

# Yawuru Area

# Yawuru Area Agreement Indigenous Land Use Agreement - Broome

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This Deed is made on the 25<sup>th</sup> day of February 2010

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## Parties

Name Kimberley Land Council (**KLC**)

Name Frank Sebastian and Patrick Dodson for and on behalf of Yawuru Native Title Group

Name Nyamba Buru Yawuru Ltd (**Nyamba Buru Yawuru**)

Name The State of Western Australia, through its Department of the Attorney General (**State**)

Name Minister for Lands, a body corporate continued under section 7(1) of the *Land Administration Act 1997 (WA)* (**Minister for Lands**)

Name Conservation Commission of Western Australia, a body corporate established under section 18 of the *Conservation and Land Management Act 1984 (WA)* (**Conservation Commission**)

Name Conservation and Land Management Executive Body, a body corporate established under Section 36 of the *CALM Act* (**Executive Body**)

Name Marine Parks and Reserves Authority, a body corporate established under Section 26A of the *CALM Act* (**Marine Authority**)

Name Shire of Broome, a local government under the *Local Government Act 1995 (WA)* (**Shire**)

# Recitals

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- A The State and the Yawuru Community have negotiated this indigenous land use agreement under the *Native Title Act 1993* (Cth) to give expression to the determination of native title by the Federal Court of Australia and to allow for the future development of Broome whilst also recognising and protecting Aboriginal heritage and the environment and providing compensation to the Yawuru Community for the loss and impairment of native title rights and interests.
- B Between 2 February 1994 and 1 December 1997, the Yawuru Community filed nine native title determination applications to land and waters in and around Broome. On 21 September 1999 eight of the applications were combined by an order of the Federal Court. Under that order the native title determination application in proceeding WAD 6006 of 1998 (Rubibi) was to be the lead application.
- C On 29 September 2004, a further native title determination application was lodged by the Yawuru Community. That application, WAD 223 of 2004 (Rubibi #17), was heard together with proceeding WAD 6006 of 1998.
- D Evidence was heard on country by Justice Merkel in 2003 and 2004, and on 28 April 2006 a determination was made in favour of the Yawuru Community as native title holders to a large part of the area covered by applications WAD 6006 of 1998 (Rubibi) and WAD 223 of 2004 (Rubibi #17). In some areas the Judge found that the Yawuru Community had the right to possession and occupation as against the whole world, in other areas the rights and interests were non-exclusive.
- E On 2 May 2008, the Full Court of the Federal Court of Australia, in the *State of Western Australia - v - Sebastian* [2008] FCAFC 65, upheld Justice Merkel's determination in favour of the Yawuru Community and recognised additional areas where native title rights and interests were found to exist.
- F On 15 August 2008, the State filed an Application for Special Leave to Appeal (proceeding No. P30 of 2008) in the High Court of Australia seeking leave to appeal an aspect of the decision of the Full Court of the Federal Court of Australia. The State discontinued its application on 29 July 2009.
- G The Determination over Broome and its environs is entered on the National Native Title Register maintained by the National Native Title Tribunal, recording the date of determination as 28 April 2006.
- H Following the Determination on 28 April 2006, the Yawuru Native Title Holders and the State commenced negotiations to resolve the issues associated with the Determination and associated matters.
- I On 31 May 2007, the State and the Yawuru Community entered into the Broome Negotiation Protocol and Broome Heritage Agreement, which together governed the global negotiations.

J On 6 April 2009, an In Principle Agreement between Yawuru RNTBC and the State was signed. The In Principle Agreement forms the basis of this Agreement and the Body Corporate Agreement, which the Parties have agreed to enter into in order to:

- P Nyamba Buru Yawuru is a body corporate incorporated under the *Corporations Act*, whose purpose is to receive and manage assets and monies provided under this Agreement on behalf of the Yawuru Community.
- Q The Minister for Lands is responsible for the administration of the *LA Act* and as such is responsible for the grant of land titles and creation of reserves under the *LA Act*.
- R The Conservation Commission is a body corporate established under section 18 of the *CALM Act* whose function is, *inter alia*, to develop management plans with respect to jointly managed land and submit them to the Minister for Environment and to accept directions from the Minister for Environment in the performance of its functions.
- S The Executive Body is a body corporate established under Section 36 of the *CALM Act*.
- T The Marine Authority is a body corporate established under Section 26A of the *CALM Act*.
- U The Shire of Broome is a local government established under section 2.5 of the *LG Act* whose functions include providing good government for residents of the Shire and making local laws to enable it to perform its functions under the *LG Act*.





