Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

OPERATION OF THE NATIVE TITLE ACT

Inquiry Into Indigenous Land Use Agreements

Submission No: 3

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INQUIRY INTO INDIGENOUS LAND USE AGREEMENTS

1. The usefulness and scope of the ILUA provisions in the Native Title Act 1993;

The State does not have any contention with the ILUA provisions in the NTA at this juncture.

The State's published guidelines on Indigenous Land Use Agreements state:-

> The Western Australian Government supports the negotiation of agreements between native title claimants and other land users, including Government itself. Any native title agreement involving the Government requires the approval of the State Cabinet.
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> As there is more than one form of agreement with legal status under the *Native Title Act* it is important to be clear about the nature of different agreements. There are two general types of agreements, two party agreements and Indigenous Land Use Agreements. Neither constitutes a recognition of native title rights and interests.
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> Two-party agreements. Since 1994 there have been many agreements reached with native title claimants across Australia. The vast majority are two-party agreements arising from future act negotiations under s.29 of the *Native Title Act*. These are usually confidential "one-off" arrangements between developers and native title claimants. The vast majority do not involve government. They usually allow individual future acts (eg the grant of a mining tenement) to proceed.
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> Indigenous Land Use Agreements (ILUAs). There are 3 types of ILUAs. Generally, they allow the parties to reach binding agreements about a wide range of issues. One type of ILUA allows native title claimants and the Government to amend the procedures of the *Native Title Act* to suit the parties. Australia-wide, only a small number have been registered since the *Native Title Act* was amended in September 1998 to allow this form of agreement to be developed.
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> Every ILUA is subject to a three-month period of public assessment and possible objection prior to its registration by the National Native Title Tribunal, after which it is legally binding. This gives an ILUA a level of transparency that cannot be achieved by two-party agreements or other "group" agreements.
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> An attraction of Indigenous Land Use Agreements is that they may allow a range of activities to proceed before a native title determination is made.
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> The Western Australian Government is negotiating ILUAs in different parts of the State. The Government's position is that ILUAs have to be approached pragmatically and that:
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> i. ILUAs are not practical tools for addressing individual future acts;
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> ii. generally, the larger the area under claim and the greater the number of parties, the more difficult it will be to reach an agreement;
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> iii. generally, a multiple-strand agreement which requires the parties to agree on a range of issues (eg mining, community facilities, heritage, conservation, environmental protection, etc) will involve a larger number of parties (indigenous, non-indigenous, local government, statutory, etc) and take longer to progress;
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> iv. if Government is a party to an ILUA, public interest requires that every reasonable effort has been taken to ensure the bona fides of the native title applicants. For more comprehensive ILUAs, a form of connection report may be required;

v. if Government is a party to an ILUA, it will in most instances require a body corporate to be established to manage the ILUA and to ensure the appropriate management of any community benefits.

2. *Your experience of the process of negotiating ILUAs*;

Since 1998 the State has accrued a range of experience with indigenous land use agreements. Three are currently five ILUA pending completion to which the State Government will be a signatory.

The negotiation of ILUA's has been restricted to some extent by the lack of experience in most representative bodies about the logistics involved in any land use negotiation and the legal obligations attached to indigenous land use agreements in particular. There has been also been a tendency to see ILUAs as a means to avoid having to actually enter into a formal process of providing proof about the indentity and rights of the native title claimants. In addition, there would appear to be ongoing confusion between the notion of a registered ILUA (which has in-built accountability) and what are loosely referred to as "regional agreements" and "framework agreements". The Government's view is that "agreements" are too often cited as a simplistic solution to all native title matters without any reference to the nature of any single agreement and the desired outcomes.

The Western Australian Government's published guidelines on native title agreements notes that the term "regional agreement" does not have any specific status within the *Native Title Act* 1993 itself. The guidelines further stress that in any usage related to native title agreements, a "region" has to be carefully defined, the parties to an agreement identified and their mandate to enter into an agreement verified.

