SCRUTINISING ILUAs IN THE CONTEXT OF AGREEMENT MAKING AS A PANACEA FOR POVERTY AND WELFARE DEPENDENCY IN INDIGENOUS COMMUNITIES

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I Introduction

In theory, the ideal modern agreement between Indigenous peoples and other parties is an agreement that empowers Indigenous peoples, delivers economic, social and cultural benefits to Indigenous peoples (including sustainable economic development), creates new forms of governance for benefit sharing, and provides a mechanism for Indigenous people to negotiate their way into the nation state in areas of land access, environmental management and infrastructure development. Of all modern agreements to date, land agreements, including native title agreements, hold the greatest potential to achieve such outcomes. Yet, this potential is not being realised in relation to Australian land agreements between native title parties and governments and/or the industry sector.

In his analysis of twenty Australian and eighteen Canadian resource development agreements between resource developers and native title parties, for example, O'Faircheallaigh found that only a minority of native title agreements deliver such benefits.[1] O'Faircheallaigh actually found examples of agreements in which native title parties were actually worse off than in the absence of an agreement.[2] O'Faircheallaigh's earlier research established that there is great variability across agreements.[3] That is, there are examples of native title parties achieving significant material (economic) benefits and agreements containing 'innovative provisions to minimise the impact of commercial activities on their traditional lands', yet, equally, there are agreements in which native title parties are the recipients of negligible benefits.[4]

Likewise, Langton and Mazel's study of Australian agreements between native title parties and large mining companies in relation to resource extraction led them to conclude that while 'agreement-making has created a unique context for engagement, ... the mere fact of agreements has not necessarily assured positive, meaningful or equitable outcomes for Indigenous communities'.[5] In analysing whether socio-economic improvement had occurred in Indigenous communities in which resource extraction is occurring, Langton and Mazel found that the 'economic situation in Indigenous communities is falling well behind the rest of Australia'.[6] Many of these communities remain in extreme poverty.[7]

Correspondingly, in his study of the negotiations in relation to the Comprehensive Regional Agreement between the Noongar people and the Western Australian government, Bradfield highlights potential and existing problems that Indigenous peoples 'have in using the native title process as a mechanism to engage in state negotiation aimed at securing a range of social, political and economic objectives'.[8]

The empirical research presented in this paper supports the above findings. Focusing specifically on Indigenous Land Use Agreements ('ILUA'), the data presented below demonstrates that in relevant cases native title parties are not being adequately compensated for land use and the potential economic, social and cultural benefits flowing to native title parties from entering into an ILUA are not being realised. There is no guarantee, for example, that native title parties will be adequately compensated for the use of land or resources. The perceived 'economic' value of the land itself may play a significant factor in determining what benefits native title parties can derive from an ILUA. Significantly though, what appears to be the main obstacle for native title parties being adequately compensated for land use is the lack of commitment on the part of non-native title parties

to negotiate equitable, just and sustainable outcomes for native title parties. The findings are especially problematic, considering that the statutory scheme lacks a framework to assess and monitor whether native title parties' interests are fully realised or protected.

In making such claims, the paper engages with data collected from in-depth telephone interviews with senior position holders and legal officers of Native Title Representative Bodies ('NTRB'), legal officers in local, state and territory government departments, and officers from the National Native Title Tribunal ('NNTT'), about ILUAs set up under the *Native Title Amendment Act 1998* (Cth) ('*NTAA*') in relation to securing 'practical' native title rights. In this context, 'practical' native title rights refer to the economic, social and cultural benefits that can potentially flow to native title parties by negotiating an ILUA with governments or developers, as well as mechanisms for protecting traditional, cultural and social interests of native title parties. The term 'practical' differs from former Prime Minister John Howard's use of the term in the late 20th and early 21st century. Howard used the term to signal the separation of 'practical' and 'symbolic' gestures of government in relation to Indigenous peoples. The Howard government used this term to denote the limiting of Indigenous affairs policy to areas of employment, education, health and housing and to problematise the 'symbolic' gestures of self-determination and a treaty.

The present paper is the second in a series of two papers examining the effectiveness of ILUAs in delivering long-term benefits to native title parties from the standpoint of senior position holders and legal officers of NTRBs, legal officers in local, state and territory government departments, and officers from the NNTT. The objective of the study was twofold. First, the study is designed to collect preliminary data to establish case studies for a detailed socio-legal study of the operation of ILUAs. Second, the study has been designed to collect much needed data from NTRBs about the ILUAs scheme more broadly. The first paper generated from this research was published in the *Australian Indigenous Law Review* in 2010.[9] It provided legal background on ILUAs as a scheme established under the *Native Title Amendment Act 1998* (Cth) and the problems with ILUAs in the context of broader legal complexities of Native Title court determinations as indicated by the same interviewees. It established that the latter is particularly pertinent in terms of 'how 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'.[10] Its empirical focus was on the limited bargaining power of native title parties, demonstrating that not only is the historical approach of native title litigation to weaken the bargaining power of native title parties, but also that language and cultural barriers, differences in knowledge and experience and under-funded and under-resourced Prescribed Body Corporates ('PBC') were also contributing to power imbalances in the negotiation process. The present paper builds on the first paper, exploring another key theme emerging from the interview data, which concerns whether ILUAs are delivering more than simple recognition of native title, but also 'practical' economic, social and cultural benefits to native title parties. This work builds on O'Faircheallaigh's work in terms of exploring the negative and positive outcomes of ILUAs on native title parties.[11] This work too points to the variability in outcomes across ILUAs, but it provides important insights about this variability and the factors at work contributing to this variation in outcome. The next stage is to obtain data that documents native title holders' experience of ILUAs and the statutory scheme.

Before engaging with the empirical data, the paper situates ILUAs in the context of modern agreement making with Indigenous peoples. An outline of the methodology adopted for this study then follows.

A Modern Agreement Making With Native Title Parties

Given the fraught history of agreement making in Australia and the lack of agreements and treaties between governments and Indigenous peoples, the new culture of agreement making is quite novel. Yet, whether or not the propensity of Australian governments and the resource sector to use agreements with Indigenous peoples to specify relationships and arrangements in terms of land use and service delivery is working in a way that truly benefits Indigenous parties still remains questionable.