*Corporations Act* means the *Corporations Act 2001*

**Right to Negotiate Procedure** means the procedure under Subdivision P of Division 3 of Part 2 of the *NTA*.

**Transaction Document** means each of this Agreement, each other document contemplated by or required in connection with this Agreement or the transactions which it contemplates and each document or agreement entered into for the purpose of amending or notating any of them.

**Yawuru Community** means the persons described in Schedule 1 of the Determination of Native Title made by Justice Merkel on 28 April 2006 in proceedings WAD 6006 of 1998 (Rubibi) and WAD 223 of 2004 (Rubibi #17).

**Yawuru Land** means that land in which an interest is to be transferred to Yawuru Native Title Group pursuant to this Agreement.

**Yawuru Native Title Group** means all the persons who comprise the Yawuru Community and who, according to their traditional laws and customs, hold the common or group rights and interests comprising native title within the area covered by this Agreement.

**Yawuru RNTBC** means Yawuru Native Title Holders Aboriginal Corporation RNTBC.

## 1.2 Interpretation

In this Agreement, unless the contrary intention appears:

- (a) words and expressions defined in the *NTA* have the same meaning where used;
- (b) a reference to a clause, schedule or annexure is a reference to a clause of, or a schedule or annexure to, this Agreement and a reference to this Agreement includes any recital, schedule or annexure;
- (c) a reference to a statute, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (d) the singular includes the plural and vice versa;
- (e) the word 'person' includes a firm, body corporate, partnership, joint venture or unincorporated association;
- (f) a reference to a person includes a reference to the person's executors, administrators, delegates, successors and assigns;
- (g) a reference to a person, statutory authority or government body (corporate or unincorporated) established under any written law includes a reference to any person (corporate or unincorporated) established or continuing to perform the same or a substantially similar function;
- (h) a reference to dollars or \$ is to Australian currency;
- (i) an obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally;



- (ii) to make this Agreement and other Transaction Documents to which they are a party admissible in evidence

### **3.5 Other Parties' Warranties**

Each of the Minister for Lands, the Conservation Commission, the Marine Authority, the Executive Body and the Shire severally represents and warrants that all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary Authorisations) in order:

- (a) to enable it lawfully to enter into, and exercise its rights and perform its obligations under, this Agreement and the other Transaction Documents to which it is a party; and
- (b) to make this Agreement and the other Transaction Documents to which it is a party admissible in evidence in the courts of the jurisdiction to which the Parties have submitted,

have been fulfilled or done.

## **4. Consents to Future Acts**

### **4.1 Parties' consent**

The Parties state as follows:

- (a) the Parties consent to the acts described in clauses 6, 8, 9 and 10, with the intent that such statement of consent satisfies the requirement of section 24EB(1)(b) of the *NTA*; and
- (b) for the avoidance of doubt and to the extent, if at all, that the following acts are not considered to be consented to in clause 4.1(a), the Parties consent to the doing of all things ancillary to the acts described in clauses 6, 8, 9 and 10 with

#### **4.4 No Right to Negotiate**

- (a) The Right to Negotiate Procedure does not apply to any of the acts referred to in this clause 4, with the intent that such statement satisfies the requirement of section 24EB (1)(c) of the *NTA*.
- (b) For the avoidance of doubt, no other procedural requirements in Part 2 Division 3 of the *NTA* apply to the future acts described in this clause 4.

