Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

OPERATION OF THE NATIVE TITLE ACT

Inquiry Into The Effectiveness Of The National Native Title Tribunal

Submission No:23

Mr Kevin Foley MP
Acting Premier
State of South Australia
GPO Box 2343
ADELAIDE SA 5001
☎08 8463 3166 08 8463 3166
E-mail:

Hon. Mike Rann MP
The PREMIER *of* SOUTH AUSTRALIA

State Administration Centre
200 Victoria Square, Adelaide

GPO Box 2343
ADELAIDE SA 5001

Telephone
(08) 8463 3166

ISD
61-8-8463 3166

Facsimile
(08) 8463 3168

premier@saugov.sa.gov.au

www.ministers.sa.gov.au/
premier

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Parliamentary Joint Committee
on Native Title and the Aboriginal and
Torres Strait Island Land Fund
Parliament House
CANBERRA ACT 2600

Attention: Ms Maureen Weeks, Secretary

Dear Ms Weeks

Thank you for the invitation to make a submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund's inquiry into the effectiveness of the National Native Title Tribunal.

I attach a submission for the Committee's consideration.

Yours sincerely

KEVIN FOLEY
Acting Premier

// /11/2002

SUBMISSION BY THE STATE OF SOUTH AUSTRALIA TO THE PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

November 2002

The Effectiveness of the National Native Title Tribunal ("NNTT").

This submission is in three parts:

1. The South Australian State-wide Indigenous Land Use Agreement ("ILUA") strategy;

2. Issues arising from the NNTT resuming formal mediation of SA native title claims under the Commonwealth *Native Title Act 1993* ("NTA"); and

3. How the NNTT's activities and the State-wide ILUA strategy can complement each other.

1. The South Australian State-wide ILUA strategy

History

In 1999 the State recognised the uncertainties which all parties to native title claims suffer while claims remain unresolved, and the costs (both economic and otherwise) to all parties in litigating such claims. Since late 1999, in an attempt to resolve native title claims and related issues by negotiated agreement (including through ILUAs where appropriate), the State has been holding discussions and negotiations with the Aboriginal Legal Rights Movement ("ALRM"), the South Australian Farmers Federation ("SAFF"), the South Australian Chamber of Mines and Energy ("SACOME") and other interested groups and individuals as appropriate.

The background and early stages of the State-wide ILUA strategy are described in further detail in the submission by the State of South Australia to this Committee in April 2000 (annexure 1).

Current key issues

The current focus of the State-wide ILUA strategy is on the interaction between native title claims and:

- pastoralism
- mining (particularly minerals exploration)
- Aboriginal heritage
- national parks and other Crown lands in the conservation estate
- future act processes, especially in relation to State and local government bodies and agencies
- fishing and sea rights

Whilst the State-wide ILUA strategy has been running for over two and a half years, the initial emphasis was on creating awareness in each of the peak bodies and their constituents as to the legal and other implications of native title claims, in building trust between the stakeholders so as to increase the likelihood of any negotiated outcomes being long lasting, and in obtaining their support for the State-wide ILUA strategy as the preferred means of approaching the resolution of native title issues.

The State notes that in the June 2002 issue of the NNTT's publication *Talking Native Title*, Adam McLean, the barrister representing the Arakwal people in an ILUA which took 7 years to complete, said:

> "We had to create relationships that had not even been contemplated before. The advantage of talking together for a long time is that you develop relationships and it's those relationships that really matter. The process might have taken longer than it should have but it included all the players and that's why the agreement will be enduring."

The culmination of this process of awareness raising and relationship building was the formation of the Congress of Native Title Management Committees in late 2000, comprising almost all the Management Committees for native title claims in the State. This Congress has become the crucial means for involving native title claim groups in the State-wide ILUA strategy, and in developing policies and pilot programs for pursuing the strategy.

Current ILUA activities

There are three ILUA pilot negotiation processes underway throughout the State involving the following indigenous groups:

- Yankunytjatjara/Antakirinja
- Antakirinja
- Narungga

In addition, the State is dealing with aspects of the Wangkangurru/Yarluyandi native title claim outside formal mediation under the NTA.

