

Response to questions arising in the Second Reading Debate of the *Land Administration (South West Native Title Settlement) Bill 2016*

<p>General comments</p>	<p>Purpose of the Bill</p> <p>The provision of benefits under the Settlement is a significant undertaking, with the implementation of the Settlement taking place over a substantial period of time.</p> <p>The <i>Land Administration (South West Native title Settlement) Bill 2015</i>, once passed, will allow for the commencement of specific land-related provisions in the South West Native Title Settlement, including:</p> <ul style="list-style-type: none"> • the allocation of freehold land, leasehold land and reserved land to be held on trust for the Noongar people (Noongar Land Base Strategy- Annexure J); and • the grant of licences to the Regional Corporations to enable the Noongar people to access and carry out activities for Aboriginal Customary Purposes on certain unallocated Crown land and unmanaged reserves (Land Access Licence- Annexure O). <p>Conditions for Settlement to commence</p> <ul style="list-style-type: none"> • The 6 ILUAs have commenced operation, but the substantive Settlement relating to the resolution of native title rights and interests and provision of compensation will not commence operation until after 4 conditions are satisfied: <ul style="list-style-type: none"> • the conclusive registration of the 6 ILUAs by the Native Title Registrar; • the proclamation of this Bill, • the proclamation of the <i>Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2015</i> (Annexure F to the Settlement Terms); and • the gazettal of water by-laws, which are set out in Annexure R to the ILUAs.
--------------------------------	---

Registration

- Conclusive Registration will occur when all 6 ILUAs are registered on the Register of Indigenous Land Use Agreements under s. 24CK(1) of the *Native Title Act 1993 (Cth)* (**NTA**) and all legal proceedings have been resolved in relation to registration of the 6 ILUAs.
- The Registrar has received a total of **107 objections from 25 objectors** to the certification of the 6 applications for registration. SWALSC and the State have been provided with copies of the objections and are in the process of responding to the objections.
- There are four related proceedings commenced in the High Court against the Native Title Registrar in relation to registration of four of the ILUAs. The State and SWALSC are a party to those proceedings. The High Court has remitted those proceedings to the Federal Court.
- The current earliest estimate for commencement of the Settlement is end of 2016.

Consultation with SWALSC on this Bill under the Settlement

- The passage of the Bill is a pre-condition to the commencement of the Settlement. Under the ILUA, the State has been required to consult with SWALSC on behalf of the Noongar Agreement Group in relation to this Bill and has done so.¹

Summary of issues raised by the Member for Willagee:

- To clarify:
 - Annexure J and Annexure O- were **negotiated and agreed** by the parties (SWALSC, State and Noongar Negotiation Team) over 5 years of negotiations.
 - Annexures J and O are not for debate or amendment. They form part of the benefits package of the ILUAs.

¹ Clause 7(c) of the Settlement Terms requires the State to consult with SWALSC, if it is at all reasonably practicable to do so if any amendments are proposed to this Bill, other than amendments which the State reasonably considers to be trivial or immaterial.

	<ul style="list-style-type: none"> ○ The operation and purpose of Annexures J and O are totally independent of one another. ○ The Noongar Land Base Strategy (Annexure J) relates only to the process for transfer of land into the Noongar Land Estate. In return for the surrender of native title rights the Land Base Strategy provides compensation through the creation of a Noongar land estate and tenure to the land. ○ The Land Access License relates only to the capacity for members of the Noongar Regional Corporations to validly access UCL and UMR in the ILUA areas for customary purposes. The land access license provides lawful access to UCL and UMR for customary purposes, which the Noongars will no longer be able to seek under the NTA. ○ There is no allocation of land under the Land Access Licence (Annexure O) – The allocation of land to the Trust is under the Land Base Strategy (Annexure J). <p>The following is detailed consideration of these issues and responses.</p>
Annexure J – Noongar Land Base Strategy	
Issue	<p>Priority Land Meeting</p> <ul style="list-style-type: none"> • issues on the land base strategy, annexure J. • One peak body will run the priority land meetings for this whole process. • decision about the suitability of the land will still be made by, potentially, three white guys. • paternalism creeps right through this process. • All that will be relied on is the goodwill of the government.
	<p>Co-operation</p> <ul style="list-style-type: none"> • The principles underpinning the Noongar Land Base Strategy and the targets for identification and selection of land have been designed to focus on areas of agreement,

