

# Investigating the law of Authorisation in Native Title

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## Premature Celebrations!

How can a project proponent undertake numerous negotiation meetings with relevant native title parties and excitedly reach agreement (or at least in principle agreement) in relation to the undertaking of a project with those parties, only to subsequently find that the agreement is not worth the paper it is written on?<sup>1</sup>

This paper will answer the above question and set out some practical tips to reduce the risk that this will happen to your project that are derived from various cases and the author's experience acting for proponents of projects in dealing with the intricacies of the Native Title Act 1993 (Cth) (**NTA**).<sup>2</sup>

In looking at this question, the paper will examine the requirements for authorisation of certain key decisions of native title parties under the NTA, in particular the entry into Indigenous Land Use Agreements referred to in Part 2 Division 3 Subdivision C of the NTA (**Area ILUA** or **Area ILUAs**). This paper will also briefly examine two decisions of the Federal Court, *Kemp v Native Title Registrar*<sup>3</sup> (**Kemp's case**) and *Fesl v The Delegate of the Native Title Registrar*<sup>4</sup> (**Fesl's case**).

Further, given the similarities between the authorisation requirements of Area ILUAs and the authorisation requirements for applications for the determination of native title, some examination of the principles associated with this later type of authorisation will also be undertaken.

## Authorisation of Area ILUAs

The short answer to the question raised above is that under the NTA, certain agreements will not be effective to ensure that projects can be undertaken validly under the NTA until the making of the agreement has been appropriately "authorised" and the agreement is registered on the Register of Indigenous Land Use Agreements. The entry into the agreement is not sufficient.<sup>5</sup> This is the case in relation to Area ILUAs. Among other things, the registration of an Area ILUA can ensure that all future acts relating to a project, such as the grant of project approvals to undertake the project in the specified area, are valid from a native title perspective (including acts already undertaken invalidly).<sup>6</sup> Area ILUAs also have an expanded contractual effect once registered, being binding on all those who hold native title in relation to the relevant area.<sup>7</sup> However, perhaps because of this, before an ILUA can be registered a number of key requirements must be met. One of these requirements is that the decision to enter into the Area ILUA must be "authorised."

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<sup>1</sup> Further, depending upon the wording of the agreement, the proponent could be bound to fulfil certain obligations without receiving benefits that would otherwise be obtained from such an agreement i.e. if benefits are payable before registration of the ILUA.

<sup>2</sup> Also see paper by Lisa Wright and Stephen Sparkes, Legal Services Section, NNTT, *ILUA discussion paper Authorisation of an area agreement* dated 26 August 2009.

<sup>3</sup> [2006] FCA 939.

<sup>4</sup> [2008] FCA 1469.

<sup>5</sup> This can be compared with other agreements with Aboriginal parties that do not require specific authorisation to obtain statutory protections such as agreements under section 31(1)(b) of the NTA and agreements under the Aboriginal Cultural Heritage Act 2003 (Qld).

<sup>6</sup> Sections 24AA(3), 24EB(1) and 24EBA(1) of the NTA.

<sup>7</sup> Section 24EA(1)(b) of the NTA.

Where is this requirement found? Before an Area ILUA can be registered an application to register the Area ILUA must be lodged with the Registrar of the National Native Title Tribunal.<sup>8</sup> The application must either have been certified by the relevant representative Aboriginal body (**Representative Body**) for the area, or include a statement to the effect that the following two requirements (**Authorisation Requirements**) have been met: firstly, all reasonable efforts must have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the agreement have been identified; and secondly, all of the persons so identified must have authorised the making of the agreement.<sup>9</sup> Importantly, before the relevant Representative Body can certify the Area ILUA, it must also be satisfied that the Authorisation Requirements have been met.<sup>10</sup>

Further, where the ILUA is certified, persons can lodge objections to the registration of the ILUA on the grounds that the Authorisation Requirements have not been met,<sup>11</sup> and, if the objection is not withdrawn and the Registrar agrees that the Authorisation Requirements have not been met, the agreement must not be registered.<sup>12</sup> If the agreement is not certified by the relevant representative Aboriginal body, before the ILUA can be registered, the Registrar must be satisfied that the Authorisation Requirements have been met.<sup>13</sup> Accordingly, all roads lead to the Authorisation Requirements and these requirements, which are crucial to the registration of an Area ILUA, will be separately examined below.

