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

# Guide to the Government Indigenous Land Use Agreement and Standard Heritage Agreements

# 1. Objectives of the Government ILUA

## 1.1 Introduction

As set out in the 7 February 2011 letter from the State Attorney-General to the Federal Court of Australia, the State of Western Australia is seeking to achieve greater certainty in a post native title determination environment for land access and use. The State's intention is to advise all parties of relevant land management interests as soon as possible after a claim is referred to mediation or case management by the Federal Court. Clarity about post-determination land use is in the interests of native title claimants and other land users, and has the potential to accelerate economic and social benefits for Indigenous interests.

## 1.2 Background to the Government ILUA

Further to this objective the State has developed a Government Indigenous Land Use Agreement ("**Government ILUA**") which seeks to facilitate greater certainty about the ways in which the State will do business following a determination of native title.

The Government ILUA includes provisions dealing with:

(a) the grant of exploration and prospecting titles;

(b) accessing determination areas;

(c) the conduct of low impact future acts;

(d) cultural heritage protection;

(e) validation of invalid acts;

(f) public works and housing in Aboriginal communities; and

(g) creating conservation reserves.

The Government ILUA comprises an agreement with several annexures. These annexures include a Government Standard Heritage Agreement ("**GSHA**") (which sets out procedures for Aboriginal heritage protection to be followed by the State and independent government agencies) and a Proponent Standard Heritage Agreement ("**PSHA**") (which, in certain circumstances, can be executed by the holders of explorations tenements or high impact section 91 *Land Administration Act 1997* (WA) ('**LAA**') licences granted under the Government ILUA).

These aspects of the Government ILUA, GSHA and PSHA are discussed further below.

## 1.3 A note on clause numbering

It should be noted that all references to clauses of the Government ILUA in this Guide refer to the Government ILUA dated 17 October 2014 and published on the Department of Premier and Cabinet's website. These clause numbers may not necessarily apply to claim specific Government ILUAs or previous versions of the Government ILUA and care is accordingly required when using this Guide with any other version of the Government ILUA.

# 2. The Government ILUA

## 2.1 Introduction

The Government ILUA provides for consent to the doing of a number of classes of future acts in the area to which the ILUA applies.

In summary, the classes of future act consented to in the Government ILUA are specified in clause 5 of the Government ILUA and include:

(a) the grant of Exploration Tenements;

(b) the doing of Deemed Low Impact Future Acts;

(c) the doing of any Housing and Works;

(d) the creation of Conservation Estate;

(e) the grant of Access Authorities;

(f) the grant of LA Act Licences; and

(g) the doing of PBC Land Acts.

The ILUA also provides for consent to the validation of certain invalid acts already done.

Each of these aspects of the Government ILUA is discussed further below. Not all classes of future act will appear in every Government ILUA drafted for a particular claim. For example, some claims may not have a requirement for the creation of a conservation estate.

The Government ILUA is intended to apply to any area within a determination where native title was determined to exist: see definition of '**Agreement Area**' and '**Determination Area**' in clause 1.2 and Schedule 3.

## 2.2 Execution and Registration of the Government ILUA

The Government ILUA will be executed by the prescribed body corporate ('**PBC**') for the relevant determination, the State and a number of independent government agencies ('**Government Parties**').

It is necessary for the Government ILUA to be signed by both the State and the Government Parties because the State is not able to legally bind these agencies in any agreement. As a result, each Government Party must execute the Government ILUA on its own behalf and will have several rights and liabilities under the Government ILUA (both as among themselves and as compared with the State): see clause 1.4(b) and (c).

As the PBC will be entering into the Government ILUA either as trustee or non-trustee for the native title group, the Government ILUA will bind the PBC and the native title group jointly and severally: see clause 1.4(a).

Some key provisions of the Government ILUA will come into effect on execution (for example, the provisions requiring the parties to register the ILUA). Other provisions of the Government ILUA cannot come into effect until registration (for example, provisions relating to consent to future acts): see clause 2.1.

The Government ILUA is intended to be registered as an ILUA: see clauses 5.7 and 9. If not registered, the Government ILUA will terminate, unless otherwise agreed by the parties: see clause 9.6. See also clauses 2.2, 2.5, 2.6, 14.5 and 18.3(c).

## 2.3 Applying the non-extinguishment principle and disapplying the right to negotiate

The non-extinguishment principle of the *Native Title Act 1993* (Cth) ("**NTA**") applies to the doing of all future acts consented to under the Government ILUA: see clause 5.5.

To avoid doubt the Government ILUA disapplies any right to negotiate procedure under Subdivision P of Part 2, Division 3 of the NTA in relation to any future acts covered by the Government ILUA which might otherwise attract the right to negotiate: see clause 5.6.

Not all of the future acts covered by the Government ILUA would, in any event, attract the right to negotiate. Accordingly, the disapplication of the right to negotiate is for clarification purposes only and is designed to ensure that the Government ILUA establishes an exclusive regime for the treatment of the future acts covered by it without duplication under the NTA.

## 2.4 Consent to the grant of exploration and prospecting titles

### Background

The economic future of Western Australia depends on certainty and timeliness in the grant of exploration titles. Each year, thousands of exploration titles are granted to explorers in Western Australia.