	<p>rather than disagreement to ensure that maximum hectare limits are reached.</p> <ul style="list-style-type: none"> • The recital to each of the ILUAs acknowledge that the arrangements put in place will only reach their full potential if all Parties engage in the implementation of the Settlement in a spirit of co-operation and the Land Base Strategy contains principles agreed between the State and the Noongar Agreement Groups to this effect. • It was agreed that parties recognised the role of the Trustee and Regional Corporations in representing the interests of Noongar people through this agreed process. <p>Priority Land Meetings</p> <ul style="list-style-type: none"> • The Priority Land Meetings are 3 monthly meetings facilitated by the State and attended by the Trustee and the Department of Lands, in relation only to land parcels of significance to the Noongar community. The State and the Trustee must use all reasonable endeavours to reach agreement, however, there is no guarantee that agreement will be reached. • It is expected that the Trustee will consult with the Regional Corporations, who are the beneficiaries of the Noongar Boodja Trust, noting that the Trustee and Regional Corporations will represent the interests on Noongar people. • The Priority Land Meeting is the final consideration of whether particular land can be included in the Noongar Land Estate. However, there may be strong public policy reasons why particular land cannot be transferred. • The principles underpinning the Noongar Land Base Strategy and the targets for identification and selection of land have been designed to focus on areas of agreement, rather than disagreement to ensure that maximum hectare limits are reached.
Issue	I am interested in the circumstances around which DMP or any other government department can object to or prevent land being allocated into the Noongar land estate.

	<p>Land Transfer Flow Charts – Assessment by other Agencies</p> <ul style="list-style-type: none"> • The process for transferring land under the Land Base Strategy follows the Government's standard procedures for the alienation of land. • Consultation with Local Government is required under s. 14 of the <i>Land Administration Act 1997</i> in relation to alienation of land in fee simple. • The approval of the Minister for Mines under s. 16 (3) of the <i>Mining Act 1978</i> is required before any land is leased, transferred or otherwise disposed of.
Issue	<p>There will be six regional corporations or Indigenous land groups, and the flow over five years of land into the control of those organisations concerns me a bit. If one organisation is more active and more able to present land for consideration or inclusion quicker, it could have a beneficial effect.</p>
	<p>Inequity between Agreement Groups</p> <ul style="list-style-type: none"> • All of the land will be transferred to the Noongar Boodja Trust for the benefit of all Noongar people. Many Noongar people are members of more than one Agreement Group. The Regional Corporations are the beneficiaries of the Trust not individuals. • In relation to the transfer of land to the Trust, there will not be an equal distribution of land from the 6 different Agreement Areas, nor will the economic value of the land from the different Agreement Areas be the same. • There is obviously more unallocated Crown land in some of the Agreement Areas than in others. The economic value of the land sits with the Trust and is potentially a benefit to all Noongar people. • When land is transferred to the Noongar Boodja Trust, the land will be identified as Cultural Land or Development Land.

	<ul style="list-style-type: none"> ○ If the land is Cultural Land and the Regional Corporation so requests, the Trustee can lease or licence an interest to the Regional Corporation. ○ Cultural Land must be held in perpetuity by the Trustee. ○ If the land is not Cultural Land, it can be passively invested by the Trustee where the returns benefit the Trust, or there is a mechanism whereby in consultation with the relevant Regional Corporation the Development Land can be developed through a separate development corporation established and owned by the Trustee. ● If Development Land is used for property development activities and sold, there is a default formula for distributing the net proceeds of sale: <ul style="list-style-type: none"> ● 10% goes to the operations account of the relevant Regional Corporation; ● 15% goes to the operations account to be shared equally amongst the remaining Noongar Corporations; and ● 75% goes to the Future Fund. This formula can be modified by the Trustee.
<p>Annexure O – Land Access Licence</p>	
<p>Issue</p>	<p>Annexure O, land licensing arrangements, where we are talking about the licensor being the minister and the dispute processes. I am a little bit mystified.</p> <p>All this is doing is amending the Lands Act to allow this to take effect. There are appeals to the Governor still extant, but in the contractual negotiation process—I will not go into any detail on that here—how are disputes resolved in relation particularly to the allocation of land or between particular groups?</p>
	<p>The Land Access Licence - Overview</p> <ul style="list-style-type: none"> ● There is no allocation of land under the Land Access Licence (Annexure O) – The allocation of land to the Trust is under the Land Base Strategy (Annexure J).

- The purpose of the Land Access Licence is to ensure that Noongar people are able to access certain land which is unallocated Crown land or unmanaged reserves, other than Excluded Land, to carry out activities for Aboriginal Customary Purposes.
- The Land Access Licence does not create any interest in land.

Who has access under the Land Access Licence?

- One Land Access Licence is granted for each Agreement Area to the Regional Corporation for that Agreement Area. The Land Access Licence provides a non-exclusive right for members of the Agreement Group to undertake certain permitted activities for Aboriginal Customary Purposes. The definition of "Licencee's Members" also extends to members of other Noongar Agreement Groups who are invited by the members of the Agreement Group and accompany Members of the Agreement Group accessing the Licence Area.