This paper does not examine the requirements referred to in section 24CD of the NTA as to who has to be a party to an Area ILUA as opposed to who needs to authorise the Area ILUA although the interaction between this issue and the Authorisation Requirements is an interesting and important one.<sup>14</sup>

**First requirement - All reasonable efforts must have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the agreement have been identified**

It is important to note that the Federal Court has supported a delegate of the Registrar who concluded that the phrase "all persons who may hold native title" to mean those who can make a out a prima facie case that they hold native title and does not impose an obligation to accept other people just because they claim to be the holders of native title.<sup>15</sup> Similarly, it has been indicated that if a person's claim to hold native title is colourable it would be open to conclude that the authorisation of that person is not required.<sup>16</sup> The phrase does not require that all persons are in fact identified.<sup>17</sup> Despite these comments, it is submitted that it is often very difficult for proponents to reach a conclusion as to who may satisfy these requirements, particularly in areas where there has been a history of competing claims. This can even be the case where there is a current registered claim. It has also been established that it is possible that two competing groups "may hold" native title in relation to the same land or waters for the purposes of the Authorisation Requirements (analysed further below).<sup>18</sup>

In any event, it is important for project proponents to collate documentation showing that reasonable efforts were made to identify all potential native title holders. The most basic step in this regard is

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<sup>8</sup> Section 24CG(1) of the NTA.

<sup>9</sup> Section 24CG(3) of the NTA.

<sup>10</sup> Section 203 BE(5) and (6) of the NTA.

<sup>11</sup> Section 24C1(1).

<sup>12</sup> Section 24CK(1) and (2)(c) of the NTA.

<sup>13</sup> Section 24CL(3) of the NTA.

<sup>14</sup> Refer decision of Justice Marshall in *Murray v Registrar of the Native Title Tribunal* [2002] FCA 1598 and Full Federal Court decision in *Murray v Registrar of the Native Title Tribunal* [2003] FCA 220.

<sup>15</sup> *Murray v Registrar of the Native Title Tribunal* [2002] FCA 1598 at [74-75].

<sup>16</sup> *Kemp v Native Title Registrar* [2006] FCA 939 at [59].

<sup>17</sup> *Kemp v Native Title Registrar* [2006] FCA 939 at [45 and 46]

<sup>18</sup> *Kemp v Native Title Registrar* [2006] FCA 939 at [47-58].

consultation with the Representative Body.<sup>19</sup> Other steps that can be undertaken by the project proponent include publicly advertising the commencement of negotiations of the ILUA in newspapers circulating generally in the relevant State or Territory, as well as in local and special interest papers, inviting persons who may hold native title to register their interest in the Area ILUA negotiations or attend information sessions about the proposed Area ILUA. Further, in circumstances where there is a registered claim, the proponent may consider joining the claim, not only to protect its interests throughout that process, but also to obtain an understanding as to the group making the claim as well as other parties that may join the claim as respondents and potential objectors to any authorisation process.<sup>20</sup> Where there is no registered claim (or even where there is a registered claim) searches can be undertaken at the National Native Title Tribunal (**NNTT**) in relation to any past claims that have been made and contact can be made with persons who had brought such claims. Particularly in more recent times, such claims may have been dismissed because of failure to comply with certain procedural steps rather than a finding that no native title claim could ever be substantiated by the relevant group. Case management officers for current or past claims can also be a very useful source of information. Finally, any anthropology that has been undertaken in the relevant area will be a very useful source of information and if no such information is available some consideration should be given to the commissioning of an anthropological report. However, this will need to be considered as part of the overall risk management strategy and the timing and cost of such a report will need to be factored into that strategy.

From all of the above a database of persons together with contact details and addresses can be established. It cannot be stressed enough that the key to successful authorisation is meticulous record keeping. This information can be provided to the NNTT at the relevant time, including in support of an application for registration of an Area ILUA that has not been certified by the Representative Body or in response to an objection to an ILUA that has been so certified. Importantly such information forms the basis for the second of the Authorisation Requirements.

### **Second requirement - All of the persons so identified must have authorised the making of the agreement**

Once all relevant persons have been identified, it must be demonstrated that all of the persons so identified have authorised the making of the agreement. In this context, section 251A<sup>21</sup> relevantly provides for two possible authorisation processes. Firstly, where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, must be complied with in relation to authorising things of that kind--the persons authorise the making of the agreement in accordance with that process.

Secondly, where there is no such process--the persons authorise the making of the agreement in accordance with a process of decision-making agreed to and adopted, by the persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the agreement or of things of that kind.