The Government ILUA provides for consent to the expeditious grant of:

(a) the full range of exploration titles under the *Mining Act 1978* (WA);

(b) certain exploration titles under the *Petroleum and Geothermal Energy Resources Act 1967* (WA); and

(c) a limited class of miscellaneous licences and general purposes leases;

(collectively defined in the clause 1.2 of the Government ILUA as '**Exploration Tenements**'): see clause 5.2(a).

Those persons who are granted Exploration Tenements are described as '**Proponents**' in the Government ILUA: see definition in clause 1.2.

## Notification Procedures

The Government ILUA provides for a notification procedure in respect of the grant of Exploration Tenements which replaces the procedures under the NTA that would otherwise apply: see clauses 11.6(a)(i), 11.7(a)(i) and 11.8.

Under the Government ILUA the State must, no later than 10 Business Days after the grant of an Exploration Tenement, give the PBC a copy of the application for the Exploration Tenement, a copy of the instrument granting the Exploration Tenement, a map showing the boundaries of the Exploration Tenement and the contacts details of the Proponent.

## Heritage Agreements

The Government ILUA also requires that every Exploration Tenement granted pursuant to the ILUA have a condition imposed on it requiring the Proponent to enter into an '**Aboriginal Heritage Agreement**' with the PBC: see definition in clause 1.2 and clause 12.3.

The condition requires a Proponent to use reasonable endeavours to execute the preferred Heritage Agreement of the PBC (which may, for example, be a relevant regional standard heritage agreement or an alternative heritage agreement used by the PBC). To this end the PBC must, after receiving notification of the grant of the Exploration Tenement, commence discussions with the Proponent regarding a Heritage Agreement, including by providing a copy of any proposed Heritage Agreement to the Proponent.

However, if 60 business days have passed since the grant of the Exploration Tenement and the PBC and the Proponent have been unable to execute a Heritage Agreement the Proponent may execute a deed accepting the terms and conditions of the PSHA (defined as a '**Proponent Acceptance Deed**' in clause 1.2 of the Government ILUA).

In those circumstances the Government ILUA provides that the PBC agrees to assume the rights and obligations of the PBC under the PSHA (as it relates to the Exploration Tenement) and the PSHA becomes an enforceable agreement between the PBC and the Proponent: see clause 12.5.

The PSHA is discussed further below.

Incentive Payments

Incentive payments are linked to the grant of certain Exploration Tenements: see clause 7.

In summary, the Government ILUA sets out a regime for the payment of land access incentive grants in respect of exploration licences, prospecting licences and special prospecting licences granted under the *Mining Act 1978* (WA).

Different rates apply as between:

(a) exploration and prospecting licences; and

(b) those licences which are located in areas that have been the subject of an exclusive determination of native title and those that have not.

The rates specified are calculated on the basis of the number of graticular blocks (in the case of exploration licences) or hectares (in the case of prospecting licences) forming part of the relevant licence. Where a licence only falls partly within an exclusive or non-exclusive determination area, the rates are pro-rated proportionately.

The annual payment is calculated on 1 January in each year based on those licences in existence and the extent to which they form part of an exclusive determination area or non-exclusive determination area. Annual payments are also adjusted to account for CPI and are paid in arrears no later than 31 March of each year.

As discussed further below at [2.12], the PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts, however, the incentive payments are set off against any future compensation liability.

## 2.5 Consent to the grant of Access Authorities

The State recognises that mineral and petroleum explorers need guaranteed access to their exploration titles.

Accordingly, the Government ILUA provides for the grant of certain titles to the holder of an Exploration Tenement for the sole purpose of obtaining access to that Exploration Tenement. These titles are described as '**Access Authorities**' in the Government ILUA (see definition in clause 1.2) and their grant is consented to in clause 5.2(b).

Those persons who are granted Access Authorities are described as '**Proponents**' in the Government ILUA: see definition in clause 1.2.

The Government ILUA provides for a notification procedure in respect of the grant of Access Authorities which replaces the procedures under the NTA that would

otherwise apply. This notification procedure is the same as that for Exploration Tenements discussed at [2.4] above: see clauses 11.6(a)(ii), 11.7(a)(ii) and 11.9.

As with Exploration Tenements granted under the Government ILUA, the Government ILUA provides that every Access Authority granted pursuant to the agreement must have a condition imposed on it requiring a Proponent to enter into a Heritage Agreement with the PBC: see clause 12.3. This requirement is discussed further above under [2.4].

The PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts as detailed at [2.12] below.

## 2.6 Consent to the grant of LA Act Licences

### Background

The State seeks to clarify processes around the grant of licences under section 91 of the LAA. As a result, consent to the grant of **LA Act Licences** (as defined in clause 1.2) is now included in the Government ILUA. Two types of LA Act Licences are included, being **LA Act High Impact Licences** which are defined as licences for activities which involve **Ground Disturbing Activity** (see clause 1.2) and **LA Act Low Impact Licences** which are defined as licences for activities which involve **Low Ground Disturbance Activity** (see clause 1.2)

### LA Act High Impact Licence – Consultation Procedures

Unless agreed otherwise by the PBC, 90 business days before granting a LA Act High Impact Licence the Minister for Lands must notify the PBC (see clauses 11.2(a)(iii) and 11.5(a)). The PBC may within 60 Business Days after notification advise the Minister for Lands of any questions or comments it may have, and the Minister for Lands must give consideration to these questions or comments (see clause 11.5(b) and (c)).

