'THE HOLY GRAIL' OR 'THE GOOD, THE BAD AND THE UGLY'?: A QUALITATIVE EXPLORATION OF THE ILUAs AGREEMENT-MAKING PROCESS AND THE RELATIONSHIP BETWEEN ILUAS AND NATIVE TITLE

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I Introduction

The Indigenous Land Use Agreements ('ILUAs') scheme was identified as one of the positive features of the *Native Title Amendment Act 1998* (Cth) ('*NTAA*'). The ILUAs scheme heralded a new age of agreement-making with Indigenous communities, offering a proverbial olive branch in that it extended to traditional owners the right to negotiate in good faith over future acts on traditional lands, whether or not native title had been determined.[1] ILUAs also offered native title claimants a way of avoiding the 'imprudence of litigation'.[2] ILUAs could potentially secure 'practical' native title rights for traditional owners, including monetary compensation for the use of land and/or employment opportunities.[3] Purportedly, governments and project proponents now had a formal, fast and effective mechanism for negotiating with native title parties in relation to the 'doing of an act' on land where potential or proved native title rights existed.[4] This is important considering that the native title adjudicative process is lengthy and its outcome uncertain.[5] ILUAs might develop relationships between parties, beyond simply clarifying conditions for future acts on land subject to native title claim. For these reasons, and more, ILUAs presented a new 'risk management tool', facilitating the avoidance of disputes and litigation concerning the use of an area where native title is claimed to exist or has been determined to exist.[6]

Whether or not ILUAs are the holy grail of agreement-making on land and/or water, subject to a potential or proved native title claims, is now questionable.[7] Ruth Wade and Lisa Lombardi have noted that the usefulness of the ILUA scheme is contingent on parties understanding the scheme, the impact on native title of a proposed act, and the desired activity that the proponent/government wishes to undertake.[8] Success is also dependent on there being plenty of time to negotiate, that the proponent/government views a long-term relationship with the Indigenous people who have claims to the land as important, and that compensation is a component of the agreement.[9] Additionally, Malcolm Allbrook and Mary Anne Jebb have highlighted emerging problems associated with implementation and resourcing of ILUAs.[10]

One of the major challenges has been to ensure that the ILUA framework works to equalise the bargaining power of native title claimants as against other parties. While the *Native Title Act 1993* (Cth) ('*NTA*') provisions attempt to support effective relationships between the potential parties to ILUAs, the legislative context in which ILUAs were set down was under the former Howard Government's 'Ten Point Plan', which significantly amended and compromised the original native title regime. The Committee monitoring the *Convention on the Elimination of All Forms of Racial Discrimination*[11] found in 1999 that these amendments to the native title regime were discriminatory, and that they failed to ensure Indigenous people's informed consent.[12] The 1998 amendments to the *NTA* have been said to severely reduce the bargaining position of native title holders, thus limiting the bargaining position that native title holders might hope for under the ILUAs scheme.[13] Indeed, it is arguable that the 'right to negotiate' system was the strongest procedural right available to native title holders prior to the 1998 amendments, and that since that time this right has been severely curtailed. As Donna Craig notes:

> This may have an impact on the culture of agreements and negotiation that had begun to develop between native title holders and resource developers, as well as community groups and local government. Effective negotiations require reasonably equitable bargaining power, access to information

> and expertise, realistic time lines for the relevant issues, facilitation and resourcing…and cross-cultural approaches designed for each negotiation.[14]

Issues relating to the equitability of parties to ILUAs and the lack of bargaining power of native title parties are a growing concern. David Ritter has gone as far as to suggest that there are a number of misgivings in relation to native title agreement-making and that the 'prospect of native title contracts leaving people feeling bewildered, bitter and resentful is something that the brightly painted language of agreement making fails to admit'.[15]

The culmination of the above concerns has meant that some parties are now considering whether it is more appropriate to negotiate an ILUA or return to pre-ILUA arrangements of negotiating a standard contract between the immediate parties. Such an unregulated state of affairs was previously acknowledged as unsuitable, and actually justified the establishment of the ILUAs scheme. Between 1993 and 1998, 1100 pre-ILUA style agreements were reached between different Indigenous groups, and miners, industry bodies and governments. Between 1998 and 5 July 2010, 434 ILUAs were registered in Australia.[16]

We believe that empirical investigation of such issues is warranted. As a starting point, we explored the perspectives of some people who represent and provide assistance to native title parties in the negotiation of ILUAs. This paper aims to provide qualitative insights into the agreement-making process of ILUAs by drawing on data from in-depth interviews with: legal and policy officers from Native Title Representative Bodies (NTRBs); representatives from relevant local, state and territory government departments; and officers of the National Native Title Tribunal (NNTT). A forthcoming paper will explore qualitative data gathered in relation to the negotiation and delivery of social, economic and cultural benefits to native title parties through ILUAs.

II Methodology

Quantitative research confines itself within a deductive framework that proceeds from the abstract (general assumptions) to the formulation of empirically testable propositions about a social phenomenon. It is based on the assumption that social phenomena can be measured. On the other hand, qualitative research confines itself to the inductive framework of theorising from research data. Qualitative research is based on the assumption that people experience physical and social reality in different ways and it aims to capture those different experiences. The objective is to collect and analyse the richest possible data, to establish what is theoretically important. Consistent with a qualitative methodology, this study attempts to capture data about the effectiveness of ILUAs, as viewed and experienced by the interviewees.[17]

In keeping with a qualitative approach, the study was designed to use a targeted (that is a non-random) sampling strategy or what is commonly referred to as non-probability or purposive sampling. The original predefined group that the study targeted was the seventeen NTRBs around Australia. Information letters were sent to the Chief Executive Officers or General Managers of the NTRBs, outlining the study and inviting them to participate in the study. The letter also informed the Chief Executive Officers or General Managers of the NTRBs that the researcher would contact them with a follow up phone call to discuss the study. The researcher then contacted the Chief Executive Officers or General Managers to elicit whether or not they wished to participate in the research.

Early in the period when participants were recruited, several of the people contacted suggested broadening the target group to include officers of the National Native Title Tribunal and public servants from relevant government departments. Contacts in the NTRBs advised that a more holistic perspective could be gained by interviewing a wider range of actors in the ILUA process. A combination of convenience and snowball sampling occurred in that additional participants were recruited by referral and through directly contacting the researcher.[18] Thirteen qualitative in-depth telephone interviews were conducted, including group interviews, with a total of 18 participants. Senior position holders within NTRBs generally assigned their legal or policy officers to participate in the interviews. Ten participants were NTRB officers or others engaged in representing the interests of Indigenous parties in ILUA negotiations. Six participants represented local, territory or state government departments, and two were officers of the NNTT.

