

Yawuru Area Agreement Indigenous Land Use Agreement - Broome

Kimberley Land Council

Yawuru Native Title Group

Nyamba Buru Yawuru Ltd

State of Western Australia

Minister for Lands

Conservation Commission of Western Australia

Conservation and Land Management Executive Body

Marine Parks and Reserves Authority

Shire of Broome

Yawuru Area Agreement Indigenous Land Use Agreement - Broome

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This Deed is made on the 25th day of February 2010

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

- 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:
- (i) give expression to the native title rights and interests of the Yawuru Community;
 - (ii) provide for the protection of Aboriginal heritage in particular Yawuru Aboriginal heritage;
 - (iii) apply the non-extinguishment principle of the *NTA* wherever possible to land transfers and land reservations;
 - (iv) provide a package to Yawuru RNTBC in consideration of and as full and final compensation for its agreement to the future acts contemplated by this Agreement and the Body Corporate Agreement and surrender of native title and in respect of impairment and extinguishment of native title;
 - (v) facilitate the future development of land in Broome for residential, infrastructural and industrial purposes, by both the Yawuru Community and by the State;
 - (vi) establish conservation and marine parks in and around Broome jointly managed by Yawuru RNTBC, the Shire of Broome and the State (dependent upon geographical area) to provide for the protection of the environment and Aboriginal heritage;
 - (vii) provide that the 'right to negotiate' procedure of the *NTA* does not apply to the doing of the future acts contemplated by this Agreement; and
 - (viii) confirm the validity of the grant of 199 freehold titles in the area known as Neighbourhood 5A.
- K Yawuru Native Title Group and the State intend that this Agreement and the Body Corporate Agreement will provide the following benefits to members of the Yawuru Community:
- (i) social and cultural maintenance and enrichment;
 - (ii) the right to practise and sustain native title rights and interests;
 - (iii) just terms compensation for loss, diminution and impairment of native title rights and interests;
 - (iv) development of economic and commercial capability and capacity; and
 - (v) promotion of economic independence.
- L This Agreement is an area agreement for the purposes of sections 24CA to 24CL of the *NTA* and regulation 7 of the ILUA Regulations.
- M The Parties intend this Agreement to be registered on the ILUA Register.
- N KLC is the representative Aboriginal/Torres Strait Islander body for the purposes of the *NTA*.
- O The Yawuru Native Title Group are a party to this Agreement as required by section 24CD of the *NTA*.

- 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*.

Agreed terms

The Parties covenant and agree as follows:

1. Defined terms and interpretation

1.1 Defined terms

In this document:

Agreement means this indigenous land use agreement entered into pursuant to Part 2, Division 3, Subdivision C of the *NTA*.

Assistance Agreement means the agreement between Yawuru RNTBC, the Executive Body and the Shire, a copy of which is annexed to Schedule 7 entered into under Section 33(1)(f) of the *CALM Act*.

Authorisation means any approval, authorisation, consent, exemption, licence, notarisation, registration or waiver however described and any renewal of or variation to any of them.

Body Corporate Agreement means the Yawuru Prescribed Body Corporate Indigenous Land Use Agreement – Broome.

Business Day means:

- (a) a day that is not a Saturday, Sunday or public holiday in the place where the notice is sent to; and
- (b) for all other purposes, a day that is not a Saturday, Sunday or public holiday in Western Australia.

Business Hours means from 9.00am to 5.00pm on a Business Day.

CALM Act means *Conservation and Land Management Act 1984*.

CATSI Act means the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

CATSI Registrar means the Registrar of Aboriginal and Torres Strait Islander Corporations appointed under section 653-1 of the *CATSI Act*.

Compensation means monetary payments, grants of interests in land and other benefits to be provided under this Agreement to Nyamba Buru Yawuru on behalf of the Yawuru Community in consideration of and in full and final compensation for the Yawuru Native Title Group agreement to the transfer of land parcels and any extinguishment, diminution, impairment or other effect on any native title rights or interests.

Conservation Estate means the areas described in clause 10.1 together with the areas described in clause 11.1 of the PBC Agreement.

Corporations Act means the *Corporations Act 2001* (Cth).

DEC means the Western Australian Department of Environment and Conservation.

Execution Date means the date of the execution of this Agreement by the last of the Parties to execute it.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes all associated legislation and regulations and any legislation or regulations substituted for or amending any of the foregoing.

ILUA Register means the Register of Indigenous Land Use Agreements established under section 199A of the *NTA*.

ILUA Regulations means the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (Cth).

In Principle Agreement means the document entered into on 6 April 2009 between the State and Yawuru RNTBC.