### LA Act Low Impact Licence – Notification Requirements

Unless otherwise agreed by the PBC, the State must within 10 business days of granting a LA Act Low Impact Licence give the PBC a copy of the licence and the contact details of the Proponent (see clause 11.7(a)(iii) and 11.10).

### Heritage Agreements

The Government ILUA also requires that every LA Act High Impact Licence granted pursuant to the ILUA have a condition imposed on it requiring the Proponent to enter into an '**Aboriginal Heritage Agreement**' with the PBC: see definition in clause 1.2 and clause 12.4.

The condition requires a Proponent to use reasonable endeavours to execute the preferred Heritage Agreement of the PBC (which may, for example, be a relevant regional standard heritage agreement or an alternative heritage agreement used by the PBC). To this end the PBC must, after receiving notification of the grant of the LA Act High Impact Licence, commence discussions with the Proponent regarding a Heritage Agreement, including by providing a copy of any proposed Heritage Agreement to the Proponent.

However, if 60 business days have passed since the grant of the LA Act High Impact Licence and the PBC and the Proponent have been unable to execute a Heritage Agreement the Proponent may execute a deed accepting the terms and conditions of the PSHA (defined as an '**Proponent Acceptance Deed**' in clause 1.2 of the Government ILUA).

In those circumstances the Government ILUA provides that the PBC agrees to assume the rights and obligations of the PBC under the PSHA (as it relates to the LA Act High Impact Licence) and the PSHA becomes an enforceable agreement between the PBC and the Proponent: see clause 12. 5.

The PSHA is discussed further below.

## 2.7 Consent to the doing of Deemed Low Impact Future Acts

Under the NTA a "*low impact future act*" is a class of future act generally having no (or minimal) impact on native title rights and interests.

Section 24LA(1)(b) of the NTA provides a low impact future act cannot consist of:

*(i) the grant of a freehold estate; or*

*(ii) the grant of a lease; or*

*(iii) the conferral of a right of exclusive possession; or*

*(iv) the excavation or clearing of any of the land or waters, but not including:*

*(A) excavation or clearing that is reasonably necessary for the protection of public health or public safety; or*

*(B) tree lopping, clearing or noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities; or*

*(v) mining (other than fossicking by using hand-held implements); or*

*(vi) the construction or placing on the land, or in the waters, of any building, structure, or other thing (other than fencing or a gate), that is a fixture; or*

*(vii) the disposal or storing, on the land or in the waters, of any garbage or any poisonous, toxic or hazardous substance.*

However, under the NTA, the low impact future act provisions of Subdivision L do not apply after a determination of native title is made. The only way to address these activities after a determination (unless there is express provision for them elsewhere in the NTA) is through an ILUA or through a compulsory acquisition.

As the State prefers to minimise circumstances of compulsory acquisition and the extinguishment of native title, it proposes to address these acts through the Government ILUA in a way which will not extinguish native title. The Government ILUA therefore contains provisions to allow the same class of low impact future acts to be done after a determination of native title, with a similar absence of procedural requirements as would have applied in a pre-determination environment: see clause 5.2(d).

These are acts described in the Government ILUA as '**Deemed Low Impact Future Acts**': see definition in clause 1.2.

The PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts, as detailed at [2.12] below.

## 2.8 Consent to the doing of Housing and Works

The provision of housing and other public works in Aboriginal communities is essential for improving the well-being of Aboriginal Western Australians. However, this is often delayed by native title procedures.

The Government ILUA provisions ensure that public housing (and other public works that are for the benefit of people living in Aboriginal communities) can be provided quickly and practicably without extinguishing native title. These acts are described in the Government ILUA as '**Housing and Works**' (see definition in clause 1.2) and are consented to in clause 5.2(e).

The Government ILUA provisions with respect to Housing and Works apply to all Aboriginal communities in the determination area which are listed in Item 4 of Schedule 2. The provisions apply to those Housing and Works which are known at the time of signing the ILUA (and listed in Schedule 4) and to any Housing and Works that may be carried out in the future.

The Government ILUA provides for a procedure in respect of the doing of Housing and Works which replaces the procedures under the NTA that would otherwise apply. In summary, if the proposed Housing and Works involve **'Ground Disturbing Activity**' (as defined in clause 1.2) the act is subject to a process of consultation set out under clause 11.3 of the Government ILUA.

The PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts, as detailed at [2.12] below.

## 2.9 Consent to the creation of Conservation Estate

The Government ILUA provides a process to create new conservation estate within the determination area which replaces the procedures under the NTA that would otherwise apply.

The conservation estate to be created under the Government ILUA must be specified in Schedule 4 of the ILUA. That is, the Government ILUA does not provide an 'open-ended' process for the creation of unspecified new conservation estate in the future: see definition of **'Conservation Estate'** in clause 1.2. The creation of new Conservation Estate is consented to in clause 5.2(f).

The creation of the specified conservation estate is subject to a process of consultation under clause 11.4 of the Government ILUA.

The PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts, as detailed at [2.12] below.