#### **4.5 Other statements relevant to the *NTA***

The Parties:

- (a) state that this Agreement is intended to be registered on the ILUA Register as an area agreement under sections 24CA to 24CL of the *NTA*

## 5.4 No objection

Without limiting clauses 5.2 and 5.3, the Parties must not object to the registration of this Agreement on the ILUA Register. If any Party becomes aware of an objection having been lodged in relation to the registration of this Agreement on the ILUA Register, then that Party must notify the other Parties and the Parties may request assistance from the NNTT to negotiate with the person making the objection with a view to having the objection withdrawn.

## 5.5 Written certification

- (a) If KLC is satisfied that the requirements of section 203BE(5) of the *NTA* have been met, then KLC agrees that it will provide written certification as referred to in section 203BE(1)(b) of the *NTA* for the purposes of the registration application as required by section 24CK of the *NTA*.
- (b) The written certification will be in the form, or substantially in the form, set out in Schedule 3 to this Agreement.
- (c) KLC warrants that to the best of its knowledge as at the Execution Date it is not aware of any circumstance that would prevent it from providing written certification in accordance with this clause.

## 6. Transfer of unconditional freehold title by State to Nyamba Buru Yawuru

### 6.1 Grant of licence by State

The Minister for Lands:

- (a) shall when requested by Nyamba Buru Yawuru grant Nyamba Buru Yawuru a licence under section 91 of the *LA Act* (**Licence**) for a term to be decided by the parties thereto at the time to enter onto Crown land parcels referred to in this clause 6 for the purpose of doing all things necessary for or incidental to preparing them for development; and
- (b) consents to Nyamba Buru Yawuru engaging a third party to undertake activities permitted under the Licence on behalf of Nyamba Buru Yawuru.

### 6.2 Reserve 37525

The Minister for Lands shall cancel reserve 37525 within 3 months of the Registration Date and transfer that land in fee simple to Nyamba Buru Yawuru within 60 days of a written request being made by Nyamba Buru Yawuru to do so, which request may not be made sooner than 3 months after Registration Date.

### 6.3 Chapple Street land, Fairway Drive North land and Wattle Downs land

- (a) The Minister for Lands shall create Crown land titles within 12 months of the Registration Date for each parcel of land described in Schedule 4 (Schedule 4 land).



- (b) The Minister for Lands shall transfer title to the Schedule 4 land in fee simple to Nyamba Buru Yawuru under Section 74 of the *LA Act*, in the manner set out in clause 7, within 60 days of receiving a written request from the Nyamba Buru Yawuru, which request may not be made sooner than 12 months after the Registration Date.

#### **6.4 Time for transfer**

- (a) Subject to receipt by the Minister for Lands of a written request from Nyamba Buru Yawuru within 58 months of the Registration Date, the Schedule 4 land must be transferred in fee simple to Nyamba Buru Yawuru within 60 months of the Registration Date.
- (b) The Parties acknowledge and agree that due to issues concerning provision of services to the Fairway Drive North land described in Schedule 4, they may agree to extend the deadline for transfer of that land or some of it beyond 60 months from the Registration Date.

#### **6.5 Delay in transfer**

Subject to:

- (a) the time restrictions provided in this clause 6 with respect to Nyamba Buru Yawuru requesting transfers; and
- (b) Nyamba Buru Yawuru complying in a timely manner with the requirements of clause 7.3(d),

if the State does not transfer to Nyamba Buru Yawuru title to any parcel of land described in Schedule 4 within 60 days of receiving a written request to do so, the State shall pay to Nyamba Buru Yawuru rent at the market value per square metre as determined at the time by the Valuer General of Western Australia at a rate pertaining to the intended land use as relevant to the zoning applicable to the parcel.



Yawuru, as appropriate, and neither Yawuru Native Title Group nor Nyamba Buru Yawuru has a claim against the Minister for Lands relating to any of those matters.

- (c) Yawuru Native Title Group and Nyamba

### **9.3 Non-extinguishment of native title**

As of the date the Minister for Lands creates reserves in respect of the land in column 1 of Part 2 of Schedule 6 (**Column 1 land**) for the purposes described in column 2 of Part 2 of Schedule 6, the care, control and management of which shall be placed with the Shire, the Yawuru Native Title Group consent to the suppression of native title in accordance with the Non-Extinguishment Principle in the Column 1 land.