The pilot groups have been carefully selected, in conjunction with the ALRM and Congress of Native Title Management Committees, due to the relevance of the key issues raised by their claims and the good relationships between other parties and the claimants.

Each of these activities is discussed separately.

Yankunytjatjara/Antakirinja

In this claim (SG 6022 of 1998), the first formal negotiation meeting between the parties took place in July 2002 and was very successful. The negotiations are ongoing. Their aim is to achieve an ILUA between the State, native title claim group and pastoral lessees resolving native title issues over the subject property. It is intended that principles underlying the ILUA will then be extracted and developed into a template ILUA that will be offered to other

native title groups and pastoral lessees through the ALRM and SAFF respectively.

At the July 2002 meeting, a large number of issues relating to pastoral activity were discussed and resolved in principle. The tone and progress of the meetings was very positive. Upon the parties' request, Mr Bardy McFarlane (a member of the NNTT) assisted as facilitator, as opposed to conducting formal NNTT mediation.

Several subsequent meetings have resulted in considerable progress. The aim is to finalise drafting of the ILUA by the end of the 2002 calendar year. The State considers that progress has been so marked largely because of the relationships already established between the parties preceding the commencement of negotiations. The State doubts that such progress could have been made under formal NNTT mediation.

Antakirinja

There are three main issues identified for negotiation so far in the Antakirinja claim group (SG 6007 of 98). These are:

- a proposed mineral exploration template to be used as a voluntary alternative to the State's approved "right to negotiate" scheme under Part 9B of the *Mining Act 1982* (SA)
- the future management of Crown reserved areas (especially the Breakaways Reserve and Tallaringa Conservation Park)
- the future act regime relating to the Coober Pedy township.

These pilot discussions are building on the good relationships that have been established between the Antakirinja claimants and other interest groups, and because the three key issues raised by the native title claim are among the key issues that have been identified as having relevance for the State as a whole.

The State's ILUA process is flexible and, although the starting point is always the peak bodies, other parties are invited to become involved as is necessary. In this case, for example, the local council (which has care, control and management of the Crown land making up the Breakaways Reserve) has been invited to take part, although its involvement has not yet been confirmed.

Narungga

Discussions between parties to the Narungga group's informal claim to the Yorke Peninsula area have commenced. The Narungga group asserts native title interests over Yorke Peninsula and surrounding waters but has not lodged a native title claim. Nevertheless, the State, ALRM and four relevant local government bodies have agreed to conduct negotiations with the Narungga group across a range of issues. As with the negotiations with native title claim groups, it is aimed to extract the principles from one or more ILUAs reached with the Narungga group and apply them in negotiations on those subjects in other parts of the State. In the case of the Narungga group, the main issues being negotiated are:

- alternative State and local government future act processes;
- management arrangements for Crown reserved lands and waters; and
- sea and fishing issues.

A protocol for conducting the negotiations is largely settled and subjects for negotiation (and their priority) have been agreed. The first matter to be addressed is likely to be State and local government alternative future act issues. At this stage, the parties are awaiting the outcome of elections for office holders of the Narungga Nation Aboriginal Corporation at its Annual General Meeting in late October 2002 before proceeding.

At a meeting on 12 July 2002, the State, ALRM, SAFF and SACOME agreed that, as the Narungga pilot negotiations were expected to include issues relating to fishing and sea rights, steps should be taken to include in the negotiations the peak bodies covering these subjects. Representatives from

the State and ALRM met the legal representative of the two peak industry bodies representing the fishing and seafood industries (the SA Fishing Industry Council and the Seafood Council of SA) to commence discussions towards this end. At its meeting on 4 October 2002, the "Main Table" for the ILUA negotiations formally resolved to include these two peak bodies.

An NNTT officer has questioned why the State is focussing on an area where there is no native title claim rather that areas where there are such claims. In fact, this is the only one of the three pilot discussions where there is no formal claim.