A semi-structured interviewing protocol was adopted using open-ended questions. Interviewees were asked a series of questions designed to elicit information about the effectiveness of the scheme, as well as gain an understanding of: the agreement-making process; the types of economic,

social and cultural benefits native title parties were deriving from the scheme; and the broader relationship between ILUAs and native title, including the effect of ILUAs on native title litigation.

Interviewees signed a participant consent form acknowledging the fact that the study was being conducted on the basis of confidentiality and that no information about interviewees would be used in any way that revealed their identity. The consent form also stated that 'the final data collected [for analysis would] be published in academic journals and conference papers, and that no information [would] be used in any way that reveals [their] identity'. Consent was also given on the condition that interviewees could withdraw from the study at any time without it affecting their relationship with the researcher(s) now or in the future.

Interviewees were advised that the interview was being audio taped, and that the audio recordings would be transcribed. Interviewees were given the option to have the transcript sent to them to edit and for verification/confirmation of the accuracy of details disclosed during the interview.

Interview transcripts were treated as 'raw data' and systematically compared, contrasted and analysed for emerging key thematic codes and categories concerning the ILUAs scheme. Rather than generating a theory, initial analysis was aimed at describing the situation and informing policy.[19] Three key themes emerged from the data. The first concerned ILUAs within the broader native title scheme. The second concerned ILUAs as a special form of agreement-making. The third related to the 'practical' native title rights, which native title parties were deriving from ILUAs, as well as mechanisms for monitoring the delivery of substantive economic and social benefits to native title parties. For example, while 'practical' native title benefits negotiated by Indigenous parties to ILUAs are typically confidential, interviewees noted that the existence of an ILUA did not necessarily mean that the native title party or parties to that agreement were deriving any practical economic, social or cultural benefits from that agreement. These concerns were substantial, warranting separate detailed and considered analysis and are the subject of a separate paper.

Accordingly, unlike a quantitative research report, which outlines the results and discusses the findings of a large-scale empirical study, the paper presents the findings of our study according to the first two key themes emerging from the data. That is, this paper explores interviewees' overall impressions of the ILUAs scheme, with particular reference to the agreement-making process and the relationship between ILUAs and native title.

III Background to the ILUAs scheme

While examples exist of Indigenous people benefiting from mining on reserves during the 1950s, it was not until the 1970s that Indigenous people began to receive royalties from mining companies.[20] The 1970s mining agreements negotiated by the Australian government, such as the Grooyte Eylandt (manganese) agreement, Gove (bauxite) agreement, and the 1975 Memorandum of Understanding for the Ranger Project, were limited in their capacity to protect Indigenous interests. Royalty rates received by Indigenous peoples through similar agreements in comparable countries were very low.[21]

Following the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Indigenous people became parties to agreements with mining companies over mining on their land, as well as parties with governments over the leasing back of Indigenous land. The first two agreements signed were the Ranger Uranium Project Agreement and the Kakadu National Park Lease Agreement. As Langton and Palmer note, since then

> there has been a proliferation of agreements between Australian Indigenous people and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, publishers, arts organisations and many other institutions and agencies.[22]

The types of agreements varied from simple contractual agreements, to Memoranda of Understanding, to agreements with a statutory status under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[23]

After the High Court recognised the existence of native title in *Mabo (No 2)*,[24] acknowledging the wrongfulness of the doctrine of *terra nullius*, agreement-making took on a new meaning. The concept of the 'right to negotiate' was incorporated into the *NTA*, however it simply set out that negotiations must take place with native title claimants before a proposal to develop could be granted the necessary approval. Section

21 of the *NTA* provided for the recognition of regional and local agreements.[25] Unfortunately the original *NTA* failed to provide adequate support for the negotiation and registration of land use agreements.[26] Moreover, no mechanism existed to ensure that all potential native title claimants or holders were parties to agreements made. Potential native title claimants or holders, who were not parties to an agreement, were effectively locked out of the process.

There are three typical situations in which agreements between Indigenous and mining interests regarding land use are said to emerge, and these also reflect the broader circumstances in which Indigenous and non-Indigenous peoples negotiate. First, where legislation mandates agreement before certain acts can proceed (for example the *Aboriginal Land Rights (Northern Territory) Act 1996* (Cth)). Second, where legislation creates an opportunity for agreement, but allows acts to proceed without agreement in some circumstances (for example, under the right to negotiate scheme in the *NTA*). Third, where there is no legal requirement to negotiate, usually because non-Indigenous parties held interests in land pre-*Mabo*, but they choose to negotiate with Indigenous people as a matter of policy.[27]

In 1995, a conference was convened 'to explore potential means of resolving competing claims to land' through Indigenous Land Use Agreements.[28] The option of agreement-making in the form of a common law contract existed, yet it was recognised that a more structured framework was needed to facilitate negotiated outcomes in relation to competing claims over the use and management of land and/or water.

The emerging native title framework shifted dramatically following the High Court's 1996 decision in *Wik*,[29] when the court found that the granting of pastoral leases by the Crown had not automatically extinguished native title, and that coexistence between the two forms of title was possible.[30] The Howard government quickly responded with amendments to the *NTA*. The bulk of the amendments were aimed at further limiting the scope of native title and protecting government-granted titles, including pastoral leases. However, the *Native Title Amendment Act 1998* (Cth) (*NTAA*) also established the ILUAs scheme, a more structured and highly regulated means of reaching negotiated outcomes between parties in relation to 'future acts' on land subject to native title claim.[31]

The often-cited advantages of ILUAs are their capacity to provide both flexibility and legal certainty.[32] ILUAs are long-term contracts negotiated to cover future acts; as such, they contemplate future acts with the objective of avoiding the need for parties to negotiate over each future act. The terms of the ILUA are open to negotiation, and so may be as broad as the parties wish. Once registered, an ILUA is a contract legally binding on all native title holders in the area covered by the agreement, whether or not they are signatories to the agreement. Registration of an ILUA binds all successors to native title or unascertainable persons holding native title to the terms of the agreement. This special binding nature, provided for in the *NTAA*, sets ILUAs apart from traditional contracts regulated by the common law.

