



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

The South West Native Title Settlement

Newsletter November 2016

On 8 June 2015 the Government of Western Australia executed the six South West Native Title Settlement Indigenous Land Use Agreements (ILUAs) with the Ballardong People, Gnaala Karla Booja, South West Boojarah #2, Wagyl Kaip & Southern Noongar, Whadjuk People and Yued native title agreement groups. The ILUAs are currently being considered for registration to enable the commencement of the Settlement.

The South West Native Title Settlement is the largest and most comprehensive agreement to settle Aboriginal interests over land in Australia since colonisation. Involving around 30,000 Noongar people and covering approximately 200,000 square kilometres, the Settlement provides an opportunity for the WA Government to work in partnership with the Noongar community to improve their economic, social and cultural development. It represents a significant investment in both the Noongar community and the shared future of the Western Australian community as a whole.



Update on ILUA Registration

At this stage the ILUAs are still progressing through the Registration process. Following a notification period from 16 September to 16 December 2015, the National Native Title Tribunal (NNTT) received 107 objections across the 6 ILUA areas from a total 25 objectors.

The NNTT Registrar is now considering whether the ILUAs can be registered. It is possible that applications for judicial review of the Registrar's decisions may be filed after this decision is made.

Separately, four High Court applications were commenced in December 2015 against the Native Title Registrar and the parties to the ILUAs, including the State and SWALSC, seeking to prevent the NNTT Registrar from registering the Whadjuk, Ballardong, South West Boojarah #2 and Wagyl Kaip & Southern Noongar ILUAs. These applications were made on the basis that these four ILUAs are not "Indigenous Land Use Agreements" as defined in the *Native Title Act 1993*, and are therefore not capable of being registered. These applications were remitted to the Full Federal Court in February 2016 and were heard on 28 and 29 July 2016. All parties now await that decision.

An update will be sent to stakeholders once the decisions have been made by the Federal Court and NNTT Register.

The Settlement will commence subject to the 6 ILUAs being registered after the conclusion of any legal proceedings challenging registration. These current legal proceedings and potential appeals or judicial review will result in delays to commencement of the Settlement. At this stage the earliest possible date for commencement is mid-2017.

Establishment of the Noongar Corporations

Six Noongar Regional Corporations and one Central Services Corporation, that will provide support to the 6 Noongar Regional Corporations, will be established once the Settlement commences.

The ILUA Groups (facilitated by South West Aboriginal Land and Sea Council (SWALSC)) are currently working towards the establishment of the Noongar Corporations.

A Regional Corporation Transition Program, outlining how the Regional Corporations will be established by the ILUA groups is now available and outlines how the Corporations will be established in line with ILUA registration and commencement of the Settlement.

A Central Services Corporation Transition Program has also been prepared for the Central Services Corporation. You can download a copy of the Transition Programs for both the Regional Corporations and the Central Services Corporation by following the links from the DPC [website](#).



Once established, the Noongar Regional Corporations will be the key conduit for engagement with a range of relevant stakeholders including government, non-government and the private-sector. Collaboration with the Noongar Regional Corporations will assist to improve social and economic outcomes for the wider Noongar community, and provide for targeted service delivery and capacity building as identified by the Regional Corporations.

Nominations for the Pre-incorporation Directors for the future Noongar Regional Corporations

Nominations are now open for Noongar people to nominate for the position of Pre-incorporation Director for each of the future Noongar Regional Corporations. The Pre-incorporation Directors will have an important role in commencing the work to establish the Regional Corporations.

Nominations are open from **Monday 26 September 2016 - Friday, 25 November 2016, 12 noon**. For further information about the nominations process and role of the Pre-incorporation Directors, please go to the Forum for Directors of Indigenous Organisations [website](#).

Interim Nominations Committee

An Interim Nominations Committee has been established to pre-qualify Noongar candidates as eligible for appointment as Directors on the boards of the Noongar Regional Corporations before the Trust is established. The Committee is comprised of six persons as follows:

- one person nominated by SWALSC;
- one person nominated by the State government;
- two representatives of the Noongar Community that have experience with directorships and boards; and
- two Independent persons that have experience with directorships and boards, of whom one has been appointed chair.

An independent organisation, the Forum for Directors of Indigenous Organisations (FDIO), will provide secretariat support to the Interim Nominations Committee for the selection process for Initial, Member and Expert Directors of the Corporations.

Town Information Sessions

Town Information Sessions being held in each of the six ILUA areas are now underway, with the last to be held at the end of November. Noongar Community members are able to attend the Town Information Sessions to further prepare for the Pre-incorporation Meetings, and the establishment of the Regional Corporations. These Sessions will lay the foundation for the upcoming Pre-incorporation Meetings.

Further information regarding the Town Information Sessions is available from the SWALSC [website](#).



Interim Period Advisory Group

Perpetual was notified on 27 June 2016 that it had been selected by the Panel as the successful Professional Trustee for the Noongar Boodja Trust. The notification completed the Trustee Selection Process, which had been undertaken in partnership between the State and SWALSC.