The reasons for choosing the Narungga group to participate in one of the pilot discussions are simple and practical. Outside the State-wide ILUA strategy, the State (in liaison with the ALRM) negotiated the State's first ILUA with the Narungga group in 2000 to facilitate a marina development on Yorke Peninsula. Because of the extinguishing effect of the development, it would not have been able to proceed without an ILUA or compulsory acquisition of any native title interests in the relevant area.

The negotiations involved a great deal of initial work by the ALRM, especially, and the State to identify relevant Aboriginal interests and to help them to prepare and organise for negotiations. This involved considerable educational effort and significant State resources. The State, ALRM and Narungga group agreed that it would be a waste not to build on all this effort, and so decided to pursue wider negotiations for the whole of the area in which the Narungga claimed a native title interest. Narungga agreed not to pursue a native title claim – with its considerable resource implications – while these wider negotiations progressed satisfactorily.

The NTA clearly envisages that a wide range of native title and ancillary issues – although not a native title determination itself – can be pursued in the absence of a native title claim, and in this case all the parties decided to pursue that course. The State sees this as a positive step, and sees no

reason why lessons learnt and the principles of agreements reached in this way cannot be applied equally effectively when those issues arise in native title claim considerations.

The State recognises the scheme of the NTA for dealing with native title claims and native title issues, including the statutory role of the NNTT. But that is not the whole of the scheme under the Act; it also envisages that many issues can be resolved by agreements outside of claims. The State considers that to concentrate solely on native title claims unnecessarily limits the resolution of relevant issues, particularly when a means for resolving at least a large number of those issues outside the native title claim process is also part of the NTA's scheme. It is implicit in this view that mediation of claims through the NNTT is not necessarily the most effective way of resolving native title issues.

Wangkangurru/Yarluyandi

A further example which shows the breadth of the State's native title negotiation strategy relates to the Wangkangurru/Yarluyandi claim (No SG6016 of 1998), which was referred to the NNTT for mediation in early 2002. The claim covers almost the whole of the Witjira National Park in the State's far North. For several years, most of the area of the park has been leased to the Irrwanyere Aboriginal Corporation ("IAC"), the members of which largely coincide with the members of the Wangkangurru/Yarluyandi and Eringa native title claim groups, and an associated joint management arrangement between the State and IAC has been in place over the Park for several years. To a large extent, the area of overlap of these two native title claims is the area of the Witjira National Park.

For over two years, the agreement between IAC and the State for joint management of the park has not been operating effectively because of disputes between members of the two native title claim groups. With the financial assistance and encouragement of the ILUA Negotiation Team, and the assistance of the ALRM and NNTT members and officers, the contending

groups reached agreement in July 2002 on changes to the management structure of IAC to allow the National Park joint management arrangements to be revived.

While these steps do not directly address native title issues, the State considers that an eventual resolution of native title issues – and especially the issue of the overlap between the Eringa and Wangkangurru/Yarluyandi native title claims – will be considerably more likely once IAC, with its Management Committee drawn from members of the two claim groups, once more works with the State on joint management of the park. On the other hand, it is the State's view that active mediation of the Wangkangurru/Yarluyandi native title claim as it relates to the Park would prematurely introduce native title issues and result in confusion and tension between the claim groups that could undo the progress made.

In the State's view, the priority now is to get the management agreement between the State and IAC working again, without any addressing of native title issues at this stage, so that the parties can get used to what joint management actually does and – perhaps at least as importantly – does not mean. The State considers that only then, once this understanding is reached and the parties are working cooperatively again, should native title issues be raised.

The State's approach reflects its relationship-centred desire for lasting results beyond just native title matters, rather than limiting itself to approaches based on formal mediation under the NTA. In the State's view, the NNTT's concentration on native title issues – to which it is limited under its statutory role – is sometimes a less effective way of resolving issues.

The general strategy in negotiations with all these four groups is to successfully conclude agreements in pilot areas and extract principles underlying those agreements for development of a template ILUA to be

offered to all native title groups and interested parties through the ALRM and relevant peak industry bodies.