However, the effectiveness of this model of agreement-making is contingent on many factors. A growing body of literature acknowledges the limitations of the ILUAs scheme as a model of native title agreement-making for Indigenous parties.[33] Despite their potential advantages, ILUAs are not a 'quick fix' to the challenges raised by the use of land subject to native title claim. Nor have ILUAs resulted in a reduction of disputes and litigation in relation to native title. In fact there are a number of identified potential risks associated with negotiating an ILUA. These include: negotiating with the wrong, or not all appropriate native title holders; and an objecting party contesting and preventing registration, and the consequent removal of an ILUA from the register, rendering its legal status uncertain. Indeed, a new form of native title dispute has emerged in relation to the proper authorisation of ILUAs.[34] While the Registrar of the NNTT is required to ensure that the application complies with legislative requirements, including authorisation requirements, a number of ILUAs have not been properly authorised and have been subject to challenge. There have also been difficulties associated with securing authorisation to procure registration.[35]

The position of Indigenous parties is also uncertain in circumstances where original Indigenous parties to an ILUA die, or where other members of an Indigenous claimant group come of age and acquire native title rights and interests under customary law.[36] Given that ILUAs are enforceable and may have no fixed term, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund Second Interim Report into Indigenous Land Use Agreements raised inter-generational equity as an issue requiring careful consideration by all parties to ILUAs.[37]

The empirical data that we collected indicates that the scheme is considered effective in terms of encouraging non-

Indigenous and potential or existing native title holders to negotiate a land and/or water use agreement in relation to future acts. Interviewees three and five reflected this view. Interviewee three stated:

I think that, as a scheme which was intended to encourage parties to negotiate and to provide some framework for those negotiations, it is broadly effective. I think it certainly ticks the box in terms of certainty for the parties to the ILUA.

Interviewee five stated:

> Whether ILUAs in the current form are adequate or could be improved is probably by the by from my perspective. It's a structured system that allows for engagement and allows for an outcome. So, if you accept the initial premise of the *Native Title Act*, then ILUAs are a good mechanism by which a structured agreement can be reached.

Nevertheless, beyond this acknowledgement that the ILUAs scheme encourages negotiated agreements, interviewees raised concerns that the scheme could disadvantage Indigenous parties. For example, interviewees acknowledged that awareness among project proponents and governments that native title litigation in Australia did not generally lead to positive outcomes for native title parties weakens the negotiating position of native title parties in relation to ILUAs. Interviewees also pointed to shortcomings or contractual idiosyncrasies specific to ILUAs as non-traditional contracts. This ranged from difficulties associated with authorisation and registration, through to concerns about the lack of mechanisms to amend ILUAs once they are registered. The issues associated with authorisation and registration are encapsulated in the following statement made by Interviewee eleven. Interviewee 11 stated that:

> I think the process for getting ILUAs finally authorised and registered is cumbersome and difficult and I have some doubts as to whether the process is the most effective method. I am sure we could find a different, better system.

The following sections of this paper explore the concerns raised by interviewees in relation to ILUAs within the broader native title scheme, and ILUAs as a special form of agreement-making. A separate paper will explore the important questions of whether social, economic, and cultural benefits are being achieved by Indigenous parties, and whether the delivery of such benefits ought to be monitored.

A ILUAs in Relation to Native Title Litigation

The National Indigenous Working Group was prominent in the push to include the ILUAs scheme in the *Native Title Act 1998* (Cth).[38] Several specialists in the field of native title law have stated with some degree of confidence that ILUAs provide a more useful native title framework for Indigenous peoples than litigation.[39] This is unsurprising given that one of the primary reasons for the establishment of the ILUAs scheme and the ongoing preference for the negotiation of an ILUA, over litigation, is not only that the court process is lengthy, expensive and unlikely to produce positive native title outcomes, but also that ILUAs provide a more useful native title framework in terms of recognising and protecting native title rights. That is, ILUAs have the potential to provide 'practical' native title benefits or rights, such as potentially facilitating social and economic development, whilst a court determination is typically limited to an acknowledgment of the existence of native title.

(i) Common law and the determination of native title

The primary method of asserting traditional ownership rights over land in Australia is through the native title system. Yet, native title remains difficult to prove. It continues to be treated as a lesser property right. Even if a court determines native title, it cannot deliver land and property rights associated with that title. It is beyond the scope of this paper to offer a comprehensive evaluation of the determination of native title in Australian courts. However, it is important to briefly acknowledge some of the limitations of the litigation framework for Indigenous parties.

Firstly, the manner in which the Australian courts have dealt with native title has meant that the complexity of native title claims, as well as how such claims impose demands on native title parties, is unprecedented in adversarial litigation.[40] As Tom Calma notes,

> in a heavily contested claim, an adversarial process leads those opposing the claim to raise every objection and to contest every point available to them. The onus is on the claimant to prove their case.[41]

Respondents object to and refute the claims of experts, attempting to undermine the evidence presented. Tom Calma goes on to note:

> In the Wongatha case[,] Justice Lindgren faced 30 expert reports, to which 1,426 objections were lodged. In the Jango case, the Yulara compensation case, certain expert anthropologists' reports were the subject of over 1,000 objections by the respondents.[42]

Furthermore, in order to prove native title, s 223(1) *NTA* requires Indigenous claimants to demonstrate a connection to the land, through the continued practice of traditional laws and customs that have normative value. Richard Bartlett refers to this as the 'burden of proof'.[43] In *Yorta Yorta*, Gleeson, Gummow and Hayne JJ held that:

> continuity in acknowledgement and observance of the normative rules in which the claimed rights and interests are said to find their foundation before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.[44]

In commenting on this interpretation of s 223 (1) in *Yorta Yorta*, Bill Jonas noted:

> the standard and burden of proof required to establish elements of the statutory definition of native title are so high that many Indigenous groups are unable to obtain recognition of the traditional relationship they continue to have with their land. In turn, their cultural, religious, property and governance rights, recognised at international law and embodied in this relationship, fail to be recognised and protected under Australian law.[45]

In light of such challenges, it has been extremely difficult for Indigenous people to achieve adequate recognition of native title rights and associated interests through the Australian courts. In this context, ILUAs hold some promise because they provide a mechanism for consent determinations of native title, which bypasses the litigation process. Further, ILUAs can potentially provide economic and social benefits associated with native title rights, in the form of compensation and employment opportunities, while other parties receive the use of land for profit.[46]

(ii) The research findings in relation to ILUAs and native title determinations

Interview respondents generally regarded ILUAs as a preferable means of dealing with native title issues compared to litigation. For example, Interviewee 12 stated that:

> at the end of the day if you have a native title determination that just gives you the strict native title rights and where [they apply] but it still doesn't deal with how people then get on and deal with what that means. And it still doesn't address ... the 80% of issues that people expect will be dealt with through a native title claim ...

Nonetheless, while ILUAs potentially circumvent the need for a court determination, interviewees noted that ILUAs are typically viewed by native title claimants as complementary to a court determination of their native title. As Interviewee 18 pointed out:

> we have been instructed fairly strongly by our clients that whatever the possible inadequacies of native title, they view it as an extremely important element of any outcome; I think primarily because of the recognition factor. Being recognised as native title holders is still a really important thing.

