

**NATIVE TITLE BRIEFING PAPER FOR LOCAL  
COUNCILS – DECEMBER 2004**

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**PART 1: The Yorke Peninsula ILUA: What does it mean?**

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The Yorke Peninsula Region of Councils (**YPRC**) comprised of the District Councils of Yorke Peninsula, Copper Coast and Barunga West and the Wakefield Regional Council lead local government in South Australia (and nationally) in having recently completed negotiations with the Narungga people and the State of SA for an Indigenous Land Use Agreement (**ILUA**) to resolve native title issues on the Yorke Peninsula. The agreement was signed on 3<sup>rd</sup> December, 2004 and a joint media release issued can be found on [www.lga.sa.gov.au/goto/media](http://www.lga.sa.gov.au/goto/media).

Although there are other examples of local governments agreements with native title parties, the Yorke Peninsula ILUA is the most comprehensive of its kind yet negotiated in Australia.

In 2002 the YPRC elected to pursue an ILUA in favour of other methods of resolving native title, such as the mediation process overseen by the Federal Court and run by the National Native Title Tribunal (**NNTT**) and the litigation process in the Federal Court.

The YPRC's decision to negotiate an ILUA followed extensive analysis by the Councils of how native title impacts on council functions and the merits of an ILUA compared to a mediated or litigated approach. The YPRC decided that an ILUA provided them with the most immediate, but long lasting, method of achieving certainty and simplicity of process with respect to native title with the added benefit of allowing for other matters, such as Aboriginal heritage, to be dealt with at the same time.

The ILUA has six main functions:

1. it validates developments undertaken by the councils in the past which may not have complied with the provisions of the Commonwealth *Native Title Act 1993* (**NTA**). Where those developments affected native title and did not comply with the Act, they would be invalid;
2. it authorises all future developments undertaken by a council which affect native title (**future acts**) provided those acts are undertaken in accordance with the notification and consultation process set out in the agreement;
3. it provides for a discretionary heritage protocol which allows a council to elect to undertake a heritage survey in relation to a future development when they see it is necessary;
4. it provides for a benefits package to Narungga of which the State of SA is the primary contributor. The package finalises claims to compensation for the impact on native title of both past and future council developments;

5. it provides for a notification protocol regarding private developers which requires a council, where it is the planning authority, to:
  - advise developers of their obligations under the Aboriginal Heritage Act;
  - provide contact details for the relevant traditional owners to developers; and
  - give Narungga notice of certain developments within the ILUA area; and
6. it establishes a liaison committee of representatives of the councils, the State and Narungga as a basis for continuing to build constructive relationships between the ILUA parties.

An important feature of the ILUA for the councils is that if a court ever determines that native title within the ILUA area is not held by the Narungga people, the councils have the option to terminate the ILUA.

The Yorke Peninsula Region of Councils, like the other parties, are now keen for the provisions of the ILUA and its benefits to commence operation. Authorisation of future acts can only occur once the ILUA has been registered by the National Native Title Tribunal and this typically takes up to six months from the date of execution.

**PART 2: State-wide ILUA Negotiations: The Local Government Side Table**

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In December 2002 the LGA became involved in the Statewide ILUA process to promote negotiated outcomes with native titles parties. The Initiative involves the State Government, Aboriginal Legal Rights Movement Inc. (*ALRM*), SA Farmers' Federation (*SAFF*), South Australian Chamber of Mines and Energy (*SACOME*) and fishing interests.

The process was initiated by former Attorney-General Trevor Griffin under the previous government and maintained by the current government under Attorney-General Michael Atkinson. It is designed to maximise the opportunities for native title to be settled by agreement without recourse to expensive Court processes.

The LGA is involved in the Statewide ILUA Initiative as the peak body representing the interests of Local Government in South Australia. Its objective in participating in the initiative is to provide leadership to the local government sector in developing options for achieving negotiated outcomes to native title issues.

Within the broader ILUA process sector specific initiatives have been identified. These include minerals exploration, pastoral, fishing and local government. Sector specific programs are managed through "Side Table" meetings. One of the Side Tables established is the Local Government Side Table.

The LGA is a key participant in the Local Government Side Table which is also attended by representatives of the State, ALRM and, where relevant to their interests, SAFF, SACOME and fishing peak bodies. The Side Table is working to develop a model agreement or 'template' reflecting negotiated native title (and Aboriginal heritage) outcomes specific to local councils. The LGA hopes that the resulting template agreement will be able to be used by individual or groups councils at their discretion, for purposes of an ILUA or mediation or other agreement.

The proposed template agreement is based on the key provisions of the Yorke Peninsula Indigenous Land Use Agreement which has recently been negotiated by the Yorke Peninsula Region of Councils, State of SA and the Narungga People. The template will take into account differences between the particular circumstances of the Yorke Peninsula, and other, councils.

It is anticipated that the Local Government Side Table will have a draft template agreement for circulation to councils by March, 2005.

### **PART 3: Options for Councils for Resolving Native Title**

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#### **A. Introduction**

Councils confront a number of issues in dealing with native title rights and interests in their council area. They are:

- what obligations does a council have if it does something on land where native title may exist?
- has native title survived anywhere within the council area?

#### **B. Council Obligations on Native Title Land**

A council may wish to do something on land where native title has not been extinguished or ceased to exist, which affects native title. This type of act is called a *future act*.