Similarly in order to make an application for a determination of native title, the named claimant or applicant must be authorised by the claim group as a whole, being all the persons who, according to their traditional laws and customs, hold the common or group rights and interests claimed.<sup>22</sup> Section 251B of the NTA provides for the relevant authorisation process in this context and is in similar terms

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<sup>19</sup> A step specifically mentioned in section 24CG(3)(b)(i).

<sup>20</sup> See *Kemp v Native Title Registrar* [2006] FCA 939 where a respondent to the native title claim proceedings was identified as a person who may hold native title in the area.

<sup>21</sup> To the extent that there was any doubt that section 251A was the relevant provision, note *Fes/ v The Delegate of the Native Title Registrar* [2008] FCA 1469 at [59-60] and Justin's Logan's view that the draftsman made a mistake in the preamble to section 251A in that "persons holding native title should be read as "persons holding or who may hold native title".

<sup>22</sup> Section 61 of the NTA.

to that required in section 251A for the authorisation of ILUAs . In this regard, Justice Logan in the Federal Court<sup>23</sup> after reviewing a number of decisions relating to section 251B of the NTA observed:

*Section 251A plays an identical role in relation to native title group "authorisation" decisions as referred to in s 24CG(3)(b)(ii) to that which s 251B plays in relation to native title claim group "authorisation" decisions under s 61 of the Native Title Act. The language employed in s 251A compared to that in s 251B is very similar and each gives content to the word "authorise" in a provision in which the word "all" appears in relation to the making of "authorisation" decisions. The analogy of application between the two sections is indeed a close one. In my opinion therefore, each of the propositions which I have distilled from cases concerning s 251B has like application, mutatis mutandis, to the meaning and effect of s 251A and in relation to the impact of that section on "authorisation" for the purposes of s 24CG(3)(b)(ii) of the Native Title Act.*

### Sections 251A and 251 B - Indigenous Decision Making Structures

Firstly it is important to note, that if there is a traditional decision making process (section 251(a)), that process must be used. In the context of section 251B(a), French J (as he then was) has noted:

*"It seems to allow for the recognition of a process applicable by way of analogy to decision making relating to the institution of native title proceedings under the Act. For that is hardly a matter likely to have been contemplated explicitly by traditional law and custom. It may be that it is sufficient... to identify traditional decision making applicable to the exercise and responsibility for, or authority over the land or waters in question. Nevertheless it should not be surprising if there is some difficulty in applying traditional decision-making processes, albeit by closest analogy, to the conferring of the kind of authority contemplated by section 251B."*<sup>24</sup>

It is contended that a similar difficulty may arise when trying to demonstrate that there is a traditional decision making process in relation to authorising things like an indigenous land use agreement.

It has also been indicated that the traditional decision making process could involve a representative or other collective body, however reliance on such a body would require proof of the existence of the body under customary law, the nature and extent of the body's authority to make decisions binding the group and that the body authorised the entry into the ILUA.<sup>25</sup>

Justice Stone<sup>26</sup> has also considered the position where the traditional decision making process had broken down, and was unable to cope with the decisions required as a result of internal disputes within the group, and found that in such circumstances there was no traditional decision making process.

Where there is not a traditional making process, there will need to be an agreed to and adopted decision making process. In relation to this process, cases under section 251B again provide a useful guide for section 251A and some were usefully analysed by Justice Logan in Fesl's case.<sup>27</sup> In this regard, the following principles can be derived:

- The use of the word **all** in section 61(1) (and therefore by analogy sections 24CG(3)(b)(ii) and 203BE(5)(b)) should be given a more limited meaning than it would otherwise have. It

<sup>23</sup> *Fesl v The Delegate of the Native Title Registrar* [2008] FCA 1469 at [72].

<sup>24</sup> *Daniel v State of Western Australia* [2002] FCA 1147 at [14]. Also refer to his Honour's comments in *Anderson v State of Western Australia* [2003] FCA 1423 at [46].

<sup>25</sup> *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [34]. This was also a case dealing with section 251B.

