Failure of the agreement has the potential to lead to litigation for breach of contract. That has the domino effect of the breakdown in community relationships and could possibly herald ultimate failure of the resource development project.

IN THE EVENT OF SUCCESS

Ultimately, the actual finalisation of an ILUA agreement needs to be symbolic. In the past when agreements have been concluded, there have been formal hand over ceremonies or, in the Yandicoogina case, a large barbecue attended by most of the affected interest holders. Alternatively, there may be a formal hand over ceremony by Aboriginal, local or national dignitaries. Suffice to say, the symbolism emphasises the importance and gives credibility, understanding and respect through public commitment to the agreement. Such symbolism also evidences the mutual respect which has formed between the interest holders who have participated in the agreement. In the final analysis success of an ILUA depends on the relationships between the parties. The obligations to these relationships do not end when this symbolic event happens. The successful conclusion of an ILUA is in itself a public commitment to the continuity of harmonious, respectful and consultative arrangements with the community. Unless parties realise and are prepared to commit to these ongoing obligations the ILUA will have a difficult life.

The resource industry would do well to recognise that in concluding such an agreement, some of the most important factors in their licence to operate have been met. The continuing relationships developed through the negotiation period will remain throughout the project and will be integral to the project's success and beyond.

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