These comments highlight a problem with the current relationship between the ILUA scheme and native title litigation. While a determination of native title reached by consent between negotiating parties is valuable for Indigenous parties, interviewees indicated that native title claimants regard a court determination of native title as of greater symbolic significance. That is, traditional owners would prefer a court determination of native title, over a consent determination of native title. Given this, and that a consent determination of native title must be ratified by a court, perhaps the native title legislative framework could be amended to raise the status of consent determinations of native title, such that Indigenous parties may come to regard them as equally significant and advantageous as those (few) instances of native title determinations reached through litigation.

(iii) The history of native title litigation and the implications for negotiating structured agreements

The interview data revealed that the history of native title litigation is having a qualitative impact on the negotiation of ILUAs by weakening the negotiation power of native title parties in four ways. First, some interviewees indicated that Indigenous parties were 'forced' to negotiate an ILUA in order to achieve some protection for their land rights, as they could

not afford to litigate. Interviewee ten raised the question, 'who can afford to take these things to trial?' Interviewee eighteen acknowledged that native title claimants can be 'pushed into a corner' in negotiating an ILUA, as the only other choice is litigation and, therefore, the ILUA is the 'best deal they can get'.

Secondly, the bargaining power of Indigenous parties in ILUA negotiations is limited by their awareness of native title litigation being extremely risky. It is possible, even likely, that litigation can lead to the rejection of a native title claim and the loss of capacity of Indigenous parties to have any say over the future uses of their traditional lands. In this context, Interviewee 10 noted that '[e]ven well prepared cases are ... a gamble, so native title parties are effectively forced into negotiations that they might not otherwise have engaged in'.

Third, while ILUAs do not depend for their existence on the recognition of native title, if there is uncertainty about the strength of the native title claim over an area, it weakens the resolve of some non-Indigenous parties to reach an agreement.[47] Faced with the possibility that non-Indigenous parties may choose to abandon negotiations and force litigation, Indigenous parties to ILUA negotiations may feel compelled to accept agreements that deliver limited benefits.

Finally, even if litigation produces an acknowledgment of native title, the courts are not empowered to decide on the substantive social, economic and cultural benefits, which may flow to native title holders in return for the future use of their land by non-Indigenous parties. This leaves native title holders little choice but to negotiate an agreement in relation to their 'practical' native title rights. It is for such reasons that many interviewees expressed concerns that ILUAs are less voluntary for Indigenous parties than they may appear, and that Indigenous parties do not find a 'level playing field'[48] at the ILUA negotiating table.

Interviewees explained how the lack of bargaining power can mean Indigenous parties face a very difficult choice; to accept an agreement with unfair provisions, or refuse an agreement altogether. In the latter case, it is possible that the Indigenous party will then receive no recognition or practical benefits. Interviewee 18 elaborated on this concern, stating that:

> Indigenous parties do not have equal bargaining power – unless we are able to offer something to the party that we are negotiating with that makes it worth their while, we do not get anywhere. It is very much our experience that, in many ways, parties who we do not think even have a right to be involved in the process, remain in the process and manipulate it by simply saying that 'unless you agree to what we want, we are not going to consent to a native title determination'. In such circumstances, unless the client is prepared to say they will go to court and pursue a litigated hearing, and of course there are many reasons why this is not usually a sensible way to go, what is the alternative? They often have to agree to the unreasonable demands. It is one of the many issues that we have raised about the mediation process, many times, over the years, with the Federal Court in its reviews of the Native Title Act. We have said, time and time again, that the process is set up so that all other parties to the process have greater bargaining power than native title claimants do.

Interviewees talked at length about the problems this degree of compulsion posed for Indigenous parties in terms of their attempts to negotiate fairly with other parties. For example, Interviewee 13 noted the problems experienced with negotiating with one state government, in terms of the inclusion of unreasonable clauses in an ILUA, and how conflict over such clauses held up the negotiation process for ten years. Interviewee 16 went so far as to suggest that Indigenous parties had been deceived during negotiations, stating that:

> there is also the question of misleading and deceptive conduct. The mining companies will frequently lie about the size and the detail of the deal of the mining enterprise that they are involved in. They will tell you it is going to end in ten years or fifteen years, when in fact they know it is going to be open for twenty-five and it's got a Stage 2 attached to it. This is compounded by the fact that sometimes the negotiating committees and even the legal officers do not really have a lot of world experience or even life experience and will negotiate a shoestring deal, based on the information provided.

The ILUAs scheme was enacted within the context of native title amendments, which severely curtailed the rights and capacities of Indigenous claimants. Bartlett has questioned whether this context has undermined the bargaining position Indigenous parties may have hoped for under the ILUAs scheme.[49] Interview data on the degree to which Indigenous parties choose to enter into ILUA negotiations,

and experiences of unequal bargaining positions, support Bartlett's proposition.

(iv) Culture and language barriers

Importantly, as with all legal processes involving Indigenous people, the interview data revealed that the effective negotiation of an ILUA can be limited by cultural barriers.[50] Representative or negotiating bodies face the considerable challenge of making the ILUAs scheme accessible to Indigenous people, who may find the process established by the *NTAA* culturally alien.[51] Indigenous peoples' capacity to negotiate an acceptable ILUA may be hindered by the failure to understand Indigenous forms of cultural knowledge and to reconcile them with the alternative institutional cultures of non-Indigenous parties.[52] This occurs because of a lack of cultural awareness on the part of legal representatives and the cultural and language barriers experienced by the native title negotiating parties. For example, Interviewee two notes that:

> As an Indigenous person, and as a lawyer, I have concerns at times whether those people who represent Indigenous people are fully qualified, culturally, to receive instructions appropriately and give advice based on those instructions.

The perspective of Interviewee 18 is also interesting in this regard, in that they stated that:

> I think it would be fair to say that the [Indigenous] individuals who are signing off on these agreements, no matter how much time and effort we put into trying to explain what is in the agreements and what the implications are, they're not lawyers, often they don't speak English particularly well, they may not have had a great education and I think there is the potential for some problems along those lines to arise in the future.

The assertions that legal representatives may lack cultural awareness and that native title parties may not always understand the implications of signing and registering an ILUA deserve further investigation.

