

2009

STATE OF WESTERN AUSTRALIA

and

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL

**HEADS OF AGREEMENT
NEGOTIATIONS IN THE SOUTH WEST**

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Ref: SSO 1535/09

THIS HEADS OF AGREEMENT is made on the 17th day of *DECEMBER* 2009

BETWEEN

THE STATE OF WESTERN AUSTRALIA through the Office of Native Title, Level 2, 197 St Georges Terrace, Perth, Western Australia ("**State**")

AND

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL (ABN 42 485 265 673) of 1490 Albany Highway, Cannington, Western Australia ("**SWALSC**")

RECITALS

- A. The State and SWALSC have agreed to commence negotiations with a view to resolving native title claims in the South West of Western Australia by means of an Alternative Settlement.
- B. Both the State and SWALSC acknowledge the importance of establishing a clear understanding of the process, scope and timeframe associated with the proposed Alternative Settlement.
- C. This Heads of Agreement sets out a framework for the scope, process and timeframe of the Alternative Settlement which will be the subject of further negotiation and development.
- D. Nothing in this Heads of Agreement is intended to preclude either party from proposing additional matters for consideration and possible inclusion in the Alternative Settlement during the course of negotiations.

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

Incorporation of definitions from the Native Title Act

Unless the contrary intention appears, terms defined in the Native Title Act have the same meaning when used in this Heads of Agreement.

Other Definitions

In this document unless the contrary intention appears:

Alternative Settlement means an agreement whereby native title rights are surrendered in exchange for a negotiated settlement package.

Ballardong claim means the native title determination application WAD 6181 of 1998 filed with the Federal Court.

Ballardong means the Ballardong native title claim.

Completion Date means the completion of the resolution of native title claims in accordance with the South West Resolution Procedural Timetable.

Execution Date means the date of the final signature on this Heads of Agreement.

Framework Agreement means the South West Resolution Framework Agreement to be negotiated between the State and SWALSC.

Gnaala Karla Booja claim means the native title determination application WAD 6274 of 1998 filed with the Federal Court.

GKB means the Gnaala Karla Booja registered native title claim.

Native Title Act means the *Native Title Act 1993* (Cth), as amended from time to time.

Parties means the State and SWALSC.

Perth Metropolitan Area means the area contained in the Part A Separate Proceeding of the Single Noongar native title determination application WAD 6006 of 2003.

Settlement Package Components means those items listed at clause 5.2.

SNC means the Single Noongar native title determination application WAD 6006 of 2003 filed with the Federal Court.

Southern Noongar claim means the native title determination application WAD 6134 of 1998 filed with the Federal Court.

South West Bojarah claim means the native title determination application No. 2 WAD 0253 of 2006 filed with the Federal Court.

South West Resolution Procedural Timetable means the timetable developed between the parties to be provided to the Federal Court.

South West Resolution Strategy means the strategy outlined in this Heads of Agreement to achieve an Alternative Settlement in the South West.

State means the State of Western Australia.

SWALSC means the South West Aboriginal Land and Sea Council.

SWB means the South West Boojarah registered native title claim.

Underlying claims means the Ballardong, GKB, Southern Noongar, SWB, WK and Yued claims.

Wagyl Kaip claim means the native title determination application WAD 6286 of 1998 filed with the Federal Court.

WK means the Wagyl Kaip registered native title claim.

Working group means the representative group of claimants for each underlying claim who provide instructions to SWALSC on matters pertaining to that claim.

Yued claim means the native title determination application WAD 6192 of 1998 filed with the Federal Court.

Yued means the Yued registered native title claim.

Interpretation

In this Heads of Agreement, unless the context otherwise requires:

- (b) the singular includes the plural and vice versa;
- (c) a reference to any thing is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (d) a reference to a gender includes other genders;
- (e) a reference to a person includes a public authority, a public body, a government department, the State of Western Australia, a company and an incorporated or unincorporated association or body of persons;
- (f) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, a person taking by novation) and permitted assigns;
- (g) a reference to this Heads of Agreement or another instrument includes all variations and replacements of either of them despite any change of, or any change in the identity of, a party;
- (h) a reference to a clause, schedule, attachment or appendix is a reference to a clause in, or a schedule, attachment or appendix to, this Heads of Agreement;
- (i) all the provisions in any schedule, attachment or appendix to this Heads of Agreement are incorporated in, and form part of, this Heads of Agreement and bind the parties;
- (j) headings are included for convenience and do not affect the interpretation of this Heads of Agreement;

- (k) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (l) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (m) if the word "including" or "includes" is used, the words "without limitation" are taken to immediately follow;
- (n) a reference to writing includes all means of representing or reproducing words in visible form including by electronic means such as facsimile transmission;
- (o) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (p) if a period of time is specified and dates from a given day or the day of an act or event, the period of time is to be calculated inclusive of that day;
- (q) if a date stipulated for payment or for doing an act is not a Business Day, the payment must be made, or the act must be done, on the next Business Day; and
- (r) where the time for performing an obligation or exercising a right is expressed by reference to a period of one or more months before or after a specified date (the **reference date**) that time period will be determined by calculating the number of months specified from the reference date, with the period expiring on the date which is the equivalent date to the reference date, or if there is no such date in the final month, the last day of that final month.
- (s) a reference to a monetary amount means that amount in Australian currency.