<sup>26</sup> *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 at [20 and 21]

<sup>27</sup> Refer particularly to paragraphs 65 to 71.

does not require that all of the persons identified be involved in the making of the decision. Further, voting under the agreed or adopted process does not need to be unanimous. It has been stated that to require such an approach would be technical and pedantic and result in individuals being given veto rights.<sup>28</sup>

- It has been said that the decision may be made by majority vote,<sup>29</sup> by all those persons whose whereabouts are known and have capacity to authorise,<sup>30</sup> or by all those persons who are reasonably available and who are competent to express an opinion.<sup>31</sup>
- The decision making system only requires proof of the process used to arrive at the particular decision in question even if other procedures are normally used for other decisions. Formal agreement to the adopted process is not required with agreement being able to be proved by the conduct of the parties, for example, all persons present at the meeting voting in favour with nobody leaving the meeting or refusing to vote.<sup>32</sup>

The importance of the notification of authorisation meetings and the conduct of such meetings has also been examined in numerous cases in the section 251B context. If persons have been identified as being relevant to an authorisation process but have not then been properly notified with sufficient advanced warning, including properly targeted by personal notification and/or public notices for authorisation meetings (for example where only a generic advertisement is used) or there are no steps taken to verify that persons at the meeting belong to the group of persons identified, this can lead to a conclusion that authorisation was not effectively undertaken.<sup>33</sup> As to attendance at meetings, it has been held that when an authorisation meeting that has been widely advertised is not attended by all identified and notified, it can still amount to an effective process<sup>34</sup> but that a meeting should be attended by persons fairly representative of the relevant group.<sup>35</sup>

The importance of maintaining good records of the conduct of an authorisation meeting was demonstrated by Justice O'Loughlin<sup>36</sup> when he stated:

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<sup>28</sup> *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2002] FCA 1517 at [25]. Referred to with approval in *Harrington-Smith v Western Australia (No 9)* [2007] 238 ALR 1 at pages 242-243.

<sup>29</sup> *Moran v Minister for Land and Water Conservation for the State of New South Wales* [1999] FCA 1637 at [41]. Also see *Booth v State of Queensland* [2003] FCA 418 where authorisation was purportedly by majority vote and Justice Tamberlin at [11] indicated that, in such circumstances, evidence should be provided as to the constitution of the group or the basis on which it is claimed that a majority vote would be sufficient, how many persons are entitled to vote and precisely what is meant by "majority vote".

<sup>30</sup> *Quall v Risk* [2001] FCA 378 at [33].

<sup>31</sup> *De Rose v South Australia* [2002] FCA 1342 at [928].

<sup>32</sup> *Noble v Mundraby* [2005] FCAFC 212 at [18].

<sup>33</sup> Justice French in *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 particularly at [45 and 46]. Compare with Justice French's decision in *Anderson v State of Western Australia* [2007] FCA 1733 where the public notices identified the apical ancestors and referred to the claim group as the biological and adopted descendants of those ancestors and their spouses. The notice also invited members of the native title claim group so identified to attend the meeting and noted only those persons would be entitled to vote. At the meeting steps were taken to verify that persons at the meeting were members of the identified group.

<sup>34</sup> *Dingaal Tribe v State of Queensland and Ors* [2003] FCA 999 particularly at [37].

<sup>35</sup> *Bolton on behalf of the Southern Noongar Families v State of Western Australia* [2004] FCA 760 at [46] and *Anderson v State of Western Australia* [2003] FCA 1423 at [45]. These cases and the other cases referred to in footnotes 33 and 34 were referred to with approval in *Coyne v State of Western Australia* [2009] FCA 533 at [35 to 52]. Also see *Quandamooka People 1 v Queensland* [2002] FCA 259 at [12 and 46] dealing with a purported traditional decision making process.

<sup>36</sup> *Ward v Northern Territory* [2002] FCA 171 at [24 and 25].

*"The information concerning the meeting that was held on 27 January 2002....is wholly deficient. There is no information about that meeting. Who convened it and why it was convened? To whom was notice given and how was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?"*

*It may not be essential that these questions be answered on any formal basis such as in terms of the convening and conducting of a meeting in a commercial atmosphere, but the substance of those questions must be addressed."*

It is submitted that if there is documentation that responds to each of the matters outlined above by Justice O'Loughlin, the parties will be well on their way to an effective authorisation process.

### **Kemp and Fesl cases**

In Kemp's case,<sup>37</sup> Justice Branson set aside the registration of an ILUA on the grounds that the Authorisation Requirements had not been met. There, a Ms Hurst had lodged a claim on behalf of the Kattang people and Mr Kemp, who purported to be a descendant of the Pirripaayi people, had been joined to the proceedings as a respondent and had continually challenged the basis for the claim of the Kattang people. At the relevant authorisation meeting a majority of the persons present (which included Ms Hurst and a number of the Kattang people and Mr Kemp for at least part of the meeting), agreed that there was no relevant traditional decision making process and that a majority vote would be the basis for authorising the ILUA. The majority voted in favour of the ILUA but Mr Kemp objected to the Agreement.