B The Idiosyncrasies of Agreement-Making Using a Non-Traditional Model

ILUAs are contractual in nature, however it is not yet established exactly how the altered statutory regime for the establishment of an ILUA interacts with the common law of contract. A contract is an agreement between two or more parties that creates legal rights and obligations are created, which will be enforced in the courts.[53] A contract's essential elements are: offer and acceptance, intention to create legal relations, provision of valuable consideration, legal capacity of the parties to act, genuine consent by all parties, and legality of the objects of the contract.[54] The law of contract is based on the common law, with supplementation by equity and various statutory regimes.

Of particular interest is the relationship between the common law of contract and the ILUA scheme in the *NTAA*. A contractual principle that is important in this context is that of privity of contract, which in general terms means that only parties to a contract can acquire rights or incur liabilities under the contract.[55] Also of interest in the context of ILUAs is the range of mechanisms provided for by common law and designed to protect parties to contracts, where it is shown that they were unable to give genuine consent. These include the doctrines of mistake, misrepresentation (whether fraudulent, innocent or negligent), duress, undue influence, and unconscionability.

Section 24EA of the *NTAA* has received significant attention in the literature on ILUAs. It provides:

> (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.

Section 24EA of the *NTAA* is the provision that gives special contractual characteristics to registered ILUAs (registration being non-compulsory). Unlike other contracts bound by the doctrine of privity of contract, ILUAs can bind people who are not signatories to the contract. As has been recognised by Chris Doepel, in relation to ILUAs, '[c]ontractual status is created where, in some instances, the general law would not

allow the contract'.[56] This occurs only in relation to native title holders, but not in relation to any non-Indigenous parties to an ILUA. Specifically, s 24EA means that:

> *all* persons holding native title in relation to *any* or *all* of the relevant land or waters – irrespective of whether they are parties to the agreement – will be contractually bound to comply with the obligations of parties and will be liable to be sued for any breach.[57]

The intent of this provision has been expressed as giving certainty to non-Indigenous parties who wish to know that their land uses cannot be challenged in the future by native title holders, with whom they have not negotiated and have not reached an agreement. It is said that the notice of intention and objection to registration procedures, under the *NTAA*, are designed to ensure that native title interests 'are not bound in the absence of notice and an opportunity to challenge registration'.[58]

The special nature of the obligations imposed by s 24EA of the *NTAA* raises the issue of inter-generational equity, a further complicating factor for Indigenous representatives seeking to ensure acceptable ILUA outcomes. Whereas native title bodies corporate have perpetual succession and can always be readily identified, native title holders will change as people die and others are born, which inherit rights and interests under the laws and customs of their community.[59] This scheme violates the contractual principle of the ascertainability of parties,[60] thus further clouding the nature of the relationship between contract law and ILUAs. Also, as the *NTAA* does not impose any mandatory time limits on ILUAs, Indigenous parties must try to negotiate to ensure benefits for both present and future native title holders, an effort made especially difficult considering the dynamic nature of communities.[61] Further, the *NTAA* makes no provision for how native title holders might distribute compensation flowing from the agreement, or how they might deal with the potential for non-Indigenous parties to the agreement to change, particularly if third parties are not acceptable to the original Indigenous contract-makers.[62] Not only do these factors raise legal issues, but they 'may also give rise to important cultural considerations for native title parties'.[63] To ameliorate such challenges, Indigenous parties may seek to include time limits or provisions for review in their ILUA.[64] However, such provisions would weaken the 'certainty', which the s 24EA provision aims to ensure for non-Indigenous parties. This in turn may reduce the likelihood of successful negotiations.

There has been no challenge to the content of s 24EA of the *NTAA* in the courts, and the minimal case law that has developed in relation to ILUAs concerns other aspects of the regime, notably the provisions relating to authorisation of, objections to, and registration of ILUAs. As little judicial discussion of ILUAs relates to the key questions raised here, case law will not be examined in detail, and only an overview of the types of issues the courts have so far confronted will be given. In *Murray v Registrar of the National Native Title Tribunal*,[65] Marshall J found (in relation to who must be consulted for the authorisation of area agreements) that the phrase 'all persons who may hold native title' refers to persons who are at least able to make out a *prima facie* case that they hold native title. In *Murray v Registrar of the National Native Title Tribunal*,[66] Spender, Branson and North JJ found that it is not a requirement of validity for authorisation or registration of ILUAs that all persons who claim to hold native title over the agreed area be identified and sought for their authorisation. The Federal Court confirmed in *Western Australia v Strickland*[67] that the requirement for ILUAs to be authorised is, however, especially important, as it recognises the communal nature of native title rights and interests.

As authorisation is so important, the courts impose strict guidelines on which bodies may exercise authority for a native title group.[68] Such bodies must exist under customary law, be recognised by group members, have authority to make decisions binding group members and give their authority, as required by the *NTA*. In *Bolton on behalf of the Southern Noongar Families v State of Western Australia*,[69] French J held that – in the absence of a traditional decision-making process under customary law – the native title group must agree and adopt a decision, which may be traced back to their collective choice, to employ a stated decision-making process.

There is no provision in the *NTAA* for objecting to the registration of body corporate ILUAs, however it is possible to object to the registration of area ILUAs (s 24CI) and alternative procedure ILUAs (s 24DJ). If an application to register an ILUA is certified by a native title representative body, an objector must be an Indigenous person who claims native title over the area, and must show in writing why he/she believes the application has not been properly certified. If the application is not certified, objectors need not be native title claimants or holders, however they must show that not all reasonable efforts were made to identify all the persons who may hold native title in the applicable area. Importantly, the NNTT has stated clearly that no objections may be made

on the following grounds: the objector thinks the agreement is a bad deal, he/she is unhappy about who receives benefits, the objector does not like the way he/she is being treated by the native title representative body, or he/she is unhappy about the progress of a native title claim in the area.[70]

In the following sections we consider some of the issues raised by interviewees in relation to the idiosyncrasies of ILUAs as non-traditional contracts.

(i) Amending ILUAs

Interviewees confirmed that, according to their experience, 'once registered an ILUA cannot be challenged'[71] and that 'it is set in concrete'[72]. Furthermore, Interviewee four commented that:

> there is no opportunity after the agreement has been registered to say, 'oh, we'd like to move this bit here and that bit there'. You'd have to do a formal amendment to the ILUA, so that is a practical limitation of the agreement-making under the scheme.

Interviewee three confirmed that mining ILUAs, which may be expressed to endure for lengthy periods, may need to be amended as circumstances change. Yet, the amendment process may be problematic.