## **10. Conservation Estate**

### **10.1 Incorporation into Conservation Estate**

As soon as reasonably practicable after the Registration Date, the Parties shall incorporate the following areas into the Conservation Estate:

- (a) marine park areas, as described in Part 1 of Schedule 7 (**Marine Park Areas**);
- (b) townsite areas, as described in Part 2 of Schedule 7 (**Townsite Areas**); and
- (c) out of town areas, as described in Part 3 of Schedule 7 (**Out of Town Areas**).

### **10.2 Future acts and Non-Extinguishment Principle**

- (a) The Parties consent to the doing of any future acts in relation to the management of the Conservation Estate, as contemplated by the Joint Management Agreement, including the construction or establishment of any public work.
- (b) The Parties agree that the Non-Extinguishment Principle applies to all acts done under this clause 10.

### **10.3 Marine Park Areas tenure and management**

- (a) The Marine Park Areas shall be reserved as a marine park under Section 13 of the *CALM Act*.
- (b) The Marine Park Areas shall be vested in the Marine Authority under Section 7 of the

- (c) The Minister for Lands shall cancel that Townsite Area reserve identified in Part 3(c) of Schedule 7, create a reserve of the land contained therein under Section 41 of the *LA Act* and classify the reserve as a Class A reserve under Section 42 of the *LA Act*.
- (d)

- (i) the Out of Town Areas Reserve shall be cancelled;
- (ii) the State shall transfer to Yawuru RNTBC the Out of Town Areas in fee simple under Section 75 of the *LA Act*; and
- (iii) Yawuru RNTBC shall enter into an agreement with the Executive Body for the provision of services under Section 33(1)(f) of the *CALM Act* for a period of one year and any extension agreed, and Yawuru RNTBC shall unilaterally develop and implement a management plan for the Out of Town Areas.

## 11. Morrell Park Road

### 11.1 Payment by State

Upon receipt of a tax invoice from the Shire subsequent to the Registration Date, the State shall pay to the Shire the sum of \$2,300,000 for the construction of a sealed all weather road of 2.77 kilometres length from Broome Road to Morrell Park in accordance with the map in Schedule 8 (**Morrell Park Road**).

### 11.2 Completion

The Morrell Park Road shall be completed by the Shire within 2 years of the Registration Date.

### 11.3 Maintenance

Upon completion of the Morrell Park Road, the State shall pay to the Shire the sum of \$330,000 to be used by the Shire for the maintenance of Morrell Park Road for the subsequent period of 10 years.

### 11.4 Return of funds

Any funds provided by the State to the Shire which have not been expended in the maintenance of Morrell Park Road during the 10 year period after its completion shall be promptly refunded to the State.

## 12. Full compensation

### 12.1 Full and final Compensation

On and from the Execution Date the Yawuru Native Title Group acknowledge and agree that the Compensation constitutes full and final compensation in relation to:

- (a) extinguishment of native title rights and interests in all areas within the external boundaries covered by the Body Corporate Agreement, which areas are not included in the Body Corporate Agreement, but are part of this Agreement up to the Execution Date;
- (b) impairment of native title rights and interests in all areas within the external boundaries covered by the Body Corporate Agreement, which areas are not

included in the Body Corporate Agreement, but are part of this Agreement up to the Execution Date; and

- (c) the exercise of any right or obligation created by the acts consented to, or confirmed, as the case may be, in this Agreement.

## **12.2 No Compensation claim**

The Yawuru Native Title Group:

- (a) release the Non-Native Title Parties from any liability for compensation, other than Compensation provided for and delivered under this Agreement, in relation to the acts consented to or the validity of which is confirmed in this Agreement, or the exercise of any right or obligation created by such acts and for the extinguishment and impairment of native title rights and interests in the area covered by this Agreement up to the Execution Date; and
- (b) agree that:
  - (i) they will not make any claim for compensation under the *NTA*, the *LA Act* or otherwise, nor will they authorise any other person to bring such a claim on their behalf, against the Non-Native Title Parties for the effects of, or the exercise of any right or obligation created by, the acts consented to or the validity of which is confirmed in this Agreement on any native title rights and interests of the Yawuru Community or for the extinguishment and impairment of native title rights and interests in the area covered by this Agreement up to the Execution Date; and
  - (ii) if the Yawuru Native Title Group or any member of the Yawuru Community makes a claim for compensation in breach of paragraph 12.2(b)(i), the Non-Native Title Parties may each plead the terms of this Agreement in bar of that claim.