Justice Branson concluded that section 251A does not provide a means whereby a single authorising decision can be obtained which is binding on two or more groups where their respective claims to hold native title in the area are in conflict. Justice Branson said that [at 41]:

*"This can be seen from the reference in paragraph (a) of section 251 to a process of decision making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, must be complied with in relation to authorising things of that kind. It is hard to imagine any such process of decision-making where the respective claims of two groups to hold the native title are in conflict; it would require traditional laws and customs in relation to jointly authorising things binding on the members of both groups."*

Justice Branson also found that the words in section 24CG(3)(b)(i) of the NTA should be construed literally and therefore where two competing groups each claim to hold the common or group rights, the persons in both groups are relevant for the purposes of section 24CG(3)(b)(i) and then, as indicated above, both of the groups have to authorise the ILUA in accordance with section 251A. Accordingly as the group represented by Mr Kemp had not authorised the ILUA, Justice Branson decided that the Registrar should not have registered the ILUA.

This can be compared with Fesl's case, where Justice Logan when considering an application for judicial review of a decision by the delegate of the Native Title Registrar to register an Area ILUA concluded that the delegate had sufficient evidence for her to conclude that there had been an appropriate authorisation decision despite there being allegations that, like in Kemp's case, there were in fact 2 groups (Gubbi Gubbi and Kabi Kabi) with persons representing the Gubbi Gubbi failing to authorise the ILUA.

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<sup>37</sup> [2006] FCA 939.

## How can Kemp's case and Fesl's case be reconciled?

In Fesl's case, Justice Logan at [63] distinguished Kemp's case as follows:

*"The difficulty for the Applicants is that, as already noted, the Delegate found that Kabi Kabi, Gubbi Gubbi and other variant spellings were ways of naming one broader group of related persons who, together, assert native title interests in relation to the project area. That finding was open on the material before her. Kemp's case was decided against the different background of there being conflicting claimant groups, not one group in which there happened to be differing views. Kemp's case is thus distinguishable."*

Simply, on the particular evidence in Kemp's case there were two competing groups claiming to hold native title while in Fesl's case there was evidence to indicate that there was only one group albeit potentially with sub-groups within that broader group. Interestingly, Justice Logan indicated that it was noteworthy that in Kemp's case it was not apparent that any of the parties had brought her Honour's attention to a body of authority that had developed in relation to section 251B of the NTA. However Justice Logan, despite reviewing such cases, indicated that the facts in the Fesl case made it unnecessary to decide whether and to what extent principles to be distilled from the section 251B cases are congruent with all of the observations made by Branson J in Kemp's case relating to section 251A.<sup>38</sup>

### Issues for Project proponents from Kemp's case

Accordingly, if more than one group has been identified as potentially holding native title, there could be a mixture of decision making processes required to authorise the ILUA, some of which may be based on traditional laws and customs (under (a) of section 251A), and some of which are an adopted and agreed decision making process for the particular agreement in question (under (b) of section 251A). Again it is very important to document the various decision making processes and how those processes were then carried out.

Kemp's case has made it clear that when looking at the first of the Authorisation Requirements, in identifying persons who may hold native title, a number of steps need to be taken. Firstly, from the persons identified, a decision needs to be made as to whether the persons may have a prima facie case to hold native title or whether the claim is colourable (to quote from the cases referred to previously in this paper). Secondly, assuming the persons satisfy the first criterion, a conclusion needs to be reached as to whether those persons are part of the same group or represent two or more groups. In many circumstances this can be a very difficult process for a project proponent,<sup>39</sup> who wants to be inclusive, but does not want a situation where, because of the number of groups and divergent views that are included in the process, authorisation becomes virtually impossible. Assistance from the Representative Body can be important in this regard, however, often the Representative Body may not yet have sufficient evidence, including anthropological evidence, to make a firm conclusion.

In any event, once this initial process has been undertaken, a project proponent, to the extent that it may have a number of alternative methods for resolving native title issues associated with the project, may conclude that an ILUA may not be the most appropriate method particularly if, given the potential number of persons involved, it is difficult to see a clear path for negotiations and subsequent authorisation. Importantly, if this decision is made during the examination of the first of

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<sup>38</sup> At [64-73].