In its modern form, agreement making with Indigenous parties in Australia is a recent invention of politics, which took on new prominence under the Howard government. Under the Howard government, agreement making was extended to the non-economic domains and institutions of social welfare programs. Such agreements also contain 'practical' measures such as capacity building, the provision of infrastructure, services and programmes. However,

they are often conditional on Indigenous communities meeting certain social standards of living. For example, the Mulan community was provided with $172 000 to put in two petrol bowsers on the proviso that it improved health outcomes; specifically that it reduced instances of trachoma. The agreement stipulated that members of the community, particularly children, must shower daily, face and hands must be washed twice a day and the community must be kept rubbish free.[12] The consequence for non-compliance is the loss of future funding. Thus, at the same time as providing a mechanism for capacity building, Shared Responsibility Agreements operate as a form of social interventionism by incorporating strategies and mechanisms for governing the conduct of Indigenous people and communities and bringing about behaviour changes. The Income Management Agreement too is a form of social interventionism that reaches the most intimate and domestic aspects of everyday existence of former welfare recipients, particularly Indigenous citizens - policies that could be described as forms of enforced obligation.[13] This is evidence of a growing prevalence to adopt Third Way approaches for governing Indigenous peoples and communities by adopting an approach that, as Nicolas Rose refers to elsewhere, involves 'the micromanagement of the self-steering practices of citizens',[14] in this case Indigenous citizens, via agreement making. While modern agreement making constitutes a new class of agreement making, Shared Responsibility Agreements, Income Management Agreements and Northern Territory Leasehold Agreement constitute an attack on the fundamental civil rights of Indigenous peoples.

Today, there is a proliferation of modern agreement making with native title parties in Australia in relation to land in the form of Mining Agreements, Explorations Agreements, Consent Determination Agreements, Future Act Agreements and Indigenous Land Use Agreements. Agreement making with Indigenous peoples and local communities in relation to land use differs from modern forms of agreement making in the area of social welfare reform. Agreement making in relation to land, for example, is not generally a form of social interventionism, except in the case of land lease agreements established under the federal Northern Territory National Emergency Response Act.[15]

In Australia, there are three typical situations in which agreements with Indigenous people regarding land use emerge, reflecting the broader circumstances in which Indigenous and non-Indigenous peoples negotiate: where legislation mandates agreement before certain acts can proceed (for example the *Aboriginal Land Rights (Northern Territory) Act* 1996 (Cth)), where legislation creates an opportunity for agreements, but allows acts to proceed without agreement in some circumstances (for example, under the right to negotiate scheme in the *NTA*), or 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.[16] The negotiations that may lead to the creation of ILUAs typically fall into the third category.

Treaty and agreement making with Indigenous peoples is not entrenched in the Australian Constitution as it is in the Canadian and New Zealand Constitutions.[17] Unlike Canada and New Zealand, Australia's history of agreement making with Indigenous peoples is relatively short. Australia's settler history was based on the precept of *terra nullius* – land belonging to no one and, as such, land treaties between the colonisers and the Indigenous inhabitants of the land were non-existent. A limited degree of recognition of land rights emerged from the 1970s onwards with the passing of various state and territory land rights laws. South Australia, for example, was the first state to pass land rights laws in which it vested inalienable freehold title to around sixty properties in an Aboriginal Land Trust. In the 1970s, the Victorian government passed the *Aboriginal Land Rights Act*, which granted freehold title to people of Lake Tyers Aboriginal reserve and the Farlingham reserve. In New South Wales, the passing of the *Aboriginal Land Rights Act 1983* (NSW) transferred some former reserves to Aboriginal peoples and established a claims procedure over a small area of 'claimable crown land, as well as creating a land fund. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) created communal title equivalent to freehold title over former reserves and mission land in the Northern Territory and allowed for claims over unalienated crown land by those Aboriginal peoples and communities who could prove traditional ownership. The vesting of Aboriginal communal ownership in the hands of some local Aboriginal communities granted Aboriginal peoples the power and right to make decisions over their land. Aboriginal people were finally in a position to enter into agreements with the resource sector in relation to mining on Aboriginal land and derive benefits from such agreements.

The ongoing lack of basic recognition of Indigenous land systems in common law carried through until the High

Court overturned the doctrine of *terra nullius* in *Mabo (No 2)*.[18] As Nettheim, Meyers and Craig note, *Mabo* was '... one of the most significant judicial decisions in Australia's history, revers[ing] the convenient assumption that the non-Indigenous settlement of Australia could proceed without any acknowledgment of the pre-existing rights of the Indigenous peoples in relation to land and waters'.[19] Howard-Wagner and Maguire add that '[a]fter the High Court recognised the existence of native title in *Mabo (No 2)*, acknowledging the wrongfulness of the doctrine of *terra nullius*, agreement-making took on a new meaning'.[20] Native title was legally established and progressively 'agreement making has become the preferred way of resolving most native title issues'.[21] *Mabo* instigated the development of native title laws in Australia, including provisions allowing for local and regional land use agreements between government and native title parties under s 21 of the *Native Title Act 1993* (Cth). These came to be known as 'Section 21 Agreements'. Section 21 Agreements were confined in their scope to agreements with governments.[22] However, as van Hattem points out, a practice emerged 'by which "ancillary" agreements [were] made between native title claimants and developers in the context of the right to negotiate procedures'.[23] Such agreements were made under the Future Acts provisions in pt 2 s 3, also known as 'Section 31 agreements'. The ILUAs scheme, which was brought in by the Howard government with the passing of the *NTAA*, extended agreement making abilities under the Act, replacing Section 21 Agreements with ILUAs under pt 2, div 3, sub-divs B-E. Further amendments were made in 2007 to promote agreement making rather than litigation by reforming the native title non-claimants (respondents) financial assistance program.[24]

The ILUAs provisions in the *NTAA* allow for the negotiation of voluntary binding agreements about future acts in relation to the use and management of land, between native title groups and other parties, contemplating 'future acts with the objective of avoiding the need for parties to negotiate over each future act'.[25] ILUAs afford a mechanism to legally bind all major stakeholders to the agreement. While Howard-Wagner and Maguire demonstrate that this is not always the case, the architects of the NTAA believed that the formal recognition of ILUAs within the native title regime would provide more scope for negotiated outcomes. It does draw parties away from litigation and legislative extinguishment of Indigenous rights, where possible and practical.[26]

Judicial interpretation of the function Parliament intended the ILUA provisions to have has been set out in a number of recent cases. For example, in *Edwards v Santos Limited*,[27] Heydon J interpreted the function of ILUAs by reference to the Native Title Amendment Bill 1998 Explanatory Memorandum, which set outs that:

> governments and others seeking to use land do not know if native title exists, and if it does, who holds it. It is difficult in such circumstances to have agreements, which provide the necessary level of legal certainty. These provisions [including what is now Pt 2 Div 3 subdiv C of the NTA] are designed to give security for agreements with native title holders, whether there has been an approved determination of native title or not, provided certain requirements are met'.

