



Government of **Western Australia**
Department of **the Premier and Cabinet**

Guide for Third Party Indigenous Land Use Agreements

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WESTERN AUSTRALIAN GOVERNMENT GUIDE FOR INDIGENOUS LAND USE AGREEMENTS (ILUAs) TO WHICH THE STATE OF WESTERN AUSTRALIA IS NOT A PARTY

1. Purpose

1.1 This Guideline is intended to:

- (a) assist parties negotiating ILUAs (in the general case where such negotiations do not contemplate the State being a party to the ILUA) in relation to proposed future acts by clarifying the State's expectations regarding the content of ILUAs given that they affect agencies of the State (including the Minister for Mines and Petroleum, the Minister for Lands and their supporting departments) in their capacity as grantors of titles, approvals and other rights (including under the *Mining Act 1978*, the *Petroleum and Geothermal Energy Resources Act 1967* and the *Land Administration Act 1997*) sought in reliance upon ILUAs; and
- (b) highlight the importance of certainty as to the scope and operation of terms proscribing statements of the parties' consent for the purposes of section 24EB(1)(b) of the *Native Title Act 1993 (Cth)* (the NTA).

2. Background

2.1 As a general matter, the State will only be a party to an ILUA where the circumstances involve:

- (a) the retrospective validation of specific previous acts;
- (b) the extinguishment of native title by surrender to the State;
- (c) the State or agencies of the State being the proposed grantee.

2.2 Where the State is not a party to an ILUA, it does not have a direct capacity as a negotiating party to influence the drafting of the ILUA.

2.3 In recent years there has been a significant increase in the ambit and complexity of ILUAs relating to the grant of titles, approvals and other rights by agencies of the State and in particular the ambit and complexity of terms proscribing statements of the parties' consent for the purposes of section 24EB(1)(b) of the NTA.

2.4 Where an agency of the State is requested to grant a title, approval or other right in reliance upon an ILUA, the agency must determine, as an objective question, whether the requested grant falls within the ambit of the relevant section 24EB(1)(b) statement of consent. That assessment will involve the agency having to:

- (a) interpret the terms of the ILUA (as registered under section 199B of the NTA), particularly those relating to the ambit of the parties' consent; and
- (b) if factual matters are relevant to that ambit (e.g. where the consent is limited to grants that are or are to be used for a particular purpose or are to have a particular degree of connection to a particular reason, purpose or use), identify and determine satisfaction as to those relevant factual matters.

Such assessment may involve the agency seeking further information from, and/or consulting with, the parties to the ILUA.

2.5 If an agency of the State concludes, as an objective matter, that the requested grant does not fall within the ambit of the relevant section 24EB(1)(b) statement of consent, then the agency may only proceed to grant on completion of an applicable alternate future act process under the NTA.

2.6 It should be appreciated that if a grant is subsequently found to have been incorrectly assessed by the granting agency of the State as falling within the scope of the relevant section 24EB(1)(b) statement of consent, then that grant may not validly affect native title.

2.7 The State is accordingly concerned to ensure that parties to proposed ILUAs recognise that complexity and flexibility of legal and factual concepts included in an ILUA (particularly in proscribing the ambit of section 24EB(1)(b) statements) may:

- (a) compromise and undermine certainty and clarity for State granting authorities that is conducive to the realisation of administrative and financial efficiencies that ILUAs are intended to achieve; and
- (b) expose State granting authorities, although acting with diligence and in good faith, to greater risk in the future that grants determined by the authority to be within the ambit of the ILUA will be disputed or challenged as not being within the ambit of the ILUA and accordingly not validly affecting native title.

2.8 The State has communicated the above concern to the Native Title Registrar.

3. State Expectations as to Content of ILUA

3.1 Having regard to:

- (a) the role of agencies of the State in granting titles, approvals and rights in accordance with the laws of the State and the NTA;
- (b) the commercial need for certainty and confidence in the validity of titles, approvals and rights granted by agencies of the State;
- (c) the potential for administrative and financial inefficiencies in agencies of the State having to interpret and apply the terms of complex ILUAs;
- (d) the risk of exposure of the State to claims even where the State acts with diligence and in good faith,

parties negotiating and drafting an ILUA should be mindful to ensure that their ILUA (and in particular section 24EB(1)(b) statements of consent) are drafted with regard to the need for clarity and certainty as to their scope as proscribed by:

- (e) their terms;
- (f) the operation of their terms; and
- (g) if relevant, the geographic area the subject of the ILUA.