## 2.10 Consent to PBC Land Acts

PBC Land Acts are included in the Government ILUA so that, should the State as part of a negotiation of the Government ILUA itself or of another agreement agree to transfer, for example, a freehold block to the PBC within the Agreement Area, the consent of the native title holders to the doing of that act (i.e. the grant of the freehold block) can be given: see definition of '**PBC Land Acts**' in clause 1.2 and consent provided for in 5.2(g). The doing of a PBC Land Act is subject to a notification process under 11.12.

In the case of PBC Land Acts that are intended to extinguish native title rights and interests (for example, freehold grants) that PBC will be required to surrender native title over the subject area.

## 2.11 Validating Invalid Acts

The Government ILUA will validate specific future acts previously invalidly granted in the determination area. These acts are described in the Government ILUA as '**Invalid Acts**' (see definition in clause 1.2) and their validity is consented to in clause 5.3.

All invalid acts must be listed in Item 6 of Schedule 2 and/or Schedule 6 of the Government ILUA. If the invalid acts are not listed, they are not validated through the provisions of the Government ILUA

The PBC remains entitled to pursue any claims for compensation under the NTA in respect of these future acts, as detailed at [2.12] below.

## 2.12 Benefits, Compensation and Set Off

### Benefits

In addition to the incentive payments discussed at 2.4 above, clause 7.2 of the Government ILUA now provides for PBC Funding. Schedule 7 to the Government ILUA is a table that sets out the agreed purpose for the funding, and the amount. Not every Government ILUA will provide the same types of funding, so the table at Schedule 7 can be tailored to a specific negotiation. Clause 7.2(a) provides for the funding to be paid over 3 years.

### Compensation and Set-off

The Government ILUA confirms that it does not affect the entitlement of native title groups or PBCs under the NTA to pursue claims for compensation in relation to the effect of future acts consented to or validated under the Government ILUA: see clause 8 and the definitions of '**Benefits**' and '**Compensation**' contained in clause 1.2.

The State is of the view that this right to claim further compensation is not prevented by the provisions of section 24EB(4) of the NTA. Rather, the State believes that the phrase "*compensation provided for in the agreement*" contained in section 24EB(4) of the NTA should be construed broadly to also cover circumstances where the compensation under an ILUA includes, or consists solely of, a right to lodge a future claim for compensation.

The Government ILUA also provides that any benefits derived under the Government ILUA (such as incentive payments for the grant of certain Exploration Tenements) would be set off against such a future compensation claim by the PBC or native title group.

## 2.13 Cultural Heritage Protection

One of the key elements of the Government ILUA is provision for the protection of Aboriginal cultural heritage. The Government ILUA achieves this through the GSHA (which is annexed to the Government ILUA and marked "A") and the PSHA (which is annexed to the Government ILUA and marked "B") (together the "**SHAs**").

The relationship between the Government ILUA and the GSHA is set out in clause 12.1 of the Government ILUA. As a consequence of executing the Government ILUA the parties to the Government ILUA agree to be legally bound to comply with the GSHA. The GSHA will be executed by the State and those Government Parties who execute the Government ILUA. Additional Government Parties may also wish to become parties to the GSHA. By executing the GSHA, separate agreements are created between the State and the PBC, and each Government Party and the PBC, reflecting their several rights and liabilities.

If, however, the State or a Government Party has a pre-existing Aboriginal Heritage Agreement that applies to an activity that is also covered by the Government ILUA, the PBC and the State or Government Party may agree that the pre-existing agreement can continue to apply and there is no need for a GSHA (see clause 12.2).

The relationship between the Government ILUA and the PSHA is set out in clauses 12.5 to 12.6 of the Government ILUA. As described at [2.4] and [2.6] above, the Government ILUA provides that every Access Authority, Exploration Tenement and LA Act High Impact Licence must have a condition imposed on it requiring a Proponent to enter into a Heritage Agreement with the PBC. The condition requires a Proponent to use reasonable endeavours to execute the preferred Heritage Agreement of the PBC. However, if 60 business days have passed since the grant of the Access Authority, Exploration Tenement or LA Act High Impact Licence and the PBC and the Proponent have been unable to execute a Heritage Agreement the Proponent may execute a deed accepting the terms and conditions of the PSHA. The Proponent and the PBC are then bound by the terms of the PSHA.

The provisions of the GSHA and the PSHA are discussed further below.

## 2.14 Default and Dispute Resolution

If a party breaches a material term of the Government ILUA (as set in clause 15.1(b)(i)) or if the PBC commits an '**Insolvency Event**' (as defined in clause 1.2) a party may give notice of the default requiring that the default be remedied: see clause 15.

If the default is not remedied, a party may initiate the dispute resolution processes in clause 16. Further, a non-defaulting party may suspend the performance of its obligations until the default is remedied: see clause 15.2(c).

Any dispute under the Government ILUA is dealt with in the first instance by informal negotiations between representatives of the parties: see clause 16.3. If those negotiations do not resolve the dispute, it may proceed to mediation (clause 16.4) and thereafter the dispute may be listed for expedited arbitration (clause 16.5).

## 2.15 Review and Variation of the Government ILUA

Clause 14 of the Government ILUA provides for formal review of the ILUA and subsisting GSHAs on its third anniversary, and every five years thereafter. A formal review may also occur if there is a major change to the law or to the native title determination: see clause 14.4.