Joint Management Agreement means the agreement, a copy of which is annexed to Schedule 7, between the State, the Minister for Lands, the Minister for the Environment, the Conservation Commission, the Marine Authority, the Executive Body, the Shire and Yawuru RNTBC under which the parties thereto provide for management of the Conservation Estate.

LA Act means the *Land Administration Act 1997*.

LEADR means the dispute resolution organisation of that name. If LEADR ceases to exist as an organisation, then **LEADR** shall be taken to mean any other dispute resolution organisation with similar objects agreed by a majority of the Parties to the relevant dispute or, if no majority agreement can be reached, decided by the Party that first notified the relevant dispute.

LG Act means the *Local Government Act 1995*.

Native Title Registrar is the Registrar appointed under section 95 of the *NTA*.

NNTT means the National Native Title Tribunal established by section 107 of the *NTA*.

Non-Extinguishment Principle means the non-extinguishment principle as defined in section 238 of the *NTA*.

Non-Native Title Parties means the State, the Minister for Lands, the Conservation Commission, the Marine Authority, the Executive Body and the Shire.

Notice has the meaning given in clause 18.1.

NTA means the *Native Title Act 1993* (Cth).

Party means a Party to this Agreement and **Parties** means two or more of them as the case requires.

Registration Date means the date on which this Agreement is registered and entered on the ILUA Register.

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;

- (j) an obligation, representation or warranty on the part of two or more persons binds them jointly and severally;
- (k) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- (l) a reference to a day is to be interpreted as the period of time commencing at midnight and ending twenty-four hours later;
- (m) references to time are to time in Western Australia;
- (n) if a payment is to be made or an act performed on a day which is not a Business Day, then the payment must be made or the act performed on the next following Business Day;
- (o) headings in this Agreement are inserted for convenience and do not affect the interpretation of this Agreement;
- (p) words of inclusion are not words of limitation;
- (q) unless provided otherwise, reference to legislation is to legislation of the State of Western Australia; and
- (r) if any conflict arises between the terms and conditions contained in the clauses of this Agreement and any schedule or annexure to this Agreement, the terms and conditions of the clauses of this Agreement prevail.

2. Commencement of Agreement

2.1 Commencement

This Agreement commences on the Execution Date and binds each of the Parties, their successors and permitted assigns.

3. Warranties

3.1 Yawuru Native Title Group warranties

The Yawuru Native Title Group represent and warrant that:

- (a) they are authorised to enter into this Agreement on behalf of the Yawuru Community;
- (b) they have received independent legal advice about the effects of this Agreement; and
- (c) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary Authorisations) in order:
 - (i) to enable them lawfully to enter into, exercise their rights and perform their obligations under this Agreement and the other Transaction Documents to which they are a party; and

- (ii) to make this Agreement and other Transaction Documents to which they are a party admissible in evidence in the courts of the jurisdiction to which the Parties have submitted,

have been fulfilled or done.

3.2 Nyamba Buru Yawuru warranties

Nyamba Buru Yawuru represents and warrants that all conditions and things required by applicable law to be fulfilled and done (including the obtaining of any necessary Authorisations) in order:

- (a) to enable it lawfully to enter into, 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.

3.3 KLC Warranties

KLC represents and warrants that:

- (a) it is the only representative Aboriginal/Torres Strait Islander body recognised under section 203AD of the *NTA* in relation to the whole of the area covered by this Agreement;
- (b) it has used all reasonable efforts to ensure that all persons who hold or may hold native title in relation to the area covered by this Agreement have been identified; and
- (c) it is of the opinion that all persons so identified have authorised the making of this Agreement in accordance with section 251A of the *NTA*.

3.4 State Warranties

The State represents and warrants that:

- (a) it is authorised to enter into this Agreement on behalf of the State of Western Australia; and
- (b) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary Authorisations) in order:
 - (i) 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;
 - (ii) 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.

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 the intent that such statement of consent satisfies the requirement of section 24EB(1)(b) of the *NTA*.

4.2 Yawuru Native Title Group's Consent

The Yawuru Native Title Group state as follows:

- (a) their consent under this clause 4 includes their agreement not to object to the acts referred to in clause 4.1; and
- (b) they agree to do all things, including signing any documents, necessary to give effect to their consent to the acts referred to in clause 4.1.

4.3 Grant of the right includes its exercise

For the avoidance of doubt consent to the doing of the acts in clauses 4.1(a) and 4.1(b) includes consent to the exercise of any right or obligation created by those acts by the person on whom the right or obligation is conferred.

