

The Burrup Agreement: a case study in future act negotiation

by Frances Flanagan¹

1. Introduction

The agreement for the acquisition of native title over areas of land on and around the Burrup Peninsula near Karratha in Western Australia is one of the most comprehensive of its kind. The Pilbara Native Title Service led the negotiations with the State of Western Australia in highly challenging circumstances: there were three overlapping and part-heard native title claims, the acquisition concerned an area of world-renowned heritage significance, the State party was a newly-elected Labor government and there were five proponent companies proposing multi-billion dollar investments.

One of the first things that my colleagues at the Land Council and I did upon realising that we would be responsible for assisting in negotiations of such magnitude and complexity was to reach for a copy of Ciaran O'Faircheallaigh's paper on negotiating major project agreements using the 'Cape York Model.'² Our immediate reaction was gratitude towards Professor O'Faircheallaigh for his excellent digestion of the issues and his articulation of a comprehensive model for pursuing major negotiated agreements. Our second reaction was grave concern: we clearly did not have the resources, time or in-house expertise to follow the Cape York Model.³ What follows is a brief summary of the strategic and logistical preparation the Land Council undertook prior to the negotiations that enabled us to broker a comprehensive agreement with the State and, at the same time, increase the expertise and skills of Land Council staff, improve the

¹ Frances Flanagan has been a Legal Officer with the Yamatji Marpa Bana Baba Maaja Aboriginal Corporation for three years. The views expressed in this paper are those of the author, and not necessarily those of the Yamatji Marpa Bana Baaba Maaja Aboriginal Corporation. The author would like to sincerely thank James Fitzgerald, Helen Lawrence and David Ritter for their comments and assistance in preparing this paper.

² O'Faircheallaigh, C, 'Negotiating Major Project Agreements: the Cape York Model', AIATSIS Research Discussion Paper no. 11, 1999.

³ The resource intensiveness of following the Cape York Model is, of course, acknowledged by Professor O'Faircheallaigh in the paper.

relationships between the native title parties and the Land Council (and between the native title parties themselves) and to continue to maintain a high level of service to other Land Council clients.⁴ The paper will also describe a few non-confidential aspects of the negotiations, summarise the contents of the final agreement and make a few comments about the legacy of the Burrup negotiations for the Roebourne community and other native title claimants in Australia.

2. Background

The State of Western Australia notified the native title parties of their intention to acquire land for the construction of a heavy industry estate on the Burrup Peninsula and adjacent Maitland area in January 2000. The notification was the culmination of many years of planning for the expansion of industrial development in the Western Pilbara undertaken by successive Liberal and Labor Governments through the late 1970s, 80s and 90s.⁵ The proposed industrial estates were intended to contain a number of downstream gas-processing plants, as well as associated infrastructure facilities and industrial lay down areas. In order to accommodate the increased population that would accompany the development, the State also required an extensive release of residential and commercial land in nearby Karratha.

At the time of the notification, three registered native title claims covered the proposed acquisition area. The three claims originally commenced as one application, Ngaluma Injibandi, which was lodged in 1994 as an inclusive claim that embraced all people of Ngarluma and Yindjibarndi descent. In 1996 and 1998, two smaller groups lodged separate overlapping claims for exclusive possession of the Burrup respectively known as the Yaburara Mardudhunera and

⁴ The paper does not attempt to describe the negotiations from a claimant perspective. It is intended as a technical paper with a practical focus that may assist other Land Council and indigenous representatives negotiating similar agreements.

⁵ Vinnicome, Patricia, *King Bay/Hearson Cove Aboriginal Heritage Survey*, 1997, p.15.

Wong-Goo-Tt-Oo claims.⁶ The members of these smaller claims were and are considered by the Ngarluma Yindjibarndi people to be part of the Ngarluma Yindjibarndi group. All three claims remained registered throughout the negotiations.

