

**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: 11

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***Parliamentary Joint Committee on Native Title and the
Aboriginal and Torres Strait Islander Land Fund.
Inquiry into the operation and effectiveness of Indigenous Land
Use Agreements (ILUAs)***

Submission by

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This submission is based on my experiences during 2000 in undertaking professional work for the Native Title Unit (NTU) of Aboriginal Legal Rights Movement (ALRM), the representative body for South Australia, on the ‘Statewide native title negotiations process’. It includes some general comments and more detailed
5 comments about two issues of particular interest to the Committee:

- Examples of negotiating ILUAs
- Resources (technical/financial) that are necessary to successfully negotiate agreements.

For most of the second half of 2000, by arrangement with Adelaide University, I
10 worked on secondment for the Native Title Unit as Senior Policy and Research Manager in the newly established Statewide Section of that Unit. My work involved coordinating specialist technical input to NTU’s consultations with native title groups about the prospect of their entering into negotiations about native title on a statewide basis with the SA Government, the SA Farmers Federation and the SA Chamber of
15 Mines and Energy. During this time I assisted with facilitation of four major statewide meetings of native title claimant group representatives and several smaller meetings and implemented action on instructions provided through these meetings.

This submission aims to outline aspects of the above experience which seem particularly pertinent to the Committee’s inquiry. My comments relate only to
20 ‘Statewide negotiations’ on native title and not to any more localised ILUAs that were under negotiation in SA in 2000 since I have been involved in the latter only in a very marginal capacity.

I apologise for the lateness of this submission due to time and similar logistic constraints in late 2000 preventing me giving the Committee’s inquiry the attention
25 that it deserves until now. I am also aware that similar constraints will have prevented an official submission from the NTU or ALRM being prepared by the time of the inquiry deadline. There would be great value in inviting the Executive Officer of the NTU Mr Parry Agius to address the Committee, particularly if the Committee schedules a hearing in Adelaide.

30 **General comments**

The Committee has a submission from the SA Attorney General (dated October 2000) which sets out the context for the development and progress of the SA Statewide ILUA/native title negotiations, such that it is not necessary to explain this here. I
35 consider that submission provides good background to the experiences that I and my colleagues at the Native Title Unit of ALRM (NTU) have had of the negotiation process in 2000 and I am in general agreement with the SA Attorney General’s comments in that submission about expectations for future outcomes.

40 However it is important to point out one instance where the Attorney General's expectations from the negotiation process are different to those of NTU and the claimants it represents. This is a minor point but nonetheless significant to the philosophy and principles on which NTU approaches its role and responsibilities in the negotiations.

45 The Attorney General has described the objective of the SA Statewide ILUA negotiations process as being to 'reach agreement on a number of key native title and land management issues, *leading to the withdrawal of native title claims*' (on page 1, second last paragraph). However, the objective of Native Title Unit in participating in these negotiations is the *settlement* of claims, rather than their withdrawal.

50 At this stage it is impossible to predict whether 'settlement' of claims will involve their withdrawal or not. However based on the views and feelings of claimants about their native title rights, it would seem unlikely that withdrawal of claims will be a general outcome of any negotiated agreements that are reached. Again reflecting claimants' views, NTU has from the start of its efforts, several years ago, to encourage the SA government to adopt a negotiated approach to native title, maintained that settlement of claims must be founded on recognition of native title.

55 A further point of difference in relation to the Attorney General's submission of October 2000 relates to time frames for reaching agreement. Time is one of the resource needs for successful negotiation (see also below). Experience within NTU of the time required to develop claimants' understandings of the issues associated with negotiation, indicates the Attorney General's prediction that agreements would be reached on some Statewide issues by the end of 2000 (page 4, second para) to have been unrealistic.

60 Some specific comments on two specific issues of concern to the Committee follow.

Experience of the process of negotiating ILUAs

65 Statewide native title negotiations in SA have not yet commenced but there was considerable preparatory work undertaken in 2000, particularly in the latter half when NTU convened a series of Statewide meetings of Native Title Management Committees (NTMCs) representing claimant groups. These meetings and associated activities were made possible by the SA Government's provision of funding to the NTU. They aimed to discuss the State Government's interest in negotiating ILUAs and to facilitate an informed decision from NTMCs about entering into negotiations on issues of Statewide or regional relevance.