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* and regulation 7 of the ILUA Regulations; and
- (b) acknowledge that, when this Agreement is registered on the ILUA Register, the Agreement will have the additional effects conferred by sections 24EA, 24EB and 24EBA of the *NTA*, including the effects on compensation provided by those sections.

5. Lodgement of the Agreement with the Native Title Registrar for registration

5.1 Application for registration

The State is authorised by the Parties to:

- (a) prepare an application for this Agreement to be registered on the ILUA Register, which application for registration shall be in the form, or substantially in the form, provided in Schedule 2 to this Agreement; and
- (b) apply to the Native Title Registrar for this Agreement to be registered on the ILUA Register, which the State will use reasonable endeavours to do within 28 days of the receipt of all documentation required to effect registration.

5.2 Registration on ILUA Register

The Parties acknowledge their intention that this Agreement should be registered on the ILUA Register in accordance with the *NTA* as soon as reasonably practicable after the Execution Date.

5.3 Further assurances

The Parties shall use their reasonable endeavours, and do all things reasonably necessary, to assist with the timely registration of this Agreement on the ILUA Register, and to maintain the registration of the Agreement on the ILUA Register following registration.

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 of land at that time for each month (adjusted pro rata for any period less than a month) until such time as the relevant title has been transferred.

6.6 Calculation for payment of market rent

- (a) Payment of rent at market value shall be calculated on the last day of each calendar month and is payable within 30 days of receipt by the State of a tax invoice rendered by Nyamba Buru Yawuru (Due Date).
- (b) If payment of rent is not made by the State on or before the Due Date, the State shall pay interest on the amount outstanding from the Due Date to the date of payment, and the interest rate applicable thereto shall be the rate prescribed under section 8(1)(a) of the *Civil Judgments Enforcement Act 2004* at the relevant time.

6.7 Extinguishment of native title

The Parties intend that upon transfer in fee simple to Nyamba Buru Yawuru of each parcel of land referred to in Schedule 4 in accordance with this clause 6, the native title rights and interests in it are surrendered and extinguished as of the date of transfer.

7. Memorials, restrictions on dealings and transfer of Yawuru Land

7.1 Memorials

- (a) The State shall lodge a memorial on all Yawuru Land to be transferred to Nyamba Buru Yawuru in fee simple to indicate that it is to be transferred to Nyamba Buru Yawuru pursuant to this Agreement.
- (b) The State shall lodge memorials:
 - (i) on the Registration Date on titles which have issued; and
 - (ii) in respect of unallocated Crown land, on the date a Crown land title or a certificate of title issues.

7.2 Restriction on dealings by State

- (a) Neither the State nor the Minister for Lands may, except as expressly provided in this Agreement:
 - (i) mortgage, charge or in any way encumber Yawuru Land;
 - (ii) dispose of or assign its interest in Yawuru Land; or
 - (iii) do or permit to be done anything which may prejudice, delay or interfere with the exercise by Yawuru Native Title Group of their rights in Yawuru Land.
- (b) The State or the Minister for Lands, as the case may be, in respect of any part of the Yawuru Land which has not yet been transferred to Yawuru Native Title Group in accordance with this Agreement shall:
 - (i) deliver to Yawuru Native Title Group copies of all notices, correspondence and other documents received by the State or the Minister for Lands, as the case may be, relating to or affecting the Yawuru Land as soon as reasonably practicable after their receipt; and
 - (ii) keep Yawuru Native Title Group informed of all matters associated with the Yawuru Land which may reasonably affect its development.

7.3 Requirements for transfer

- (a) The State shall attend to the removal of all encumbrances on the titles to Yawuru Land, where it is reasonable to do so, prior to their being transferred to Nyamba Buru Yawuru.
- (b) Subject to clause 7.3(a), Yawuru Native Title Group and Nyamba Buru Yawuru acknowledge that the transfer of fee simple of Yawuru Land is subject to any restrictive or positive covenant or easement registered on the deposited plan to the relevant parcel prior to the date of this Agreement, or which was registered on the deposited plan to the parcel after the date of this Agreement with the prior written consent of Yawuru Native Title Group or Nyamba Buru

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 Buru Yawuru acknowledge and agree that the transfer of the fee simple of parcels of Yawuru Land is subject to any error or misdescription of those parcels where the deposited plans to those parcels are in existence at the Execution Date but not otherwise.
- (d) Within 30 days of serving a written request on the Minister for Lands for transfer of a parcel of land, Nyamba Buru Yawuru must deliver to the Minister for Lands a transfer of land duly executed by Nyamba Buru Yawuru which is in a form suitable for registration.
- (e) Upon receipt of a transfer of land executed by Nyamba Buru Yawuru, the Minister for Lands shall promptly:
 - (i) execute the transfer of land;
 - (ii) lodge the transfer of land at Landgate; and
 - (iii) attend to all stopped document notices and other requisitions necessary for registration to be effected.