In referring to the matter at hand, Heydon J interpreted Parliaments intent to give security to non-native title parties in dealing with native title parties, as well as giving 'native title claimants the opportunity to obtain immediate advantages which would otherwise be postponed until a perhaps distant day when their native title claim succeeds'.

Similarly, in *QGC Pty Limited v Bygrave* (No 2), Reeves J in referring to the intent of the ILUAs provisions within the *NTAA* pointed out that:

> the ILUA process in the Act is intended to achieve a balance between allowing future acts to be validated, so as to provide certainty for the broader Australian community, but at the same time, ensuring that those who hold, or claim to hold, native title in the land and waters affected by such future acts, agree to them being undertaken and, if they do, to obtain a corresponding benefit from so agreeing. By this process, those who hold or claim to hold native title in such land and waters should be able to share in the benefits that flow from the future use of their native title rights and interests in that land and waters.[28]

There are three types of ILUAs that can be made. If a determination of native title rights exists and a registered native title body corporate has been established, then a *body corporate agreement* can be negotiated and entered into. If there is no registered native title body corporate for the whole area subject to the proposed agreement and native title rights and interests have not been determined, and/or if native title rights and interests are to be surrendered to a government resulting in extinguishment of native title rights

and interests, then an *area agreement* can be negotiated and entered into. If there is a registered body corporate for only part of the area, and native title rights and interests are not to be surrendered to a government resulting in extinguishment, then an *alternative procedure agreement* can be entered into.

Logan J made a number of preliminary observations about the statutory scheme in relation to area agreement including that:

> The statutory provision for the making of an area agreement in respect of an area even where there are no registered native title claimants or registered native title bodies corporate balances two of the main objects of the *Native Title Act*. Out of an abundance of caution and evidencing the recognition by the Parliament of the importance of native title, it liberalises membership of a "native title group" in those circumstances to the extent of permitting those who do nothing more than claim to hold native title in relation to an area to have an opportunity to be heard and to have an opportunity to participate in decision-making. In this fashion the provision can be seen as a benign endeavour, out of an abundance of caution, to preserve native title where it may exist, fulfilling the object in s 3(a) *Native Title Act*. At the same time, by permitting the making in such circumstances of a consensual agreement the effect of which may be to extinguish native title by a future act done under the authority of a registered agreement, the *Native Title Act* serves the object in s 3(b) by establishing a way in which a future dealing concerning native title may proceed.[29]

ILUAs have the potential to effect change and have a number of advantages that litigation does not. The negotiation of an ILUA can sit alongside the consent determination process and can lay the foundation for resolving claims by agreement through a consent determination, bypassing the litigation process, but could also potentially deliver unlimited 'practical' economic, social and cultural benefits to native title parties. In practice though, while the former has been realised in a number of instances, interviewee's indicated that the potential of ILUAs to deliver unlimited 'practical' economic, social and cultural benefits to native title parties has been affected by the bargaining power of native title parties, which has been compromised by the very history of native title litigation in Australia.[30]

The provision for ILUAs in the *NTAA* are designed to encourage the resource sector, developers and governments to negotiate with native title parties in relation to a proposed land use activity that may affect native title. In theory, the economic, social and cultural benefits that can flow to native title parties in exchange for the other party's use of the land are unlimited. The premise of this form of agreement making with native title parties in relation to land was considered quite momentous and positive at the time, especially given Australia's settler history. In theory also, Indigenous parties are now in a much better position to negotiate for better terms and conditions to be incorporated into land agreements than they were in the 1970s (not only because native title is now recognised). Theoretically too, Indigenous parties should be in a better negotiating position because of the significant shift in corporate governance philosophies in which principles such as corporate social responsibility and good corporate citizenship have become core operational values that influence the way corporations negotiate with Indigenous parties.[31] In this new era, a land agreement between mining companies, governments and native title parties can represent more than a contract about land use. It can represent a corporation's ethical report card in terms of how the agreement fairs as a social contract that contributes both to the capacity building of Indigenous communities and the sustainable regional economic development of Indigenous communities. Such contemporary governance ethics around responsibility and sustainability equally apply to governments in the context of their role in ensuring that such regional economic development is sustainable. Crook, Harvey and Langton indicate how this relates to ILUAs, noting that, '[t]he negotiation of an ILUA should result in the mining company being responsible for generating the value-adding enterprise activity and the relevant government being responsible for ensuring that there is a sustainable basis (that is infrastructure and services) for delivering a net benefit to the region'.[32]

Yet, the studies conducted to date show that there is presently little promise for land agreements, such as ILUAs, to be a panacea for the cycles of poverty and excessive welfare dependency among Indigenous peoples and local communities, such as creating sustainable regional 'economic' development,[33] or providing a mechanism for Indigenous peoples 'to negotiate their way into the nation state, particularly in areas concerning land access, social and environmental management, and associated infrastructure development'.[34] Hence, the potential of ILUAs as land agreements has not been realised.