Interviewee 11 regarded the lack of provisions for making amendments to ILUAs as a failing of the statutory scheme:

> The difficulty is there does not appear to be any way of registering an amendment to an ILUA with the Native Title Tribunal short of doing a full blown ILUA saying, 'this ILUA replaces clauses 56 and 83 of the previous ILUA' and registering it as an ILUA. There is no mechanism whereby a simple agreement to vary something in an ILUA can be recorded… Even if you specify in your ILUA that the applicants all sign the amendment, there is no way of registering that at the Tribunal. You could amend an ILUA, create a new ILUA, and there would be no notation linking the two together. It seems to be that one of the great difficulties when you're looking at long term commercial arrangements is an ability to register an agreed change. And maybe that's not such a big problem if everybody agreed and we just lived our lives accordingly, but the mechanisms for officially recording that are absent.

The limited capacity to easily amend, and register an amendment to, an ILUA may heighten the unequal bargaining position of Indigenous parties, who may regard themselves as 'stuck' with an agreement that does not meet their needs.

(ii) The special binding nature of ILUAs

Some interviewees expressed concern that it is possible for ILUAs to endure for indefinite periods of time, raising the question of their capacity to meet the interests of future generations of Indigenous parties. Of even greater concern to many interviewees, however, was the capacity of ILUAs to bind not only the signatories, but also any other native title holder in the area. One cause of concern was that an agreement to extinguish native title through an ILUA – or indeed any other aspect of an ILUA – will affect the rights of future traditional owners, without those people having had the opportunity to give informed consent.

Interviewee 10 noted how unusual it is for a contract to bind those other than the signatories:

> It is indeed a strange beast that it can bind people who have not even been born yet, although I can understand where that comes from in the sense that what you're really dealing with is a class right. You can also look at it from the point of view that there are many things that will happen that may affect future generations who have no say in it... One of the things that puzzles me, and I have never gotten to the bottom of it of course, is how somebody who is bound by the agreement, because they have to be part of mob X, even if they never took part in negotiating it (a young person for example, as the elders make all the decisions) how do you then get a hold of this agreement by which you are bound, of which you know nothing? The Tribunal will not give you a copy. What happens if other people will not give you a copy? There does not seem to be a mechanism to actually specify how people can get to see the things that are binding them. That is a potential problem. It raises questions about all of these confidentiality clauses that exist in them... An answer to the problem I suppose is, that anyone who proves, and when I say proves I mean *prima facie* without having to go into huge depth, that they're a member of mob X, should be entitled to get a copy of an ILUA registered with the Native Title Tribunal.

These comments demonstrate that the special binding nature of ILUAs may give greater certainty to non-Indigenous

parties, while producing uncertainty for future generations of Indigenous parties.

However, not all interviewees shared this perspective, as is clear in this comment from Interviewee eight:

> The fact that it binds future native title owners, in my view, I don't see that as an issue, because at the end of the day a matter has to be negotiated at a point in time. So, if you negotiate a matter now in good faith and for all the right reasons, then I'm not quite sure that anyone could say well you're going to have to renegotiate that with the next generation. Because the issues and timeframes will be different then so I don't see it as an issue and indeed I see it as probably giving some certainty to future generations of native title owners.

Nonetheless, Interviewee eight and others did share concerns relating to informed consent, good faith negotiations and unconscionability in ILUA negotiations, particularly in light of Indigenous parties not always understanding the implications of signing and registering an ILUA. Interviewee eight went on to say:

> I'll agree that the situation is not clear. Given that ILUAs are essentially a form of contract one should expect that they are subject to all of the usual remedies in a contract that has been agreed; you know, unconscionability in arriving at the terms of the ILUA, practices found by a company acting in a manner that was untruthful or dishonest, not providing all information etcetera. I would think that all of the normal remedies should be available, but again, complications will always arise because of the nature of the thing. ... One of the troubles, and again where I see problems arising is proving [unconscionable conduct]. They've only got to turn around and say, 'oh well I told such a one that, sorry he didn't pass it on'. There's a lot more scope for wriggling out of things with ILUAs, because of how they've developed …

It should be noted at this stage that such issues have not been litigated in relation to ILUAs, so it is impossible to determine how ordinary contract law doctrines, such as protection against unconscionability, would operate in relation to ILUAs.

(iii) ILUAs and the extinguishment of native title

Some interviewees indicated that non-Indigenous parties, particularly governments, have sought and sometimes achieved, the extinguishment of native title through ILUAs. Examples were given by the Inerviewees of non-Indigenous parties demanding that potential or existing native title holders agree to the extinguishment of native title as part of an ILUA.[73] Interviewee 15 expressed concern over this matter, stating that:

> We have had many arguments with the State Government over the years in circumstances where the State says they have a policy, or that it is their position, or it is required by law that there be an extinguishment, that surrender is required in an ILUA. We have said to them over and over again, that we do not accept that acknowledgement of extinguishment is required by law or that the policy is appropriate, because there is no need for a surrender of native title in the circumstances. However, it really is an issue that we have not had a great deal of success with, and at the end of the day, our clients have generally been happy to accept the State's requirement for extinguishment or surrender in order to get the other benefits that are on offer.

This account was not an isolated example. Other interviewees gave examples of ILUA negotiations that involved the surrender of native title. The extinguishment of native title was stated to be in return for some practical benefits for Indigenous parties. For example, there were cases in which a different form of land tenure was considered to be of greater value to an Indigenous community than native title. Interviewee two notes that:

> There are a number of examples where people are obviously consenting to extinguishment of [native title over] parts of their land and as a result they're getting freehold to pursue commercial activities, economic activities, they are agreeing to Aboriginal freehold under the *Aboriginal Land Act* here in Queensland where in some shape and form you're still keeping that community ownership in a freehold but as a result there are those types of deals. So, extinguishment is a very serious thing, but it is, and can be, used strategically for realising the aspirations of that traditional owner group.

Interview data confirmed that non-Indigenous parties will demand 'concessions' in return for benefits negotiated in favour of Indigenous parties, and that this may often result in demands 'for extinguishment of native title or other legal rights in return for negotiated agreements'.[74] Native title cannot be revived once it has been extinguished. Extinguishment relieves non-Indigenous parties of longer-

term obligations to negotiate in relation to the use of traditional lands. Therefore, even though some Indigenous parties have accepted extinguishment in return for other benefits, the fact that extinguishment appears to be a common demand of non-Indigenous parties further emphasises the unequal bargaining power of parties to ILUAs.[75]

The discussion above has highlighted some key challenges facing Indigenous parties to ILUAs, resulting from their special binding nature. ILUAs have sometimes required the extinguishment of native title in exchange for other benefits, and are not as flexible as first thought; for example, once registered an ILUA cannot be amended without the creation of a new ILUA. Additionally, issues of intergenerational equity have not been adequately dealt with in the scheme. Each of these issues is deserving of further investigation.