<sup>39</sup> In Kemp's case at [60], Justice Branson suggested that the people who drafted the relevant provisions of the NTA did not envisage the circumstances that arose in that case and that the circumstances were perhaps unusual. The author suggests, based on his experience, that such circumstances are not actually that unusual particularly in areas where there are no claims or where there is or have been overlapping claims including where a group has agreed to reduce the area of the claim to ensure that the application for a determination of native title can proceed.

the Authorisation Requirements, it can avoid costly negotiations and an ineffective authorisation process.

### **Sustainability of Agreements - Removal and deregistration of an ILUA**

Another important reason for ensuring an authorisation process is properly carried out and carefully documented is that an Area ILUA must be removed from the Register of Indigenous Land Use Agreements where an approved determination of native title is made in relation to any of the area covered by the agreement, and any of the persons who, under the determination, hold native title in relation to the area is not a person who authorised the making of the agreement.<sup>40</sup> This will be particularly important if there are project approvals that are validated by the ILUA but that are not to be granted for many years after the initial registration of the ILUA. Under section 24EB(1)(b) of the NTA, the grant of such approvals will only be valid while the agreement remains on the Register of Indigenous Land Use Agreements.

Accordingly, as well as ensuring that all documents relating to an authorisation process are maintained for the term of the project, a project proponent may consider including in the provisions of an ILUA mechanisms for dealing with new claims that may be made in the area the subject of the Area ILUA. This may include: (a) provisions requiring the native title parties to the ILUA to take certain positive steps if new claims are lodged by a native title claim group, such as opposing new applications that appear to be made by groups that did not authorise the original ILUA; and/or (b) an obligation for the native title parties to take steps to have the new claimants execute documentation with the project proponent pursuant to which the new claimants acknowledge that they and their relevant native title claim group are bound by the ILUA and will make their claim subject to the requirements of the ILUA and the rights of the proponent under the ILUA.<sup>41</sup> Ultimately this may require a further authorisation process for the new arrangement with the new group (including a new compensation arrangement with the new group) if the project proponent wants to ensure that the ILUA is not deregistered. The original ILUA may also include provisions that provide for a suspension of benefits to the native title parties if such circumstances arise.

### **Interaction Between Area ILUAs and Aboriginal Cultural Heritage Act**

The topic provided referred to this interaction. This was an issue discussed in Fesl's case and while not directly related to the authorisation issue is worth noting particularly for Queensland practitioners.

In Queensland, under the Aboriginal Cultural Heritage Act 2003 (**ACHA**), a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage.<sup>42</sup> This is known as the cultural heritage duty of care. A person is taken to have complied with the duty of care if the person is acting under a native title agreement (which includes a registered ILUA) or another agreement with an Aboriginal party, unless the relevant Aboriginal cultural heritage is expressly excluded from being subject to the agreement.<sup>43</sup> In Fesl's case, Dr Fesl was an Aboriginal party for the purposes of the ACHA. The Federal Court considered an argument by Dr Fesl that an agreement attached to the ILUA to deal with the management of Aboriginal cultural heritage was unlawful in that it was not with an Aboriginal party as defined in the ACHA and therefore the ILUA contained conditions that contravened the law.<sup>44</sup> It was argued that based on such unlawfulness, the "purported" ILUA was not an agreement that met the requirements of being an ILUA that was capable of being registered.

Justice Logan concluded that whether the agreement met the requirements of being an Area ILUA, including whether it was lawful (or for example contained conditions that were unlawful and not

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<sup>40</sup> Section 199C(1)(b) of the NTA.

<sup>41</sup> In this regard see section 199C(1A) of the NTA which provides a limited exception to the requirement that the Registrar must remove an ILUA from the Register under section 199C(1)(b).

<sup>42</sup> Section 23 of the ACHA.

<sup>43</sup> Section 23(3)(a)(iii) of the ACHA.

<sup>44</sup> Refer to words in brackets in section 24CE of the NTA.

capable of being severed and therefore potentially affecting the overall lawfulness of the ILUA) was a relevant consideration. However, he found that in that case, based on a reading of the ACHA as a whole, despite the "awkward wording" it appeared that the State Parliament had intended that an ILUA made under the NTA was an alternate way of satisfying the cultural heritage duty of care to another agreement with an Aboriginal party (as defined under the ACHA) and accordingly the ILUA did not need to be with an Aboriginal party under the ACHA.

For practitioners in Queensland this a useful clarification, however, the ACHA is currently under review and one of the initial recommendations that had come out of the review was that in order to gain the automatic protection relating to the cultural heritage duty of care, an ILUA should be with the Aboriginal party. It will be interesting to see where this debate finishes but the various arguments for and against this proposition are beyond the scope of this paper.