One only has look to other jurisdictions, such as Canada and New Zealand, to find examples of the potential land agreements hold for Indigenous peoples. While Australia does have agreements that could be termed 'comprehensive', and ILUAs could potentially be comprehensive, ILUAs differ to Canadian Comprehensive Regional Agreements (such as the Nunavut and Yukon Agreement).[35] Canadian Comprehensive Agreements are a full settlement that:

> often include full ownership of certain lands in the area covered by the settlement; guaranteed wildlife harvesting rights; guaranteed participation in land, water, wildlife and environmental management throughout the settlement area; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and parks in the settlement area.[36]

The Canadian Comprehensive Regional Agreements are effectively a public process that attempts to re-negotiate political relationships between the state and Indigenous peoples in a constitutional and practical sense. In many ways ILUA's are the antithesis of these comprehensive regional agreements as they are ad hoc and confidential. The potential of ILUAs is limited in terms of facilitating new forms of governance.[37]

As demonstrated in my earlier paper, the limitations of ILUAs are due in part to the limitations with provisions within the Act. Nettheim, Meyer and Craig also point to the limitations of the statutory scheme in a comparative sense noting that:

> The Regional Agreement provisions in the 1998 amendments to the NTA recognise Indigenous Land Use Agreements (ILUAs) but do not provide resources, triggers or organisations (such as the British Columbia Treaty Commission), which are likely to facilitate agreements that are regional, comprehensive and a step towards self-government.[38]

The present paper builds on Howard-Wagner and Maguire by exploring the ways in which ILUAs limit the ability of native title parties to benefit beyond mere recognition of native title, but also 'practically' from negotiating an ILUA.[39] While it is recognised that not all ILUAs are of the scope and size of a comprehensive regional agreement, ILUAs are not delivering the 'practical' benefits that they could to native title parties, no matter their size or scope.

B Methodology

The study was aimed at gaining an in-depth understanding of the working of ILUAs. Qualitative in-depth case studies had been employed to date by other researchers, such as O'Faircheallaigh and Bradfield.[40] What appeared to be missing from the research was an overview of the working of ILUAs from the standpoint of those involved in negotiating ILUAs on behalf of native title parties. As a starting point, the researcher decided to conduct in-depth qualitative interviews with staff from NTRBs who represent and assist native title parties in the negotiation of an ILUA.

The study design utilised a non-random targeted sampling strategy or what is commonly referred to as non-probability or purposive sampling.[41] The original predefined group that the study targeted was the seventeen NTRBs around Australia. In the early stages of recruitment the sample group was expanded to include National Native Title Tribunal staff and public servants from relevant government departments. Those interviewed suggested broadening the target group as 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 by contacting the researcher directly.[42]

Thirteen qualitative in-depth telephone interviews were conducted, including group interviews, with a total of eighteen participants. Ten participants were NTRB officers or others engaged in representing the interests of native title parties in ILUA negotiations. Six participants represented local, territory or state government departments, and two were members of the NNTT.

The number of interviews was limited for two reasons. First, unlike quantitative research, qualitative research cannot be generalised theoretically or to the broader population, the objective being to collect rich, meaningful in-depth data about the phenomenon being studied, and, therefore, smaller samples are common. Secondly, in qualitative research, one generally continues to conduct interviews until such time as theoretical saturation occurs.

A standardised semi-structured interview protocol was used, along with questions specific to each participant.[43] That is, while the questions asked were similar, the content of the questions differed based on the jurisdiction and background

of the interviewee. For example, the wording of a question may have differed for a member of the NNTT compared with a NTRB officer in the Northern Territory and differed for an NTRB officer in the Northern Territory compared with an NTRB officer in Victoria.

Interviewees were asked a number of questions designed to collect data about ILUAs as a mechanism for protecting and delivering 'practical' native title rights. For example, interviewees were asked whether ILUAs have the capacity to be effective as long-term mechanisms for protecting native title rights and interests. They were also asked what measurable economic, social and cultural benefits ILUAs were delivering to native title parties, and if these benefits were being delivered post agreement. Interviewees were also asked to give specific examples of measurable benefits and how they were being realised. Other questions included whether they believe ILUAs are an effective measure for protecting cultural heritage and ongoing access to land for traditional ceremonies, such as initiation ceremonies, and cultural practices, for example, hunting and fishing, or are they simply providing economic and social benefits to native title parties.

Interview transcripts were treated as 'raw data' and systematically compared, contrasted and analysed for emerging key thematic codes and categories concerning the ILUAs scheme. Initial analysis was aimed at describing the situation and informing policy.[44] 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 first two themes formed the basis of a paper aimed at describing the situation and informing policy in the context of the broader native title scheme and ILUAs as a special form of agreement making.[45]

The third theme related to agreement making in terms of the capacity of ILUAs to deliver economic, social and cultural benefits to native title parties. This could be measured in terms of the ability of ILUAs to contribute to the social and economic development of Indigenous peoples and local communities, as well as their ability to protect traditional, cultural and social rights to land. This is considered of particular importance given the intergenerational nature of ILUAs.

II ILUAs and Valuable 'Practical' Native Title Rights

ILUAs potentially allow native title parties to be economically compensated for future acts, and for their traditional, cultural, and social interests to be protected, which was something the court system had not been able to achieve. The limitations of litigating native title in the Australian court system compared with negotiating an ILUA in terms of 'practical' native title rights are set out in the following comment by interviewee 18:

> [I]f you can only establish non-exclusive native title then the practical benefits of going through the process may not be much more than simply recognising that you are the traditional owners of the land. It may not equate to any particular practical benefit and so we have said maybe it is worth thinking about forgetting the native title process or even withdrawing a native title claim and focusing on using an ILUA to get Aboriginal freehold and to get a range of other things that do not require the kind of torturous native title process.

ILUAs are a mechanism for delivering 'practical' native title rights. As interviewee 18 went on to state, 'ILUAs are the only option available to [Indigenous people] to get practical, on-the-ground benefits, and not just a piece of paper that says they've got native title'. Thus, if well negotiated and resourced, ILUAs could theoretically create win-win situations where, for example, Indigenous people receive recognition of native title, as well as a range of economic, social and cultural benefits, while other parties receive the use of land for a profit.

The interview data reinforces this finding. For example, interviewee nine noted that:

> One of the beauties of the ILUA is that a lot more things are capable of being put on the table in the agreement. If you pursue a litigated outcome, it is either a determination of native title rights or that native title is extinguished. It is really up to the group to determine if that is what they want though, but often you will have groups reaching a compromise between certain financial outcomes, or compensation or land packages, employment opportunities, with no native title recognition, or they may have a combination of both. Or they might just say they want straight out native title recognition, in which case we have to go through the federal court.

The voluntary nature of ILUAs means that, at least in theory, native title parties are free to attempt to negotiate for the best possible outcomes for their communities in terms of the delivery of 'practical' native title rights, and they cannot be compelled by law to agree if negotiations do not produce satisfactory results. Other interviewees pointed to potential types of 'practical' economic, social and cultural benefits that can flow from ILUAs. For example, the 'economic benefits vary from land tenure through to agreements with parties for royalties or shared profits'.[46] There is also the potential for ILUAs to protect significant sacred sites or cultural heritage.[47] As interviewee seven noted, 'capacity building is a big one' too.