## **12.3 Non-extinguishment**

The State acknowledges and agrees that suppression of native title rights and interests pursuant to the Non-Extinguishment Principle as applied in this Agreement does not constitute abandonment or relinquishment of native title rights and interests.

## **12.4 Other Impairment or extinguishment of native title**

The State agrees that if within 7 years of the Execution Date the State or the Yawuru Native Title Group learn of the impairment or extinguishment of native title rights or interests that have occurred between the 28 April 2006 and the Execution Date, which impairment or extinguishment has not been compensated in this Agreement or otherwise, then the State shall compensate the Yawuru Community for that impairment or extinguishment.

## **12.5 Early termination of Agreement**

Unless the Parties enter into a substitute agreement concurrently with termination of this Agreement, if this Agreement is terminated prior to all of the Parties fulfilling their

respective obligations hereunder, then Yawuru Native Title Group reserve their right to require payment or delivery of any unpaid or undelivered Compensation.

## **13. Variation**

### **13.1 Variation of this Agreement**

This Agreement may not be varied unless the variation is effected in writing executed by all of the Parties to this Agreement.

### **13.2 Variation of Agreement once registered on ILUA Register**

- (a) If this Agreement is registered on the ILUA Register the Parties each agree that they will not, without the consent in writing of each of the other Parties first had and received, make any application to revoke or vary the registration of this Agreement on the ILUA Register.
- (b) If details of this Agreement are entered on the ILUA Register, then any variation of this Agreement which amends the details on the ILUA Register only takes effect upon the entry of those amended details on the ILUA Register.
- (c) If details of this Agreement are entered on the ILUA Register, and the Parties have agreed, in accordance with clause 4f.



### **14.3 Compliance with dispute resolution**

For the avoidance of doubt, a Party must comply with the dispute resolution provisions of clause 15.2 to 15.4 in respect of an alleged default to which clause 14.2 applies before commencing arbitration or court proceedings (except proceedings for urgent interlocutory relief).

## **15. Dispute resolution**

### **15.1 No arbitration or court proceedings**

If a dispute arises under this Agreement including a dispute in respect of clause 14 (**Dispute**), a Party must comply with clauses 15.2 to 15.4 before commencing arbitration or court proceedings (except proceedings for urgent interlocutory relief).

### **15.2 Notification**

A Party claiming a Dispute has arisen must give the other Parties to the Dispute notice setting out details of the Dispute.

### **15.3 Parties to resolve Dispute**

During the 20 Business Days after a notice is given under clause 15.2 (or longer period if the Parties to the Dispute agree in writing), each Party to the Dispute must use its reasonable endeavours to resolve the Dispute. If the Parties cannot resolve the Dispute within that period, any Party to the Dispute may request that the Dispute be referred to a mediator and, if a Party so requests, the Dispute must be referred to mediation in accordance with clause 15.4.

### **15.4 Mediation**

- (a) If the Parties to the Dispute cannot agree on a mediator within 10 Business Days after a request under clause 15.3, the chairman of LEADR will appoint a mediator at the request of either Party.
- (b) The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in advance in writing.
- (c) Any information or documents disclosed by a Party under this clause 15:
  - (i) must be kept confidential; and
  - (ii) may only be used to attempt to resolve the Dispute.
- (d) Each Party to a Dispute must pay its own costs of complying with this clause 15. The Parties to the Dispute must equally pay the costs of any mediator.
- (e) The Parties will engage in the mediation process in good faith and with the aim of reaching a resolution of the Dispute. If the Parties fail to achieve a resolution of the Dispute by mediation within 20 Business Days of the appointment of a mediator under this clause, or such further time as is agreed

by the Parties, any Party may take such action as it considers appropriate, including (subject to clause 15.5) referring the matter to arbitration or commencing legal proceedings.