Intense negotiations for the acquisition did not commence until late 2001. The landscape for negotiations changed radically in the intervening twenty months since notification: all three native title claims had finished giving evidence of their connection to the Burrup before the Federal Court; the legal representatives for the Ngarluma Yindjibarndi claimants, the Aboriginal Legal Service (WA) lost representative body status and the Gallop Labour Government won power in Western Australia. At the time that serious negotiation commenced, the relationship between the new representative body, the Pilbara Native Title Service (PNTS) and the Ngarluma Yindjibarndi community was still at a formative stage. Although the PNTS had been acting for the community in future act matters for several months, many important relationships were just beginning to develop and the procedures for taking instructions and obtaining informed consent from the group were not yet well tested. The PNTS also was faced with the challenge of establishing close working relationships with the other approximately fifteen native title claim groups it had recently come to represent in the Pilbara. In addition to the difficulties posed by the transition in representation, there was also a degree of acrimony and resentment within the Roebourne Aboriginal community between Ngarluma Yindjibarndi claimants and key Wong-Goo-Tt-Oo and Yaburara claimants, who had presented conflicting evidence of each others' connection to the Burrup during the recent trial.

Just prior to the commencement of Law Business in 2001, the State announced its intention to conclude an agreement with all three native title claim groups for the acquisition of the Burrup and Maitland land by the end of March 2002. The notion of completing such complex negotiations within a four month time period

⁶ For background to the lodgment of the overlapping claims, see the Four Corners documentary, *Secret White Men's*

(that included Law Business) was described by one experienced negotiator as 'simply inconceivable.' The highly compressed timeframe for negotiation was, we were told, a consequence of the immutable commercial deadlines of the five international companies who had expressed interest in taking leases in the proposed estates. The new Labor government was naturally keen to demonstrate its ability to attract big investment to the region, and the pressure to conclude a native title agreement quickly was intense: if all five proponents took leases, their proposed developments would involve 7 billion dollars worth of capital expenditure, 3,500 direct and indirect jobs, and up to a billion dollars per annum expenditure in the Australian economy.⁷ Expenditure on capital alone was large enough to have a perceivable impact on the value of the Australian dollar in international currency markets. The State had itself already committed \$120 million to infrastructure development necessary for the development.

3. Strategic Preparation for Negotiations

There were many reasons for ensuring that the negotiations were approached in a highly strategic manner. It was apparent that the economic and social impact of the proposed Burrup would be enormous, and would not only be felt by the Ngarluma Yindjibarndi claimants on whose land the development would proceed but also by our other claimant groups in the region. The PNTS was also cognisant of the exceptionally high cultural and environmental value of the Burrup itself. The Burrup is, in the words of one Ngarluma Yindjibarndi claimant, 'the biggest monument to the whole of this land', and we knew that any disturbance to it would be felt very deeply by many people.⁸ There were also very high expectations that the new Labor government would distinguish itself from its Liberal predecessor and take an honourable path to economic development in the Pilbara by means of a precedent-setting native title agreement.

Business, 1999. Transcript is available on the ABC website at www.abc.net.au.

⁷ Paragraph 1.2, State's Section 31 Agreement Proposal dated 12 November 2001.

(a) Creation of the Negotiation Team

It was clear that the Land Council had to give a special priority to the Burrup negotiations. In many instances, this might mean briefing out the matter to an experienced firm or negotiator. However, the Land Council could not afford to brief out the negotiation without making some significant sacrifices to the level of service delivery we were providing to our other Pilbara clients. We were also mindful of the imminent burden the PNTS were about to take on advising the Ngarluma Yindjibarndi Prescribed Body Corporate, and saw the Burrup negotiations as an opportunity to strengthen the Land Council's nascent relationship with the Roebourne community. Finally, we also wanted the Land Council to retain the negotiation experience that comes with involvement in a major negotiation, as well as the detailed knowledge of the agreement itself that would be required for the implementation phase.

The only way that all of PNTS' objectives could be met was by establishing an in-house negotiation team who would deal exclusively with the Burrup negotiations on a full-time basis. The core negotiation team that was formed consisted of two PNTS lawyers and a consultant lead negotiator with extensive experience in negotiating major agreements. A PNTS Senior Anthropologist, Mining and Future Act officer and two Aboriginal Liaison Officers provided support and assistance to the negotiating team during the negotiations.⁹

Where it was possible, all of the work was completed by the in-house negotiation team with the advice of the lead negotiator. However, in areas outside the team's expertise it was necessary to get external advice, which included

⁸ The Burrup is said to be a source of mythological beings who came ashore there and took the Law inland. Michael Robinson, personal communication, 2002.