A Are ILUAs Delivering 'Practical' Native Title Rights?

There is bound to be great variability across the scheme in terms of the economic, social and cultural benefits that native title parties may derive from an ILUA. An agreement can be made in relation to a wide range of land use activities from local and small scale land-use such as the maintenance of telecommunications or meteorology equipment through to large scale regional and multipurpose land-use such as the management of national parks or exploration, mining and infrastructure development.[48] Given this variability, the economic, social and cultural benefits to native title parties will differ considerably based on the size and extent of the land-use activity and the extent to which land use activities impact on their native title rights. As interviewee four notes:

> Depending on what you are negotiating, the economic benefits can either be minimal or can actually be quite large, especially when negotiating on whole of claim basis. We have negotiated quite significant monetary benefits as well as land and houses. So there are examples of native title parties achieving significant economic benefits. There are also examples of native title parties benefiting socially and culturally. For example, where people have been unable to live on country for whatever historical reasons, this process has allowed them to get back on country more often. Also, some parties have been able to negotiate land and housing provision or co-management over country.

The types of benefits flowing from an ILUA may also be limited in scope because the native title parties may have negotiated the ILUA for a particular purpose such as gaining access to and/or protecting a significant cultural site or area. For example, interviewee 10 notes that in:

> one of the ILUAs that is currently under negotiation, there is an area that is highly culturally significant, and perhaps the driving force behind the ILUA, rather than any other particular desire on a third party's part or the State's part to actually obtain land. Of course there is a third party and they're looking for an upgrade of tenure, but the driving force I'd say behind that negotiation is certainly the desire of the NT Parties for cultural heritage, not only protection, but actually ownership of the land that contains the cultural heritage. Economic development is similar. Often the economic development aspirations relate to the ownership of land that NT Parties may not be able to use for other purposes.

In some cases then, an agreement is not negotiated for the purpose of deriving economic and social benefits from that land, but rather to obtain ownership of the land to protect and maintain cultural heritage or sacred sites.

The type of economic, social and cultural benefits that native title parties may derive from an ILUA may also be limited because of the type and nature of the proposed land use activity. Or, as interviewee 12 indicates, the 'economic' value of the land itself may play a significant factor in determining what benefits native title parties can derive from an ILUA:

> It does vary. Some native title claims are in very resource rich areas or areas in which their land may be specifically sought. Other claims may be in poor resource areas and it would be hard to really draw any benefit.

The interviewee suggests that benefits flowing from an ILUA to native title parties may be measured or calculated in terms of the material (economic) value of the land or the resource richness of the land. This warrants further consideration in the context of what is currently considered 'best practice' for flexible and sustainable agreement making in which an interest-based approach is recommended.[49] An interest-based approach aims to provide 'benefits based upon the aspirations of the parties, as opposed to narrow and technical definitions of what may constitute native title rights' or based on narrow definitions of the property value of the land.[50]

While 'practical' benefits flowing from ILUAs differed in accordance with the type of agreement and scale of land use activities, interviewees indicated that native title parties did

not always benefit to the degree that they potentially could. Interviewees suggested that the scheme had not yet reached its full potential in terms of its capacity to deliver economic, social and cultural benefits to native title parties.[51] For example, when asked about the degree to which native title holders were deriving economic, social and cultural benefits from the negotiation of ILUAs, interviewee 11 states, '[n]ot as yet to a huge degree'. This applied across the different range of land use agreements, including mining agreements.

Interviewees noted that the negotiation of an ILUA does not guarantee that native title parties will be adequately compensated for the use of land or resources. The degree to which this could be occurring in relation to mining agreements was encapsulated in the following comment made by interviewee 16:

> The economic benefits can be relatively substantial, and I say relatively because it's relative to what existed pre-NT, pre-NT of course nobody got given any recognition of having any minor interest in either the land or the use of resources. However, since the introduction of the NT Act, people have been able to negotiate and many have received a substantial amount of money. However, the general outcome is that Aboriginal people are getting somewhere between 0.5%-2% of the total value of the project. This does not reflect or demonstrate any real value in the ownership interest in the resources or the land. It reflects a payment to accommodate the procedural aspects of the process. It is to pay people to shut-up really. If we were talking even 5%, I think we would be talking about a more equitable arrangement.

Going on the information the interviewee has provided, this figure would appear to be extremely low by world standards.[52]

Similarly, interviewee 17 plainly pointed to the consequences of this for native title parties:

> I have seen ridiculously token amounts being offered. I think that somebody should really look at the power of the Tribunal maybe, to arbitrate, not as it does now, but actually to look at the [content of the ILUA] ... I mean, at the minute the Tribunal will look at good faith issues and things of that kind, but it won't look to the value of a royalty offer or the value of a financial offer, but somebody should have the power to do that. You should be able to go on review and challenge why a company, and I'm thinking of a specific case, where an $8 billion coal mine can get away with paying $15m over 15 years. It's just ridiculous. You can't tell me that is a proper situation and there are many examples of that kind.

The narrow interpretation of ILUAs as mechanisms for delivering compensation to native title parties may, in some cases, also be hindering the capacity of ILUAs to deliver broader economic benefits, as well as cultural and social benefits, to native title parties. This limited interpretation of ILUAs as compensatory is represented in the comments of interviewee 12, who states that: ILUAs are really more a one-off economic tool for native title parties rather than a cultural thing'. This comment warrants further investigation given ILUAs are long-term agreements in relation to future acts that can, depending on the life of the Agreement, affect future generations and especially if native title rights are reduced to an economic commodity in which a one-off commercial market value is given to the land.[53]

Overall, the empirical data that was collected for this study supports the findings of empirical research conducted by O'Faircheallaigh's, in that it points to variability in outcomes for native title parties negotiating ILUAs.[54]

B Negotiating and Monitoring As Impediments to Equitable, Just and Sustainable Outcomes

So, why is there such variability? The empirical data presented here indicates that, if the power to negotiate is weakened, then the ability to achieve the best possible outcomes for native title parties is also weakened. Hence, the main reason that native title parties are not gaining the full extent of the benefits that ILUAs could potentially deliver is that they do not hold an equal bargaining position to that of their counterparts.[55] This was of particular concern to interviewees.[56] For example, interviewee 17 commented, 'I am concerned about the very weak negotiating power that is sometimes brought to bear, particularly with mining companies'.