The notion of "framework agreements" has also been loosely applied. A framework agreement is, generally, an agreement to negotiate over particular issues according to particular conventions (what, when, who, how, where, etc). There are no real precedents (in terms of completed native title framework agreements) in Australia. After four years of negotiation of two separate framework agreements in Western Australia only one agreement is near completion.

Relative to ILUAs, there is additional confusion about the notion of an ILUA and two-party agreements. By way of example, NNTT documents regularly refer to the Tribunal's role in more than 1000 agreements nationally. These are predominantly confidential agreements between miners and native title claimants – with no scope for public accountability - or agreements between different native title claimants (eg over claim boundaries). The NNTT's reporting procedures have tended to distort the overall picture of the nature of agreements being reached and the demands involved. In practical terms, every agreement with indigenous people about land use should not be confused with an ILUA.

In negotiations with some land councils the State Government has found that there is also a resistance to developing ILUA in favour of broad-based agreements which individual developers endorse as required. In those circumstances the State has refused to become a party to any agreement. The State's advice to the Goldfields Land Council in June 1999 is self-explanatory:

> The Western Australian Government is committed to accountable strategies that will facilitate prospecting and exploration in the Goldfields, giving rise to sustainable opportunities for Aboriginal people to benefit. A prerequisite is that any agreement can be registered with the National Native Title Tribunal as an indigenous land use agreement (ILUA). In the absence of a native title determination in the Federal Court, an ILUA at present provides the only means to some form of legal and procedural certainty for all parties.
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> Without the GLC's commitment to ensure any agreement must be registered prior to its implementation, the proposed framework does not satisfy the Government's fundamental benchmark for legal and procedural certainty and could not be endorsed by the Government. The risks to the mining industry are far too great as are the risks to the native title claimants.
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> The **[GLC's]** proposed framework perpetuates uncertainty and introduces unnecessary procedures into the process. Essentially, if there is a commitment by native title claimants to remove restrictions to prospecting and exploration, they can indicate that they will not oppose s.29 applications and will limit negotiations to a standard heritage clearance (where relevant). This requires no commitment by individual miners to a localised agreement. This procedure might not bind individual claimants but neither does the GLC's proposed framework. The GLC conceded in discussions that individual Wongutha claimants could still lodge objections and force arbitration or separate negotiations with individual mining companies. By contrast an ILUA can bind both mining companies and claimants to a set framework.
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> There is no evidence to support Mr Vincent's contention that the registration of an ILUA will be unreasonably time-consuming or restrictive. By definition, the registration process introduces a level of transparency and accountability that makes a registered agreement sustainable. The registration time frame, including the process for objection, is potentially no more onerous than that required under the Native Title Act for processing individual future acts.
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> Some individual aspects of the GLC's framework, given the limited detail provided, have common ground with our analysis of how to limit restrictions on prospecting and mining. However, the intention not to maximise legal certainty under the Native Title Act restricts their value.
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> I reiterate the Government's commitment to consultation with the GLC and other stakeholders to see effective outcomes for prospecting and exploration in the Goldfields. This can only be achieved if the GLC accepts the need for an agreement to be registered as an ILUA. Given the GLC's previous contention that the Government is not supporting the development of agreements within the region, the current proposal effectively removes the involvement of Government, at the expense of a stronger agreement. We were particularly surprised that you are promoting a document in which the Government is not a signatory.

3. *The ILUA registration requirements and process*;

The Western Australian Government does not have the necessary experience at this stage to offer comment on the ILUA registration requirements. A number of ILUA will be seek registration during the latter part of 2000.

4. The role local/state/federal government should play in the negotiations;

The need for the involvement of any level of Government is presumably determined by the nature of the ILUA (ie. "Does it affect local, state or federal government interests?")

In general, ILUAs involving State/Territory Government have the widest scope to implement changes, particularly where an ILUA is linked with a State/Territory systems for land administration. State/Territory Governments have the most power of any level of government to influence land management outcomes and their participation is central to native title management (whether via ILUA, native title determinations, or any other manner of agreement which addresses Aboriginal land interests).