2. OPERATION AND STATUS

- 2.1 This Heads of Agreement will operate from the Execution Date until the Completion Date.
- 2.2 This Heads of Agreement represents a genuine, good faith commitment by the parties but is not intended to have legal force or effect.

3. SCOPE OF NEGOTIATION

- 3.1 The negotiations under this Heads of Agreement will address the following:
 - (a) a connection research process to determine whether the native title applicants are descended from ancestors who were present in their respective claim areas at settlement and have maintained an association with that land such as to enable the State to engage in Alternative Settlement negotiations with the right people for country;

- (b) a settlement package for the underlying claims in the South West;
- (c) appropriate legal entities and governance structures for the holding and management of any benefits that flow from the settlement package negotiated; and
- (d) the full and final resolution of native title claims in the South West, including any compensation liability.

4. CONNECTION RESEARCH PROCESS

- 4.1 The parties agree to engage in a connection research process in relation to the underlying claims to determine whether the State is engaging in Alternative Settlement negotiations with the right people for country.
- 4.2 The scope and timeframe for completion of the connection research process are set out in Schedule 1.

5. SETTLEMENT PACKAGE FOR THE UNDERLYING CLAIMS

- 5.1 The South West resolution strategy is aimed at settling all of the underlying claims concurrently by means of a settlement package that is delivered at both central and regional levels.
- 5.2 The parties agree that the settlement package may comprise the following components ("**settlement package components**"):
 - (a) Traditional Ownership Recognition;
 - (b) Governance and Service Provision;
 - (c) Sustainable Economic Base;
 - (d) Land Base;
 - (e) Land Access;
 - (f) Revised Heritage Regime;
 - (g) Joint Management of areas of Conservation Estate;
 - (h) Access to and use of Natural Resources;
 - (i) Land Use Activity Regime; and
 - (j) Community Development.
- 5.3 Whilst each of the settlement package components will be the subject of exploration and development during the course of the negotiations, the following issues have been identified as initial points for discussion:
 - (a) Traditional Ownership Recognition:
 - (i) The manner in which Noongar people's status as Traditional Owners of the South West region is to be recognised; and
 - (ii) The extent and exercise of rights associated with Traditional Ownership recognition.

- (b) Governance and Service Provision
 - (i) The establishment of Regional Bodies Corporate representing each underlying claimant group to hold and manage benefits arising from the settlement package;
 - (ii) The establishment of a Central Body Corporate and its role in relation to the Regional Bodies Corporate;
 - (iii) The role of the State in establishing the objects of the Bodies Corporate;
 - (iv) The extent of funding required to support the establishment and maintenance of the governance arrangements for the Bodies Corporate, including office premises, staffing and administration costs.

- (c) Sustainable Economic Base
 - (i) The parameters of a sustainable economic base including defining objectives and quantum;
 - (ii) How the economic fund will be established;
 - (iii) The relationship between the Central Body Corporate and Regional Bodies Corporate in economic management including financial distribution; and
 - (iv) Taxation related issues.

- (d) Land Base
 - (i) The extent of the land component of the settlement package;
 - (ii) A process for the identification of land parcels for inclusion in the settlement package for cultural or economic development purposes;
 - (iii) Appropriate forms of tenure relevant to the objective of the land holding;
 - (iv) The relationship between the Central Body Corporate and Regional Bodies Corporate in terms of land holding, land management and land development ventures;
 - (v) Transfer of Aboriginal Lands Trust estate; and
 - (vi) Financial obligations associated with land holdings.

- (e) Land Access
 - (i) An appropriate land access regime to enable access to State owned land for traditional purposes.

- (f) Revised Heritage Scheme
 - (i) An appropriate heritage protection regime aligning the *Aboriginal Heritage Act 1972* with the Regional Bodies Corporate as the key decision making bodies for heritage processes, providing for a consistent approach in dealing with

heritage issues throughout the region.

- (g) Joint Management of Conservation Estate
 - (i) Development of a joint management model providing for a meaningful role for Noongar people in the management of conservation estate in the region;
 - (ii) Identification of appropriate conservation areas for joint management; and
 - (iii) Employment and scholarship opportunities for Noongar people in land conservation and management.

- (h) Access to Natural Resources
 - (i) The form of recognition of non-commercial customary use of natural resources;
 - (ii) The extent and operation of rights recognised in relation to natural resources; and
 - (iii) Opportunities in relation to the commercial use of natural resources.

- (i) Land Use Activity Regime
 - (i) An appropriate regime to accommodate Noongar interests in the State's use and development of State land.

- (j) Community Development
 - (i) Funding toward the promotion of indigenous culture and improving educational outcomes; and
 - (ii) Relationship between Central Body Corporate and Regional Bodies Corporate in the management of programs and funding distribution.