Interviewees explained how the lack of bargaining power can mean native title parties face a very difficult choice: accept an agreement with unfair provisions, or refuse an agreement altogether.[57] Such comments were encapsulated in the statement made by interviewee 18, who noted that:

> It's very much our experience that in many ways parties who we don't 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're not going to consent to a native title determination. In that circumstance, unless the client is prepared to say they'll go to court and pursue a litigated hearing, and of course there's a whole bunch of reasons why that is for the most part not usually a sensible way to go, what's the alternative? They often have to agree to the unreasonable demands.

This means that a power imbalance often occurs from the onset, resulting in the proponent or government or both 'having greater power in terms of bargaining than the claimants do'.[58]

In 2001 and 2002, Neate noted that power imbalances can 'arise from differences in levels of knowledge and experience, the competence of each party's representatives and advisers, and the financial resources to engage in protracted mediation and, if necessary, court proceedings.[59] While Neate raised concerns about power imbalances in native title negotiations in the early 21st century, over the last ten years the effects of power imbalances in agreement making with native title parties has been under explored.[60] Government and other parties are assumed to negotiate with native title parties in 'good faith', which is a key principle underpinning the right to negotiate both as a principle in the *NTAA* and international instruments.[61] The findings presented in this paper, and the earlier paper, clearly indicate that power imbalances are detrimental. Power imbalances are, for example, limiting the benefits native title parties derive from the negotiation of an ILUA.

It was clear from the interview data too that the statutory regime and associated processes of the NNTT and NTRBs are currently insufficient to monitor the outcomes of ILUAs. Further, almost all ILUAs contain a significant impediment to the monitoring of outcomes in the form of confidentiality clauses. This was an area of particular concern for interviewees. For example, interviewee 18 pointed out that:

> there are lots and lots of ILUAs that are being negotiated and registered, but if the benefits, which are set out, are not being realised, then it's a problem.

Interviewee 11 expanded on this, noting the following:

> I think the main issue is the lack of resources with the claim groups themselves, lack of resources to be able to implement and get the most out of the benefits that come from it. And so, for example, if we're dealing with a mining company about employment opportunities and those sorts of things, it's very easy to say that there will be those opportunities, but then unless you have claim group members who have the appropriate trade ticket or the truck licence or whatever else it might be to get the job, in practice they can't get the jobs.
> ...
>
> There is no tracking system to monitor the implementation of benefits. ... We don't then sit down and have a long term post implementation review of how effective those benefits are being used. We know anecdotally that in some cases it's being used as well as we thought they might be; partly we suspect that that's about lack of resources in the claim group to be able to actually implement those things properly.

Interviewee seven recognised too that more could be done in terms of securing and maintaining such initiatives:

> I recognise that we need to do more in terms of follow up and capacity building so that they can reap those benefits and actually apply them, I think that's the major weakness we've got. The other major weakness is just the funding amounts and processes ...

Similarly, interviewee 14 made the following comments:

> I guess what has happened is that there's been ownership of land as a result of that for the native title parties. In that particular case, how the native title parties use the land after it's been provided, there certainly hasn't been, not on our part anyway, a lot of investigation as to how that's progressed.

Interviewee 11 suggested that:

> In my view, there needs to be a 'service provision body', which is ordered by government which provides all of the administrative assistance to NT claim groups that they need. A body that: ensures that books are kept and that notices are responded to; audits are done; and, agreements are implemented. It's my understanding that all over the country there are agreements that make provision for scholarships for Indigenous people that are not being taken up and they're just lapsing. But nobody knows about them. It is a ridiculous state of affairs – just because the information is not being made available.

Ritter points to the empty promise of agreement making in the 'absence of any apparatus for dealing with implementation'.[62] Similar to the interviewee above, Ritter notes that, '[i]f, for instance, an agreement contains a provision for an employment protocol, intended to recruit and train local Indigenous workers, the promises are empty as the wind if no company staff are tasked with implementing the commitment'.[63] Concerns about 'empty promises' could be investigated further via a review of existing agreements. Concerns about 'empty promises' as an ongoing practice could be overcome via the incorporation of review and monitoring mechanisms into the statutory scheme, as indicated above in the comments made by interviewee 11 and others.

Concerns regarding the negotiation of ILUAs and the monitoring of outcomes of the agreements made are the most significant of all the issues raised by the research in terms of the effectiveness of ILUAs to enable native title parties to realise economic, social and cultural benefits, as well as protect their economic, social and cultural rights and interests in relation to land.

III What Would Be the Benefits of Leveling the Playing Field, as Well as Incorporating Review or Monitoring Mechanisms into the Scheme?

The present paper and an earlier paper by Howard-Wagner and Maguire found that: 'ILUAs are less voluntary for Native title parties than they may appear, and that Native title parties do not find a "level playing field" at the ILUA negotiating table'.[64] If Native title parties agree to negotiate under such conditions, 'it is possible that the Indigenous party will then receive no recognition or practical benefits'.[65]

Similarly, O'Faircheallaigh notes that 'Native title has delivered many Indigenous groups in Australia "a seat at the negotiation table". However this of itself is no guarantee that their members will achieve substantial benefits – or will not incur substantial costs – from resource development on their ancestral lands, because the system of native title in Australia places Indigenous negotiators in a weak bargaining position'.[66] Without the support of statutory or policy processes, native title parties may be left incapable of fully realising the promise of their agreements.

The first step to arrive at beneficial agreements and to optimise the economic, social and cultural benefits flowing from ILUAs is 'to ensure that the playing field is level'.[67] How do we go about this? Calma questions whether 'it is enough to simply change the legislation or amend policies without building the capacity of communities or native title groups to access and engage with the system actively and positively'.[68] Substantive outcomes that are just and equitable can only be achieved if there are minimum standards in place to recognise and protect our human rights'.[69] The right to negotiate is a valuable Indigenous right.[70] Arguably then, to suggest that parties adopt the 'model litigant principles' (e.g. acting honestly and fairly, acting impartially and consistently, not seeking to take advantage of a party that lacks resources)[71] and conduct negotiations in good faith is not enough. Other principles should guide negotiations, including best practice for flexible and sustainable agreement making and ethical and responsible corporate governance, to ensure that ILUAs come to function as an effective tool to assist Indigenous people and local communities in realising the full potential of their native title rights. NTRBs and PBCs need to be better resourced and funded to ensure that they are able to better represent and assist native title parties.[72] Governments could invest in the capacity building of native title parties to empower them in the negotiation process.

