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## **'TREATIES', 'AGREEMENTS', 'CONTRACTS', AND 'COMMITMENTS' - WHAT'S IN A NAME? THE LEGAL FORCE AND MEANING OF DIFFERENT FORMS OF AGREEMENT MAKING**

DAVID LLEWELLYN\* and MAUREEN TEHAN\*\*

### **INTRODUCTION**

The multi-dimensional nature of treaty and agreement making has assumed a central focus in the conduct of relations between Indigenous peoples and settlers in Australia and elsewhere.<sup>1</sup> Whether as a means of resolving disputes,<sup>2</sup> delivering government programmes,<sup>3</sup> or establishing common understandings,<sup>4</sup> agreement making, however defined and named, has become the key tool for engagement between Indigenous and non-Indigenous Australians. Agreements come in all shapes and sizes, ranging from registered Indigenous Land Use Agreements (ILUA)<sup>5</sup> to Statements of Commitment, Memorandums of Understanding and Regional Agreements.<sup>6</sup> In other jurisdictions these may be called 'treaties'.<sup>7</sup>

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\*\* Associate Professor, Law School, University of Melbourne. This article was prepared with assistance from the Australian Research Council Linkage grant: 'Agreements, Treaties and Negotiated Settlements with Indigenous Peoples in Settler States: Their Role and Relevance for Indigenous and Other Australians'. With thanks also to Andrew Robertson and Lee Godden. This article should not be taken as legal advice. It is designed to provide general pointers to issues which may arise when engaging in negotiations. The authors accept responsibility for any errors.

<sup>1</sup> Marcia Langton et al (eds), *Honour Among Nations: Treaties and Agreements with Indigenous People* (2004).

<sup>2</sup> National Native Title Tribunal, *Annual report / National Native Title Tribunal 2002/2003* (2003) 22.

<sup>3</sup> 'The Australian government has been fostering a new culture of agreement making with Indigenous people that is giving them real influence and control in the affairs of state that matter to them', in 'Shared Responsibility Through Partnership' *Indigenous Issues Fact Sheet Series* (October 2003) 1. <<http://www.Indigenous.gov.au/ip.dll/SearchResults?s=1427>> at 8 November 2004.

<sup>4</sup> For example: *Memorandum of Understanding for Model Exploration and Mining Agreements (2001) between Rio Tinto and the Northern Land Council Agreements*, Treaties and Negotiated Settlements Database <<http://www.atns.net.au/biogs/A000077b.htm>> at 8 November 2004.

<sup>5</sup> See the National Native Title Tribunal <[http://www.nntt.gov.au/ilua/browse\\_ilua.html](http://www.nntt.gov.au/ilua/browse_ilua.html)> at 8 November 2004.

<sup>6</sup> See for example the agreements database at Agreements, Treaties & Negotiated Settlements (ATNS) database website at <<http://www.atns.net.au/browse.htm>>

<sup>7</sup> Brad Morse 'Indigenous-Settler Agreement Making in Canada' in Langton, M et al (eds) *Honour Among Nations*, above n 1.

Treaties have become a central focus of the evolving relationship between Indigenous and non-Indigenous peoples in Canada, the United States and New Zealand. However, in Australia the predominant Federal government position is that treaty making can only occur between sovereign nations and that the sovereignty of Australia cannot be divided in order to accommodate a treaty between peoples within the nation.<sup>8</sup> Sovereignty, however, need not be considered an indivisible concept. While from the outside of a nation, sovereignty appears indivisible, looking from within a nation the right to exercise the powers that constitute sovereignty ‘may be divided vertically or horizontally’.<sup>9</sup> Thus ‘internal sovereignty may be divided’,<sup>10</sup> and is divided, for example, between State and Federal parliaments under the Australian Constitution.<sup>11</sup> In arguing for the survival of an Indigenous sovereignty, Brennan, Gunn and Williams observe that the High Court has recognised that ‘sovereignty is a fluid concept dependant on context, that (implicitly) Indigenous people were sovereign prior to colonization, and that Indigenous legal systems continue to operate.’<sup>12</sup>

While sovereignty is not confined to the nation-state, treaty making, too, is not a tool reserved only for use between nation-states. Mick Dodson points out that ‘the word ‘treaty’ covers a broad range of concepts, including contract or compact, a covenant, an agreement, a settlement, or international arrangements between nation states.’<sup>13</sup> He suggests that the ‘international legal meaning of treaties is used by the present Australian Government to unequivocally reject calls for a treaty.’<sup>14</sup> He refers to Martinez<sup>15</sup> who suggests that a Eurocentric historiography of treaties must be put to rest if we are to progress to new treaty-making, and that in certain circumstances agreement making may be seen as a form of treaty process. Langton and Palmer observe that ‘an agreement is not necessarily considered to be of a different nature to a treaty, particularly if the subject matter of the agreement relates to ‘the notion and contents of sovereignty (such as territory/land and other jurisdictional matters)’. In such cases, both ‘treaty’ and ‘agreement’ are settlements between

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<sup>8</sup> See Sean Brennan, Brenda Gunn, and George Williams, ‘Sovereignty and its Relevance to Treaty Making Between Indigenous Peoples and Australian Governments’ (2004) 26 *Sydney Law Review* 307, 308, quoting John Howard, 29 May 2000, ‘A nation ... does not make a treaty with itself.’

<sup>9</sup> *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 479-480, quoted in Brennan, Gunn and Williams, above n 8, 319.

<sup>10</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337 at 480, quoted in Brennan, Gunn and Williams, above n 8, 319-320.

<sup>11</sup> *Constitution* s51.

<sup>12</sup> Brennan, Gunn and Williams, above n 8, 328.

<sup>13</sup> Mick Dodson, ‘An Australian Indigenous Treaty: Issues of Concern’, Paper presented at the An Australian Indigenous Treaty Seminar, <http://www.aiatsis.gov.au/rsrch/smnrs/papers/dodson.htm>

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* referring to Miguel Alfonso Martínez, ‘Final report of the Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations’ (United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1999/20, 1999).

parties having rights to dominion or possession.<sup>16</sup> Langton and Palmer assert that agreement-making processes between Indigenous peoples in Australia and the settler community contest national sovereignty by asserting and exercising Indigenous governance and customary authority.<sup>17</sup> They state:

Indigenous forms of political legitimacy or jurisdiction compete both symbolically and politically with the declared nation-state sovereignty, which is often weakly exercised in the territory of the [Indigenous] people, especially in remote areas. Some agreements in Australia today ... have effected mutual recognition of the respective jurisdictions of the Indigenous and settler parties, with the express purpose of constituting jural, political and economic relationships based in an agreed distribution of public and private rights in land.<sup>18</sup>

Thus, both individually and in sum total, the agreement making process may be implicitly recognising sovereignty of Indigenous communities. Tehan points out that underlying current discussions about treaty and agreement making is the real matter of substance – that of the development of a fair and just relationship.<sup>19</sup> Thus, while agreement making in Australia has an important place in the evolving relationship between Indigenous and non-Indigenous peoples in Australia, it must also be examined for its practical outcomes, and whether these do indeed foster a fair and just relationship.

In dealing with this question of fairness and justness, this paper examines agreements in Australia from the point of view of their enforceability, referring to the category of agreement and the status of the parties.<sup>20</sup> The paper discusses various categories of agreement and the enforceability of each type. This discussion aims to provide practitioners and native title-holders and claimant's information to assist them choose the appropriate agreement type for their purpose, and to understand the language,

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<sup>16</sup> Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Langton, M et al (eds) *Honour Among Nations*, above n 1, 34, 40, quoting Miguel Alfonso Martinez, 'Second Progress Report of the Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations' (United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th sess, Un Doc E/CN.4/Sub.2, 1992) para 256.

<sup>17</sup> Langton and Palmer, 'Treaties, Agreement Making', above n 16, 48.

<sup>18</sup> Ibid 48-49.

<sup>19</sup> Maureen Tehan, (Paper presented at Unfinished Business Conference, Melbourne, 2002) in John Rickard and Vince Ross (ed), *Texts and addresses from the Unfinished Business Conference* (2002) 85, 89.

<sup>20</sup> Although 'enforceability' is the central organizing principle in this paper, we do not consider this to be the only significant element in contract and agreement making. Indeed, legal researchers have indicated that in many circumstances it is the relationship between the parties, rather than their strict legal rights that determines compliance with contracts and agreements. Space does not permit exploration of the idea of relational contracts here. See Stewart Macaulay, 'Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94 *Northwestern University Law Review* 775, Ian Macneil, in David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001), Richard E Speidel, 'The Characteristics and Challenges of Relational Contracts' (2000) 94 *Northwestern University Law Review* 823.

meaning and consequences of particular agreements. The paper does not seek to provide an exhaustive legal analysis of the elements of each type of agreement. Rather, it highlights the significant characteristics of each type of agreement, including its common legal status and its most frequent applications. In doing so, the paper provides an accessible insight into the intersection between contract law and agreement making.

Some types of agreements are merely intended to be unenforceable outlines of principles for future dealings. Other agreements, referred to in law as contracts, are expected to create legally enforceable obligations between the parties.<sup>21</sup> Each type can be useful according to the outcome desired by the parties. The paper observes that the enforceability of an agreement may depend upon the identity of the parties and also the agreement type. For example government may be immune to contractual enforcement, and an Indigenous Land Use Agreement (ILUA) may impose different burdens upon native title-holders than will a legally enforceable contract with the same terms.<sup>22</sup>

Ultimately the paper provides some tools to help determine what might be meant by one party when it proposes to another the making of an agreement, with a view to avoiding the difficulties that can come from a clash of differing expectations. The paper also provides the discussion points that may help parties make a choice of agreement type that meets their needs and expectations.

## **CATEGORIES AND ENFORCEMENT OF AGREEMENTS**

### **I. Commercial Contract And Pre-Contractual Liability**

*When might compensation become due as a result of pre-contractual negotiations?*

The most common form of agreement making in Australia is the making of common law contracts. Most people make contracts on a daily basis. Buying a newspaper involves the making of a contract, even though nothing may be said during the exchange. A contract is an agreement between parties that produces legally enforceable rights. If the shopkeeper takes the money and refuses to hand over the newspaper this is, among other things, breach of contract. Similarly if the purchaser asks for a newspaper, makes to hand over the money, is given the newspaper by the shopkeeper, and then fails to complete the handover of the money while taking the paper, this too is, among other things, breach of contract. The principles of contract law apply from the simplest transaction to the most complex. While buying the newspaper might take mere seconds and involve no speech or written communication,

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<sup>21</sup> But note that obligations can arise between parties involved in negotiations even where a contract is not formally entered into. This is an emerging and important aspect of law relating to the formation of legal obligations between parties, and is a particular issue with some of the types of agreements discussed in this paper.

<sup>22</sup> But good drafting is an essential element of any agreement, regardless of its type.

negotiations prior to the formation of some legally binding contracts can take years. The formation of a contract requires at least two parties, a promise by at least one of them, and either an exchange of promises or an exchange of a promise for an act. The exchanged promises or acts must have some value, known as consideration, such as a promise to pay money. This process involves the making of an offer, the acceptance of the offer, and the exchange. There must also be an intention to create legal relations, but this is determined objectively. Further there must be terms on the contract that are both essential to the contract and that are certain.

Rights may be created during pre-contractual negotiations even where no contract is formed. In the case where a contract is formed a court may refer to pre-contractual negotiations to add to, subtract from, alter, or allow a party to completely escape from the contract. There are three sources of law which can affect the rights of negotiating parties, whether or not a contract is formed – the common law, equity, and statute. This section provides an overview of causes of action that derive from common law and equity. This overview provides a useful background to some of the problems that are discussed later in this paper in relation to other agreement types.

### ***Where a contract is formed***

Several major categories of causes of action are available to remedy problems that derive from pre-contractual negotiations. These include:

- **Misrepresentation:** A misrepresentation is a representation made during negotiations for a contract that leads a party into error, and acts as an inducement to enter into a contract on the basis of the error.<sup>23</sup> Misrepresentation includes representation by words, conduct (for example a nod of the head) and, in some instances, silence. The representation may be fraudulent,<sup>24</sup> where the person making the representation is aware of the falsity of the representation or has no belief in it. The representation may also be negligent, where the person making the representation has not taken care to ensure the information provided is accurate and advice given is sound. In addition the representation may be innocent, being neither fraudulent nor negligent. Remedies include rescission of the contract or damages.