2. Issues arising from the NNTT resuming formal mediation of SA native title claims

Between the commencement of the State-wide ILUA strategy in early 2000 and early 2002, the Federal Court did not refer any claims to the NNTT for mediation, and mediation of those claims already in mediation was virtually suspended. During this period regular reports were provided to the Federal Court as to the progress of claims that had previously been referred to the NNTT for mediation, essentially pointing out that mediation had not proceeded while the ILUA negotiations were under way. Briefings on progress in the ILUA negotiations have also been provided to the Court at User Group Meetings.

There are currently applications by ALRM in the Nukunu and Yankunytjatjara/Antakirinja native title claims under section 86B(2) of the NTA, requesting the Federal Court to make an order either that only those aspects of the claims that complement the State-wide ILUA negotiations be referred to the NNTT for mediation; or that the claims not be referred to mediation at all for the time being.

The State supports ALRM's applications, which will be heard by the Court on 15 November 2002, and in doing so has provided considerable information about the purpose and course of the State-wide ILUA negotiations. As with the ALRM, the State's resources would also be seriously stretched if it had to pursue both the ILUA negotiation strategy and NNTT mediation simultaneously across the same subject matter. The strategy of reaching template agreements through pilot negotiations affords all the parties a cost effective opportunity to reach lasting resolutions of native title issues in an ordered way. South Australia is fortunate in having a relatively small number of native title claims, a single Native Title Representative Body and some

strong peak bodies for other native title stakeholders. In the State's view, these factors bode well for the eventual success of the State-wide ILUA strategy in preference to other approaches.

South Australian members and officers of the NNTT have already been involved directly in parts of the State-wide ILUA negotiations and have a standing invitation to attend all Main Table meetings of the negotiating parties. The use of NNTT members as facilitators to assist some parties to reach agreement is proving effective. It allows the negotiating parties to retain control over the direction of the negotiations but introduces an objective and disinterested overview of the process. The State will continue to co-operate with the NNTT where it would be conducive to progress of the ILUA negotiation strategy to do so, or where the involvement of the NNTT relates to matters that are not inconsistent with that strategy.

Meetings have recently taken place between the State, ALRM and the NNTT regarding co-operative approaches to mediation and negotiation.

The State has the predominant responsibility for effective land management in South Australia in the public interest. In exercising that responsibility, it has made a considered judgment about the best way to introduce the greatest certainty for all parties in the shortest possible period and with the optimum use of public funds.

Given the considerable time and resources already committed by the negotiating parties to ensuring that native title groups and other parties are prepared to take part in the strategy, the considerable progress made to date, and the forward schedule of planned negotiations, the State is hopeful that the Federal Court will allow a reasonable period for the State-wide ILUA strategy to be pursued in the absence of parallel NNTT mediation.

The State does not wish to prevent any party from pursuing outcomes outside the State-wide ILUA strategy if it wishes and will continue to consider

approaches from other parties on their individual merits. However, the State will decide in each case the extent to which State resources will be applied to other matters in light of its overall priorities, including its preference to deal with issues through the State-wide ILUA strategy.

The State-wide ILUA strategy includes a definite component of flexibility. It is recognised that a template on a subject is unlikely to meet all the needs of all the parties in all cases. However, the aim is to at least address the major components in a way that is attractive to most parties in most cases, with the benefit of reducing time spent to resolve remaining issues.

The State remains open to considering ways of addressing the concerns of parties who are not directly involved in the State-wide strategy or pilot negotiations held under the auspices of the State-wide strategy.

Most parties, including the State, want native title matters dealt with as expeditiously as possible. However, over the past decade, dealing with those matters through claims in a process that draws the parties inexorably towards contested trial, including a phase of NNTT mediation, has been inordinately expensive, time-consuming and, ultimately in South Australia at least, ineffective on the whole. The State is pursuing the State-wide ILUA strategy instead because it believes that a different approach must be tried that will, in the long run, be more effective and a better use of everyone's resources. It has not reached this conclusion lightly or capriciously.

The State and other negotiating parties have agreed to develop and state their positions in the light of each other's positions, which requires ongoing processes of trust and understanding between them if the final solutions are to be effective in the long term. The State aims to develop those relationships, listen to each party's position, and respond accordingly, either by applying an existing policy or a by developing a new measure to fit unforseen circumstances. In the State's view, this approach is able to be implemented more effectively outside NNTT mediation.