(iv) Under-funded and under-resourced bodies

Related to the issues explored above is the frequently expressed concern that NTRBs may not all have adequate capacity to represent the interests of native title parties during ILUA negotiations, given that such bodies are typically under-funded and under-resourced.[76] Some interviewees talked at length about the implications of under-resourced Prescribed Body Corporates (PBCs) in relation to the negotiation of ILUAs, both in a general sense[77] and in terms of the effects for native title claimants or holders.[78] Interviewee five stated that:

> The resourcing issue is probably the most important one; especially since more and more native title determinations are made across this jurisdiction. As my colleagues pointed out, once the PBCs are set up, then they are basically left without funding. Without those resources, the finalisation and registration of an ILUA is much harder to achieve.

Interviewee four stated that:

> One of the limitations for native title holders is that they invariably end up funding the administration of their native title rights – sometimes by going as far as surrendering their native title rights to do so. So, my concern about lack of resourcing is more a concern about the lack of funding for the administration of native title rights; that is a limitation of the system.

Several respondents representing NTRBs commented that the authorisation processes required, prior to registration of an ILUA, are particularly challenging for under-resourced NTRBs. Interviewees noted that there is a risk that such processes would not be appropriately handled, resulting in some Indigenous parties not being properly consulted prior to the registration of an ILUA.[79] This could potentially be addressed as a result of additional funding to these bodies, as set out in the federal Government's 2009/2010 budget.[80]

V Conclusion

David Ritter asserts:

> A number of myths are told about native title agreement making which purport to explain what the process is all about and to guide the way that we think about the deals … [that] are not wholly wrong and certainly not deliberately false or intentionally wicked.[81]

This paper has explored whether a myth was created in September 1999 when *ATSIC News* heralded the registration of the first ILUA as a significant advancement in terms of native title. The Walgalu and Wiradjuri peoples had successfully and quickly negotiated an ILUA with Adelong Consolidated Mines, which enabled mining proposed by the corporation, while offering Indigenous people the benefits of employment opportunities and the protection of sacred sites from damage. The *ATSIC News* report reflected what appeared to be the consensus view on the advantages of ILUAs at that time; in that they enabled parties to agree on mutually beneficial outcomes, and gave Indigenous people greater space to speak for country.

Despite the increasing use of the ILUAs framework over the past decade, the question remains whether ILUAs are all that they originally claimed to be. ILUAs' functional idiosyncrasies potentially make them a flexible model of agreement-making, which may offer more cost-efficient and durable outcomes than litigation. It is apparent that negotiated agreements may enable a broader range of benefits for all parties than litigated claims. The growing number of ILUAs indicate that industry and government parties are increasingly recognising the value of negotiating with Indigenous people over land use.

However, this paper has raised questions as to the capacity of ILUAs to serve as 'instruments of consent' to give parties greater control over the process and outcomes, and 'sculpt'

'the nature of the relationship between native title and other interests in a practical way'.[82] There exists a clear power imbalance between Indigenous and non-Indigenous negotiating parties that may limit the benefits that ILUAs can deliver to Indigenous people. Interviewee responses explored in this paper indicate that the registration of ILUAs is not a guarantee that native title parties will achieve best possible outcomes, due to the process of negotiation being flawed. Considering the special binding nature of ILUAs, issues with the agreement-making process must be further interrogated. Beyond this inquiry into process, questions must also be posed as to the capacity of ILUAs to deliver social, economic and cultural benefits to Indigenous parties.

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1 Heather McCrae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook Co, 3rd ed, 2003) 370.

2 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) 57.

3 Lee Godden and Shaunnagh Dorsett, 'The Contractual Status of Indigenous Land Use Agreements' (2000) 2(1) *Land, Rights, Laws: Issues of Native Title*, 2.

4 Ritter, above n 2, 57.

5 A common objective for negotiating an ILUA is that it provides clarity and certainty in the form of a long-term contract negotiated to cover future acts. The ILUA contemplates future acts with the objective of avoiding the need for parties to negotiate over each future act. Once registered, an ILUA is a legally binding contract for all native title holders in the area, whether or not they are signatories to the agreement, setting it apart from the traditional contract. Successors to native title or unascertainable persons holding native title are also legally bound by the ILUA.

6 Graeme Neate, 'The Effectiveness of ILUAs as a Risk Management Tool: A Mediator's Perspective' (Paper presented at the Australian Mining and Petroleum Law Association Twenty-Third Annual Conference, Sydney, 28 July 1999); Daniel O'Dea, 'The Indigenous Land Use Agreement as a Risk Management Tool: An Aboriginal Perspective' (1999) *Australian Mining and Petroleum Law Association Yearbook* 238, 241.

7 Ritter, above n 2, 28-29; see also Malcolm Allbrook and Mary Anne Jebb, *Implementation and Resourcing of Native Title Related Agreements* (National Native Title Tribunal, 2004) 8; Rhonda Kelly and Ciaran O'Fairchellaigh, 'Native Title, Mining and Agreement Making: Best Practice in Commercial Negotiations' in *Native Title and Cultural Heritage in 2002: 16th-18th April 2002, Novotel Hotel, Brisbane* (IIR Conferences, 2002) 9.

8 Ruth Wade and Lisa Lombardi, 'Indigenous Land Use Agreements: Their Role and Scope' (Paper presented at the Native Title Forum, Customs House, Brisbane, 1-2 August 2001).

9 Ibid 2–9.

10 Malcolm Allbrook and Mary Anne Jebb, *Implementation and Resourcing of Native Title Related Agreements* (National Native Title Tribunal, 2004).

11 *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('*Race Convention*').

12 Sue Kee, 'Indigenous Land Use Agreements: Which, Why and Where?' in Bryan Keon-Cohen (ed), *Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference*, *16–20 April 2000* (AIATSIS, 2001) 523.

13 Richard H. Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed, 2004) 523.

14 Donna Craig, 'Native Title and Environmental Planning: Indigenous Land Use Agreements' (2000) 17(5) *Environmental and Planning Law Journal* 440, 444.

15 Ritter, above n 2, 6.

16 National Native Title Tribunal <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx> at 7 July 2010.

17 Alan Bryman *Social Research Methods* Second Edition (Oxford University Press, 2004).

18 Ibid 100.

19 Ian Dey, *Qualitative Data Analysis: A User Friendly Guide for Social Scientists* (Routledge, 1993) 7.

20 Jon Altman, 'Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory' (1995) 2(3) *Agenda* 291, 291–299.

21 'Comparing World Agreements' (1978) *Land Rights* News (Northern Land Council) 7.

22 Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Trends and Issues' (2003) 8(1) *Australian Indigenous Law Reporter* 1.