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<sup>23</sup> See NC Seddon and MP Ellinghaus, *Cheshire and Fifoot, Law of Contract - Eighth Australian Edition* (2002) para 11.9 and 11.10.

<sup>24</sup> For these categories see Peter Heffey, Jeannie Paterson and Andrew Robertson, *Principle of Contract Law* (2002), 475 ff. Negligent misrepresentation is a tort. A tort is a legal category comprising a grab-bag of cases where the law has found that a 'duty of care' has been breached. Liability for a negligent misrepresentation is independent of contract law, and may be found where no contract is formed. The leading case is *Hedley Byrne v Heller* [1964] AC 465.

- **Duress and pressure:** This applies where one party brings unacceptable pressure upon another, the pressure being a factor that compelled or forced the party to enter into a contract.<sup>25</sup> The pressure can be physical (including violence or threats of violence), economic or psychological. Remedies include that the party influenced may choose to make the contract void (rescission of the contract).
- **Undue influence:** Undue influence exists where one party to a contract has a relationship of dominance or ascendancy over another person, and this relationship prevents the person over whom the influence is held from exercising independent judgement in deciding to enter the contract. This is distinguished from duress and pressure by the fact that the influenced party will frequently enter into the contract willingly. Nor does it require any ill-will from the party that exercises the influence.<sup>26</sup> Where undue influence is found remedies include that the party influenced may choose to make the contract void, and therefore unenforceable.
- **Unconscionable conduct:** The term ‘unconscionable conduct’ refers both to a general principle that informs a broad range of doctrines in law, and also refers to a specific doctrine of equity. This part deals only with the latter form. In the latter form unconscionable conduct exists where, broadly speaking, ‘one party, by reason of some condition or circumstance is placed at a special disadvantage *vis à vis* another and unfair or unconscientious advantage is then taken of the opportunity thereby created...’<sup>27</sup> and where that relationship leads to unfair or unjust terms of a contract for the person at the disadvantage.<sup>28</sup> Where unconscionable conduct is found the party influenced may choose to make the contract void, and therefore unenforceable.
- **Mistake:** Mistake can apply where ‘it would be unconscionable for one party to assert his or her strict legal rights arising from the contract, having regard to a mistake which has been made either by both parties or by one party which was known to the other.’<sup>29</sup> A mistake may have been made by both parties about some fundamental fact relating to the contract, for example, that the

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<sup>25</sup> See Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, para 13.1.

<sup>26</sup> See *ibid* paras 14.1 to 14.5.

<sup>27</sup> Mason J in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462. See also *ibid* Ch 15 ‘Unconscionable Conduct’.

<sup>28</sup> See Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, para 15.4 – 15.6. The most important case defining the doctrine of unconscionable conduct is the *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447. Note that while this is seen as a doctrine independent of undue influence, duress or pressure, its difference from these may be ‘illusory’ in relation to undue influence, or ‘hard to discern’ in relation to duress or pressure. From Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, para 15.4, fn 24.

<sup>29</sup> Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, para 12.3.

subject of the contract has perished.<sup>30</sup> A mistake can also be made by both parties where they misunderstand each other about the subject of the contract and are at cross-purposes – for example that a car being sold is a Ford, not a Holden.<sup>31</sup> In addition, mistake can be found where one party knows of another's mistake, for example where the seller of a painting is aware that the buyer believes it is an original, where in fact it is a copy.<sup>32</sup> Remedies for mistake include that the party in whose favour the mistake is found may choose to make the contract void, and therefore unenforceable.

### ***Where a contract is not formed***

Common law estoppel and equitable estoppel come into play in the pre-contractual situation where one party, by its behaviour or representations, induces another party to make an assumption to its detriment in relation to the coming into play of a contract, and it would be unconscionable for that assumption not to be met. Common law estoppel applies where a party is induced into believing a contract has been made. Equitable estoppel comes into play where a party is induced into believing a contract, or some element of a contract, will be agreed to. In broad terms courts will treat the parties 'as if' a contract had been made between them, and 'as if' there had been a breach of that contract.<sup>33</sup> However courts have the freedom to create a remedy that removes the detriment the party making the assumption has suffered in relying upon the assumption.<sup>34</sup> Courts are, however, reluctant to remedy unconscionable pre-contractual behaviour where no contract has been formed.<sup>35</sup> Courts require that the conduct complained of create a sufficiently unconscionable situation so as to allow them to turn aside the normal rules of contract formation.<sup>36</sup>

While many agreements are contracts<sup>37</sup> there are many that are not. As we have seen, rights can be created in contract or they can be created in pre-contractual negotiations. Pre-contractual negotiations will frequently be used by Courts to interpret and give meaning to the agreements reached and to

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<sup>30</sup> Ibid para 12.5.

<sup>31</sup> Ibid para 12.5.

<sup>32</sup> Ibid para 12.5.

<sup>33</sup> NC Seddon and MP Ellinghaus, *Cheshire and Fifoot, Law of Contract - Seventh Australian Edition* (1997), para 1.15.

<sup>34</sup> See ibid para 1.15 and chapter 2. See also Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 410, and *Giumelli v Giumelli* (1999) 196 CLR 101.

<sup>35</sup> Heffey, Paterson and Robertson, above n 24, 179.

<sup>36</sup> Seddon and Ellinghaus, *Law of Contract 7<sup>th</sup> ed*, above n 33, para 2.16. See also the section on misrepresentation, above and footnote 24, for a reference to negligent misrepresentation. A remedy for a negligent misrepresentation may be given by a court where a harm has been suffered as a result of a misrepresentation, irrespective of whether a contract has been formed.

<sup>37</sup> For dangers specific to native title from the resolution of issues by contract see for example Frances Flanagan, 'Pastoral Access Protocols: 'The Corrosion of Native Title by Contract'' in Jessica Weir (ed), *Land, Rights, Laws: Issues of Native Title: Issues Paper Vol 2, no. 19* (2002).



require parties to perform their obligations. We now turn to consider a range of these agreements and the rights they create.

## II. Memorandum of Understanding – Invention of the Devil?

The term ‘memorandum of understanding’ (MoU) is used widely, and refers to agreements of many types. MoUs are used both for private transactions and for transactions between organisations, municipal authorities, and between states.<sup>38</sup> In the private arena the term is most frequently applied to pre-contractual agreements, while in agreements between nations one major use of the term is to refer to treaties that take the form of multiple documents.<sup>39</sup> Other names applied to documents with the same use and effect as a MoU in the private sphere are ‘protocol’, ‘letter of understanding’, and ‘heads of agreement’.<sup>40</sup> However ‘letter of intent’ is the dominant term in commerce, and this term has shown signs of becoming the generic term for pre-contractual agreements.<sup>41</sup> Letters of intent are frequently used in commerce to establish the pre-contractual and non-binding position of a party or parties.<sup>42</sup> In complex negotiations they often include clauses intended to bind the parties. They are seen to inhabit an ‘unclear grey zone’<sup>43</sup> in law.

In the arena of Indigenous agreement making in Australia, Bradfield<sup>44</sup> notes that the term MoU refers to a type of agreement that is sometimes also labeled a ‘statement of commitment’, or a ‘framework agreement’.<sup>45</sup> The term is also applied to agreements that provide a ‘broad statement of mutual respect and shared objectives that can guide the preparation of [future] agreements.’<sup>46</sup>

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<sup>38</sup> Ralph B Lake and Ugo Draetta, *Letters of intent and other pre-contractual documents: comparative analysis and forms* (1989), and for example, the City of Port Phillip Memorandum of Understanding with Indigenous Community (1999) at the ATNS website at <<http://www.atns.net.au/biogs/A000667b.htm>> at 8 August 2004.

<sup>39</sup> Lake and Draetta, above n 38, 3. Other uses include documents signed between the United States Securities and Exchange Commission and similar organisations in other countries for the purpose of cooperation in enforcement matters. In this application MoUs do not have the status of treaties, or even of executive agreement. (Lake and Draetta, above n 38, 4).

<sup>40</sup> Ibid 8 notes that for in the international commercial arena the terminology is in a state of ‘anarchy, referring to ‘Anarchie terminologique’ Fontaine, *Les lettres d’intention dans la negotiation des contrats internationaux*, 3 *Droit et Pratique du commerce international* 99 (1977).

<sup>41</sup> Lake and Draetta, above n 38, 4-5. See also Robert Macey, ‘Letters of Intent, are they worth it?’ (2004) 78(3) *Law Institute Journal* 60.

<sup>42</sup> Lake and Draetta, above n 38, 9.

<sup>43</sup> Ibid 10.

<sup>44</sup> Stuart Bradfield, ‘Agreeing to Terms: What is a ‘Comprehensive’ Agreement?’ in Serica Mackay (ed), *Land, Rights, Laws: Issues of Native Title: Issues Paper Vol 2, no. 26* (2004).

<sup>45</sup> Ibid 4.

<sup>46</sup> In Aboriginal and Torres Strait Islander Commission, *Regional Agreements Manual* (2001) 4 <[http://www.atsic.gov.au/about\\_atsic/regional\\_agreements/Default.asp](http://www.atsic.gov.au/about_atsic/regional_agreements/Default.asp)> at 30 October 2004. In this document MoUs are described as forms of ‘framework agreement’, and the quote refers to framework agreements as a whole. The ‘[future] agreements’ referred to in the definition are specifically referred to as ‘regional agreements’, (at page 4) however this is not an exclusive definition. See for example a summary of the Cape York Peninsula Heads of

A primary use of the MoU, or similar document, is to outline the way future negotiations about a matter anticipated in the document will take place.<sup>47</sup> Bradfield suggests there may be hundreds of Indigenous-related MoUs in operation.<sup>48</sup> So unfixed is the term MoU, that it would be wise to ensure that each party has a similar idea of what is intended by the drafting of such a document.

MoUs are used by a diverse range of parties to negotiations. They have been used in pre-contractual negotiations between Indigenous people and agencies and organisations, governments, departments and industry bodies, covering areas such as health, housing, service delivery and processing future acts.<sup>49</sup> MoUs have also been used in relation to the negotiation of specific projects (for example, mining ventures) with private firms,<sup>50</sup> and for more general agreements, such as a 'comprehensive regional agreement' in the East Kimberly region.<sup>51</sup> In 2002 the Northern Land Council signed an exploration MoU template agreement with several mining companies, in order to speed up the agreement process while reducing costs.<sup>52</sup> This was an umbrella agreement that established the procedure to be used for negotiating agreements between individual mining companies and individual Indigenous groups.

Pre-contractual agreements may acknowledge certain rights of other parties, thus establishing both a position of goodwill and respect between parties, and the boundaries within which the future negotiations will take place.<sup>53</sup> The pre-contractual MoU is usually intended to reflect preliminary agreements or understandings of some or all of the parties to a future contract.<sup>54</sup> Macey<sup>55</sup> and Lake and Draetta<sup>56</sup> suggest that a MoU is useful where the parties wish to establish a sense of the seriousness of their intention and create a non-legal bonding to a particular course of action,<sup>57</sup> to help focus negotiators' minds on the issues and to record the 'meeting of minds' (and reveal

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Agreement (1996) at ATNS website, <<http://www.atns.net.au/biogs/A000107b.htm>> at 10 October 2004.

<sup>47</sup> Bradfield, above n 44, 4.

<sup>48</sup> Ibid 4. Under the heading of MoU Bradfield includes process agreements, some agreements referred to as statements of commitment, and 'types of framework agreement'. Some 50 agreements specifically titled 'MoU' are listed at the ATNS website <[http://www.atns.net.au/br\\_m\\_function\\_agreements.htm](http://www.atns.net.au/br_m_function_agreements.htm)> at 12 August 2004.

<sup>49</sup> Bradfield, above n 44, 4. See also the ATNS website for many examples of MoUs, at <[http://www.atns.net.au/br\\_m\\_function\\_agreements.htm](http://www.atns.net.au/br_m_function_agreements.htm)> at 12 August 2004.

<sup>50</sup> See for example Memorandum of Understanding with McArthur River Mining (2001) at ATNS website, <<http://www.atns.net.au/biogs/A001339b.htm>> at 20 August 2004.

<sup>51</sup> Bradfield, above n 44, 4 referring to Kimberley Land Council Argyle Diamond Mine Memorandum of Understanding (2001) described at the ATNS website <<http://www.atns.net.au/biogs/A000094b.htm>> at 30 August 2004.

<sup>52</sup> Bradfield, above n 44, 4.