6. TIMEFRAME FOR RESOLUTION

- 6.1 The parties agree that they will use their best endeavours to finalise the negotiations within a two year timeframe from the execution of this Heads of Agreement, as provided for by the South West Resolution Procedural Timetable.

7. LEGAL ENTITIES AND GOVERNANCE ARRANGEMENTS

- 7.1 In addition to the negotiations contemplated in clause 5.3(b), SWALSC will continue to fulfil its obligations and responsibilities toward the development of the corporate entities and the associated reporting as required under the terms of the South West Negotiation Funding Agreement.

8. FULL AND FINAL RESOLUTION OF NATIVE TITLE CLAIMS

- 8.1 The parties agree that the consideration for an agreed settlement package will be the full and final resolution of any current and future native title claims in the region, including all compensation liabilities arising from those claims.
- 8.2 The parties will agree an appropriate means of claim resolution to ensure certainty in achieving full and final resolution of native title in the region.

9. PERTH METROPOLITAN AREA

- 9.1 The parties acknowledge that the proposed negotiations will include the resolution of the Perth Metropolitan Area, notwithstanding that the only claim currently made over the area is the SNC.
- 9.2 The parties will discuss the means by which full and final resolution of native title is to be achieved over the Perth Metropolitan Area.

10. RESOLUTION OF OVERLAPS

- 10.1 The parties acknowledge the necessity to resolve all overlapping claims to enable a negotiated resolution of native title claims in the region to be achieved.
- 10.2 SWALSC agrees to pursue the resolution of overlapping claims as a priority and to provide the State with regular reports as to the progress achieved.

11. CONFIDENTIALITY AND FUNDING

- 11.1 The parties acknowledge that the confidentiality of, and funding for, the negotiations contemplated by clause 5 of this Heads of Agreement are governed by the South West Negotiation Funding Agreement.

12. TERMINATION BY THE STATE

- 12.1 If the State, acting reasonably:
- (a) is not satisfied with the progress of negotiations pursuant to this Heads of Agreement; or
 - (b) is of the reasonable opinion that SWALSC is in breach of this Heads of Agreement,

the State may provide SWALSC with notice in writing that it intends to terminate the negotiations. The State must allow SWALSC 14 days from the notice date in which to satisfy the State that there is merit in proceeding with negotiations.

12.2 If, 14 days after the State has notified SWALSC under clause 12.1, it is the State's opinion (acting reasonably) that:

- (a) it is not likely that negotiations can be reinstated and progressed within a reasonable period; or
- (b) SWALSC is unlikely to rectify a notified breach of this protocol within a reasonable period,

the State may terminate this Heads of Agreement by giving SWALSC a written termination notice which will be effective immediately upon receipt by SWALSC (**State Termination Notice**).

12.3 Upon receipt by SWALSC of a State Termination Notice:

- (a) this Heads of Agreement will terminate automatically;
- (b) none of the parties will have any rights or obligations under this Heads of Agreement; and
- (c) clause 4 of the South West Negotiation Funding Agreement will apply.

13. TERMINATION BY SWALSC

13.1 SWALSC may terminate this protocol for no cause by notice in writing to the State. (**SWALSC Termination Notice**).

13.2 Upon the State's receipt of a SWALSC termination notice under clause 13.1:

- (a) this Heads of Agreement will terminate automatically;
- (b) none of the parties will have any rights or obligations under this Heads of Agreement; and
- (c) clause 4 of the South West Negotiation Funding Agreement will apply.

Signed for and on behalf of the)
State of Western Australia by)
the Attorney General)


per _____

The Hon C. Christian Porter MLA

17 December 2009
Date

Signed for and on behalf of the)
South West Aboriginal Land and)
Sea Council by its Chairperson)



Graeme Minter
Chairperson

17.12.09
Date

Signed for and on behalf of the)
South West Aboriginal Land and)
Sea Council by its Chief)
Executive Officer)



Glen Kelly
Chief Executive Officer

17/12/09
Date

SCHEDULE 1

With respect to each of the underlying claims, SWALSC will provide a set of illustrative genealogies and a report addressing each ancestor or ancestral couple for the area. The State will then provide its response.

CLAIM	PROVISION OF DRAFT GENEALOGIES BY SWALSC	RESPONSE BY STATE	GENEALOGIES FINALISED	REPORT PROVIDED
GKB	JULY 2008	DECEMBER 2008	MAY 2009	NOVEMBER 2010
WAGYL KAIP/ SOUTHERN NOONGAR	FEBRUARY 2010	APRIL 2010	MAY 2010	JANUARY 2011
BALLARDONG	JUNE 2010	AUGUST 2010	SEPTEMBER 2010	SEPTEMBER 2010
YUED	OCTOBER 2010	DECEMBER 2010	FEBRUARY 2011	OCTOBER 2010
S/W BOOJARAH	MARCH 2011	MAY 2011	JUNE 2011	MARCH 2011