Nonetheless, it is not simply enough to level the playing field. Non-compliance is also a major concern. As the above data and the research conducted by Kelly and O'Faircheallaigh indicate, 'numerous cases of non-compliance with terms of agreements, including those related to financial payments, cultural heritage protection and employment and training' exist.[73]

The benefits of reviewing the sustainability of an agreement prior to registration, as well as monitoring and reviewing the implementation of native title agreements is highlighted by Crook, Harvey and Langton.[74]

Crook, Harvey and Langton conducted a review of the Western Cape Communities Co-existence Agreement ('WCCCA'), which was registered as an ILUA between Comalco Ltd, the Queensland government and the relevant native title parties comprised of eleven traditional owner groups on the western Cape York Peninsula of Australia in August 2001.[75] Crook, Harvey and Langton list the benefits flowing from the ILUA to the native title parties, including the establishment of a charitable trust of which both Comalco ($2.5 million) and the Queensland government ($1.5 million) annually contribute to and of which 60 per cent is placed

in a long-term secure investment to provide 'a sustaining economic base for all its beneficiaries and future generations'. In addition to the trust funding, Comalco is obligated under the terms of the agreement to provide 'employment, education and youth training programs, business enterprise development, the surrender and return of rehabilitated lands to traditional owners, other land transfers, and help with outstation development and cultural recognition programs'. In return, 'the traditional owners have agreed to support all of Comalco's current and future mining operations on its western Cape York Peninsula lease area'.[76] While their review found 'that good progress had been made in the areas of employment and training, cultural heritage protection, the initial establishment of governance and administration systems, and the internal company support for local indigenous business', the general lack of understanding and knowledge of the content and intent of the Agreement among Comalco employees and community members was limiting the agreement's effectiveness in creating a sustainable economic base for its beneficiaries and future generations.[77] The Review identified that company leadership was needed in implementing the agreement; capacity building was needed to support Indigenous business development (so that Indigenous business could tender for Comalco contracts) and Indigenous governance and administration over time (so that the WCCCA trustees could effectively administer the trust so that it resulted in the development of a robust regional economy).[78] Furthermore, after the review, Comalco addressed the issues raised by the review.[79]

This case study points to the benefits of monitoring the implementation of ILUAs to ensure their effectiveness in delivering the agreed economic, social and cultural benefits to native title parties.

IV Conclusion

Historically and retrospectively, agreement making in the form of treaties with Indigenous parties around the world has benefited the state and resulted in the diminution of Indigenous peoples rights over land or outright loss of land and has been a corollary for deterioration of local Indigenous communities. Modern agreement making with Indigenous parties in Australia that is resulting in socio-economic improvement in local Indigenous communities is the exception rather than the rule.[80] Hence, it is important not to superficially accept modern agreement making as the great panacea for cycles of poverty and welfare dependency. This includes ILUAs. There is far more work that needs to be done to ensure that ILUAs function effectively in the delivery of long term benefits to native title parties.

In the case of ILUAs, whether or not it comes down to some groups not being well served by the regime as it is or ILUAs simply serving limited purposes also requires further empirical consideration. Only a limited number of case studies of ILUAs have been conducted to date, and these have related to agreements between native title parties, governments and mining companies. More case studies of mining agreements need to be conducted and would be warranted given the findings of the present study. As too do case studies of agreements relating to local small-scale land use activities and larger non-resource based agreements.

As the scheme is presently operating, there is not a 'level playing field' and native title parties remain reliant on the 'goodwill of whitefellas'. The scheme needs to be improved so that it actually facilitates equitable outcomes in terms of the delivery of economic, social and cultural benefits to native title parties commensurate with the land use activities of other parties (but also appreciates the value of the land/area to native title parties). Therefore, there is a clear need for the development of mechanisms to ensure both equitable negotiations and guaranteed positive outcomes for native title parties. Furthermore, without capacities to monitor the outcomes of agreements, ILUAs potentially contain a bag of 'empty promises' as other parties continue to fail to comply with terms of agreements.

The federal government is currently reviewing the framework for native title agreement making with a vision for, among other things, improving transparency and the capacity of NTRBs and PBCs to negotiate complex commercial agreements in a sustained way. It is also considering the benefit of establishing a new statutory function to support native title parties in maximising positive financial and non-financial benefits from agreements now and for future generations, as well as having the role of reviewing agreements to establish their capacity to contribute to sustainable intergenerational, social and economic development for native title parties. In relation to ILUAs specifically, its focus is on streamlining the ILUA process and clarifying the 'good faith' negotiation principle.

The results of this study indicate that these are important considerations, but what is most clearly needed is greater

accountability and transparency, currently being considered by the federal government, as well as a 'level playing field' (how this will be achieved within the framework of the proposed review is unclear). On the whole, ILUAs are not designed to deliver a new form of governance on benefit sharing, although there is more potential for ILUAs to deliver far better outcomes for native title parties than mere recognition of native title, if they were resourced and equitably negotiated.

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2 Ibid.

3 Ciaran O'Faircheallaigh, 'Implementation: The Forgotten Dimension of Agreement-Making in Australia and Canada' (2002) 5(20) *Indigenous Law Bulletin*, 7.

4 Ibid.

5 Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31, 44.

6 Ibid.

7 Ibid 32.

8 Stuart Bradfield, 'Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia', in Marcia Langton (ed) *Settling with Indigenous People: Modern Treaty and Agreement Making* (Federation Press, Sydney 2008).

9 Deirdre Howard-Wagner and Amy Maguire, 'The Holy Grail or the Good, the Bad and the Ugly?: A qualitative exploration of ILUAs Agreement-Making Process and the relationship between ILUAs and native title' (2010) 14(2) *Australian Indigenous Law Review*.

10 Ibid 76.

11 O'Faircheallaigh, above n 1.

12 Louise Yaxley, 'AM: Vanstone Explains 'Shared Responsibility Agreement' (9 December 2004) ABC Online <http://www.abc.net.au/am/content/2004/s1261164.htm>.

13 Mitchell Dean, 'The Regulation of the Self', in Tim Jordan and Steve Pile (eds) *Social Change* (Blackwell Publishers 2002), 229.