23 Ibid.

24 *Mabo v Queensland (No 2)* (1992) 175 CLR 1

25 Paul Sheiner, 'Parliamentary Joint Committee's Report on Indigenous Land Use Agreements' (2001) 5(5) *Native Title News* 90.

26 Justice Robert French, 'A Moment of Change: Personal

Reflections on the National Native Title Tribunal 1994–1998' (2003) 27(2) *Melbourne University Law Review* 488, 504.

27 Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14(5) *Environmental Politics* 629, 634–635.

28 Gary D Meyers and Simone C Muller, 'An Overview of Indigenous Land (and Resources) Use Agreements' in Gary D Meyers (ed), *The Way Forward: Collaboration and Cooperation in Country - Proceedings of the Indigenous Land Use Agreements Conference, 26–29 September 1995* (National Native Title Tribunal, 2nd ed, 1995) 3, 7.

29 *Wik Peoples v State of Queensland and Ors* (1996) 187 CLR 1.

30 Ibid.

31 Division 3 of the *NTAA* includes the framework for ILUAs, which are defined as voluntary binding agreements about the use and management of land, between native title groups and other parties. They were inserted into the native title regime in order to provide more scope for negotiated outcomes, and draw parties away from litigation and legislative extinguishment of Indigenous rights, where possible and practical. See Parry Agius et al, 'Comprehensive Native Title Negotiations in South Australia' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 203, 206.

32 Graeme Neate, 'Indigenous Land Use Agreements: Some Legal Issues' (Paper presented at the Native Title Forum, Brisbane, 1–3 August 2001) 1–2.

33 See, eg, Rhonda Kelly and Ciaran O'Fairchellaigh, 'Native Title, Mining and Agreement Making: Best Practice in Commercial Negotiations' in *Native Title and Cultural Heritage in 2002: 16th-18th April 2002, Novotel Hotel, Brisbane* (IIR Conferences, 2002); Ciaran O'Faircheallaigh 'Native Title and Agreement Making: Focusing on Outcomes for Indigenous Peoples' (Paper presented at the Native Title Conference, Alice Springs, 3-5 June 2003); Malcolm Allbrook and Mary Anne Jebb, *Implementation and Resourcing of Native Title Related Agreements* (National Native Title Tribunal, 2004) 8.

34 National Native Title Tribunal, 'Authorisation of Area Agreements' (Discussion Paper, National Native Title Tribunal, 2004).

35 Ibid 4–6.

36 Neate, above n 6, 8.

37 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Fund, Parliament of Australia, *Second Interim Report for the s 206(d) Inquiry: Indigenous Land Use Agreements* (2001) 17.

38 Daniel O'Dea, 'The Indigenous Land Use Agreement as a Risk Management Tool: An Aboriginal Perspective' (1999) *Australian Mining and Petroleum Law Association Yearbook* 238.

39 Lee Godden and Shaunnagh Dorsett, 'The Contractual Status of Indigenous Land Use Agreements' (2000) 2(1) *Land, Rights, Laws: Issues of Native Title* 1, 2; Sue Kee, 'Indigenous Land Use Agreements: Which, Why and Where?' in Bryan Keon-Cohen (ed), *Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference*, *16-20 April 2000* (AIATSIS, 2001) 341.

40 Human Rights and Equal Opportunity Commission, *Native Title Report* (2007) 2.

41 Ibid 2.

42 Ibid 2.

43 Richard Bartlett, 'Canada: Indigenous Land Claims and Settlements', in Bryan Keon-Cohen (ed), *Native Title in the New Millennium: A Selection of Papers from the Native Title Representative Bodies Legal Conference*, *16–20 April 2000* (AIATSIS, 2001) 362.

44 *Members of the Yorta Yorta Community v Victoria* (2002) 194 ALR 538, [88].

45 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* (2002) 21–22.

46 National Native Title Tribunal, 'What is an Indigenous Land Use Agreement? (2000) <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Fact%20sheets/What_is_an_ILUA.pdf> at 22 July 2010.

47 ILUAs cannot be negotiated if the courts have conclusively found that native title does not attach to a particular area.

48 Interviewee 13.

49 Bartlett, above n 13, 523.

50 This is despite the fact that in 2001 the Commonwealth Parliamentary Committee, charged with inquiring into the ILUAs scheme, advocated the build-up of a precedent system for agreements, and the translation of agreements into Indigenous languages.

51 O'Faircheallaigh and Corbett, above n 27, 629.

52 Ibid 629.

53 Leslie Rutherford and Sheila Bone (eds), *Osborn's Concise Law Dictionary* (Sweet and Maxwell, 8th ed, 1993) 89.

54 *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424.

55 *Tweedle v Atkinson* (1861) 1 B & S 393; 121 ER 762; [1861-1873] All ER Rep 369.

56 Chris Doepel, 'Indigenous Land Use Agreements: Notification and Registration' (Paper presented at the Native Title Forum, Customs House, Brisbane, 1–3 August 2001) 2.

57 Neate, above n 6, 5.

58 Bartlett, above n 13, 529.

59 Neate, above n 6, 8.

60 Neate, above n 6, 8.
61 Godden and Dorsett, above n 3, 5.
62 Godden and Dorsett, above n 3, 4-5.
63 Neate, above n 6, 8.
64 Godden and Dorsett, above n 3, 4.
65 [2002] FCA 1598.
66 [2003] FCAFC 220 (24 September 2003).
67 (2000) 99 FCR 33.
68 *Moran v Minister for Land and Water Conservation for NSW* [1999] FCA 1637.
69 [2004] FCA 760.
70 National Native Title Tribunal, *ILUA or the Right to Negotiate Process? A Comparison for Mineral Tenement Applications* (2006) <www.nntt.gov.au/ilua/Comparison.html> at 17 May 2006.
71 Interviewee three.
72 Interviewee four.
73 Craig, above n 14, 440.
74 Ritchie Howitt, 'The Other Side of the Table: Corporate Culture and Negotiating with Resources Companies' (1997) *Land, Rights, Laws: Issues of Native Title*.
75 The unequal bargaining power of parties to ILUAs is a key theme explored in a forthcoming paper.
76 O'Dea, above n 38.
77 Interviewee five.
78 Interviewee four.
79 Interviewee six and interviewee nine.
80 Australian Government, Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing) <http://ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem%28AdditionalFundingandLapsing%29> at 22 July 2010.
81 Ritter, above n 2, 5.
82 Diane Smith, 'Indigenous Land Use Agreements: The Opportunities, Challenges and Policy Implications of the Amended Native Title Act' (CAEPR, No 163, 1998) 7.