8. Neighbourhood 5A

8.1 Validation

To the extent that they may have been invalid, the Parties hereby validate the grant of 199 fee simple titles in the area known as Neighbourhood 5A (Neighbourhood 5A titles);

8.2 Extinguishment

Yawuru Native Title Group acknowledge and agree that as of the date of grant of the Neighbourhood 5A titles, any native title rights and interests existing therein were surrendered to the State with the intention that they be extinguished.

9. Land Arrangements in favour of State

9.1 Surrender of native title

As of the Registration Date, the Yawuru Native Title Group surrender in favour of the State native title in the land described in Part 1 of Schedule 6 with the intention of the Parties that the native title rights and interests therein be extinguished.

9.2 No objection

KLC and the Yawuru Native Title Group shall not object to the transfer by the State or its agencies to any person of any title of the land described in Schedule 6.

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 *CALM Act*.
- (c) Joint management of the Marine Park Areas shall be undertaken by Yawuru RNTBC, the Marine Authority and the Executive Body pursuant to a cultural management plan and a management plan prepared under Part V of the *CALM Act* and in accordance with the Joint Management Agreement.

10.4 Townsite Areas tenure and management

- (a) The Minister for Lands shall reserve under Section 41 of the *LA Act* and classify as a Class A reserve under Section 42 of the *LA Act* the land in Part 2(a) of Schedule 7.
- (b) The Minister for Lands shall reserve under Section 41 of the *LA Act* the land in Part 2(b) of Schedule 7.

- (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) The Minister for Lands shall place the Townsite Areas for care, control and management jointly with Yawuru RNTBC and the Shire with assistance to be provided by the Executive Body pursuant to the Assistance Agreement.
- (e) Joint management of the Townsite Areas shall be pursuant to a cultural management plan and a management plan prepared under Section 49 of the *LA Act* and in accordance with the Joint Management Agreement.

10.5 Out of Town Areas tenure and management

- (a) The Parties agree that from the Registration Date until the earlier of:
 - (i) the *CALM Act* being amended to allow for joint management of private land (**CALM Act amendment**); or
 - (ii) the 4th anniversary of the Registration Date,

the Out of Town Areas will be reserved under Section 41 of the *LA Act* (**Out of Town Areas Reserve**) and an order will be made placing the care, control and management of the Out of Town Areas Reserve with Yawuru RNTBC and the Conservation Commission jointly in accordance with a cultural management plan and a management plan prepared under Part V of the *CALM Act* and the Joint Management Agreement.
- (b) If the *CALM Act* amendment is legislated within 4 years of the Registration Date, or within such other period as the Parties agree:
 - (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* on the condition that Yawuru RNTBC use and manage the Out of Town Areas for the purpose of conservation, recreation, and traditional and Customary Aboriginal use and enjoyment and for the purpose of practising, sustaining and maintaining native title rights and interests;
 - (iii) Yawuru RNTBC shall promptly grant a lease to the State for a term of 99 years at a rental of \$1.00 of the Out of Town Areas save those sections of the Out of Town Areas identified by Yawuru RNTBC as law grounds, which sections shall be surrounded by restricted access areas and managed in accordance with an appropriate cultural management plan prepared by Yawuru RNTBC; and
 - (iv) the Joint Management Agreement remains on foot and is deemed to be an agreement between Yawuru RNTBC and the Executive Body for the purpose of the relevant provision of the *CALM Act*.
- (c) If the *CALM Act* amendment is not legislated within 4 years of the Registration Date and Yawuru RNTBC and the State have not agreed otherwise, then:

- (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 this Agreement, to vary this Agreement, then the Parties each agree to do all things necessary to vary the details of this Agreement as entered on the ILUA Register including, if necessary, having this Agreement removed from the ILUA Register and replaced with a varied Agreement.

14. Default

14.1 Notice of default

If any Party believes that another Party has defaulted in fulfilling an obligation arising from this Agreement, then the first Party shall within 10 Business Days notify the defaulting Party, specifying the nature of the default and what action the notifying Party requires.

14.2 Failure to remedy

If the alleged defaulting Party:

- (a) within 10 Business Days of receipt of the notice referred to in clause 14.1, by written notice denies that it has committed a default; or
- (b) does not remedy the alleged default within ten Business Days, or such longer time as specified in the notice of default,

then either Party may invoke the dispute resolution provisions of clause 15.