In the State's view, if the NNTT once more becomes active in claims mediation there is the risk that scarce resources – both in terms of finances and available expertise – will be split between the State-wide ILUA strategy and NNTT mediation, leading to a weakening of the effectiveness of both courses. The State's preference is to pursue the State-wide ILUA strategy because it considers that it builds on relationships already established between the negotiating parties, suits the priorities and timetables that they have set, and is likely to result in a more effective, longer-lasting resolution of native title claims that could be achieved through NNTT mediation or contested litigation before the Federal Court.

3. How the NNTT's activities and the State-wide ILUA strategy can complement each other

In the June 2002 issue of *Talking Native Title* Mr Graeme Neate, the President of the NNTT said:

> "In the second decade of the native title era, we want to provide that assistance in impartial, practical, innovative and fair ways so that mutually beneficial outcomes are achieved and the Australian community recognises and respects the relationship between native title and other interests in land and waters."

The State commends and supports the NNTT in these goals. The following are areas in which the State considers that it and the NNTT might continue to work towards the goals in conjunction with the parties to the State-wide ILUA strategy.

Assisting the State-wide ILUA strategy as requested by the peak bodies

The State-wide ILUA strategy reflects priority setting and scheduling mechanisms which do not fit neatly into the NNTT's approach to mediation. The NNTT's approach is on a claim by claim basis, whereas the State's ILUA strategy is applied subject by subject or region by region. The State would

prefer to pursue this strategy without the confusion and resource splitting that the formal mediation of native title claims will create. The State also wishes to continue to liaise with the NNTT to agree ways that the NNTT can continue to assist the parties to reach agreements as it has done in some instances already (for example, when an NNTT member has facilitated some of negotiation sessions).

Overlapping claims/claim group authorisation issues

A major area where the NNTT can assist the parties is in the resolution of overlaps and authorisation issues within claimant groups. Unless resolved, those are two areas which have the potential to hinder the State-wide ILUA strategy regardless of any agreements reached by the negotiating parties, and the NNTT is experienced and empowered to deal with the issues concerned.

In a strict legal sense, overlapping claims are not necessarily a hindrance to the registration of an ILUA. However, where overlaps do exist they are often accompanied by discord between members of the overlapping claims, with that discord being focussed on the overlap. In such cases, an attempt to register an ILUA over land that is also covered by another claim may well attract objections from members of the native title claim group who are not a party to the ILUA, leading to considerable delays in registration or to thwarting of the ILUA altogether, with all the attendant waste of time and resources that this would entail. In the State's view, it is preferable to resolve any issues about such overlaps before the ILUA is settled, to minimise these undesirable results.

The State's pre-1999 experience of formal mediation under the NTA was that, at least in some cases, the NNTT approached mediation in a directive style that was more suited to commercial cases than native title cases. It is the State's belief that such an approach often does not suit the preferences of all the parties and may not lead to lasting solutions. This is not to say that there is not an important role for the NNTT to play in the State-wide ILUA

negotiation process. In particular, the resolving of overlaps and authorisation issues are important and conducive to the role and style of the NNTT. The State is willing to participate in any of these discussions to the extent that it considers appropriate.

Impartiality

The State cannot comment on whether other parties in South Australia always find the NNTT's role to be disinterested and objective, but notes that concerns are raised about the impartiality of the NNTT in the other submissions already made to the PJC.

NNTT members and officers are already involved in the State-wide ILUA negotiations where the parties agree. The involvement of the NNTT may well increase once all the parties gain more confidence in the way the NNTT takes part in this role outside formal mediation. The crucial difference is that the NNTT's role in the State-wide ILUA negotiations is with the agreement of all the negotiating parties and in accordance with the agenda and timetable they have set, rather than those set by the NNTT.

Registration role

The State notes the NNTT's statutory role when it comes to registration of claims and of ILUAs. The State refers to its submission to this Committee in October 2001 (annexure 2). In that submission the State expressed concerns about the length of time that the NNTT took in relation to aspects of registration of an ILUA reached over a part of the Yorke Peninsula. The State recognises the statutory periods in the NTA but was concerned at the length of time the NNTT spent in notification of the claim in the first place, and in dealing with the sole objection that was raised.