⁹ The negotiation team comprised Helen Lawrence (Senior Legal Officer), Frances Flanagan (Legal Officer), James Fitzgerald (Lead Negotiator), Alum Cheedy (Aboriginal Liaison Officer), David Daniel (Aboriginal Liaison Officer) Nicholas Green (Director of Research), Adrian Murphy (Mining and Future Act Officer). Invaluable support and assistance was provided by all staff at the Land Council, with a special mention to Michael Ryan (Legal Officer), Natasha Case (Legal Officer) and David Ritter (Principal Legal Officer).

economic and property valuation advice over the course of the negotiation. The mentoring the in-house lawyers received from the lead negotiator has proved invaluable in future negotiations with other clients, and has also enabled them to pass on what they learned to other colleagues in the Land Council.

(b) Securing adequate resources

The State's funding contribution to the negotiation team was absolutely essential in enabling the community to give informed consent to the agreement. As well as assisting with the professional fees of the lead negotiator, State resources were used to employ locum practitioners to relieve the Land Council lawyers of their usual work responsibilities. The final result would have been inconceivable without the State's commitment to adequately resourcing the community's representatives.

(c) Preliminary Legal advice

The strength of the Ngarluma Yindjibarndi people's negotiation position could not be evaluated until we obtained legal advice about two matters: firstly, the group's prospects of success in their native title claim over the Burrup (and the prospects for the two overlapping claims) and, secondly, the legal bases (if any) for requiring the State to recommence notification. Since the PNTS had not been involved in representing the group in the native title trial, it was necessary to first obtain the advice from Senior Counsel who had run the trial.¹⁰ Without obtaining the advice, there would have been no way of assessing the risks of the claimants losing their right to negotiate if an adverse determination was made during the negotiation period. As it happens, the trial judge has still not made a determination to date, however it was not possible to know that would be the case during the negotiations, and so Counsel's advice was invaluable in determining the robustness of the negotiation position that could be adopted.

¹⁰ The contents of the advice are confidential.

The advice that we obtained regarding the State's technical compliance with legislative requirements for the acquisition was also critical. The leverage registered claimants can obtain in negotiations using the right to negotiate alone is increasingly limited.¹¹ More often it is the standing of native title claimants to challenge the validity of the State or developer's technical compliance that will make the difference in negotiations. In the Burrup negotiations, the threat of challenging the validity of the State's actions was used to great effect. It would not have been possible to do this without comprehensive research as to technical compliance having been completed at the outset. Without such research, any threats we may have made would have been spurious and devalued our credibility in negotiations.

(d) Negotiating with the right people

Before negotiations with the community began, the Land Council was keen to ensure that the community would be negotiating with the right people within Government. Before early 2002, the State had approached the negotiation in a somewhat ad hoc fashion, making limited and heavily conditional offers via officers who did not have the authority to make the high level policy decisions that would be required for a comprehensive agreement. In view of the incredibly short time frame available to complete the negotiation, it was clear that the agreement would not be completed unless the negotiator for the State had such authority. To this end, Chris Athanasiou was appointed as the State's lead negotiator in March 2002.

(e) Relationship with the community

¹¹ For instance, the recent decision of Deputy President Franklyn in WF02/4 in *Darcy Hunter/ Frank Sebastian/ John Dudu/ Gulliver Productions / Gulliver Oil / State of Western Australia* indicates the highly restrictive interpretation the National Native Title Tribunal have taken of the content of the obligation to negotiate in good faith.

The Ngarluma Yindjibarndi community comprises over a thousand people living primarily in Roebourne but also in Karratha, Port Hedland, Onslow, Dampier, Tom Price and other towns and reserves in the Pilbara. The challenge of ensuring that the community was in a position to give informed consent to such a major development in such a short period was considerable. It was critical that the Land Council developed a strong relationship with the community quickly so that we could confidently take instructions and credibly advise the community of their options. To this end, we sought funds from the State to employ an additional Ngarluma Liaison Officer to join our existing Yindjibarndi Liaison Officer. The Liaison Officers worked incredibly hard to ensure that everyone in the community, even those not able to attend meetings, understood what was going on in negotiations and had a way of having their say. There is no doubt that the final agreement would not have been possible without them.