Appeals to the Governor

- There should be no appeals to the Governor in relation to the Land Access Licence. Appeals to the Governor under Part 3 of the LAA only apply where the Minister intends to cause the forfeiture of an interest in Crown land. The Land Access Licence does not create any interest in land.

No forfeiture of licence, but suspension or termination in limited circumstances

- Because this licence is part of a Settlement, there can be no forfeiture of the licence. This is dealt with in clause 16 of the Bill which dis-applies s. 91(3) of the LAA.
- The Land Access Licence can only be suspended for breach under clause 7(a) of Annexure O or terminated under clause 7(c) or (d) of Annexure O, including where similar or greater rights of access to and use of the Licence area are conferred by other means or by

	<p>agreement.</p> <p>No compensation</p> <ul style="list-style-type: none"> • No compensation is payable for suspension or termination of the Licence. <p>Further grant of licence</p> <ul style="list-style-type: none"> • If the Licence is terminated because the Regional Corporation ceases to exist, the Minister must grant a further Land Access Licence to when a new Regional Corporation is appointed under the Trust Deed.
Issue	<p>Clause 2.3 of annexure O, states that the minister has —the right to take Land under Parts 9 and 10 of the LAA —The Land Administration Act — or any other Law; with regard to any land or licence that is taken away, is there an obligation to replace it with like-for-like, and what is the process for that?</p>
	<p>The Licence Area is defined in Schedule 1</p> <ul style="list-style-type: none"> • The Licence Area for each Land Access Licence is defined in Schedule 1 as all land in the Agreement Area that is unallocated Crown land or unmanaged reserve, other than land which is Excluded Land at the Relevant Time.² The Relevant Time is defined as the time the Licence Area is accessed. • Not only will the tenure of land change from time to time with unallocated Crown land and unmanaged reserve converted to other tenure (including via the Land Base Strategy), but land may also become or cease to be Excluded Land because of interests being granted over unallocated Crown land and unmanaged reserves. • The Licence does not confer an estate or interest in land.

² Unless a smaller area is agreed under clause 2.8 of Annexure O.

	<ul style="list-style-type: none"> • The Licence does not prevent the Minister from creating other interests under the LAA. • The Licence cannot be asserted against any person who makes an application under any law for use of the Licence Area. • The Land Access Licence does not fetter rights of the State or the exercise of powers by the Minister in any way to deal with the land.
Issue	<p>Paragraph 4.1 of Schedule 1 contains express limitations. It talks about access to the land and the fact that people cannot camp in any one place under licence for more than 14 continuous days, and then go away and come back.</p> <p>A definition of "vicinity" will be something we can talk about here because of multiple access</p>
	<p>Camping temporarily – in the vicinity</p> <ul style="list-style-type: none"> • Camping temporarily is an Excluded Act if a person is Camping temporarily in a part of the Licence Area and less than 14 days has elapsed since the person was last Camping temporarily on that part of the Licence Area or in the vicinity of that part of the Licence Area. • The term "vicinity" has its ordinary meaning, meaning "near in space". It is a term which will depend on context. It is intentionally not defined. • The Licensee (Regional Corporation) is required to hold information sessions for its members in relation to Permitted Uses and Excluded Acts.
Issue	<p>How are coastal waters going to be treated?</p> <p>I know that there are traditional fishing rights; are they going to be extended under this? They are under native title. Are they going to be extended out into the waters, and, if so, how far?</p> <p>With regard to access to inland waterways, are they able to be subject to special licence?</p>

Land Access Licence applies to water, including coastal waters and inland waters, that are unallocated Crown land or unmanaged reserve

- The Land Access Licence in relation to each Agreement Area will apply to all unallocated Crown land and unmanaged reserve in the Agreement Area, other than Excluded Land. The definition of unallocated Crown land includes coastal waters and waters within the limits of the State in relation to which no interest is known to exist.
- There are additional measures under the Settlement to provide for a limited range of customary activities in Public Drinking Water Source Areas. The ILUA provides for by-laws to be adopted under section 34 of the *Water Agencies (Powers) Act 1984 (WA)*. Draft by-laws are attached as Annexure R to the ILUAs.
- Amended water by-laws regarding Noongar customary activities in public drinking water source areas will also give Noongars the capacity to undertake particular traditional activities in those areas.
- Section 6 of the *Fish Resources Management Act 1994 (WA)* provides that an Aboriginal person is not required to hold a recreational fishing licence to the extent the person takes fish in accordance with Aboriginal tradition and not for a commercial purpose.
- Aboriginal persons may do certain things for Aboriginal customary purposes on land under s. 103A of the *Conservation and Land Management Act 1984 (WA)* in relation to land to which that Act applies.