70 The meetings were successful in securing an informed decision from NTMCs to move towards such negotiations. However this decision was not secured easily. In spite of the considerable *prima facie* arguments why negotiating agreements about native title is a better option than pursuing claims through the courts, many claimant representatives are resistant to negotiation, and particularly to negotiating ILUAs. This resistance is indicated by the following generalised comments made by claimants during the Statewide meetings in late 2000, comments which point to some serious credibility problems for ILUAs:

- 80 • ILUAs are seen by many, perhaps a majority, of claimants as something apart from, and instead of, native title. Rather than being a means of recognising native title or settling claims, ILUAs are seen as offering only a watered down substitute for native title.
- 85 • ILUAs are also widely seen by claimants as necessarily requiring extinguishment of native title.
- 90 • The State Government's support for ILUAs is taken by claimants as confirmation of the above views. While native title and its protection is assumed by claimants to be the role of the Commonwealth government, because the *Native Title Act 1993* is a Commonwealth Act and because the Mabo decision had national ramifications, the State is seen to be working against this Act and undermining protection of native title. The ILUA process that the State Government is supporting is seen as a second rate option that will neither recognise native title rights nor the authority of native title groups as holders of those rights.

95 The above negative impressions indicate a widespread suspicion of ILUAs amongst claimants. Amongst some claimants and associated people, this suspicion is such that the Joint Parliamentary Committee's Inquiry into ILUAs was being spoken of in late 2000 as if it was an inquiry which would unmask the "ILUA fraud" and lead to the demise of this illicit new substitute for native title.

100 These negative impressions have been difficult to change, although some progress towards this was made during the meetings held and other information disseminated by NTU in the latter half of 2000, such that there are now some claimants who will take issue with those of their peers who continue to promote such views.

105 The experiences and information on which the above negative views of ILUAs are based remain unclear to me. Certainly the State Government's actions during 2000 to pass legislation confirming the extinguishment of native title on certain categories of leases, and to bring forward arguments for the Statewide historical extinguishment of native title in the De Rose Hill Court case, reinforced and compounded claimants' initial negative impressions about why the State Government was supporting ILUAs. However claimant's negative impressions of ILUAs seemed to be well established even without consideration of these other factors. They probably derive generally

from suspicion and mistrust of State Government action that has been generated by experiences outside the native title policy arena.

Given the above impressions, it is unfortunate that the terms of SA's first ILUA (Port Vincent marina) will involve extinguishment. This will serve to confirm some of
115 negative perceptions that claimant's have of ILUAs notwithstanding the parallel provisions of this ILUA which I understand provide for forms of 'recognition' to native title holders.

Such are the claimant's suspicions of ILUAs that it is clear that Native Title Unit's work towards Statewide negotiations will not have any credibility with claimants if it
120 is seen as being about 'ILUAs'. Consequently Native Title Unit badges its work towards settlement of native title claims by Statewide negotiation as the 'Statewide native title negotiations process'. This is a deliberately different emphasis to that taken by the SA government, which badges its efforts as being about ILUAs. From late August 2000, soon after consultations with claimants about the prospect of
125 Statewide negotiations began, NTU staff and advisers associated with this consultation process have avoided as far as possible using the term 'ILUA' in discussions with claimants. This has involved some delicate juggling because it has been important to also explain to claimants that the ILUA provisions of the Native Title Act are an important mechanism whereby some aspects of negotiated
130 agreements may be given legal force. Nevertheless it has been a necessary precaution, because of the mistrust amongst claimants of ILUAs.

At a Statewide meeting in Coober Pedy in October 2000 the vast majority of Native Title Management Committees (NTMCs) agreed to work continue to work towards negotiations about native title involving the SA Government, and SA farmer and
135 miner peak bodies. At this meeting, most NTMCs also rejected the term 'ILUA' as a description of what they will be negotiating towards. Instead claimants said they considered they are working towards a 'Statewide Native Title Settlement Agreement' or some similar entity. Informally some claimants describe this entity as a 'treaty'. The Attorney General's submission has pointed out that 'any ILUA has limitations and there may be need for legislative amendments to underpin the agreement' (page 4,
140 third last para). The scope of claimant's aspirations indicates that there will certainly be demand from them for agreements which go beyond the ILUA provisions of the Native Title Act, addressing Aboriginal governance and social justice issues and the reform of government institutions for natural resource management. As such these
145 agreements will require changes to State legislation for effective implementation.