An informal review of the ILUA and subsisting GSHAs and PSHAs is conducted annually: see clause 14.3.

The committee to review the Government ILUA consists of representatives of the State, the Government Parties and the PBC: see clause 14.2.

## 2.16 Confidentiality

Generally, information which is exchanged:

(a) between the parties during negotiations for the Government ILUA; or

(b) during the implementation of the Government ILUA and is identified as confidential by the disclosing party

is classified as '**Confidential Information**' and must not be disclosed unless permitted by clause 13 (which deals with the publication of certain documents) or pursuant to the general disclosure regime contained in clause 17: see clause 17.1.

It should be noted that the Government ILUA itself (including as executed) is not confidential, and is intended to be published on State government websites and the 'Agreements, Treaties and Negotiated Settlements' database maintained by the University of Melbourne: see clause 13.

Clause 17.2 provides the general circumstances in which Confidential Information may be disclosed to a third party. It should be noted that the disclosure of '**Sensitive Heritage Information**' (which is defined in clause 1.2 to include culturally restricted information about Aboriginal sites or any other items of Aboriginal heritage, provided by the native title group during the course of an Aboriginal heritage survey conducted under the GSHA) is more restricted than other types of confidential information: see clauses 17.2(b).

## 2.17 Other agreements – exemptions

Where the State has entered into an existing ILUA before the Government ILUA is registered, the parties must discuss whether the existing ILUA continues to apply or whether the Government ILUA should replace the existing one: see clause 2.6 and Items 7 and 8 of Schedule 2.

The default position is that unless the existing ILUA is explicitly specified (and thereby 'saved') the Government ILUA will prevail over it: see clause 2.6(a).

## 2.18 Administration of the agreement (including notices)

The State and a number of Government Parties will execute the Government ILUA. Each will provide a notice of address for service and each will be responsible for particular activities they carry out.

For example, the Department of Housing, and the Department of Finance's Building Management and Works division will be the points of contact for housing and public works issues respectively. The Department of Mines and Petroleum will be the point

of contact for Exploration Tenements, and the Department of Parks and Wildlife will be the contact for conservation estate issues.

Where Government Parties who have executed the Government ILUA are involved in an activity or future act in the Agreement Area, for example through the consultation or notification procedures set out in the Government ILUA, those authorities will be the relevant ones to receive notice.

However, the State (through the Department of the Premier and Cabinet) will be the point of contact for general matters relating to the Government ILUA, including review of the Government ILUA, and will be copied on *all notices* issued under the Government ILUA by the PBC: see clause 19.

# 3. The Standard Heritage Agreements

## 3.1 Parties, execution and application of the SHAs

There is no requirement for a GSHA or a PSHA to be entered into, or, (if a GSHA or PSHA has already been entered into) for the terms of the GSHA or PSHA to be met in relation to Activities which are urgently required to secure life, health or property, or to prevent or address an imminent hazard to the life, health or property of any person – see clause 2.

Government Standard Heritage Agreement - GSHA

It is intended that the State and Government Agencies will execute the GSHA at the same time as the Government ILUA is executed. Execution of the GSHA has the effect of creating separate agreements as between the State and the PBC and as between each Government Agency and the PBC. These agreements become effective once both parties executed them: see clause 3.1 of the GSHA.

Accordingly, while annexed to the Government ILUA, the GSHA will have independent status as a contract between the parties such that an executed GSHA will continue even if the Government ILUA is de-registered. The GSHA comes into effect on the latter of the date on which it is executed and the date on which the Government ILUA is executed: see clauses 3.1 and 3.2 of the GSHA.

If the State or a Government Agency has an existing heritage agreement with the PBC the parties must discuss whether the existing agreement can apply or whether the GSHA should apply. The default position in the Government ILUA is that the GSHA will prevail over existing heritage agreements, unless otherwise specified: see clause 12.2 and Items 9 and 10 of Schedule 2 to the Government ILUA.

The GSHA applies to any activity, including physical works or operations (defined as '**Activities**' in clause 1.1 of the GSHA) undertaken by the State or a Government Agency in the area to which the GSHA applies. The application of the GSHA to the State and the Government Agencies is very broad and is not, for example, limited to particular land titles or activities.

The GSHA applies within the '**Aboriginal Heritage Area**' as defined in clause 1.1 of the GSHA and described in Schedule 3. The Aboriginal Heritage Area will typically be broader than the area to which the Government ILUA applies. This is because the Government ILUA is intended to only apply to areas within a determination where native title was determined to exist. However, the fact that native title may have been extinguished over a particular area does not mean that Aboriginal heritage concerns cease to exist. Accordingly, the Aboriginal Heritage Area will typically be defined to include all areas of land within the relevant native title determination application

boundary (including those areas where native title has been extinguished): see definition of Aboriginal Heritage Area, '**Agreement Area**' and '**Determination Area**' in clause 1.2 of the Government ILUA.

It is intended to use the GSHA as a basis for the State's and Government Agencies' heritage agreements with native title parties in both the post-determination and pre-determination environments. However, only the post-determination version of the GSHA will form part of the Government ILUA framework.