## **15.5 Arbitration**

(a)

- (c) all rights and obligations under this Agreement which accrued before or on the date of termination of this Agreement or removal from the ILUA Register (as

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day in the place that it is received, the Notice is taken to be received at 9.00 am on the next Business Day.

## **19. Goods and services tax**

### **19.1 Interpretation**

Any reference in this clause 19 to a term defined or used in the GST Act is, unless the contrary intention appears, a reference to that term as defined or used in the GST Act.

### **19.2 Amounts exclusive of GST**

Unless otherwise expressly provided to the contrary, all amounts fixed or determined under or referred to in this Agreement are exclusive of GST.

### **19.3 GST payable**

- (a) If GST is or becomes payable by a Supplier in relation to any supply that it makes under, in connection with or resulting from this Agreement, the Parties agree that, in addition to any consideration provided by a Party (Recipient) for a supply from another Party (Supplier), the Recipient must pay to the Supplier the amount of any GST for which the Supplier is liable in relation to that supply (additional amount).
- (b) The obligation to pay the additional amount only arises once the Supplier has issued a tax invoice (or an adjustment note) to the Recipient in respect of the additional amount.
- (c) If a Recipient is required under this Agreement to reimburse or pay to a Supplier an amount calculated by reference to a cost, expense or an amount paid or incurred by that Supplier, the amount of the reimbursement or payment will be reduced by the amount of any input tax credits to which the Supplier is entitled in respect of any acquisition relating to that cost, expense or other amount.
- (d) If a Supplier makes a taxable supply under this Agreement to a Recipient the consideration for which is a supply by the Recipient which is not taxable, the additional amount is not payable by the Recipient to the Supplier unless the Recipient is entitled to an input tax credit for the taxable supply.

### **19.4 Taxable supplies made to Yawuru Native Title Group or Nyamba Buru Yawuru**

Where clause 19.3 requires Yawuru Native Title Group or Nyamba Buru Yawuru to pay an additional amount to a Supplier equal to the GST imposed on a supply, the State shall, on behalf of Yawuru Native Title Group or Nyamba Buru Yawuru, as the case may be, pay to the Supplier an amount equal to the GST imposed on the Supply by the date Yawuru Native Title Group or Nyamba Buru Yawuru, as the case may be, would be required to pay the GST.



### **21.3 Waiver**

A right or power under this Agreement shall only be deemed to be waived by notice in writing, signed by the Party waiving the right or power, and:

- (a) no other conduct of a Party (including a failure to exercise, a delay in exercising or a partial exercise of a right or power or any forbearance or indulgence granted by one Party to another Party in respect of a right or power) operates as a waiver of the right or power or otherwise prevents the exercise of that right or power;
- (b) a waiver of a right or power on one or more occasions by a Party does not operate as a waiver of that right or power if it arises again in the future or prejudices that Party's other rights or powers or future rights or powers in respect of the right or power waived; and
- (c) the exercise of a right or power does not prevent any further exercise of that right or power or of any other right or power.

### **21.4 Further action**

Each Party must use its reasonable endeavours to do all things necessary or desirable to give full effect to this Agreement.

### **21.5 Assignment**

- (a) Except as otherwise provided in this Agreement, a Party may not:
  - (i) sell, transfer, assign, novate, license or otherwise dispose of; or
  - (ii) mortgage, charge or otherwise encumber,any right hereunder to any person or permit any person to assume any obligation hereunder without the prior written consent of the other Parties, which may withhold their consent in their absolute discretion.
- (b) Where a Party is a company under the *Corporations Act* any of the following is deemed to be an assignment:
  - (i) there is a change in the majority of the directors;
  - (ii) anything occurs the effect of which is to transfer directly or indirectly the management or control of the company to another person; or
  - (iii) there is any change in control of the company within the meaning of the *Corporations Act*.

### **21.6 Governing law and jurisdiction**

- (a) This Agreement is governed by the law applicable in Western Australia.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia.

## **21.7 Counterparts**

This Agreement may be executed in any number of counterparts. All counterparts, taken together, will constitute one instrument. A Party may execute this Agreement by signing any counterpart.