I consider that the semantic rejection by claimants of 'the ILUA process' is informed less by the 'facts' of what ILUAs can and cannot deliver, than it is by the outright suspicion of ILUAs outlined above. However, given that NTMCs have agreed to continue to work towards negotiations, there will be opportunity to develop different
150 understandings about ILUAs as the negotiation process develops. Of course this will need resources, as discussed below.

More generally, it seems timely that the Committee might consider what general educational action it might take to inform people about outcomes from ILUAs which involve recognition of native title and a flow of tangible benefits to communities. Can
155 ILUAs make a contribution to the 'treaty' debate which is now once again before the interested public, and how?

Resources necessary to successfully negotiate agreements

To be authoritatively negotiated, ILUAs require that the authority of the claimants' communities is effectively represented at the negotiating table. The effort and resource needs required to secure this should not be underestimated. Geography and inefficient communications hamper the capacity for representatives of claimant communities to keep community members informed about negotiations, act on their instructions and ensure their informed consent to agreements.

In the SA Statewide negotiations process, these issues are compounded by scale. However even within each claim group, they are not insignificant.

In SA the establishment, over the past three years, of Native Title Management Committees (NTMCs) as authoritative representatives of claimant communities has provided an essential structure to span the interface between native title processes under Aboriginal custom and tradition, and those under the Australian legal system. However although the NTMCs have been established, they are new intercultural institutions and if they are to be effective they require much support for their essential work in informing, consulting with and representing their community members.

Similarly, a coalition of these SA NTMCs at a Statewide level such as is required for Statewide negotiations and such as the NTMCs agreed in October 2000 to pursue, requires support to become an effective negotiating forum. The resources required are very considerable. Overseas experience would seem to confirm that this is not an unusual situation.

Resource needs include time as well as money, specialist expertise and training/skills development. Skilled and sympathetic people are required on all sides of the negotiating table in order to engender trust in the capacity of the negotiating process to deliver tangible benefits to all parties. One of the key factors in commitment to the SA Statewide negotiating process developing as far as it has to date, notwithstanding claimants' suspicions, has been the involvement of such people.

Agreements can certainly be negotiated without such resources, but it is very doubtful that such agreements will result in the settlement of claimants' major grievances. As such, they will not remain undisputed within claimant communities and they will not be able to deliver certainty to other stakeholders.

Neither will any agreements reached be able to be monitored and implemented by claimant groups/NTMCs unless those groups have operational resources. SA NTMCs have further made it clear that their involvement in any Statewide negotiations is predicated on protection for their local autonomy in relation to decisions which specifically affect their native title claim areas. Thus for agreements to be reached at the Statewide level, resourcing at the local NTMC level is also required. While some such resources might flow as benefits from agreements reached, particularly in the mining sector, these resource flows will not be even across all NTMCs. Unless anticipated and addressed, such inequities will lead to problems of regional dysfunction in the implementation of any Statewide agreements reached.

It is by no means clear that the level of resourcing required for negotiation and for management of negotiated agreements has been adequately considered by governments. The resource needs do rather test the veracity of what are now commonplace claims that the relative cost of negotiation vis a vis litigation is an

important reason to support ILUAs. However I consider there are other very important benefits from negotiated approaches which justify the costs involved.

Negotiated approaches involve capacity building on all sides and lay the foundation for stakeholder groups to direct the future of their regions based on co-existence. The resources involved are directed to regional economies to a far greater extent than court processes. This in itself is a key feature given that regional development is an issue of critical national and state concern.

There is a significant opportunity for the Commonwealth government to promote sustainable regional development as an outcome from native title negotiations through appropriate encouragement for capacity building and development of specific skills. This could be catalysed by promoting these needs in existing funding programs such as Rural Plan, Regional Communities and the VET sector.

Preparations for the SA Statewide native title negotiations in late 2000 did begin to show the emergence amongst all parties of enhanced capacity for effective native title negotiations. Given adequate resourcing, the process has clear potential for highly significant and far reaching future outcomes.