<sup>53</sup> Cape York Peninsula Heads of Agreement (1996) at <<http://www.atns.net.au/biogs/A000107b.htm>> at 24 August 2004.

<sup>54</sup> Lake and Draetta, above n 38, 5. According to Macey, above n 41, 60 these set out the basic terms of a proposed transaction.

<sup>55</sup> Lake and Draetta, above n 38, 61.

<sup>56</sup> Ibid 12-17.

<sup>57</sup> Lake and Draetta refers to this as a 'moral commitment'. Ibid 16.

misunderstandings<sup>58</sup>) to that point, to establish a framework for future negotiations,<sup>59</sup> to record oral understandings so as to help prevent misunderstandings occurring later, to serve as memory aid for the drafts person when later drawing up the contract, to use as evidence to a third party, such as a lender, that a contemplated transaction is viable,<sup>60</sup> or to use for publicity purposes to indicate a particular course of action is underway. MoUs are useful where negotiations are likely to be protracted and complex.

Despite their many uses, MoUs, along with all letters of intent,<sup>61</sup> have been branded ‘inventions of the devil’<sup>62</sup> for the combined reasons of the lack of clear guidance in law as to their transition from pre-contractual agreement to contract, and the ease with which they may slip from one to the other. The legal enforceability of MoUs will depend upon their contents and the intentions (objectively determined by the courts) of the parties.<sup>63</sup> However, a contract may be found to exist where a MoU appears to be a final statement of agreement between the parties or where there is strong objective evidence of the intention to create reciprocal obligations.<sup>64</sup> In reaching a decision courts will examine the terms used in the MoU, including the use of stock phrases, the intentions of the parties as evidenced by their statements and conduct, and surrounding circumstances. Where one party has begun to perform some aspect of an obligation in a MoU courts may find that a contract exists where there is nothing in the MoU to indicate otherwise. Further, promises made in a pre-contractual document or negotiations may be enforced by a court in accordance with equitable estoppel, even where no contract has yet been formed.

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<sup>58</sup> Ibid 12.

<sup>59</sup> Ibid 14 refers to these as ‘framework letters of intent’, and in current practice in Indigenous sphere these might better be considered as ‘framework agreements’.

<sup>60</sup> In response the third party may give a ‘comfort letter’ or ‘letter of awareness’ providing assurance of some kind to the negotiators of the contract. Ibid 13.

<sup>61</sup> Used as an umbrella term in both Macey, above n 41, and Lake and Draetta, above n 38.

<sup>62</sup> New York attorney Stephen R Volk: ‘a letter of intent is an invention of the devil and should be avoided at all costs’, from Comment, ‘Devil’s Advocate: Salvaging the Letter of Intent’, 37 *Emory L.J.* 137 (1988), quoted in Lake and Draetta, above n 38, 20, n51.

<sup>63</sup> Macey, above n 41, 60.

<sup>64</sup> The traditional elements of contract formation include mutual assent (even where no offer nor acceptance can be identified) a promise to which an offer has been duly accepted, consideration (something of use or value exchanged), and an intention (objectively determined) to enter into a contract. See Lake and Draetta, above n 38, 25 Note that these traditional elements are less rigidly enforced by courts than during the 19<sup>th</sup> century. In Seddon and Ellinghaus, *Law of Contract 7<sup>th</sup> ed*, above n 33, at 78 the current thinking is described as ‘have the parties engaged with each other in such a way that, if one party were to pull out, the other party would be adversely affected?’

Note that in James Willis, ‘Enforceability of Heads of Agreement, Intention to be Bound and Omission of Essential Terms, *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Limited*’ (2001) 20 *Australian Mining & Petroleum Law Journal* 312 Willis refers to the dissenting opinion in *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2001] NZCA 289 as ‘compelling’. In his dissenting judgment Thomas J. states ‘If the heads of agreement entered into in the circumstances of this case are not to be honoured by the parties and enforced by the courts a valuable and essential commercial tool will be seriously prejudiced.’ (at para 135).

Precautions can be taken to help ensure that a pre-contractual agreement is not binding, where this is desired.<sup>65</sup> Macey recommends that in Australia if the parties do not intend to be bound this should be stated in the document, along with a statement that no reliance should be placed on the terms of the document. The terms should be outlined with little specificity or detail, and some substantive issues should be left open for final negotiations. Some indication should be made in the document that such issues require further agreement, or have not been agreed upon.<sup>66</sup> Subsequent conduct should reflect the intention not to be bound.<sup>67</sup> As a matter of caution Macey recommends the inclusion of a modest liquidated damages provision that might serve as a basis for limiting potential liability.<sup>68</sup> Where an agreement is intended to become binding only upon registration as an ILUA, this should be noted in the document.

### **III. Framework Agreement**

Like 'memorandum of understanding' the use of the term 'framework agreement' in the literature is very mixed.<sup>69</sup> Lake and Draetta discuss 'framework letters of intent' as agreements that deal with the practical matters of future negotiation such as the allocation of responsibilities for particular parts of negotiation to particular persons, the provision of milestone dates, the scope of the negotiations, and the identification of agreements that will govern various aspects of a transaction.<sup>70</sup> Lake and Draetta note that these kinds of agreements frequently contain provisions that are designed to be obligatory, such as (in the commercial sphere) the protection of trademarks, confidentiality,<sup>71</sup> a denial of agency or partnership relation, and cost allocation.<sup>72</sup> They note these agreements also frequently contain clauses

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<sup>65</sup> See for example *Air Great Lakes Pty Ltd & Others v KS Easter (Holdings) Pty Ltd* [1985] 2 NSWLR 309, cited in Macey, above n 41, 60.

<sup>66</sup> See *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2001] NZCA 289 (10 October 2001), cited in Macey, above n 41, 61.

<sup>67</sup> For further discussion see Janelle Moody, *Recent Cases Concerning Heads of Agreement*, Australian Mining & Petroleum Law Association Yearbook (2003), including summary at 618. Subsequent behaviour indicating an intention not to be bound might include not fulfilling any of the conditions of the contract, not making preparations which might indicate an expectation of a contract coming into force, not fulfilling requests made by another party which would satisfy terms of the contract, and not making like requests of other parties. Also, where a party acts as if in reliance on some future contract, the other party should make an effort to ensure that the first party is aware that they should not act in reliance upon the coming into existence of the contract.

<sup>68</sup> Macey, above n 41, 63.

<sup>69</sup> Note that framework ILUAs are dealt with in the section on ILUAs below. Section 24DB of the *Native Title Act 1993* (Cth), dealing with coverage of alternative procedure agreements, states: 'The agreement must be about one or more of the following matters in relation to an area: ... (e) providing a framework for the making of other agreements about matters relating to native title rights and interests.'

<sup>70</sup> Lake and Draetta, above n 38, 14-15.

<sup>71</sup> See also *ibid* 121.

<sup>72</sup> See also *ibid* 120.

denying liability or obligation as to the subject of the agreement once a defined negotiating period has elapsed.<sup>73</sup> They observe that these, and other matters dealt with in the framework letter of intent, are frequently desired by both sides to be obligatory and enforceable. In Australian and English common law where part of an agreement is found to be enforceable because that part is considered by the court to be the essential term/s of the agreement, the whole agreement may become binding.<sup>74</sup>

In the Indigenous context Neate refers to framework agreements as establishing a path for proceeding to a final agreements suggesting they are agreements ‘about the process [the parties] will follow to negotiate an ILUA’.<sup>75</sup> Neate’s use of the terms ‘framework’ and ‘process’ suggest that he sees the concepts, as related to types of agreement, as synonymous.<sup>76</sup> In Australia the term is also frequently conflated with ‘memorandum of understanding’.<sup>77</sup> For example Bradfield refers to the definition of framework agreement in the ATSIC Regional Agreements Manual.<sup>78</sup> The manual states:

A framework agreement is a broad statement of mutual respect and shared objectives that can guide the preparation of regional agreements. In order to build trust, a statement of recognition and mutual respect is often appropriate. This can establish some principles that will be important in developing a more detailed argument.

The manual goes on to state that a MoU is a ‘type of framework agreement’.

Finlayson states that framework agreements provide protocols about ‘how to think’ about issues, for example equity, compensation, employment,

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<sup>73</sup> Ibid 15.

<sup>74</sup> Contract law allows for a contract to have essential and non-essential terms. Terms of a contract might be considered essential where a party would not have entered into the contract were it not for the terms. See Moody, above n 67, 615, which states after examining the case *African Minerals Ltd v Pan Palladium Ltd* [2003] NSWSC 268 that: ‘...this case is an important reminder that for there to be a legally binding agreement, all fundamental terms need to be agreed. Courts will not intervene to assist parties who have failed to agree on key terms.’ See also Lake and Draetta, above n 38, 122 which states ‘A confidentiality obligation in a pre-bid letter of intent might be held to be the only really essential term, and thus render the entire agreement enforceable... In this case, a prebid letter of intent would be a contract to negotiate.’

<sup>75</sup> Graeme Neate, ‘The effectiveness of ILUAs as a risk management tool: a mediator’s perspective’ (1999) *Australian Mining & Petroleum Law Association Yearbook* 254, 262-3. See also Stan Doenau, *Native Title and Negotiated Agreements* (1999), 16-17 and Neate, ‘ILUAs as a risk management tool’, above n 75, 266. ILUAs are enforceable to the extent of the ILUA regime under the *Native Title Act 1993* (Cth). (See section in this article on ILUAs).

<sup>76</sup> See Neate, ‘ILUAs as a risk management tool’, above n 75, 263.

<sup>77</sup> See Bradfield, above n 44, 4 and 6, referring to Aboriginal and Torres Strait Islanders Commission (ATSIC), *Regional Agreements Manual*, p4, available at [http://www.atsic.gov.au/about\\_atsic/regional\\_agreements/Default.asp](http://www.atsic.gov.au/about_atsic/regional_agreements/Default.asp) at 15 September 2004.

<sup>78</sup> Bradfield, above n 44, 4 and 6, referring to Aboriginal and Torres Strait Islanders Commission (ATSIC), *Regional Agreements Manual*, above n77, 4.

service contracts, native title and heritage. She contrasts framework agreements with project agreements, which deal with the particulars of the subject matter.<sup>79</sup> In each of these cases the thrust of the definition is towards a commitment that is not binding, and that fulfills the role, outlined in the previous section, of the letter of intent and thus falls under the same grey area of enforceability encountered in the discussion above of MoUs.

A similar usage of the term 'framework agreement' is found in the six-stage treaty process in the British Columbia, Canada. Stage three of the process involves the making of a framework agreement that is 'in effect, the "table of contents" of a comprehensive treaty.'<sup>80</sup> At this point the parties agree on the 'subjects for and objectives of the negotiations, and establish a timetable and the procedural arrangements for the negotiations.'<sup>81</sup> The making of the framework agreement involves First Nations, and the governments of Canada and British Columbia defining the issues to be included in later negotiations.

In Australia the Greater Shepparton Shared Responsibility Agreement (2003)<sup>82</sup> is a framework agreement outlining a 'more coordinated approach where governments and communities work together to develop more flexible programmes and services based on each community's priorities.' Topics covered by the agreement include building leadership and governance skills, promoting pride in Aboriginal culture, improving education and employment outcomes; improving health and housing services and increasing business

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<sup>79</sup> Julie D Finlayson, *Indigenous heritage protection, native title and regional agreements: the changing environment - discussion Paper No 145/1997* (1997), 3.

<sup>80</sup> British Columbia Treaty Commission, 'Negotiations - Six-Stage Treaty Process' at [http://www.bctreaty.net/files\\_2/sixstages-intro.html](http://www.bctreaty.net/files_2/sixstages-intro.html) at 29 October 2004.

<sup>81</sup> *Ibid.* The website provides a list of issues to be considered during the making of a framework agreement. It states:

'The Framework Agreement should identify what will be on the treaty negotiation table by setting out all of the subjects that the parties agree they will negotiate during [the next stage]. Examples of procedural arrangements which should be addressed in a Framework Agreement include:

- Structure of tables, such as main table, side table, working group;
- Frequency, location and notice of meetings;
- Estimated time to complete [the next stage];
- Who is responsible for agendas and record keeping;
- Who is to chair the meetings;
- Access to and confidentiality of records produced by the parties;
- Who is entitled to attend meetings;
- Coordination of communications and public information program;
- Process for dispute resolution, particularly in the context of a party suspending negotiations.