Proponent Standard Heritage Agreement - PSHA

The PSHA is a form of Aboriginal heritage agreement which can be executed by a Proponent in compliance with the condition imposed on titles granted under the Government ILUA. Accordingly, the PSHA annexed to the Government ILUA is limited in application to titles granted post-determination.

Once executed, any activities, including physical works or operations (defined as '**Activities***'* in clause 1.1 of the PSHA) proposed to be undertaken by the Proponent on the title that the Proponent has obtained under the Government ILUA (defined as the '**Tenure**' in clause 1.1 of the PSHA) must be done in compliance with the heritage protection provisions of the PSHA.

The PSHA may be executed:

(a) by both the Proponent and the PBC: see clause 3.1(a) of the PSHA; or

(b) unilaterally by a Proponent when all of the conditions precedent contained in clause 3 of the Proponent Acceptance Deed (Schedule 10 to the Government ILUA) have been satisfied: see clause 3.1(b) of the PSHA.

In respect of a unilateral execution by a Proponent, clause 3 of the Proponent Acceptance Deed provides that the PSHA will only come into force where:

(a) 60 business days have passed since the Proponent was granted Tenure under the Government ILUA;

(b) the Proponent has not entered into a heritage agreement with the PBC despite using reasonable endeavours to do so; and

(c) the Proponent has executed the Proponent Acceptance Deed and provided a copy of the executed Proponent Acceptance Deed to the PBC.

Further, in accordance with the condition placed on the Proponent's Tenure pursuant to clause 12.3 of the Government ILUA, the Proponent must also provide a Statutory Declaration (contained in Schedule 11 to the Government ILUA) to the State confirming that clause 3 of the Proponent Acceptance Deed has been satisfied before they can exercise any rights under their Tenure.

## 3.2 Exchange of Information

The SHAs seek to ensure that the parties commit to the regular flow of information concerning the conduct of Activities by the State or a Government Party (together defined as "**Government Proponent**" – see clause 1.1 of the GSHA)[1] or a Proponent to avoid misunderstandings and enable informed decisions to be made: see clause 7.1.

Accordingly, if requested by a PBC, a Government Proponent or a Proponent must provide an outline of the Activities they plan to undertake in the next field season or next field operations program in the area to which the relevant SHA applies. Further, if the PBC becomes aware of any particular heritage concern regarding those planned Activities, the PBC will use reasonable endeavours to raise those concerns with the relevant party.

## 3.3 The Activity Notice

Requirement to Issue an Activity Notice

The SHAs provide that, as a general rule, if a Government Proponent or a Proponent intends to undertake an Activity in the area to which the relevant SHA applies it must issue a notice to the PBC containing the information specified in Schedule 4 to the GSHA and Schedule 5 to the PSHA: see clause 8.2(a).

This notice is defined as the '**Activity Notice**': see definition in clause 1.1.

The main purpose of an Activity Notice is to determine whether an Aboriginal heritage survey is required (defined as a '**Survey**' in clause 1.1) and, if so, provide information relevant to the conduct of the Survey: see clause 8.2(b).

There are, however, some circumstances in which a Government Proponent or a Proponent is not required to issue an Activity Notice and, accordingly, where a Survey is not required to be completed: see clause 8.1(a). These include circumstances where the Activity proposed to be done consists entirely of:

(a) Minor Impact Activity (as defined in clause 1.1);

(b) '**Low Ground Disturbance Activity**' (as defined in clause 1.1) of a class that the PBC has notified in writing need not be the subject of an Activity Notice; or

(c) the Government Proponent or Proponent has reasonable grounds to form the opinion that no survey is required, taking into account the Due Diligence Guidelines (see definition of "**Due Diligence Guidelines**" in clause 1.1).

[1] Note that the Government Proponent can carry out Activities through contractors and will ensure the contractor is aware of all relevant obligations; see clause 7.2(b)

If a Government Proponent or a Proponent has a reasonable doubt as to whether they should issue an Activity Notice the SHAs provide that notice should be given in any event: see clause 8.1(b).

### Contents of the Activity Notice

The Activity Notice must provide the information and documents (including maps) specified in clause 8.2(c) and Parts 1 and 2 of Schedule 4 to the GSHA and Schedule 5 to the PSHA.

If a Government Proponent or a Proponent omits to specify any of the required information then a default position is provided for: see clause 8.2(e) and Part 3 of Schedule 4 to the GSHA and Schedule 5 to the PSHA.

A Government Proponent or a Proponent may modify aspects of an Activity Notice once given to the PBC but, in certain circumstances, the PBC may request that a fresh Activity Notice be issued: see clause 8.2(f).

### Consideration of the Activity Notice and planning for Survey

The SHAs provide that within 15 Business Days after receiving an Activity Notice the PBC must notify the Government Proponent or the Proponent as to whether it considers that a Survey is required to be conducted. This response is called an '**Activity Notice Response**': see clause 8.3(a).

The SHAs set out a number of factors that the PBC must consider in coming to this decision: see clause 8.3(a).

It is only in highly unusual circumstances that a PBC would require a Survey to be conducted in respect of Low Ground Disturbance Activities: see clause 8.3(e).

A Government Proponent or a Proponent is free to conduct any Activity without conducting a Survey where the PBC either agrees in writing that a Survey is not required or waives its right under the SHA to require a Survey: see clause 8.3(b).