14 Nicolas Rose, 'Community Citizenship and the Third Way', in Denise Merydith and Jeffrey Minson (eds) *Citizenship and Cultural Policy* (Sage 2001), 14.

15 *Northern Territory Emergency Response Act 2007* (Cth) and *Northern Territory Emergency Response Amendment Act 2010* (Cth).

16 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.

17 Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (2003), 8(1) *Australian Indigenous Law Reporter*, 47.

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

19 Garth Nettheim, Gary Meyers and Donna Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Issues*, (Aboriginal Studies Press, 2002), 2.

20 Howard-Wagner and Maguire, above n 10, 73.

21 Graeme Neate 'Experience Proves Agreement Making the Preferred Way to Resolve Native Title,(Media Release, 16 April 2002) National Native Title Tribunal<http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Experience_proves_agreement_making_preferred.aspx>.

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23 Ibid.

24 *Native Title Amendment Act 2007* (Cth).

25 Howard-Wagner and Maguire, above n 10.

26 Parry Agius, Jocelyn Davies, Richard Howitt, and Leslet Johns, *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia,* Land, Rights, Laws: Issues of Native Title (Issues Paper No 20, Australian Institute of Aboriginal and Torres Strait Islander Studies, December 2002) 4.

27 *Edwards v Santos Limited* [2011] HCA 8,[24].

28 *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019 [59].

29 *Fesl v Delegate of the Native Title Registrar* (2008) 173 FCR 150; [2008] FCA 1469 [21].

30 Howard-Wagner and Maguire, above n 10, 76.

31 Peter Crook, Bruce Harvey and Marcia Langton, 'Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: The Western Cape Communities Co-existence Agreement' in Marcia Langton (ed) *Settling with indigenous people: modern treaty and agreement making* (Federation Press, 2007).

32 Ibid 103.

33 Ibid 103.

34 Maureen Tehan, Lisa Palmer, Marcia Langton and Odette Mazel, 'Sharing Land and Resources: Modern Agreements and Treaties

with Indigenous Peoples in Settler States', in Marcia Langton (ed) *Settling with indigenous people: modern treaty and agreement making* (Federation Press, 2007).

35 Serica Mackay, 'Contributing to the understanding of crucial issues of concern to native title', Land, Rights, Laws: Issues of Native Title(Issues Paper No 29, Australian Institute of Aboriginal and Torres Strait Islander Studies, September 2004) 3, 8.

36 Ibid 3; Nettheim, Meyers and Craig, above n 20, 448.

37 Nettheim, Meyers and Craig, above n 20.

38 Ibid 432.

39 Howard-Wagner and Maguire, above n 10.

40 See, eg, O'Faircheallaigh, above n 1, and Bradfield, above n 9.

41 Alan Bryman, *Social Research Methods* (Oxford University Press, 2nd ed, 2004).

42 Ibid 100.

43 Qualitative in-depth interviewing works toward rich, detailed answers; it is a method that allows the researcher to collect data that provides a more holistic understanding of the area of research. The two main types of in-depth interviewing techniques are structured and semi-structured interviewing. With semi-structured interviewing, the researcher has a list of questions or specific topics that operate as an *interview guide.* The interviewee has the flexibility in how they respond to the questions. The interviewer can probe for more information by asking the interviewee to elaborate, etc; it is a protocol that still enables comparisons of responses across the range of data. This study adopted a semi-structured interviewing technique.

44 Ian Dey, *Qualitative Data Analysis: a user friendly guide for social scientists* (Routledge, 1993), 7.

45 Howard-Wagner and Maguire, above n 10.

46 Interviewee 12.

47 Interviewee 10.

48 Diane Smith, 'Indigenous Land Use Agreements: The Opportunities, Challenges and Policy Implications of the Amended Native Title Act' (Discussion Paper No 163, Centre for Aboriginal Economic Policy Research, 1998), 10.

49 Joint Working Group on Indigenous Land Settlement, *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (August 2009), 10.

50 Ibid 10.

51 Interviewees 11, 12, 16 and 17.

52 Langton and Palmer, above n 18.

53 Garrick Small and John Sheehan, 'Selling your Family: Why customary title is incomparable to Western conceptions of property value' (Paper presented at the Pacific Rim Real Estate Society Annual Conference, Melbourne, 2005), 2.

54 Interviewees seven and nine; O'Fairchellaigh, above n 1.

55 Interviewees four, ten, 11, 12, 16, 17 and 18.

56 Interviewees four, ten, 11, 12, 16, 17 and 18.

57 O'Faircheallaigh above n 1, 19. He notes that '[s]ome companies are committed to developing long-term relationships with native title groups and communities affected by their operations... providing a more equal playing field and a firmer basis for negotiating equitable outcomes'.

58 Interviewee 18.

59 Graeme Neate, 'Reconciliation on the ground: meeting the challenges of native title negotiation – Part 2', (2002) *ADR Bulletin*, No. 5, 113.

60 Ibid.

61 The right to negotiate interconnects with a variety of human rights principles, particularly land and property rights identified in various international covenants and conventions, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the International Labour Organisation Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No. 169). International law also sets out standards for facilitating Indigenous economic and social development, as well as protecting Indigenous peoples' spiritual, cultural, social and economic interests in relation to land.

62 David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) 73.

63 Ibid.

64 Howard-Wagner and Maguire, above n 10, 77.

65 Ibid.

66 O'Faircheallaigh, above n 13, 19.

67 Tom Calma, Native Title Report (Human Rights and Equal Opportunity Commission 2009) 61.

68 Ibid.

69 Ibid.

70 The right to negotiate is a valuable Indigenous right reflected, for example, in arts 32(1) and 32(2) of the Declaration on the Rights of Indigenous peoples.

71 Joint Working Group on Indigenous Land Settlement, above n 25, 12.

72 Howard-Wagner and Maguire, above n 10.

73 Rhonda Kelly and Ciaran O'Faircheallaigh, 'Native Title, mining and agreement making: best practice in commercial negotiations' (Paper presented at the Native Title and Culture Heritage Conference, Brisbane, 2002)

74 Crook, Harvey and Langton, above n 29.

75 Ibid 100.

76 Ibid 100.

77 Ibid 105.

78 Ibid.

79 Ibid.

80 Langton and Mazel, above n 6.