Further, during framework negotiations, each party should describe to the others its proposed ratification procedure to conclude a final treaty.' Note that this list bears the hallmarks of a legally binding commitment, with for example, quite specific provisions and a process for dispute resolution. However, as the agreement is with government it may not bind the government parties in law. It may be more in the nature of a political agreement. (See [http://www.bctreaty.net/files\\_2/negotiations.html](http://www.bctreaty.net/files_2/negotiations.html) at 30 September 2004 and section in this article on agreement with government.)

<sup>82</sup> See Greater Shepparton Shared Responsibility Agreement (2003) at ATNS website, <http://www.atns.net.au/biogs/A001330b.htm> at 29 October 2004.

opportunities. This agreement paves the way for further initiatives between government and the Shepparton district Indigenous peoples.

The term 'framework agreement' is also used in Indigenous matters to refer to broad-based agreements between government and Indigenous peoples which in themselves devolve power and some level of autonomy to Indigenous peoples. For example Behrendt observes that the term 'framework agreements' is applied to both regional agreements and to a treaty. She notes that 'there has been some confusion between the talk of a treaty and the development of regional agreements, often facilitated by the use of the term 'framework agreement' to describe both processes.'<sup>83</sup> Such agreements would be final agreements, and not agreements made primarily for the purpose of establishing a process for the making of a primary agreement in the future. Another primary usage of the term that Behrendt identifies is where it refers to an agreement

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<sup>83</sup> Larissa Behrendt, *Achieving Social Justice - Indigenous Rights and Australia's Future* (2003), 167. See also at p15, 92-3, 124, 133, and 176. This confusion might be because framework agreements have been proposed as the basis of a treaty process in Australia. In this sense the framework might be a final and entrenched process allowing for different treaty-type agreements at the local or regional level.

See also Marcia Langton, *A Treaty Between Our Nations. Inaugural Professorial Lecture By Professor Marcia Langton, Chair of Australian Indigenous Studies University of Melbourne, Australia* (2000), 23: 'Patrick Dodson set out the idea of a [nationwide] Framework Agreement as a process for the settlement of the outstanding inequalities in the relationship between the first peoples and the settler state.' Langton is referring to Patrick Dodson, Vincent Lingiari Memorial Lecture, Northern Territory University, 1999, and subsequent representations by Aboriginal people to the Prime Minister. See also reference to state-wide framework agreements to deal with native title claims. A South Australian state-wide agreement is discussed in Parry Aguis et al, 'Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia' in Jessica Weir (ed), *Land, Rights, Laws: Issues of Native Title: Issues Paper Vol 2, no. 20* (2002) 1-2, and Parry Aguis et al, 'Comprehensive Native Title Negotiations in South Australia' in Langton, M et al (eds) *Honour Among Nations*, above n 1, 203. For reference to a Victorian framework agreement for the purpose of dealing with native title see Garth Nettheim et al, *Indigenous Peoples and Governance Structures - A Comparative Analysis of Land and Resource Management Rights* (2002) 459. Each of these agreements may be seen as a final agreement, but dealing with the future resolution of lesser agreements. The South Australian agreement is being negotiated to cover many matters, including 'progressive legislative, administrative, constitutional and procedural reform'. (In Parry Aguis et al, above, this note) 4. See also Sean McLaughlin, 'Towards a Coherent Claim Strategy - Developing a Framework Agreement in the Northern Rivers Region of NSW' (1999) 4(21) *Indigenous Law Bulletin*. 18, which states: 'A Framework Agreement ... provides a procedural framework by which State agencies and claimants can more effectively progress and resolve native title claims.' Strelein states: 'The emergence of state wide framework agreements recognised that providing a mechanism for future act agreements does not remove the need for negotiations between Aboriginal and Torres Strait Islander peoples and the state over outstanding issues, including historical loss, government service delivery and autonomy options.' In Lisa Strelein, 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government' in Langton, M et al (eds) *Honour Among Nations*, above n 1, 189, 195. See also Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' 8(1) *Australian Indigenous Law Reporter* 14, 15 where they discuss 'regional framework agreements' with a usage broadly similar to that in Behrendt, *Achieving Social Justice - Indigenous Rights and Australia's Future* (above, this note).

made between government and local groups of Indigenous peoples to provide the rough equivalence of local government powers.<sup>84</sup>

#### **IV. Statement of Commitment**

The 'statement of commitment' is used in both commercial and government environments. Though widely used in international relations and in relations between governments and interest groups, the term remains undefined in the forums where it is used. While the phrase includes the word 'commitment', which in law will generally refer to a binding agreement, or an agreement that will be binding where certain conditions are met,<sup>85</sup> the phrase 'statement of commitment' is generally taken to refer to a non-binding unilateral statement.

Statements of commitment are generally broad statements outlining a particular attitude that will be brought to future relations, and providing in broad terms a commitment to further interaction and negotiation based upon those principles. They have a unilateral quality about them, and so do not represent agreements or contracts with other parties, even where they have been made with the consent or following discussions with another party. However, as with many of the categories in this article, the statement of commitment may be framed in such a way and be made in such circumstances that it may create legally enforceable rights, such as where a statement appears unequivocal, and others may be expected to rely upon that statement to their detriment.<sup>86</sup>

The general perception that statements of commitment are of the broad and unbinding nature is found in a reference to them by Jerry Ellis, at the time President of the Minerals Council of Australia, in a speech he made in 1997:

From an industry manager's perspective, the commitment to achieve reconciliation has to come from senior management. It has to be more than a general statement of commitment, because it requires ongoing monitoring and, as appropriate, intervention to make the commitment a reality within the company.<sup>87</sup>

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<sup>84</sup> For examples of the return of a level of autonomy for Indigenous peoples see Behrendt, above n83, 159-168. These generally involve the handing over to Indigenous peoples powers of the rough equivalence to the powers of local government. See also for example 160, 162, 163, 167.

<sup>85</sup> 'Commitment', is defined in *West's Law and commercial dictionary in five languages : definitions of the legal and commercial terms and phrases of American, English, and Civil Law jurisdictions*, St. Paul : West Pub. Co as: 'Agreement or pledge to do something; e.g. a statement by a lender that a loan will be made under certain terms. Commitments may be of various types. That is, a conditional commitment, subject to certain items being met, or a firm commitment, which is binding on the lender without conditions.'

<sup>86</sup> The party making the representation may be estopped from asserting a claim or right that contradicts what they have said or done before.

<sup>87</sup> Jerry Ellis, *Reconciliation in the Community - How do we make it a reality? Industry* (1997) at <http://www.austlii.edu.au/au/other/IndigLRes/car/1997/3/book1/s1indust.htm> at 5 October 2004.



In this usage the term appears to refer to an entirely voluntary commitment to a course of action or an approach, which is to be subject purely to self-monitoring for compliance.

Many statements of commitment have been made between government and Indigenous peoples. In Australia, local councils frequently use them to indicate respect for and commitment to Indigenous peoples.<sup>88</sup> These agreements convey the sense that they are not intended to legally bind the entity making the statement. They are, for example, usually fairly vague as to specific rights acknowledged or courses of action to be undertaken. Their value is more in their symbolic recognition of Indigenous society. For example a document of the Warringah Council headed 'Statement of Commitment' declares:

Warringah Council acknowledges that Indigenous Australians were the first people of this land. We celebrate the survival of Indigenous Australians and their culture, following the devastating impact of European colonization. We support the right of Indigenous Australians to determine their own future.

The arrival of Europeans brought massive change to the Kuring-gai people who were the original inhabitants of our local area and we mourn their suffering and loss.

Today, Warringah is occupied by people drawn from Indigenous and many other cultures. Warringah Council is committed to the values of tolerance of and respect for one another. This Council is also committed to the process of reconciliation, both locally and on a national level.

We accept our responsibility to develop an awareness and appreciation of Aboriginal history and culture which, we believe, strengthens and enriches our lives. Warringah Council is also committed to respecting, protecting and managing Aboriginal sacred sites and special places.

We encourage Aboriginal and non-Aboriginal people to work together to celebrate their different cultures and to go forward together.<sup>89</sup>

Such statements may also be a part of a wider consultation with Indigenous people, resulting in the production of other documents with greater legal force. For example, of its process of reconciliation, the Warringah Council reports:

All of Warringah Council's reconciliation activities have involved the development of documents. As a result, we have learned:

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<sup>88</sup> Bradfield observes that ten percent of Australia's local governments have signed 'some form of agreement with Indigenous representatives'. Bradfield, above n 44, 6. Note too the Australian Local Government Association [ALGA] in the 1999-2000 Report on the Operation of the Local Government (Financial Assistance) Act 1995 reports that:

'The ALGA President cemented local government's support for reconciliation by formally committing to the documents at Corroboree 2000 by presenting the Council for Aboriginal Reconciliation's Chairperson with a Statement of Commitment which a majority of local councils have adopted.' See at

[http://www.dotars.gov.au/localgovt/publications/national\\_report/99\\_00/chapter\\_5/index.aspx](http://www.dotars.gov.au/localgovt/publications/national_report/99_00/chapter_5/index.aspx) at 30 September 2004.

<sup>89</sup> See 'Preparing Documents of Reconciliation' at

[http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtsp\\_nov98/pages/WTnov28.htm](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtsp_nov98/pages/WTnov28.htm) at 6-October 2004.

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- The process of developing documents and agreements has required lengthy consultation. As a consequence we have all learned more about each other, what we value, what we have the capacity to deliver, and what we find challenging about reconciliation. The process itself helped us to reconcile and to move forward.
- Having documents and agreements that clearly articulate aims, strategies, responsibilities and time lines has diminished the likelihood of misunderstandings.
- The fact that Council has taken this initiative and involved the community has sent clear messages to the community and reduced the risk of misunderstandings and suspicions. Communication also contributes to the ultimate goal of reconciliation.<sup>90</sup>

Statements of commitment have also been made at the State level.<sup>91</sup> For example in 2001 the West Australian government made a statement of commitment that 'commits the parties to work together to build a new and just relationship between the Aboriginal people of Western Australia and the Government of Western Australia.'<sup>92</sup> The document states its purpose is to 'agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.'<sup>93</sup>

In 1997 the New South Wales government made a statement of commitment that the premier stated is 'the blueprint document for the Government's initiatives in all areas including infrastructure, health, education, economic development, cultural heritage and justice.'<sup>94</sup>

In addition, in 2002 the Federal Government's Department of Family and Community Services made a statement of commitment to Aboriginal and Torres Strait People. The aim of the commitment is to 'provide an integrated and comprehensive approach to improving outcomes for Indigenous people.'<sup>95</sup> Bradfield proposes that the broad process of commitment making between Indigenous peoples and local councils appears to recognise Indigenous (local)

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<sup>90</sup> Ibid.

<sup>91</sup> See the agreement at <http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx> at 6 October 2004.

<sup>92</sup> The parties to the agreement are the Government of Western Australia and the Western Australian ATSIC State Council, supported by Aboriginal peak bodies, being the Western Australian Aboriginal Native Title Working Group, the Western Australian Aboriginal Community Controlled Health Organisation, and the Aboriginal Legal Service of Western Australia.

<sup>93</sup> <http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx> at 12 October 2004 or <http://www.dia.wa.gov.au/Policies/StateStrategy/Files/StatementOfCommitment.pdf> at 12 October 2004.

<sup>94</sup> See cached document, Bob Carr, 'Working together Towards Reconciliation' at: [http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtno24\\_mar1999/pages/wtmar10.htm](http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/wtno24_mar1999/pages/wtmar10.htm) at 30 October 2004. See also the ACT Government Statement of Commitment to Reconciliation, 2000 at <http://www.cmd.act.gov.au/community/Indigenous/actgstmtcom.html> at 30 October 2004.

<sup>95</sup> <http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/ipnao.htm#statement> at 30 October 2004, and for the statement see [http://www.facs.gov.au/internet/facsinternet.nsf/VIA/ipnao/\\$File/booklet.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/ipnao/$File/booklet.pdf) at 30 October 2004.

politics, compared with settler (national) politics. He suggests that this process 'may suggest ... forms of Indigenous self-government will emerge as a bottom-up rather than a top-down process'.<sup>96</sup> However he cautions that the principles contained in such agreements must be backed up with action that reflects the commitment. The enforcement of such statements is largely a matter for politics rather than for law.