There have been no further dealings with the NNTT on registration of ILUAs so the State is not able to comment on whether the approach of the NNTT has become more timely.

In the case already mentioned and since then, NNTT staff have been helpful and effective in advising the State and other negotiating parties on technical issues relating to the drafting of ILUAs to ensure that they are capable of registration.

Funding issues

The State-wide ILUA strategy was put in place by the previous State Government, but it has been fully endorsed by the current Government and substantial resources have been dedicated to it from the State. In the current 2002/2003 financial year, the State has allocated $3.6 million towards the strategy. This includes a provision of up to $1.75 million to reimburse the actual and reasonable costs of the ALRM in the process, in the absence of funding for the ALRM to participate in the ILUA process from the Aboriginal and Torres Strait Islander Commission ("ATSIC"). This is in addition to the sum of $2.9 million which has already been provided to ALRM by the State in previous financial years since the negotiations began.

There is a real question of whether the State will be able to maintain this level of support for ALRM in coming financial years.

While ALRM receives funding from ATSIC for its non-ILUA-negotiation activities as a native title representative body, the State does not know the level of such funding or whether it is adequate for ALRM's purposes. However, despite many approaches by both ALRM and the State Government to ATSIC elected officers and staff, relevant Commonwealth Ministers and this Committee over almost the past three years, no ATSIC funds have been made available to ALRM for the State-wide ILUA negotiation strategy except for $400,000 in the 2001/2002 financial year. While there may be a number of understandable reasons for the lack of ATSIC financial support for ALRM's role in the State-wide ILUA strategy - including an overall limit of the Commonwealth's funding of ATSIC and competing demands for ATSIC funds - the fact remains that it has resulted in a considerable burden on the State's

resources when under the NTA it is envisaged that it should not be a State responsibility.

Without the State's contribution the ALRM would not have been able to pursue the State-wide ILUA negotiation strategy in even a rudimentary form, and there would have been a much greater call on resources by ALRM to pursue litigation outcomes.

This shortfall in funding for ALRM cannot be made up by a greater use of NNTT mediation. By far the greatest expense in dealing with native title claim groups in reaching agreements is in allowing them to follow culturally appropriate decision making processes, including considerable meeting expenses. The NNTT does not contribute significantly to these expenses in mediations.

The State is not aware of the exact funding that the NNTT receives for its activities in South Australia. However, recent figures released by the Commonwealth Attorney-General for the 2001-2002 budget expenditure show that 20% of native title funding went to representative bodies and 27% to the NNTT. The State considers that the Commonwealth should consider reviewing this funding in light of the South Australian ILUA strategy which places minimal demands on the NNTT's resources but increases the funding requirements of ALRM, South Australia's only representative body.

Conclusion

The State's approach to native title is a long term, strategic, ordered and creative approach. It is an approach focussed firmly on working closely and cooperatively with South Australia's sole native title representative body (ALRM), indigenous communities and other peak bodies.

In the June 2002 issue of *Talking Native Title* Mr Fred Chaney, a member of the NNTT said:

> "Even greater challenges lie ahead after native title determinations are achieved and these are beyond the role assigned to the Tribunal. Native title should enable Indigenous people to leverage a better future. It could be used to enable cultural survival, economic progress, social development, enhanced political status and even constitutional recognition. But none of this will come as a matter of course. ...secure tenure of land alone does not deliver an end to social and community disadvantage."

The State agrees with Mr Chaney that tenure of land alone, including through native title determinations, will not end disadvantage for Indigenous communities. The State hopes that the Federal Court and NNTT will support the State, ALRM and other peak bodies in continuing to actively address native title and broader Indigenous issues in a way that will be lasting, long term and built on strong relationships.

The State-wide ILUA strategy being pursued by the State is an effective way of taking into account matters that are wider than just native title. The State considers that this will prove to be a more effective way of achieving long-lasting, satisfactory solutions than by pursuing resolution of native title claims through NNTT mediation and Federal Court contested litigation, which are necessarily limited to native title considerations.