Fundamental recognition of the complexity and the extent of State/Territory land administration has consistently been underestimated in the overall management of native title, despite the fact that a State/Territory Government will ultimately be a critical partner in any sustainable native title settlement.

It is logical that State/Territory Governments will seek to establish policy which governs their involvement in ILUA. By way of example, the Western Australian Government has set some pre-conditions for its involvement in any ILUA (or any native title agreement). The guidelines for native title agreements state:

> The establishment of a body corporate able to administer native title rights is a condition of Government support for a consent determination of native title. Government will also usually require the establishment of a body corporate prior to entering into an Indigenous Land Use Agreements.
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> In those circumstances, the Government must be satisfied that:
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> - the body corporate is able to represent the native title/Aboriginal parties and to hold and administer any land tenure granted under the agreement;
> - the control of the body corporate is vested in and resides with the members of the body corporate;
> - there is an objective formula or method in place by which it can be discerned who is, and is not, a member of the body corporate;
> - where a body corporate represents native title holders, the descendants of the members are entitled to membership of the body corporate;
> - there are adequate arrangements for the body corporate to carry out its responsibilities;
> - there are adequate arrangements in place for the distribution of and accounting for, any benefits accruing to members under the agreement; and
> - there are adequate dispute resolution procedures.

5. The advantages/disadvantages of ILUAs compared with agreements outside the framework of the Native Title Act;

As noted previously, one “disadvantage” of ILUAs is linked to a lack of education about how they might function and the tendency for ILUA to be seen as the simple solution for all situations. Despite this, the major advantage is that they provide a vehicle for flexible, innovative approaches to the NTA and amending the impact of particular sections of the NTA.

The disadvantage of any agreement outside the Native Title Act is simply that it is outside the NTA – it doesn't have the jurisdiction to amend the application of the NTA as law. If the intention of an agreement is to provide an alternative to the procedures of the NTA, an ILUA provides the most accountable and defensible vehicle. Logically, the question has to be asked why parties would not use an ILUA if they are aiming to have the same impact on the application of the NTA.

The State Government's experience is that a refusal to use the ILUA mechanism in appropriate circumstances is usually a guide to limitations in the definition of the native title claim group or an unwillingness to expose the claim group to wider scrutiny or formal objection. Furthermore there are some scenarios (eg in mining regions) where unregistered "group" agreements are potentially a restraint on free trade obtaining compliance by duress. Such contracts also have wide capacity to generate litigation between the parties in the event of a dispute.

The Western Australian Government believes the key issue in any native title agreement is accountability. An agreement reached outside the NTA cannot deliver the same level of accountability and certainty as an agreement registered under the Act. Agreements outside the NTA are not subject to a process of independent assessment and public scrutiny and may not provide a structured and independent means for means of dispute resolution.

The State's clear preference is that agreements designed to modify the impact of the Native Title Act (eg future act provisions) or to endorse particular claimants over any other potential native title claimants should be registered as ILUAs. Some WA representative bodies have favoured multi-party agreements that function essentially as contracts between the parties to expedite parts of the NTA (eg the Kimberley Heritage Agreement). This model delivers less certainty to the parties and is more open to legal interpretation than an ILUA.

6. *The resources (technical/financial) that are necessary to successfully negotiate agreements;*

The level of resources required will depend on the nature and complexity of the Agreement. From the State Government's experience the technical/financial resources are less important as a pre-requisite that the human issues (especially skills).

In negotiations that have involved the State the key starting point has been communication between the State and the native title claimants and their representatives – essentially some basis in trust which allows an open exchange of ideas. Given the relatively untested nature of ILUAs, the drafting process has so far been lengthy and placed even more pressure on communication between the parties. This should become less onerous as there are more models of ILUAs developed.

Access to the native title claimants on a reliable basis for consultation is imperative and this, more than any other single cost item, has been critical from our experience to develop a successful agreement. The involvement of mediators (NNTT or other) has not been necessary and this in itself is an indicator that the parties have entered into a process which they have mutual confidence in, increasing the probability of a successful outcome.