3.2 Where parties to a proposed ILUA are concerned as to the degree of flexibility or complexity relating to the interpretation or operation of their proposed ILUA then the parties may elect to provide the State with a draft of their proposed ILUA for consideration on the following basis:

- (a) The draft ILUA should be provided to the State with the express agreement of all parties.
- (b) The State should be afforded a reasonable period of time (not less than 60 calendar days) to consider the proposed ILUA.
- (c) The State is under no obligation to consider the draft ILUA and may decline to provide any comment.

- (d) Any comment by the State shall be provided to all parties to the draft ILUA.
- (e) Any consideration or comment by the State is undertaken with a view to minimising any future inefficiencies for agencies of the State and consequentially for the parties to the ILUA. However, the terms of the ILUA remain always at the risk of the parties alone and any consideration and comment (including any absence of comment) by the State shall not prejudice the State and agencies of the State in respect of their rights under the NTA or in their future administration of the ILUA (including to decline granting tenure or other rights in reliance upon the ILUA if the State objectively considers that the grant is not covered by the ILUA).

3.3 If parties to a proposed ILUA are considering a section 24EB(1)(b) statement of consent the ambit of which:

- (a) depends upon the application of multiple or complex provisions of the proposed ILUA; and/or
- (b) depends upon the determination of particular legal and/or factual matters that lack certainty as to ambit (e.g. where the consent is limited to grants that are or are to be used for a particular reason, purpose or use or the grant is to have a particular degree of connection to a particular reason, purpose or use); and/or
- (c) is otherwise vague or uncertain,

the parties should note that agencies of the State that are to be requested to grant in reliance upon the ILUA will, as a general matter, require the request to be accompanied by a statutory declaration from a senior officer of the proposed grantee:

- (d) outlining the legal basis upon which the grantee contends that the requested grant is consented to under the ILUA (with reference to relevant terms and provisions of the ILUA); and/or
- (e) attesting to all relevant factual matters and appending supporting factual information.

If the native title party to the ILUA has in the context of the specific requested grant indicated its agreement or lack of objection to that grant falling within the scope of the relevant section 24EB(1)(b) statement (such as by a certificate as contemplated by 3.5 below), the statutory declaration should also append any written evidence of that fact. The provision of such evidence will, in assisting the State to consider the requested grant, also assist the parties in achieving the efficiencies they sought to be realised by the ILUA.

3.4 It is expected that ILUAs will be negotiated by proposed grantee parties to ensure that the ILUA, with the State's reliance upon the application of section 11 of the *Property Law Act 1969*, relieves or otherwise discharges any potential native title compensation liability of the State (whether under the NTA, State law or otherwise) that may arise in relation to grants made in reliance upon the ILUA.

3.5 Where the parties to a proposed ILUA decide, including after consulting the State as to the terms of the proposed ILUA, to include a section 24EB(1)(b) statement of consent the ambit of which depends upon:

- (a) the application of multiple or complex provisions of the proposed ILUA; and/or
- (b) the determination of particular legal and/or factual matters that lack certainty as to ambit,

it is anticipated that ILUAs will be negotiated to include:

- (c) a certification mechanism by which the parties provide their agreement in writing to the relevant State granting authority on a case-by-case basis that each requested grant falls within such statement of consent; or
- (d) the release in relation to claims by the parties against the State and indemnification in respect of third party claims against the State arising from any grant made by the State in good faith in reliance upon the ILUA.

3.6 Nothing in this Guideline or in its application to any requested grant will affect a State granting authority's duty or right to consult with or otherwise seek the views of the parties to an ILUA or any other persons in accordance with State law and policies or administrative practices or procedures applicable to that grant.

Further Information

Government agencies and officers with questions about this policy guide should contact the Land, Approvals and Native Title Unit of the Department of the Premier and Cabinet.

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