However, if the PBC considers that a Survey is required, then the SHAs provide that the PBC must give certain additional information to the Government Proponent or the Proponent. In particular, this additional information encompasses those aspects of the Activity Notice with which the PBC disagrees, and includes an estimate of costs to conduct the Survey: see clause 8.3(d).

If, after the PBC has provided an Activity Notice Response, the parties are unable to agree on any matter to do with the conduct of a Survey then they must endeavour to resolve all outstanding matters by following the provisions of clause 9. The parties must consult for 20 Business Days with respect to the matters set out in clause 9

before they can invoke the dispute resolution provisions set out in clause 17: see clause 8.4.

Clause 9 is designed to guide the parties' discussions regarding whether a Survey is required, the Survey methodology to be used, the extent of Low Disturbance Activity to be undertaken, the provision of an estimate of the Survey costs, the selection of a Principal Aboriginal Heritage Consultant and an estimate of time for the survey. Any discussions between the parties under clause 9 must be conducted reasonably and in good faith: see clause 9.1(c).

The SHAs set a period of 20 Business Days (calculated from the date on which the PBC's Activity Notice Response is received) in which the parties are to discuss and come to an agreement about the matters contained in clause 9 (called the '**Survey Agreement Period**'): see clause 9.1(d). The date on which the parties reach an agreement within that Survey Agreement Period is defined as the '**Survey Agreement Date**': see clause 9.1(a).

If the parties cannot agree on all outstanding matters during the Survey Agreement Period, a Government Proponent or a Proponent may write to the PBC indicating that the Survey Agreement Date has been reached notwithstanding that lack of agreement. In such a case the parties are to continue to discuss the non-agreed matters with a view to resolving them as quickly as possible: see clause 9.1(e). This has the effect of waiving the time limit imposed by clause 6.1(a)(ii) and consequences which would otherwise flow from the breach of that time limit (see [3.7] below for a discussion of compliance with time limits).

## 3.4 Surveys

As soon as possible after the Survey Agreement Date, the PBC or the person engaged by the native title group to carry out Surveys on their behalf (defined as the '**Aboriginal Heritage Survey Provider**' in clause 1.1) must organise a Survey Team to conduct the Survey. The SHAs make provision for the number and qualifications of the personnel who are to make up a Survey Team: see clause 10.1.

The SHAs also detail what activities the Survey Team are required to undertake in respect of a Survey and the type and extent of information which is required to be provided by a Survey Team. Provision is also made for how representatives of a Government Proponent or a Proponent are to conduct themselves if they accompany a Survey Team on a Survey: see clause 10.2.

Two different types of heritage survey methodology may be used by a Survey Team in conducting a Survey:

(a) **Site Avoidance Model** which identifies areas where Activities should not be undertaken due to the presence of an Aboriginal site; or

(b) **Site Identification Model** which involves the identification of Aboriginal sites in the Survey area. This is generally the type of Survey required for an application under section 16 or 18 of the *Aboriginal Heritage Act 1972* (WA) ("**AHA**").

(see definitions of both in clause 1.1)

A survey methodology is to be nominated by a Government Proponent or a Proponent in their Activity Notice (clause 8.2(c)(ii) and GSHA Schedule 4 1.2(c), PSHA Schedule 5 1.2(c)) and the parties will discuss and reach agreement about a Survey Methodology that is fit for purpose taking into account relevant matters (see clause 9.4).

The parties must also agree on a budget (including those items to be paid in advance by the Government Proponent or the Proponent) during the Survey planning process: see clause 9.5.

The costs and expenses payable by a Government Proponent or a Proponent for a Survey have been standardised with the applicable rates and charges set out in Schedule 5 to the GSHA and Schedule 6 to the PSHA: see clause 11(a). Some components of the costs must be paid before the Survey commences, and if they are not the commencement of the Survey may be delayed: see clause 11(b) and (c). The balance of costs must be paid within 21 days of receipt of the Survey Report: see clause 11(e).

## 3.5 Survey Reports

Within 35 Business Days of the last day of fieldwork for a Survey, the Aboriginal Heritage Service Provider or the anthropologist or archaeologist in charge of the Survey (defined as the '**Principal Aboriginal Heritage Consultant**' in clause 1.1) must provide a final Survey Report to the Government Proponent or the Proponent: see clause 12.1(c). Clause 12.4 and Schedule 6 to the GSHA and Schedule 7 to the PSHA set out the information that a Survey Report must contain.

A Government Proponent or a Proponent can also nominate in their Activity Notice to receive:

(a) a Preliminary Advice (which must be given within 7 Business Days of the last day of fieldwork and must contain at least the information contained in clause 12.4(c)(i)): see clauses 8.2(c)(ii), 12.1(a), 12.3 and 1.2(f) of Schedule 4 to the GSHA and Schedule 5 to the PSHA; and / or

(b) a draft Survey Report to enable them to provide comments in respect of it (which must be given within 20 Business Days of the last day of fieldwork): see clauses 8.2(c)(ii), 12.1(b) and 1.2(f) of Schedule 4 to the GSHA and Schedule 5 to the PSHA

If a Government Proponent or a Proponent did not originally ask for a Preliminary Advice or a draft Survey Report in their Activity Notice they may, nevertheless, ask for one at any later time under clause 12.2(a). However, such a request may impact upon the times and cost for a Survey: see clause 12.2(b).

