



Concluding Indigenous Land Use Agreements

Prepared by Sunil Sivarajah
Associate, MacDonnells Law
<http://www.macdonnells.com.au/>

INTRODUCTION

Last year Woodside Petroleum signed an in-principle agreement with Traditional Owners in the Kimberley Region of Western Australia over its Browse gas project. Mr Murray Wilcox AO QC, a former Australian Federal Court Judge who has presided over several native title cases, was quoted in the Australian newspaper on 10 February 2010 as saying: "Mr Barnett thinks he is going to get an indigenous land use agreement; I don't think he is. Not without a lot of litigation anyway and whether Woodside would be interested in hanging around while that happens, I don't know."

Mr Wilcox's comments should be carefully considered by any Australian-focused energy and mining company which is considering an ILUA with a native title group.

WHAT IS AN ILUA?

An ILUA is a particular type of commercial agreement that has been created under the *Native Title Act 1993* (NTA). An ILUA is of great benefit because it can enable a project to proceed with agreement on the amount of compensation payable to an Aboriginal group and can ensure native title is not extinguished by certain "acts". Key provisions remain on the public record.

HOW DOES AN ILUA WORK?

Like any other commercial agreement, parties to an ILUA are bound by its terms and conditions.

ILUAs may cover a narrowly-defined area, a project area comprising of, say, different petroleum production and infrastructure tenements or even an entire native title claim area.

Ordinarily, for the grant of a petroleum licence, a petroleum company must comply with procedures under the NTA. One procedure is the "right to negotiate" procedure. This procedure includes the requirement to *negotiate in good faith* with a registered native title party for at least six months, in an attempt to conclude an agreement. Alternatively, a petroleum company may choose to conclude an ILUA with the relevant native title party to bypass the "right to negotiate" requirements. Negotiating an ILUA may ensure all future licences are granted expediently under the terms of an ILUA rather than the 'right to negotiate' process (which can become bogged down in litigation and create hostility between parties).

In addition to native title matters, an ILUA may also resolve Aboriginal cultural heritage matters by defining timeframes and costs associated with heritage surveys and future ground disturbing activities. In Queensland, an ILUA may be drafted to comply with the "duty of care" requirements of the *Aboriginal Cultural Heritage Act 2003*. In Western Australia an ILUA may be drafted to set out a process to disturb an Aboriginal site, if necessary.

ILUA PROCESSES

Concluding any ILUA is a process which, generally, involves three distinct phases. First, parties must negotiate and reach an agreement. More often than not, resource companies will negotiate the terms of an agreement with a "working group" which represents the broader native title party. Once an agreement has been reached, the native title party must authorise its representatives to execute the agreement. After the parties have executed or authorised the ILUA, the final step is a complex public "registration process". The following is slightly more detailed summary of each of these steps.

Negotiations

Depending on the size of the project and the available resources to negotiate an agreement, a resource

company may need to engage in negotiations with a working group for approximately 3-18 months with meetings on average every 1-3 months. These are indicative timeframes only - we have advised on ILUA processes with shorter or longer timeframes.

In the first instance, a resource company should agree on an ILUA process with the native title party. That agreement may include details about negotiation timeframes and expectations about payments for meetings.

Authorisation and Execution

When an agreement has been reached by the parties, a resource company will execute the agreement in accordance with its usual requirements (for example by a director and secretary or by power of attorney). In contrast, a native title party must "authorise" their representatives, to sign the agreement, usually at a "properly" publicised community meeting. While the work group may accept the terms of an ILUA, all persons who assert to hold native title interest must agree to it being signed. An improperly authorised ILUA could result in the ILUA being legally ineffective. If, for example, the participants in the authorisation meeting were not properly representative of all native title interests in the ILUA area; or there is an improper decision making process adopted during the authorisation meeting; key Aboriginal people were excluded from the authorisation process; or the community meeting to authorise the ILUA was not properly publicised the authorisation of the ILUA may be invalid. Resource companies need to monitor authorisation processes, particularly, if they are funding meetings.

Registration

Once an ILUA has been "authorised" by the native title party and executed by the resource company, it will be lodged for registration under the NTA. In some instances, the relevant native title representative body may agree to "certify" that the authorisation process was compliant with the requirements of the NTA. If so, parties will not be required to, for example, demonstrate that all

reasonable efforts were made to identify any person who may hold native title in the ILUA area. Generally, a representative body will only agree to certify an authorisation process if it has been involved in that process. Resource companies should properly document all aspects of the ILUA process whether or not they expect the representative body to certify the authorisation process.

Once the Registrar of the National Native Title Tribunal accepts that the ILUA process has complied with the technical requirements of the NTA, the Registrar will publicly notify the proposed ILUA and give any relevant Aboriginal person an opportunity to comment on the registration of the ILUA.

The resource company should have considered this third phase early on in the ILUA process at the same time as closely monitoring the status of any relevant Federal Court proceedings. This is a prudent course of action not only to assess any risk that a native title application may fail but also to monitor any risk posed by Indigenous respondents to such an application who assert to also hold native title interests in the project area.

Importantly, once an agreement has been reached, all parties should work together with the common objective of registering the ILUA. Native title parties, the resource company and any native title representative body should collaborate on the process to be adopted at an authorisation meeting including notice of the meetings, agenda and proposed resolutions.

There are obvious risks associated with any ILUA process, however, our experience is that an ILUA can be enormously useful to assist resource companies to achieve timely approvals and certainty for a project.

Apart from private practice experience at a national law firm in Perth and MacDonnells Law in Brisbane, I have also spent a considerable time working for a native title representative body in the resource-rich Pilbara region (as the coordinating lawyer) when I advised on, amongst other things, a number of onshore and offshore petroleum native title agreements.

MacDonnells Law has negotiated and concluded numerous ILUAs. It boasts one of the largest Native Title and Aboriginal Cultural Heritage practices in Australia.

Recently, we advised Surat Gladstone Pipeline Pty Ltd on an approval processes to secure an approximately 470 kilometre long gas pipeline in Queensland. We have negotiated and concluded numerous ILUAs for an electricity service provider. And, in 2006 MacDonnells Law, in conjunction with the Local Government Authority of Queensland (LGAQ) represented 16 Councils in the negotiation with three claim groups of a template Local Government ILUA. The ILUA was cited by the Commonwealth Human Rights Commission in its 2007 Native Title Report to the Commonwealth Parliament as an example of "national best practice" native title agreement making. The template Local Government ILUA is now being used by most Councils in Queensland and offers a "one stop shop approach" to addressing native title, land access and future infrastructure compliance matters.