## V. Indigenous Land Use Agreement (ILUA)

Indigenous land Use Agreements have become a significant form of agreement making for Indigenous people and parties wishing to engage with specific native title claimants or holders. They represent a particular form of agreement with specific attributes defined by the legislation under which they are created.

### *Parties*

Indigenous parties to ILUAs<sup>97</sup> may be native title-holders, registered native title claimants, or persons claiming to hold native title. Other parties could be any interested group or individual, including government, graziers, miners, local government, land councils, or other Indigenous people.<sup>98</sup> In some instances government participation is required.<sup>99</sup> ILUAs can be made for diverse purposes, from governing Indigenous access to pastoral leasehold land for specified activities and enabling developers access to minerals on native title land, to governing the delivery of welfare, health and housing services over broad areas,<sup>100</sup> including making changes in Indigenous administrative

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<sup>96</sup> Bradfield, above n 44, 6.

<sup>97</sup> There are three types of ILUA; the Body Corporate Agreement (*Native Title Act 1993* (Cth)), ss24BA to BI), the Area Agreement (ss24CA to CL) and the Alternative Procedure Agreement (ss24DA to DM). For a useful summary of the ILUA system see Graeme Neate, 'Indigenous Land Use Agreements: Some legal issues' (Paper presented at the Native Title Forum, Customs House, Brisbane, 2001) and Mary Edmunds and Diane Smith, *Members' Guide to Mediation and Agreement-Making Under the Native Title Act* (2000) and for a more detailed discussion see Christos Mantziaris and David Martin, *Native Title Corporations - a legal and anthropological analysis* (2000). At November 2004 there were 139 ILUAs registered with the National Native Title Tribunal, comprising 124 area agreements and 15 body corporate agreements. See <[http://www.nntt.gov.au/ilua/browse\\_ilua.html](http://www.nntt.gov.au/ilua/browse_ilua.html)> at 9 November 2004.

<sup>98</sup> A criticism of the ILUA provisions is that they 'do not recognise any status for native title holding groups beyond one of many private users of land.' See Strelein, 'Symbolism and Function' above n 83, 194.

<sup>99</sup> Body corporate agreements and area agreement require the participation of the relevant government as a party where there is a surrender of native title to a State, a Territory or the Commonwealth. (See *Native Title Act 1993* (Cth) ss24BD(2) and 24CD(5)). The relevant government must be a party for all alternative procedure agreements. (See ss 24DE(1) and (2))

<sup>100</sup> Such as the statewide ILUA which has been proposed in South Australia. Although, note that while in Aguis et al 'Negotiating Comprehensive Settlement', above n 83, 4 the agreement was referred to as an ILUA, a subsequent publication refers to the ILUA process as

arrangements enabling greater autonomy.<sup>101</sup> The regime of negotiation that is part of the ILUA process encourages deep community consultation.<sup>102</sup>

### ***Application of General Contract Rules***

Agreements registered as ILUAs have significant differences from contractual agreements. These include:

1. An ILUA is to be treated as if it were a contract even where it would otherwise not contain enforceable rights;
2. An ILUA can bind third parties,<sup>103</sup> and;
3. The act may be interpreted as limiting the usual causes of action and remedies available to contracting parties if an agreement is registered as an ILUA.

#### ***1. 'As if it were a contract'***

To become an ILUA an agreement must be registered with the National Native Title Tribunal. Under section 24EA(1) of the NTA, during the period that an agreement is entered on the Register of Indigenous Land Use Agreements it has the effect 'in addition to any effect that it may have apart from this subsection, as if it were a contract among the parties to the agreement'.<sup>104</sup> An agreement that might not contain enforceable rights under contract law or equity becomes enforceable when registered as an ILUA. Where an agreement is made with the intention of it being registered as an ILUA, but registration does not occur, that agreement is not an ILUA. Where the rules of contract are not met, an unregistered agreement may end up containing no enforceable rights.<sup>105</sup>

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*inspiring* the negotiations, but refers to many different types of potential outcome. See Aguis et al, 'Comprehensive Native Title Negotiations', above n 83, 207.

<sup>101</sup> Aguis et al 'Negotiating Comprehensive Settlement', above n 83, 10-11.

<sup>102</sup> See for example Tony Foley, 'Negotiating Resource Agreements: Lessons from ILUAs' (2002) 19(4) *Environmental Planning Law Journal* 268, Jan Macpherson, *Indigenous Land Use Agreements as a Risk Management Tool: A View from the Resource Industry*, Australian Mining & Petroleum Law Association Yearbook (1999) 217, 228, Bradfield, above n 44, 5.

<sup>103</sup> In broad terms a third party is a person not originally taken to be a party to the contract, but who acquires some rights and interests that one of the parties has. They will not automatically become subject to rights and responsibilities that derive from the contract. Where a third party becomes involved, the rights and responsibilities under the contract may become unenforceable.

<sup>104</sup> *Native Title Act 1993* (Cth) 24EA(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.

<sup>105</sup> For further discussion of the situation where an agreement that appears to satisfy the conditions for the creation of enforceable rights is not registered, see Parliament of Australia Joint Committee, *Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements* (2001) Commonwealth of Australia, paras 3.22 and 3.26.

An issue arises as to how contract law can be applied to an agreement that would not satisfy the rules of contract formation but for the agreement being deemed to have contractual effect by the legislation. For instance a problem might arise where the terms of an ILUA are written vaguely, the contract is incomplete, or the offer and acceptance, consideration, or the intention to create legal relations were inadequate in the eye of contract law, to the point that the agreement would not ordinarily be considered contractual.<sup>106</sup> If a dispute arose about perceived rights it is unclear as to what principles a court could draw upon to allocate rights and obligations, or determine whether such rights and obligations exist at all, where some or all of the above elements of contract formation are deficient in contract law, but where the agreement is to remain registered and thus contractual.<sup>107</sup> This problem also lies at the heart of the next two sections, where a court may find difficulty in applying contract law to a situation where a contract is deemed to exist (in accordance with the NTA) where it could not exist under contract law.

## 2. *Binds native title holding non-parties*

Under s24EA(1)(b) of the act an ILUA is binding on all persons holding native title in relation to any of the land or waters in the area covered by the agreement, irrespective of whether they have been a signatory to the agreement or not.<sup>108</sup> By contrast, under contract law a general principle exists, known as the doctrine of privity of contract. Under this rule a contracting party cannot bind a third party who is not a party to the contract.<sup>109</sup>

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<sup>106</sup> These issues are raised in *ibid* para 3.30.

<sup>107</sup> A party which may otherwise be able to rescind or terminate a contract in contract law is not able to do so. *Ibid* para 3.40.

<sup>108</sup> See *Native Title Act 1993* (Cth) 24EA(1)(b).

<sup>109</sup> In *Mantziaris and Martin*, above n 97, 253-4 the authors observe that this section 'abrogates two fundamental principles of contract law – the principles that parties to a contract must be ascertainable, and the principle that only the parties to a contract are legally bound to it and are entitled to enforce it (the 'privity of contract' doctrine).' See also Neate, 'ILUAs: Some legal issues' above n 97, 8.

It may also abrogate a third which requires that only a party that has provided consideration for a promise can enforce the promise. In this case a native title holder may not have received consideration and may not have made a promise, (though that native title holder's rights might, under the act, have been diminished in fact) and yet may both acquire rights and obligations under the ILUA.

However note that the rules of privity of contract have been diluted somewhat during the twentieth century. The rule 'has been roundly criticised, is subject to significant exceptions, can be circumvented in numerous ways and has been substantially abrogated in numerous jurisdictions.' (Heffey, Paterson and Robertson, above n 24, 191) These exceptions have been made to avoid injustice, particularly in insurance cases where a third party seeks to derive benefit from a contract to which they were not a party. (See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 116-123 cited in Heffey, Paterson and Robertson, above n 24, 193. A more applicable instance is where a contractor seeks to impose a legal burden upon a non-contracting third party. This can occur in the enforcement of a restrictive covenant on land, but only where the new purchaser of land has been made aware of the covenant. The relevant law is not contract, but the law of estates. See Heffey, Paterson

In 1998 the NTA was amended, in part to overcome difficulties that had been observed in the operation of section 21 of the unamended act. Under s21 native title-holders could surrender native title rights to government in exchange for consideration. One difficulty with this system was that it only applied to those native title-holders who were party to the agreement.<sup>110</sup> Unknown or subsequent native title-holders could invalidate acts approved in section 21 agreements.<sup>111</sup> The new section 24EA binds native title-holders who are not party to an agreement. While this enhances certainty for those who are actual signatories to the agreement, the section has introduced the potential for some considerable anomalies in the law. For example future generations may be bound to agreements they have not approved, having effects with which they disagree.<sup>112</sup> Individuals or groups may be bound to contracts from which they have not derived any benefit.<sup>113</sup>

Commentators have noted the imbalance of this provision.<sup>114</sup> While native title parties may be bound whether or not they are actually a party to the contract<sup>115</sup> there is no reverse provision extending the obligations undertaken by the other ILUA parties to third parties who might, for example, take over a lease or become a mortgagee. Under contract law third parties such as mortgagees or a third party to whom a developer might transfer its interest are not bound by a contract between the developer and another. This unequal operation of ILUAs has been criticized by interested parties including

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and Robertson, above n 24, 195 referring to *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143. Other exceptions include the purchase of personal property, including ships, which can carry the obligation for the purchaser to fulfil agreements made with a third party by the previous owner, and in bailment. See Heffey, Paterson and Robertson, above n 24, 195.

Perhaps what may be taken from the instances given above is not a direct relationship in law between section 24EA *Native Title Act 1993* (Cth) and the instances, but an awareness that the doctrines of contract law are permeable according to the circumstances. The rule of privity can be circumvented by the application agency, trust, estoppel, tort and misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth). See Heffey, Paterson and Robertson, above n 24, 197 – 202.

<sup>110</sup> For other issues leading to the amendments in relation to s21 agreements see Joint Committee, above n 105, para 2.11-2.14.

<sup>111</sup> *Ibid.*

<sup>112</sup> See Lee Godden and Shaunnagh Dorsett, 'The Contractual Status of Indigenous Land Use Agreements' in Lisa Strelein (ed), *Land, Rights, Laws: Issues of Native Title: Issues Paper Vol 2, no. 1* (2000) 4; Joint Committee, above n 105, paras 3.6 – 3.9, including reference to reports by the Human Rights and Equal Opportunity Commission, the Attorney-General's Department, and to DE Smith, 'Indigenous Land Use Agreements: New Opportunities and Challenges under the amended Native Title Act' in *Land, Rights, Laws: Issues of Native Title: Issues Paper no. 7* (1998).

<sup>113</sup> See Godden and Dorsett, above n 112, 5. Godden and Dorsett observe that the *Native Title Act 1993* (Cth) omits the reservation of resources gained by native title holders for the benefit of future native title holders, such as a next generation who may be bound by an agreement from which they may gain no benefit.

<sup>114</sup> See for example Mantziaris and Martin, above n 97, 253; Joint Committee, above n 105, Chapter 3; Paul Sheiner, 'Parliamentary Joint Committee's Report on Indigenous Land Use Agreements' 5(5) *Native Title News* 90, 90; Godden and Dorsett, above n 112, 5.

<sup>115</sup> Godden and Dorsett, above n 112, 5 referring to *Native Title Act 1993* (Cth) s24EA(1)(b).

‘representative bodies, mining companies and the Commonwealth Attorney General’s department’.<sup>116</sup>

ILUAs themselves can address such circumstances.<sup>117</sup> The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Land Fund Report (Joint Committee) notes for example the value of the inclusion of renegotiation clauses for agreements made for lengthy time periods to help ensure intergenerational equity, and to accommodate changed circumstances.<sup>118</sup> Similarly, an ILUA can stipulate that a developer cannot enter into an agreement with a third party unless it includes in that agreement the relevant conditions of the ILUA. But Godden and Dorsett observe that a contract may not be effective where a mortgagee exercises power of sale.<sup>119</sup> Thus they suggest a role for government in ensuring that new leases or tenements are conditional upon acceptance of the ILUA conditions – but this depends upon the willingness of the government to impose such conditions and thus is outside of the contractor’s control.<sup>120</sup>

### 3. ***Removing an ILUA from the NNTT Register***<sup>121</sup>

An ILUA may be removed from the NNTT register where the Federal Court finds that a party would not have entered into the agreement but for fraud, undue influence or duress by any person (whether or not a party to the agreement).<sup>122</sup>

Section 199C(3) states:

199C Removal of details of agreement from Register

...