Perpetual can now be described as 'Trustee in Waiting' as it will only be formally appointed and commence its role as the Trustee at the 'Trust Effective Date'. This will only occur after the Settlement commences, following the registration of the six ILUAs with the NNTT.

During the Trustee Selection Process, the Noongar Boodja Trustee Selection Taskforce identified the need for a group representing the State and SWALSC to advise the Trustee during the Interim Period. Consequently, in January 2016 the State and SWALSC agreed to establish the Interim Period Advisory Group (IPAG).

The IPAG is a stakeholder group that will advise Perpetual prior to the commencement of the Settlement, and will be the primary mechanism for communication between the Parties. This will ensure that communications remain open and transparent. The group consists of three SWALSC representatives and three State representatives.

ILUA Implementation- Requirements for Legal Advice

The Department of Premier has recently been made aware that there has been some stakeholder confusion regarding whether it is necessary to obtain external legal advice in relation to the implementation of the ILUAs.

It should be acknowledged that the intent of the Settlement is to make governmental processes more streamlined, rather than creating another level of compliance or obligations that requires seeking external legal advice.

Instead, any agencies, including local government authorities, are encouraged to direct any queries to the relevant government departments for clarification. For instance, queries regarding Heritage can be directed to the Department of Aboriginal Affairs (DAA), the Department of Lands (DoL) can assist with issues relating to land transfer and the Department of the Premier and Cabinet can answer queries regarding the South West Settlement implementation.

Noongar Standard Heritage Agreement

Sign up to the NSHA

The 'Noongar Standard Heritage Agreement' (NSHA) was one element of the ILUAs that commenced upon ILUA execution on 8 June 2015. From that date WA Government agencies and instrumentalities have been required to enter into a NSHA with SWALSC on



behalf of the relevant ILUA group when conducting an Aboriginal Heritage Survey in an ILUA area.

Four agencies – Main Roads WA, the Water Corporation, the Department of Parks and Wildlife and the Public Transport Authority, have now signed up to a total of 15 NSHAs across the six ILUA areas. A further five agencies are considering sign up in the near future.

The Department of Mines and Petroleum has also, since 8 June 2015, been granting new tenements in the ILUA areas with a heritage condition. Proponents with a heritage condition have the initial option to nominate to enter into a NSHA or seek to negotiate another form of Heritage Agreement with SWALSC. A heritage agreement must be reached before rights can be exercised in relation to the tenement. As at September 2016, with a heritage condition applied to 119 live tenements, there were 29 resulting NSHAs and 21 Alternative Heritage Agreements. The NSHA is SWALSC's preferred option. Industry Proponents can visit the [Department of Mines and Petroleum website](#) for more information.

Other land users are encouraged to consider using the NSHA when an activity may require a heritage survey. Where a NSHA is not used, following key NSHA elements, including use of the [Aboriginal Heritage Due Diligence Guidelines](#), is valuable in ensuring *Aboriginal Heritage Act 1972* compliance.

While SWALSC is currently signing up to NSHAs on behalf of the six Noongar ILUA groups, the Noongar Regional Corporations will, once established, take on this role. At this time all existing NSHAs will transfer to the relevant Noongar Regional Corporation/s – there is no requirement for re-signing.

Operation of the NSHA

NSHA signatories now have a clear framework for when and how Aboriginal heritage surveys will be conducted across the Settlement area, assisting them in compliance with the *Aboriginal Heritage Act 1972*.

The [Aboriginal Heritage Due Diligence Guidelines](#) are assisting agencies in determining when their activities are at risk of impacting Noongar heritage, requiring the provision of a NSHA 'Activity Notice' to SWALSC. Upon provision of an Activity Notice, SWALSC then carries out a process of research and consultation to determine whether a survey is required, and identifies the relevant Aboriginal consultants to assist the survey.

Following heritage surveys conducted under the NSHA, Survey Reports and Aboriginal Heritage Information Submission Forms are required to be submitted to the DAA. Provision of this information is building the database of heritage information in the South West, maximising the protection of Aboriginal heritage and assisting new land users in determining whether their activities are likely to impact sites.

There are six NSHA templates, one for each ILUA area, which can be found on the [DPC website](#) together with the [Aboriginal Heritage Due Diligence Guidelines](#), and ILUA maps and



technical descriptions for inclusion in NSHAs as required. A number of templates have also been developed in relation to key NSHA steps, and may be amended from time to time, so be sure to visit the DPC website for the latest information before proceeding.

To learn more about the NSHA, contact the DAA [South West Settlement \(Heritage\) Director, Jeremy Elliott](#), or visit the [DPC website](#). Peter Nettleton, SWALSC Senior Legal Officer, the primary NSHA contact at SWALSC, can also be contacted at Peter.Nettleton@noongar.org.au.

Heritage vs Native Title Act obligations - reminder

Land users are reminded that the requirement for WA Government agencies and instrumentalities to use the NSHA, and the heritage condition on new tenements, apply across all land in the ILUA areas, including private land. These obligations relate to the *Aboriginal Heritage Act 1972*. They are to be distinguished from 'future act' obligations that arise under the *Native Title Act 1993 (NTA)*, which only apply where native title may exist.