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) If the Parties to a Dispute have complied with clauses 15.1 to 15.4 then, if all those Parties agree, they may refer the Dispute to arbitration under the *Commercial Arbitration Act 1985*.
- (b) The arbitration shall be held in Perth, Western Australia or any other place agreed by the Parties.
- (c) The Parties shall appoint a person agreed between them to be the arbitrator of the Dispute.
- (d) If the Parties fail to agree on a person to be the arbitrator under clause 15.5(c), then the Parties shall request the President of the Law Society of Western Australia to appoint an arbitrator who has experience in the area of the Dispute and in Indigenous cultural matters.

15.6 Breach of this clause

If a Party to a Dispute breaches clauses 15.1 to 15.4, the other Parties to the Dispute do not have to comply with those clauses in relation to the Dispute before starting court proceedings.

16. TERMINATION

16.1 No termination

No Party may unilaterally terminate this Agreement for any reason, including by reason of any breach or repudiation of this Agreement by any Party.

16.2 Agreement to terminate

If all Parties agree in writing, the Parties may terminate this Agreement at any time, including at any time after this Agreement is registered on the ILUA Register.

16.3 Consequences of termination

Unless otherwise agreed in writing by all Parties, if this Agreement is terminated in accordance with clause 16.2 or is removed from the ILUA Register by the Native Title Registrar in accordance with section 199C of the *NTA*, then:

- (a) other than this clause 16 and clauses 12 and 20 of this Agreement (which are to remain operative), and to the extent provided in this clause 16, this Agreement ceases to have any force or effect on and from the date of termination or removal from the ILUA Register (as the case may be);
- (b) any act done under or in accordance with this Agreement shall remain, to the extent permitted by law, valid; and

- (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 the case may be) shall remain binding and enforceable by or against each Party.

16.4 Termination after registration on ILUA Register

- (a) If the Parties propose to terminate this Agreement after the registration of this Agreement on the ILUA Register in accordance with clause 16.2, then all Parties must advise the Native Title Registrar in writing in accordance with section 199C(1)(c)(ii) of the *NTA*.
- (b) For the avoidance of doubt, if the Parties terminate this Agreement in accordance with clause 16.2 and this Agreement is subsequently removed from the ILUA Register by the Native Title Registrar in accordance with section 199C(1)(c)(ii) of the *NTA*, the operative date for the purpose of clauses 16.3(a) and 16.3(c) is the date of termination.

17. Confidentiality

For the avoidance of doubt, from Execution Date nothing in this Agreement is confidential.

18. Notices and other communications

18.1 Service of notices

A notice, demand, consent, approval or communication under this Agreement (**Notice**) must be:

- (a) in writing, and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or facsimile to the recipient's address for notices specified in Schedule 1 as varied from time to time by any Notice given by the recipient to the sender.

18.2 Effective on receipt

A Notice given in accordance with clause 18.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the tenth Business Day after the date of posting (or on the twentieth Business Day after the date of posting if posted to or from a place outside Australia);
- (c) if sent by facsimile when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within 8 Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice,

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.

19.5 Indemnity

The State agrees to indemnify and keep indemnified Yawuru Native Title Group and Nyamba Buru Yawuru from and against any losses and damages, including penalties or interest, which may arise in respect of a breach of clause 19.4 by the State.

20. Costs and duties

20.1 Duties, taxes and government charges

Subject to clause 19, the State must pay all duties, or taxes of a similar nature, on and in relation to:

- (a) this Agreement;
- (b) any instrument, document or transaction contemplated by this Agreement; and
- (c) any instrument or document required under any relevant law in connection with any transaction contemplated by this Agreement,

even if another Party is primarily liable for payment of the duty.

20.2 Recovery

If the State fails to perform its obligations under this clause, any other Party may pay the duties or other taxes of a similar nature and recover the amount paid from the State as a debt due on demand.

20.3 Effect of termination

Termination of this Agreement or its removal from the ILUA Register by the Native Title Registrar in accordance with section 199C of the *NTA* does not affect the operation of this clause 20.

21. General

21.1 Entire Agreement

As at the Commencement Date this Agreement constitutes the entire Agreement between the Parties as to its subject matter and in relation to that subject matter, supersedes any prior understanding or Agreement between the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

21.2 Severability

If any provision of this Agreement is void, voidable by any Party, unenforceable or illegal according to the law in force in the State of Western Australia, it shall be read down so as to be valid and enforceable or if it can not be so read down, the provision (or where possible the offending words), shall be severed from this Agreement without affecting the validity, legality or enforceability of the remaining provisions (or parts of those provisions) of this Agreement which will continue in full force and effect.

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.