(2) The Federal Court may, if it is satisfied on application by a party to the agreement, or by a representative Aboriginal/Torres Strait Islander body for the area covered by the agreement, that the ground in subsection (3) has been made out, order the Registrar to remove the details of the agreement from the Register.

Ground for order

(3) The ground is that a party would not have entered into the agreement but for fraud, undue influence or duress by any person (whether or not a party to the agreement).

Godden and Dorsett note that in this section the Act may limit the usual grounds for remedy in the law relating to the pre-contractual phase, which, in addition to those in

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<sup>116</sup> Sheiner, above n 114, 90 referring to submissions to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Land Fund, (see Joint Committee, above n 110).

<sup>117</sup> This is the conclusion drawn by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Land Fund in Joint Committee, above n 105, at para 3.10. See also Smith, above n 97, 99-100.

<sup>118</sup> Joint Committee, above n 105, para 3.10. See also Mantziaris and Martin, above n 97, 254.

<sup>119</sup> Godden and Dorsett, above n 112, 5.

<sup>120</sup> Ibid. See also Joint Committee, above n 105, para 3.16 to 3.18.

<sup>121</sup> *Native Title Act 1993* (Cth) s199C(2) and (3).

<sup>122</sup> Section 199C(2) and (3).

the section, include unconscionability, mistake, and misrepresentation.<sup>123</sup> They also observe that the section casts doubt on the ability of parties to the agreement to seek a remedy where negotiations have not been undertaken in good faith.<sup>124</sup> Further, the act is silent as to whether the fraud referred to in the section is common law fraud, with narrow grounds for relief,<sup>125</sup> or the wider equitable fraud.<sup>126</sup> Under the Act the parties may also be unable to terminate the contract where another party does not perform, requiring instead reliance on fraud, undue influence or duress.<sup>127</sup>

The Joint Committee notes that a literal reading of the Act suggests that an agreement would retain its contractual force despite deficiencies, such as unconscionability or mistake.<sup>128</sup> The committee observes that 'it is strongly arguable that the Federal Court would be precluded from ordering the Registrar to deregister an ILUA because Parliament has specified the circumstances where a Federal Court may make such an order.'<sup>129</sup>

They further note that whereas rescission may be available to a contracting party in the case of fraud, undue influence or duress, completely setting aside the contract from its beginning, this is not available to Indigenous

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<sup>123</sup> Godden and Dorsett, above n 112, 7. Section 199C(3) appears to be a restriction to section 24EA(1)(a) where an ILUA is to be treated 'as if it were a contract among the parties to the agreement.' Section 199C allows a contract can stay on the register and be treated 'as if it were a contract' even if it would normally attract grounds for relief other than those referred to in section 199C(3). Such an agreement is only to be treated 'as if it were a contract' in certain circumstances, in comparison with a contract without the protection of section 24EA(1)(a).

<sup>124</sup> Ibid 7. This is an emerging requirement in contract law. See Heffey, Paterson and Robertson, above n 24, 260. See also Elisabeth Peden, 'The meaning of contractual 'good faith'' (2002) 22 *Australian Bar Review* 235, and Elisabeth Peden, *Good faith in the performance of contracts*, 2003.

<sup>125</sup> At common law damages may be sought where there has been fraudulent misrepresentation. Fraudulent misrepresentation occurs where the representor has 'knowledge of the falsity or absence of belief in the truth of the representation.' (Heffey, Paterson and Robertson, above n 24, 475). In *Derry v Peek* (1889) 14 App Cas 337, 374-5, quoted in Heffey, Paterson and Robertson, above n 24, 475, Lord Herschell stated:

'... fraud is proved when it is shown that a false representation has been made: (1) knowingly or (2) without belief in its truth or (3) recklessly, carelessly whether it be true or false. Although I have treated the second and the third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he says. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.'

Thus where there is honest belief in a statement, where the statement is negligent, or in some circumstances where it is ambiguous, fraud will not be made out.

<sup>126</sup> This includes situations where there has not been an actual intention to cheat, for example where an obligation is violated as a result of an innocent misrepresentation. (See *Nocton v Lord Ashburton* [1914] AC 932, quoted in DRC Chalmers and JK Maxton GE Dal Pont, *Equity and trusts: commentary and materials* (3 ed, 2004), 261-3.) For further discussion see Godden and Dorsett, above n 112, 7. See also Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, 694ff.

<sup>127</sup> For further discussion see Godden and Dorsett, above n 112, 9.

<sup>128</sup> Joint Committee, above n 105, para 3.42.

<sup>129</sup> Ibid para 3.43.



parties in relation to a registered agreement under the NTA where a future act has occurred, because the future act remains valid despite removal of an ILUA from the register.<sup>130</sup>

The Joint Committee quotes a submission by the Attorney-General's Department which seeks to answer concerns in relation to the legislative intent of s.24EA combined with s199C(3):

The expansion of the contractual effect of ILUAs and the specific conditions upon which ILUAs may be de-registered ... was not intended to displace any remedies that may be available for contracting parties under the common law.<sup>131</sup>

And, further, during evidence before the Committee the Attorney-General's Department stated:

I do not see that anyone would exclude normal contract law from those ILUA provisions unless there was an express indication it was intended to be excluded, and it certainly has not been.<sup>132</sup>

However, currently there does appear to be some tension between Native Title Act sections 24EA and 199C, and the operation of contract law in relation to registered ILUAs.<sup>133</sup> If the act does not displace remedies an anomalous situation might arise where an ILUA cannot be removed from the register where a remedy of, for example, termination is granted by the court. By remaining registered the ILUA retains its contractual force.<sup>134</sup> The final word belongs to the courts.<sup>135</sup>

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<sup>130</sup> Ibid, para 3.44.

<sup>131</sup> Submission No 38, p.12., quoted at *ibid*, para 3.20.

<sup>132</sup> Joint Committee, above n 105, quoting 'Evidence, p.NT248'. See also Godden and Dorsett, above n 112, 7: 'Generally speaking courts are most reluctant to exclude the operation of the common law without express statutory words to that effect.'

<sup>133</sup> The Joint Committee report states 'It has been suggested that the inclusion of s.199C(3) is intended to dissuade parties from engaging in fraud, undue influence or duress in the negotiation of ILUAs. [citing DE Smith, 'ILUAs – New opportunities and challenges', above n 112, 9]. However, given the likely effect of s 199C ... in relation to the validation of future acts done while the agreement was registered, it is arguable that the section provides a more limited disincentive for parties to engage in such conduct than the remedies usually available at common law.' Joint Committee, above n 105, para 3.45. The Joint Committee report suggests that the *Native Title Act 1993* (Cth) should be amended to clarify that the contractual status given to ILUAs upon registration only cures the absence of any element necessary to contract formation. (See Joint Committee, above n 105, para 8.41.)

<sup>134</sup> See Joint Committee, above n 105, para 3.40 – 3.42. At para 8.42 the Joint Committee recommends that the *Native Title Act 1993* (Cth) be amended to allow a contract to be deregistered where it has lost its contractual effect because a court has found it to be, in contract law, able to be terminated or rescinded.

<sup>135</sup> See also discussion in Joint Committee (above n 105) relating to the curing of defects by registration (paras 3.28 to 3.32). The report states at 3.32 'The ambiguity of the provision [s24EA] raises the question whether registration will give to an agreement the status of a contract that would not normally receive recognition as a contract because matters such as estoppel, unconscionability, mistake or misrepresentation were operative during its formation. It would seem unlikely that Parliament would intend such an outcome. However in the

### ***The status of an agreement when not registered as an ILUA***

The Joint Committee pointed out three further issues in relation to the status of ILUAs, and the interaction between ss.24EA, 199C and common law contract principles.<sup>136</sup> These issues relate to the time prior to registration, after de-registration, and where registration does not occur.

- **Prior to registration:** The Joint Committee notes there is confusion as to whether a future act may proceed before registration of an ILUA is completed.<sup>137</sup> However the answer the Committee proposes is consistent with the act – that ‘the validity of the act attaches to the registration of an ILUA. Parties choosing to proceed with a future act before registration take the risk that the ILUA will fail registration, with consequent invalidity of any future act done.’<sup>138</sup>
- **After de-registration:** The Joint Committee cites evidence that future acts authorized by an ILUA and already done will generally remain valid if the ILUA is removed from the register.<sup>139</sup> The report quotes the Attorney-General’s Department which states ‘...the removal of the ILUA from the register would mean that the future acts done after the removal would not be valid under that ILUA. But that would not invalidate all the future acts that had already been done, except in exceptional circumstances.’<sup>140</sup> In relation to the status of the agreement itself after deregistration the report quotes the Attorney General’s Department which states: ‘The expanded contractual effect of an ILUA continues only for

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absence of clarification of s24EA, it is difficult to see that such an interpretation by a court, however unintended, would not be possible.’

<sup>136</sup> Ibid para 3.21.

<sup>137</sup> See *ibid*, para 3.24 referring to the Australian Local Government Association submission No. 4, p6.

<sup>138</sup> *Ibid*, para 3.25 This view is supported in Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (2003) para 8A.10.

<sup>139</sup> Joint Committee, above n 105, paras 3.33-3.38. Perry and Lloyd, above n 138, para 8A.110 supports this view.

<sup>140</sup> Joint Committee, above n 105, para 3.28, quoting ‘Evidence p.NT247’ and ‘Submission No 38, p.16’. The report also quotes the Explanatory Memorandum of the *Native Title Amendment Bill 1997* and the National Native Title Tribunal President (see Neate, ‘ILUAs: Some legal issues’ above n 97, 23 largely confirming this view. The President’s view is cautiously put, stating that removal from the register ‘will probably not retrospectively invalidate the agreement or invalidate future acts that have already been done under the agreement’.

This issue is raised in Godden and Dorsett, above n 112, 6. They note that it is unclear under the *Native Title Act 1993* (Cth) whether Indigenous parties are bound to allow a future act to continue where an ILUA is de-registered. (See s24EB(1) and (2)). Godden and Dorsett suggest that a literal reading of s24EB(1) and (2) might allow that a future act may continue despite deregistration.

the duration of registration, although, upon deregistration, the agreement may continue to have contractual effect under the general law.’<sup>141</sup> If an ILUA is removed from the register as a result of a court order under s199C(2) the person whose conduct led to the removal will be required to pay compensation to any party to the ILUA who suffers loss or damage as a consequence.<sup>142</sup>

- **Where registration does not occur:** The Joint Committee notes that where an agreement is made with the intention that it be registered as an ILUA, but it is not registered, there is uncertainty as to whether it will continue to operate as a contract or whether an implied term of the contract might exist that it is not to operate unless registration takes place.<sup>143</sup> The report suggests that the agreement should contain clauses relating to what outcomes are desired should registration fail,<sup>144</sup> and, if it is desired that the agreement should continue irrespective of registration, the agreement should be written so as to satisfy the rules for contractual formation.<sup>145</sup>

The above issues create considerable problems of interpretation of the effect of the statute and for predictability. For example there is a question as to

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<sup>141</sup> See Joint Committee, above n 105, para 3.23 referring to Attorney General’s Department submission No 38, p11.

Godden and Dorsett (Godden and Dorsett, above n 112) suggest at page 3 that sub-section 24EA(1) of the *Native Title Act 1993* (Cth) can be read in several ways. One of the readings they propose is supported by most commentators - that the section is neutral as to the contractual status of an agreement prior to registration (the agreement may or may not satisfy the law of contract) but that upon registration the agreement has effect as if it were a contract (subject also to the conditions imposed by the act) during the time it is registered. From this reading it may reasonably be assumed that when the agreement is removed from the register it assumes whatever characteristics it may have under ordinary contract law. This reading is supported by the Attorney General’s evidence, cited above. See also Mantziaris and Martin who suggest the legal effect of the provision is clear. Mantziaris and Martin, above n 97, 253. See also Mary Edmunds, ‘Conflict in native title claims’ in Jessica Weir (ed), *Land, Rights, Laws: Issues of Native Title: Issues Paper no. 7* (1995) 89 which states that upon removal of an ILUA from the register the ILUA ‘might still retain contractual force depending on its terms and conditions’. See also Perry and Lloyd, above n 138, para 8A.110 which also supports the view that ILUAs cease to have contractual effect deriving from s24EA, but they ‘may continue to have contractual and other effects at common law and in equity.’