Once native title rights and interests have been resolved through the successful registration of the six Settlement ILUAs and the surrender of native title, the *NTA* will no longer apply in the ILUA areas. In the meantime, *NTA* future act requirements still need to be considered.

Noongar Land Base Strategy

The DoL is continuing work towards the creation of a Noongar Land Estate through the transfer of a maximum of 320,000 hectares of Crown land into the Noongar Boodja Trust. The process for creation of the Noongar Land Estate is prescribed by the ILUAs in the Noongar Land Base Strategy.

Once land is selected there is a further assessment process. This involves identifying any constraints or issues for each land parcel as well as conducting referrals and obtaining statutory clearances as required by the ILUA Land Base Strategy in compliance with the Land Administration Act (LAA) 1997. All transfers, coordinated by the DoL, are subject to statutory clearances and consultation with any affected WA Government or Local Government interests.

The land will be drawn primarily from existing unallocated Crown land and unmanaged reserve, as well as Aboriginal Lands Trust properties. None of the land will be from private land holdings.

As the identification, selection and assessment of parcels of land have commenced across the South West, the DoL has conducted a number of briefings to Local Governments explaining the land transfer process, and in particular how they will be consulted about their interests.



Water By-Laws Amendment

The amendments to the *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981* and the *Country Areas Water Supply By-laws 1957* came into effect on 8 June 2016 and provide Noongar people with lawful access to areas within a Public Drinking Water Source Area (PDWSA) for an Aboriginal customary purpose. An Aboriginal customary purpose is defined as:

- a) preparing or consuming food customarily eaten by Aboriginal persons; or
- b) preparing or using medicine customarily used by Aboriginal persons; or
- c) engaging in artistic, ceremonial or other cultural activities customarily engaged in by Aboriginal persons; or
- d) engaging in activities incidental to a purpose stated in paragraph (a), (b) or (c).

The Department of Water and the Water Corporation have been working on the implementation of the water by-laws amendments and how that will be managed from both a policy perspective and from the more practical on the ground perspective.

Access to bushland and water sources on Noongar land is of fundamental importance to Noongar people because of their spiritual relationship to the land and the desire to carry out traditional practices and pass on knowledge to future generations. The By-Laws amendments provide access to the land for only these defined purposes and usual PDWSA restrictions still apply, for example, no water-based activities such as fishing and marroning are permitted. See the Department of Water's operational policy '[Recreation within public drinking water source areas on Crown Land](#)' for general guidance.

Each PDWSA, within the Settlement Area, is unique, ensuring safe and unrestricted access for the Noongar people will be an ongoing duty. The Water Corporation has already briefed their Rangers about the changes and has begun preliminary work engaging with the Noongar people to develop protocols for accessing specific PDWSAs.

To assist in community awareness, the Water Corporation will release a pamphlet detailing the types of activities, the various PDWSAs, where further restriction may apply in relation to access and customary purpose. Once the Settlement commences and the Noongar Regional Corporations are in full operation they will have an opportunity to work closely with the Water Corporation in relation to access to PDWSAs. In the interim Noongar people can contact SWALSC and the Water Corporation about changes to the Water by-laws and what that means for the Noongar Community.

WA Government officers and agencies should contact the Department of Water for further information on by-law amendment [Department of Water website](#).



Communication

South West Settlement Briefings

DPC, DAA and DoL representatives continue to offer briefings on the Settlement to a range of stakeholders, including WA Government agencies and Local Governments and can arrange further briefings upon request. DAA's Settlement Director [Jeremy Elliott](#) can be contacted directly in relation to NSHA briefing requirements.

Online information about the South West Settlement

Fact Sheets, available on the DPC website, assist in stakeholder and broader community understanding of the South West Native Title Settlement. The Fact Sheets outline the specific benefits being provided through the Settlement, including answers to frequently asked questions raised by a range of stakeholder groups during consultations. Fact Sheets can be copied and distributed by any stakeholders to interested community members when they seek information about the Settlement.

All relevant documentation about the Settlement is available on the DPC website: www.dpc.wa.gov.au.

Information includes:

- Copies of each of the 6 executed ILUAs;
- Maps of the relevant ILUA area boundaries;
- Technical descriptions of the 6 ILUA boundaries;
- Template Noongar Standard Heritage Agreements for each ILUA area and key NSHA steps;
- Aboriginal Heritage Due Diligence Guidelines;
- An Information Pack on the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*;
- Information on the *Land Administration (South West Native title Settlement) Act 2016*;
- Information on the *Metropolitan Water Supply, Sewerage, and Drainage Amendment By-Laws 2016* and the *Country Areas Water Supply Amendment By-Laws 2016*;
- Supporting information, such as the Fact Sheets, that may assist in understanding of the Settlement.
- Links to the SWALSC website and relevant documents such as the Transition Programs.

DPC's South West Settlement Implementation Unit can be contacted directly:

Email: [South West Settlement Implementation Unit](#) Phone: 08 6552 6191