A future act must be done in accordance with the requirements of the Commonwealth *Native Title Act (NTA)*. If it is not, the act is invalid.

The NTA requires either that:

- specific procedures set out in the Act be followed. These procedures are complicated and differ for different types of acts; or
- an Indigenous Land Use Agreement (*ILUA*) is entered into which authorises future acts. An ILUA can authorise acts generally and can establish its own procedures for acts.

Future acts **can only** be authorised by an agreement if the agreement is an ILUA.

#### **C. Has Native Title Survived?**

This question is only able to be conclusively determined through litigation in the Federal Court by a native title determination. This can be by way of contested proceedings or agreement of **all** the parties to a native title claim. If the determination is made by agreement it is called a consent determination.

A determination of native title will typically deal with the identity of the persons who hold the native title, the nature of the native title rights held by those persons and the area over which those rights are held, the nature of other interests in relation to that area and the relationship between the native title and other rights (eg whether the other rights prevail over native title).

A determination does **not** deal with the “on the ground” implications for the native title holders and other persons with interests in relation to the relevant

land. Even where a determination of native title has been made, an agreement is needed between the parties if these “on the ground” issues are to be dealt with. However, in a post determination climate this will be all the more difficult due to the likely disintegration of relationships which will have occurred during the litigation process.

During the course of a native title claim, the Federal Court must order mediation with a view to the claim being settled by agreement between the parties to it. Mediation may lead to a consent determination if **all** parties agree to terms on which the claim is to be settled. Alternatively the native title claimants and particular parties (such as local councils) may reach an agreement to settle issues relative to native title between the claimants and those parties. Importantly, such an agreement can **only** authorise future acts (see section B) if it is an ILUA and registered with the NNTT. Where a comprehensive ILUA has been entered into, it is debatable whether the particular parties to it need to continue as parties to the native title claim.

Native title claims typically involve multiple parties and diverse issues. There is no guarantee that a local government party’s interests will be heard in priority to other matters during any mediation process. Furthermore parties are subject to the schedules and agendas specified by the NNTT and the Federal Court.

The provisions of the NTA acknowledge that native title litigation is a resolution method of last resort by encouraging resolution by agreement making. Litigation is an expensive and time consuming process for all involved and often polarises the relationship with the parties.

Even where a court determines that native title has been extinguished on all the land within a particular claim, a council is unlikely to be prejudiced if it has entered into an ILUA. ILUAs will typically provide for a right on the part of a council to terminate an ILUA in these circumstances. Of course, even where such a right exists a council may choose to continue an ILUA because of other benefits such as an Aboriginal heritage protocol.

#### **D. What is an ILUA?**

An ILUA is a voluntary binding agreement, provided for in the NTA, between native title parties any other willing individual or group (such as a local council or group of councils) who also have interests in land. An ILUA may authorise future acts and validate any prior invalid acts. It may also finalise any claim to compensation for extinguishment of native title. In addition it can also address any range of related issues important to the parties such as Aboriginal heritage. An ILUA must be registered by the NNTT to take effect.

#### **PART 4: The State of SA's Consent Determination Policy**

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In addition to an ILUA, native title claimants may wish to increase the social and legal recognition of their association to land and waters through obtaining a Federal Court determination of their rights and interests. A Federal Court determination sets out the rights and interests enjoyed by the native title claim group and applies as regards the world at large.

The State of SA has recently released its policy in relation to consent determinations and the LGA has provided a copy on its Native Title web page: [www.lga.sa.gov.au/goto/nativetitle](http://www.lga.sa.gov.au/goto/nativetitle).

The policy only reflects the State's position as to when it will support a consent determination. It does not seek to bind any other parties to a native title claim. For a consent determination to be made all parties to a claim must agree to the determination.

In principle the State is prepared to assess the appropriateness of a consent determination in all native title claims. For such assessment to be considered, a native title claim group must first fulfil the following basic criteria:

- the group must be willing and able to engage in the process;
- the group must be stable and represented by a functioning native title management committee;
- the group must have a current connection with the claimed land; and
- there must be no contested overlapping claims.

When negotiating a consent determination, parties to the native title claim must reach agreement on the nature and extent of native title rights and interests in all or part of the claim area. If that is achieved they can ask the Federal Court to make a determination of those rights and interests with the consent of all parties to the claim, ie. a *consent determination*.

The claimants will need to provide the State with evidentiary material in the form of one or more reports (referred to as Native Title Reports).

The State will ensure that the assessment of evidence for a consent determination is rigorous and that the evidence meets the requirements of the NTA. All respondents (including local councils) will have a right to provide information relevant to the State's formulation of its position and claimants must provide to respondents the information necessary to enable them to respond, including particularised details of rights and interest claimed.

The fact that the State engages in the assessment is no guarantee that a consent determination will result. The State's assessment may show that the claim does not fulfil the requirements of the NTA. A consent determination, by its very nature,

requires the consent of all parties. Just because the State is prepared to consent to a determination does not mean that all other parties must also agree.

Other parties, such as councils, will need to separately consider whether they are prepared to support a consent determination. Where the State has decided to support a consent determination in a native title claim, other parties will be provided with the State's Position Paper and the Native Title Report to enable them to make their own independent assessment.

If all parties to a claim agree to a consent determination, the Federal Court would be asked to make orders in the terms of a draft determination presented by the parties to the court. The court has a discretion whether or not to make a consent determination and, if it does so, must be satisfied that it is appropriate to make orders in the terms proposed.