Godden and Dorsett observe that after deregistration, where a contract is found to be void *ab initio* – void from its inception – because of fraud, undue influence or duress there would have been no agreement to the future act by the native title holding or claimant parties, and so the future act would most likely not be able to continue without further agreement with the native title party. This they observe could also reverse a surrender of native title. Godden and Dorsett, above n 112, 6.

<sup>142</sup> See *Native Title Act 1993* (Cth) section 199C(4), also Perry and Lloyd, above n 138, para 8A.110.

<sup>143</sup> Joint Committee, above n 105, para 3.22 quoting Smith, above, n97, 91. See also Neate, ‘ILUAs: Some legal issues’ above n 97, 11.

<sup>144</sup> See also Neate, ‘ILUAs: Some legal issues’ above n 97, 11.

<sup>145</sup> Joint Committee, above n 105, paras 3.26-3.27.

how common law contract principles can be adequately applied to parties that in reality (but for the legislation) have not fulfilled the conditions of privity of contract, as anticipated by s24EA(1)(b), particularly where those persons have not been recipients of any of the benefits derived from the contract.<sup>146</sup> Under the Act it is possible, on one reading, that a native title party that did not have knowledge of the contract and gained no benefit from it, could be sued for breach of the contract even where the contract was entered into in a manner that involved unconscionable conduct, mistake or misrepresentation (or all three). Doubtless courts would be reluctant to make such a finding, however the rules of precedent, in combined effect with the Act, may dictate otherwise. Not all of these issues can be overcome by careful drafting of ILUAs.

## **VI. FUTURE ACT**

One of the main objects of the NTA is 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings.'<sup>147</sup> Under the NTA a future dealing that does not affect native title is not termed a 'future act'. An act will affect native title if it will extinguish native title rights and interests or if it will be wholly or partly inconsistent with the continued existence, enjoyment or exercise of those rights and interests.<sup>148</sup> A future act agreement is an agreement about a proposed activity or development on land and/or waters that may affect native title by extinguishing it or creating interests that are inconsistent with the existence or exercise of native title.<sup>149</sup> While ILUAs frequently deal with future acts<sup>150</sup> they are not the only agreements that can be made in relation to future acts.

Valid acts that affect native title are set out in subdivisions G to M of Part 2, Division 3 of the NTA. Acts taken in accordance with these sections may attract compensation for native title-holders. Some valid future acts are able to be done without negotiation with native title holders, but for which compensation is paid. For some valid future acts a negotiation regime is in place.<sup>151</sup> The act imposes time limits for these negotiations. If time limits are not met an arbitral body<sup>152</sup> may make a determination upon application by a party, and where no decision is made within four months the relevant

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<sup>146</sup> See also Godden and Dorsett, above n 112, 6, where issues of the relation of contract law with the section are raised.

<sup>147</sup> See *Native Title Act 1993* (Cth) s3(b).

<sup>148</sup> See *Native Title Act 1993* (Cth) s227.

<sup>149</sup> See *Native Title Act 1993* (Cth) s233 for definition of 'future act' and see the ATNS website at <[http://www.atns.net.au/br\\_f\\_function\\_agreements.htm](http://www.atns.net.au/br_f_function_agreements.htm)> for examples of future acts agreements. The future acts regime is laid out in ss24AA to s44G of the *Native Title Act 1993* (Cth).

<sup>150</sup> See Joint Committee, above n 105, para 2.25.

<sup>151</sup> See subdivision P of Part 2, Division 3 of *Native Title Act 1993* (Cth), which includes s24IC permissible lease renewals of mining leases, and acts which pass the 'freehold test' in subdivision M and which are the creation or variation of a right to mine or the compulsory acquisition of native title.

<sup>152</sup> The National Native Title Tribunal, and equivalent State or Territory body (s207B) or a recognised State/Territory body (s207A) depending on the location of the future act.

minister<sup>153</sup> may intervene and request that the body make a determination. Where no determination is subsequently made the minister may, in some circumstances, make a determination.<sup>154</sup> Where the arbitral body makes a determination that determination may be overruled by the relevant minister. In each case a determination by an arbitral body or a minister are taken to have effect, if the act is done, as if the conditions were ‘terms of a contract among the negotiation parties.’<sup>155</sup> The effect is in addition to any other effect that the agreement or determination may have apart from the section providing the contractual effect. Thus the arbitral body or the minister can impose upon parties an agreement that is to be taken to have contractual effect.

This regime raises the question whether a court, in resolution of a dispute, will deal with such an agreement using the principles of contract law. If it does so it will be applying contract law where there may have been, on the Indigenous party’s side, no intention to create legal relations, and where the terms and conditions of the determination may have been agreed to by none of the parties. Thus broadly similar issues arise as for ILUAs but with even greater force. In the case of ILUAs the parties have in fact actually reached an agreement, and that agreement appears to be given something approaching contractual status by the act. In the case of the ‘right to negotiate’ regime an ‘agreement’ may be imposed on the parties or one of the parties, with virtually no identifiable contract formation procedures undertaken. The major, but slim, safeguard against arbitrary imposition of terms, apart from the political process, is the stipulation in the NTA that negotiations be undertaken in good faith.<sup>156</sup> As yet there are no rulings by courts as to how they will interpret the sections of the NTA that have the effect of treating ILUAs and other future act agreements and determinations as if they were contracts.

## VII. LEGISLATION AND CONTRACTS: *THE TRADE PRACTICES ACT 1974 (CTH)*

The *Trade Practices Act 1974 (Cth)* regulates against both unconscionable conduct and misleading and deceptive conduct in trade and commerce. Part IVA of the Act deals with unconscionable conduct in trade or commerce. Section 51AB provides protection in consumer transactions (which are not relevant to this paper), section 51AA is aimed at large scale commercial transactions, and provides legislative backing for judge-made law. Section 51AC provides protection for smaller business transactions. These sections of the act not only provide a means to challenge the way a contract (or other

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<sup>153</sup> See *Native Title Act 1993 (Cth)* s27A.

<sup>154</sup> See *Native Title Act 1993 (Cth)* s36A.

<sup>155</sup> See *Native Title Act 1993 (Cth)* ss36C, 41 and 42.

<sup>156</sup> *Native Title Act 1993 (Cth)* s31(1)(b). For a discussion of this duty see Richard H Bartlett, *Native Title in Australia*, 2004, paras 21.19, 21.22, 21.23 and 25.35. Bartlett states ‘Good faith negotiation entails negotiating with a genuine desire to reach an agreement’ and is judged objectively (para 25.35). See also Carr J in *Walley v Western Australia* (1996) 67 FCR 366, 137 ALR 561 at 572-3 and 576. See also footnote 124, above.

agreement) is formed, (examining the negotiation process), but they also allow for a court to step in and govern the manner in which a contract operates. The operation of the act is not dependent upon the formation of a contract.

Section 51AA states:

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

The 'unwritten law' referred to is the common law and law of equity that is elucidated by Australian courts in their judgements, and which is briefly reviewed above. Section 51AA(2) confines the application of this section to transactions not covered by sections 51AB and 51AC. Thus it is confined to large-scale business transactions. The effect of the section is to expand the remedies available under the judge-made law to include further remedies provided by the Act. These remedies include those appearing in sections 80 (injunctions), 82 (damages) and 87. Section 87 provides a wide discretion to courts, allowing a court to provide a remedy that the Court thinks is appropriate and will compensate the applicant,<sup>157</sup> including a declaration that the contract is void,<sup>158</sup> variation of the contract,<sup>159</sup> and orders to repair goods or to supply services, or to return money or property.

As mentioned above the term 'unconscionable conduct' has at least two meanings in law. The first is the narrow sense, which refers to a particular doctrine of law, and the second is a general principle that informs a broad range of equitable doctrines. The meaning of 'unconscionable conduct' in this section lies in the first use,<sup>160</sup> where a person suffers from some special disability or is placed in some special situation of disadvantage and an unconscionable advantage is taken of that disability or disadvantage by another.<sup>161</sup>

Section 51AC(1) regulates business transactions of a less substantial nature, prohibiting 'conduct that is, in all the circumstances, unconscionable.'<sup>162</sup> The section provides some guidance as to what principles are to be applied to determine unconscionability,<sup>163</sup> by referring to, for

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<sup>157</sup> *Trade Practices Act 1974* (Cth) s87(1A).

<sup>158</sup> *Trade Practices Act 1974* (Cth) s87(2).

<sup>159</sup> *Trade Practices Act 1974* (Cth) s87(2).

<sup>160</sup> See *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.

<sup>161</sup> See Second Reading Speech, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1992, 2408 cited in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 62.

<sup>162</sup> *Trade Practices Act 1974* (Cth) s51AC(1) states that: A corporation must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person (other than a listed public company); or (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company); engage in conduct that is, in all the circumstances, unconscionable. Section 51AC(2) applies the same wording, except that it operates against a 'person' in relation to a 'corporation'. See *Trade Practices Act 1974* (Cth) s51AC generally for the limitations to the size and types of the transactions.

<sup>163</sup> See *Trade Practices Act 1974* (Cth) ss51AC(1), (2), (3) and (4).

example, applicable industry codes.<sup>164</sup> Sundberg J has stated: ‘Whether conduct is unconscionable for the purpose of s 51AC is at large. In performing its task the court is aided but not confined by the factors listed in sub-s (3).’<sup>165</sup> Because this section does not tie unconscionability to judge-made law, as in section 51AA, courts are able to interpret the section without being limited by judge-made law. However courts will probably be guided to some extent by this law in their deliberations. Sections 80, 82 and 87 again help provide the wide range of remedies noted above, to resolve disputes covered by this section.

## **Section 52**

Under the section there is a duty not to create, by words, action or silence, a misimpression by a contracting party during negotiation, that something is true which is not true. Section 52 of the Act states: (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Pengilly describes this section as an Exocet missile in favour of a plaintiff.<sup>166</sup> The section applies to all conduct in trade and commerce, not just to consumer matters. It is applicable not only to corporations but also to some classes of trade and commerce involving natural persons.<sup>167</sup> One particular strength of the act, from the plaintiff’s point of view, is that negotiators representing corporations, and directors and employees of corporations may be held personally liable as a result of the use of misleading or deceptive conduct, including negotiating tactics, under the act.<sup>168</sup> This provides an alternative target for litigation in the event of a firm being without assets. Generally speaking where individuals engaging in trade and commerce<sup>169</sup> are not covered by the Commonwealth Act because of constitutional restrictions on Commonwealth powers<sup>170</sup> those individuals will be covered by state Fair Trading Acts.<sup>171</sup>

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<sup>164</sup> *Trade Practices Act 1974* (Cth) s 51AC(3)(g).

<sup>165</sup> (2000) 178 ALR 304, 317, quoted in Heffey, Paterson and Robertson, above n 24, 542.

<sup>166</sup> See WJ Pengilly, ‘Section 52 of the *Trade Practices Act* - A Plaintiff’s New Exocet?’ (1987) 15 *ABLR* 247; WJ Pengilly, ‘‘But You Can’t do That Any More!’ - The Effect of Section 52 on Common Negotiating Techniques’ (1993) 1 *Trade Practices Law Journal* 113 113.

<sup>167</sup> Including natural persons where the trade and commerce is carried out across state boundaries or in a territory, where it involves supply of services to the Commonwealth, where the conduct involves the use of post, telephone, radio or television. It also includes natural persons who aid and abet a corporation (section 75B), including directors, agents and employees of a corporation. In the case of native title issues, this would include negotiators acting on behalf of a corporation.

<sup>168</sup> Colin Lockhart, *Law of Misleading and Deceptive Conduct* (2003).

<sup>169</sup> Or in some state acts ‘any business or professional activity’. See *ibid* 37.

<sup>170</sup> See Heffey, Paterson and Robertson, above n 24, 485.

<sup>171</sup> Lockhart, above n 168, 7-8 These acts are the *Fair Trading Act 1992* (ACT), *Fair Trading Act 1987* (NSW), *Fair Trading Act 1989* (Qld), *Fair Trading Act 1987* (SA), *Fair Trading Act 1990* (Tas), *Fair Trading Act 1999* (Vic), *Fair Trading Act 1987* (WA), *Consumer Affairs and Fair Trading Act 1990* (NT). See also table of further Australian misleading or deceptive

Perhaps the greatest strength of the *Trade Practices Act* lies in the expansion of remedies it provides in relation to misleading and deceptive conduct. Remedies include those of sections 80, 82 and 87 discussed above, thus expanding the remedies available at common law or in equity.