All intellectual property in a Survey Report is vested in the Native Title Group: see clause 13.1, but the PBC on behalf of the Native Title Group grants the Government Proponent or Proponent a licence to use the Survey Report for those purposes specified in clause 13.2.

## 3.6 Post-survey matters

### Identification and relocation of Ancestral Remains or Objects

Clause 14 sets out the obligations of a Government Proponent or Proponent when, as a result of an Activity skeletal remains or an area or object likely to be an **Aboriginal Site** or **Aboriginal Object** (as defined in clause 1.1) are uncovered or identified.

### Environmental Protection

Clause 14A sets out the obligation of a Government Proponent or Proponent to rehabilitate the Aboriginal Heritage Area.

### Programme of Works (POW) under the Mining Act

Clause 15.1 of the PSHA provides that a Proponent must not lodge a POW unless it has the written consent of the PBC to both the works proposed within the boundaries of an Aboriginal Site and the lodgement of the POW, or authorisation under s16, or consent under s18, of the AHA.

### Consultation about AHA Applications

Clause 15.1 of the GSHA and clause 15.2 of the PSHA set out the steps that must be taken by a Government Proponent or Proponent to notify and (if required) consult with the PBC about an AHA section 16 application or AHA section 18 application.

## 3.7 Time Limits

Clause 6.1(a) of the SHAs sets out a number of time limits for certain processes under the SHAs which must be strictly complied with by the parties. Whilst failure to comply with these specified time limits does not give a party the right to terminate the relevant SHA, such failure does have certain consequences: see clause 6.1(c). It should be noted, however, that clause 6.1(b) provides that the time limits set out in 6.1(a) may be extended by agreement in writing between the parties, and that clause 6.2 allows for delay caused by **Force Majeure** or **Aboriginal Cultural Business** (see definitions in clause 1.1) to be excluded from the time limits set out in 6.1(a).

If the time limits set out in 6.1(a) are not complied with a Government Proponent or a Proponent will no longer be bound by clauses 9 to 12 of the applicable SHA and may then, at its own election: decide not to proceed with the Activities previously proposed; proceed with the Activities at their own risk; or make alternative arrangements to conduct a heritage survey using their own consultants: see clauses 6.1(d) – (g). However, the AHA continues to apply and the Government Proponent and Proponent are still required to consult with the PBC prior to lodging a section 16 or 18 application under clause 15.1 of the GSHA or clause 15.2 of the PSHA.

## 3.8 Confidentiality

Generally, information which is:

(a) disclosed during the course of a Survey or in a Survey Report (including Sensitive Heritage Information);

(b) given by a Government Proponent or a Proponent in respect of their Activities and which they identify as confidential;

(c) obtained during the course of a Survey about native title rights and interests but which is not related to the purpose of the Survey; or

(d) disclosed by one party to another under the SHA and which is identified by the disclosing party as confidential;

is classified as '**Confidential Information**' and must not be disclosed unless permitted by the general disclosure regime contained in clause 18: see clause 18.1.

Clauses 18.3 and 18.4 provide the general circumstances in which Confidential Information may be disclosed to a third party and the requirements which must be fulfilled before disclosure can occur. It should be noted that the disclosure of Sensitive Heritage Information is more restricted than other types of Confidential Information but may be disclosed in certain circumstances (such as for the purpose of an application under sections 16 or 18 of the AHA): see clauses 18.3(b) and (c).

However, a copy of the Survey Report and (if relevant) a Heritage Information Submission Form must always be provided to the Department of Aboriginal Affairs: see clause 18.5 and Schedule 7 to the GSHA or Schedule 8 to the PSHA.

## 3.9 Notices

GSHA

The State and a number of Government Parties will execute the GSHA. Each will provide a notice of address for service and each will be responsible for the particular Activities they conduct and the Activity Notices they provide to the PBC.

However, the State (through the Department of the Premier and Cabinet) will be the point of contact for general matters relating to the GSHA and will be copied on *all notices* issued under the GHSA by the PBC: see clause 20.2 of the GSHA.

PSHA

Under the PSHA, the Proponent must provide contact details to the PBC for the service of notices. Where it is executed bilaterally, these details are entered on the front page of the PSHA and, where it is executed through the Acceptance Deed, the details are included in the deed and a copy is given to the PBC.

## 3.10 Default and Dispute Resolution

The SHAs include similar default provisions to those which apply under the Government ILUA and a non-defaulting party may suspend the performance of its obligations until the default is remedied: see clause 16.2(c) of the GSHA and clause 16.2(d) of the PSHA.

The SHAs have a separate dispute resolution scheme from that which applies under the Government ILUA, but one which similarly involves initial negotiation (clause 17.3), followed if necessary by mediation (clause 17.4) and with an arbitration option (clause 17.5). However, dispute resolution is not available during the Survey Agreement Period: see clause 8.4.

Where the issue in dispute involves non-compliance with certain time periods (clause 6.1(a)), those time periods continue to run and are not suspended where a dispute resolution process is commenced by a party (clause 6.1(h)). In all other cases, the parties must continue to perform their respective obligations under the SHA so far as circumstances allow (see clause 17.7).