Perhaps the greatest limitation of the Act is that it applies only to trade and commerce. It does not apply where, for example, misleading information is provided by an employee of a corporation to a second employee of the same corporation, leading to the second person having an on-site accident.<sup>172</sup> Instead the offending behaviour must be done in trade or commercial dealings with persons outside of the business entity at fault, for example with consumers, or other outside negotiating parties. It is possible that an agreement between native title holders and a pastoral leaseholder in relation to access to land for ceremonial purposes would not be considered a commercial agreement.

Under the Commonwealth Act a negotiating party need not have had the intention to mislead or deceive, nor a lack of good faith.<sup>173</sup> Courts will examine conduct and representations that have occurred over the full period of negotiation, and examine these in their context.<sup>174</sup> Examples of where section 52 of the Act applies include where a party to a contract has:

- Given an opinion which does not reflect their actual state of mind;
- Failed to disclose matters where circumstances 'give rise to the reasonable expectation that if some relevant fact exists it would be disclosed';<sup>175</sup>
- Represented that things will happen which are unlikely (including the availability of finance, or the intention to contract where this is not the real or likely intention); and
- Failed to reveal side letters which rob, for example, a letter of intent of its meaning where this letter of intent is used to support representations made during negotiations.<sup>176</sup>

The key to section 52 is to ask 'was the conduct engaged in', 'does the conduct convey a certain meaning', and 'is the meaning deceptive, or likely to be so?'<sup>177</sup> However, where conduct is merely confusing it might not be found to be misleading and deceptive, unless some intention to mislead and deceive is

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conduct related legislation in Seddon and Ellinghaus, *Law of Contract 8<sup>th</sup> ed*, above n 23, para 11.102.

<sup>172</sup> See *Concrete Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

<sup>173</sup> Lockhart, above n 168, 65-67.

<sup>174</sup> *Ibid* 70.

<sup>175</sup> *Ibid* 141 quoting Gummow J in *Kimberley NZI Finance Ltd v Torero Pty Ltd* (1989) ATPR (Digest) 46-054 at 53,195 (Fed Ct).

<sup>176</sup> Lockhart in Lockhart, above n 168, divides his discussion into 'Express Statements' (Ch 4), 'Non-disclosure' (Ch 5), and 'Implying Commercial Association' (Ch 6).

<sup>177</sup> *Ibid* 80 Despite cases to the contrary, the weight of cases suggest that the act extends beyond the making of representations, to include conduct generally, including silences. See Lockhart, above n 168, 35.



present.<sup>178</sup> The boundary between liability and acceptable behaviour is currently ill defined.<sup>179</sup> Where a person has relied upon a representation and has not made appropriate investigations into those representations they will, in most cases, still be able to succeed in a claim under the Act. In some instances damages will be reduced.<sup>180</sup>

## VIII. AGREEMENT WITH GOVERNMENT

The subject of contracting with government is a complex field and this paper can only provide a few hints as to factors that make government a unique party to contracts, and what are some of the rules that apply in these circumstances.

The first point to note about government is that it is not a homogenous entity. Not only can the States contract more freely than the Commonwealth, because the Commonwealth is limited by restrictions on its powers by the Constitution, but, in addition, government can deal through its departments<sup>181</sup> or through statutory corporations. Statutory corporations, including local government, are restricted by the legislation that creates them and this can limit the capacity to contract, depending upon the powers that are granted. Further, some corporations attract Crown privileges, while some are treated merely as any other private corporation.<sup>182</sup>

The enforceability of a contract or agreement with government or with a corporation that has Crown immunity will primarily depend upon the nature of that agreement itself. If the contract has a strong commercial flavour it is likely to be considered binding upon the government party. For example, under normal circumstances a company with a contract to supply the government with paper will be able to enforce that contract just as if the contract was with a non-government party. However, where the government is supplying funds to individuals, groups or companies, such as in the provision of money for social services, the commercial flavour diminishes. In this situation the subject matter of the agreement is more governmental in nature. In many instances however government still prefers that a detailed contract-like formal agreement is made out, and that this agreement be enforceable.<sup>183</sup> Seddon notes:

Certainly grant agreements under which (usually) community bodies receive money to provide human services are intended by the government side to be contractual .... They are drafted in a manner that resembles in every way a normal commercial contract. The question of intention to enter into contractual relations is ultimately tested by resort to an objective test: what would a reasonable person consider was the legal status or otherwise of such an agreement? The answer to this is that the intention

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<sup>178</sup> Lockhart, above n 168, 64.

<sup>179</sup> Lockhart, above n 168, 62.

<sup>180</sup> See *Trade Practices Act 1974* (Cth) s82(1B).

<sup>181</sup> Though contracts are actually made with the state, not the particular department. See Nicholas Seddon, *Government contracts: federal, state and local* (2004) 117.

<sup>182</sup> For a discussion, see *ibid* Ch 4.

<sup>183</sup> *Ibid* 84 and 87.

is for the agreement to be legally binding both because of the form of the agreement and the underlying imperative to make the funding recipient as accountable as possible for the proper acquittal of the grant.<sup>184</sup>

Seddon observes, however, it is arguable that such agreements are simply gifts on conditions, and that despite the formality of an agreement, government might be found not to have intended to create legal relations.<sup>185</sup> This is because, among other things, outcomes are hard to measure, the usual contract remedies are frequently not of use, and damages are mostly impossible to assess. If this were so, despite a detailed formal agreement, no contract would exist and neither party would be legally bound by the agreement.<sup>186</sup>

If government wishes to be sure about enforceability it can make an agreement binding by embodying it in a deed under seal. Another technique the government has of ensuring an agreement is given legal protection is by putting it into legislation. While this latter technique gives the agreement considerable standing, it does not protect against future legislative change.

The primary reason for allowing government to make agreements without incurring legal obligation is the unique position of government. It must implement policy, and this can change from time to time. Government needs to remain flexible and responsive, and being bound by contract law would limit such flexibility.<sup>187</sup> This need for flexibility allows government, in certain circumstances, to break agreements of a commercial nature. Where a commercial (or any other) agreement made in the past is seen to fetter present policy it can be breached with immunity.<sup>188</sup> To implement new policy government will pass new legislation and this law can override contractual obligations, or past legislation. No compensation is required to be paid by the government in this situation.<sup>189</sup>

In general, government is presumed not to be bound by Acts of parliament unless that intention is specifically stated in the Act.<sup>190</sup> The *Trade Practices Act* does specifically state that where the Commonwealth is engaged in 'business' it is to be subject to the Act. Business is to be more than a single transaction in that area, and must involve the provision of goods and services of a kind that an entity carrying on a business would provide – like any private trader might provide. A rule of thumb test for this is whether the activity in question is one where the government is dealing in traded goods and services for reward in competition with others.<sup>191</sup> However even where the Commonwealth government is found to be carrying on a business, particular

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<sup>184</sup> Ibid 88.

<sup>185</sup> Note that this is an objective test, and is not related to what the contracting parties thought they were doing, but what they actually did.

<sup>186</sup> See Seddon, *Government contracts*, above n 181, 84-5 generally.

<sup>187</sup> See *ibid* ch5.

<sup>188</sup> Ibid 195.

<sup>189</sup> Note that in the US and Canada statute overriding a contract is considered a breach of contract, and can result in the payment of damages. See *ibid* 209.

<sup>190</sup> See Lockhart, above n 168, 8ff.

<sup>191</sup> Ibid 10-11.

dealings in relation to that business might be exempt if they are not done ‘in the course of carrying on the business’.<sup>192</sup> For example, where the sale of the entire business is the matter of the dispute this has been found not to involve the personnel involved in the day to day running of the business and hence not to be a business activity.<sup>193</sup> The *Trade Practices Act* only binds the Commonwealth in such transactions, not the states or territories. They are exempt from the *Trade Practices Act*.<sup>194</sup> Instead the States are subject to the provisions of their own Fair Trading acts, which generally mirror the *Trade Practices Act*.<sup>195</sup>

Where a government is not legally bound by the agreements it makes,<sup>196</sup> it can still find itself unable to escape an agreement because of political pressures. This can happen merely as a factor of electoral pressure. It is in this final, political, arena that this discussion of the enforceability of agreement takes us back to the beginning point of the article. Where a government makes an agreement with an Indigenous people in relation to matters frequently associated with sovereignty, such as agreements that deal with territory, and agreements that devolve powers providing a level of self-determination, the agreement may be seen to be taking on a quality that is more akin to a treaty with a sovereign entity. This might be considered an even stronger issue where that *people*, as native title holders, become parties to the agreement, assuming responsibilities to it irrespective of whether they were aware of the agreement or not.<sup>197</sup> It is usually sovereign entities that make such treaties or

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<sup>192</sup> Ibid 11.

<sup>193</sup> Ibid 11.

<sup>194</sup> Ibid 12.

<sup>195</sup> But there are differences between the states, and the effect of the Acts in comparison with the Commonwealth Act. See Lockhart, above n 168, chapter 6. In addition the issue of a fiduciary duty being owed to Indigenous peoples by Australian governments is raised by in Larissa Behrendt, ‘Bargaining on More than Good Will: Recognising a Fiduciary Obligation in Native Title’ in Lisa Strelein (ed) *Land, Rights, Laws: Issues of Native Title: Issues Paper Vol 2, no. 4* (2000). As yet such a duty has not been specifically found, but Behrendt discusses the possible emergence of the duty. See also *Re Wadi Wadi People’s Native Title Application* (1995) 129 ALR 167; L Di Marcio, ‘A Critique and Analysis of the Fiduciary Conception in *Mabo v Queensland*’, *Melbourne University Law Review*, 19(4) 1994, 868; C Hughes, ‘The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada’, *University of New South Wales Law Journal*, 16 (1), 1993, 70 for a discussion of the duty. A relationship akin to a fiduciary duty has been found to exist between the Canadian government and the Indigenous peoples of Canada. See Bryant, ‘Crown-Aboriginal Relations in Canada: The Phantom of Fiduciary Law’, (1993) 27 *UBC Law Review* 19. In New Zealand a fiduciary relationship between the Crown and the Maori people has been found in *New Zealand Maori Council v A-G* [1987] 1 NZLR 641; *New Zealand Maori Council v A-G* [1989] 2 NZLR 142 and *Te Runanga o Wharekauri Rekohu Inc v A-G* [1993] 2 NZLR 301. A fiduciary relationship is where a person or entity is required to act for the benefit of another person on all matters within the scope of their relationship, or where the duties of good faith, trust, confidence and candour is owed.

<sup>196</sup> Or where it can escape the usual legislative and common law and equitable remedies, including those discussed elsewhere in this article.

<sup>197</sup> See section on ILUAs, above. This element is not restricted to agreements with government.

agreements.<sup>198</sup> Thus, one aspect of government agreement making that differentiates it from the usual contract making is that government brings to the agreement making process a different set of potentialities from the private corporation.<sup>199</sup> Agreements between government and Indigenous peoples may be of a commercial nature, but they may also be intended to implement government policy, or they may be purely political. A single agreement may contain one or several of these elements. And so, agreement making with government has a greater capacity to include some recognition of sovereignty in the other party.

## CONCLUSION

The focus on agreement making, both as a form of dispute resolution and as a means of renegotiating relationships between Indigenous and settler Australians has been lauded as the way of the future. However, little attention has been paid to what this might mean in practice and the extent to which agreement making, in all its guises, really does transform those relationships. Our brief examination of the legal effects of various agreements has indicated a pastiche of parties, rights and obligations emerging from the lived experience of agreement making. By exploring the legal effects of the various types of agreements we have attempted to give meaning to the new language that governs these processes. Two conclusions emerge from our inquiry. First, when it comes to the myriad of agreements, the name or title of an agreement is only part of the story and many variables will determine whether an agreement is enforceable and effective in achieving its objectives. Second, the essential preconditions to achieving effective agreements are a clear understanding of the aims and objectives of the agreement, of the complexity of the decisions involved and competent, well informed advisers. Even then, difficulty in predicting the effects of contract law and statutes may still impede the effective use of agreements to advance Indigenous peoples' aspirations.

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<sup>198</sup> For further development of this theme, with reference to public and private treaty-making see Langton and Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Langton, M et al (eds) *Honour Among Nations*, above n 1, and *Honour Among Nations* generally.

<sup>199</sup> Private agreements may strengthen an Indigenous claim of sovereignty too, but government comes to the table with sovereignty as part of its tradeable capacity.