The immense pressure of the State's timeframes also led to the decision to abandon any attempt to establish a negotiation team or steering committee with delegated authority from the community to conduct the negotiations. With such complicated and difficult decisions to be made, the imperative to ensure that decision-making was transparent, inclusive, and had the mandate of the entire community overrode the convenience of taking instructions from a smaller negotiating team. There was simply not enough time to convene separate community meetings to confirm the negotiation team's instructions. The result was that we adopted a somewhat cumbersome but reliable practice of having meetings open to the entire community on a nearly weekly basis during the intense negotiation period. Meetings were advertised very widely and attendance varied between twenty and a hundred people, often with squealing children running around the hall in the background. Nearly all of the meetings were videotaped to demonstrate transparency of decision-making and as evidence of the advice that had been given to the community. While there is no doubt that these meetings were far more difficult than would have been the case with a negotiation team, the decision paid off when the community later decided

to make an application to the Court to remove a registered claimant who had, notwithstanding the open invitation to attend all meetings, chosen not to participate in the negotiation and had declined to follow the community's wishes in signing the agreement.¹²

It should also be mentioned that attempts were made to establish a joint approach to negotiation that included all three native title groups, however, at an early stage it was evident that the objectives of the three claim groups were highly disparate and that a mutually satisfactory arrangement for jointly negotiating with the State would not be possible.

(f) Anthropological research

The time pressure on the community to conclude an agreement within four months clearly mitigated against the Land Council undertaking negotiation-specific anthropological research and social impact assessment. However, the fact of the near-completion of the trial meant that the Land Council negotiation team had access to advanced and detailed research about the likely effect of the acquisition on the group's native title rights, as well as information about the people most likely to be affected by the development. The Land Council also had the benefit of having two senior anthropologists on staff for part of the negotiation, each with more than twenty years involvement with the Ngarluma Yindjibarndi community and experience as expert witnesses in the trial.¹³ These anthropologists also provided invaluable advice about taking instructions and developing relationships within the community.

(g) Economic advice

Although it was clear that the proposed industrial estates would have a significant impact on the economy, it was not clear precisely who would benefit from that

¹² See *Daniel v State of Western Australia* [2002] FCA 1147 (13 September 2002).

impact and to what extent. The fact that there were obvious political imperatives for the State to establish the industrial estates did not necessarily mean that the State would be a primary direct economic beneficiary of the developments. It thus became critical to obtain expert advice about what the State's financial interest in the acquisition were. The advice was decisive in formulating the financial aspects of the Ngarluma Yindjibarndi group's offer to the State for compensation. Separate advice was also obtained about the financial profile of one of the proponent companies, Burrup Fertilisers Pty Ltd, as well as information about the average cost of leases in other similar industrial estates in Australia.

4. Commencing Negotiations

It was evident that neither the State nor the Ngarluma Yindjibarndi people were likely to achieve their objectives by relying solely on the processes of the *Native Title Act*. The community knew that they were not able to stop the development by withholding their consent to it. Pursuing the arbitration processes of the *Native Title Act* would have achieved little more than frustrating or impeding the State without addressing substantively the objectives of the community. Negotiating an agreement meant that they could attempt to minimise the negative impacts on the environment and their cultural heritage and maximise the positive social and economic aspects of industrial development for the community.

Thus the Ngarluma Yindjibarndi community's decision to negotiate an agreement was relatively straightforward. However, the task of deciding what should go into an agreement was clearly more complex. The Land Council was keen to ensure that the perspectives and priorities of the Ngarluma Yindjibarndi people, rather than those of the State, were the starting point for the negotiation process. The offers that had been made over the previous two years by the State in no way

¹³ These were Michael Robinson and Nicholas Green.

reflected Ngarluma Yindjibarndi people's aspirations. It was agreed that the Ngarluma Yindjibarndi people would present a comprehensive counter-offer to the State that would establish a clear Ngarluma Yindjibarndi negotiation position and, it was hoped, fundamentally re-set the agenda for the negotiation.

Time constraints made it impossible to complete a separate Economic and Social Impact Assessment prior to taking instructions on the content of the counter-offer. However, the Land Council had the benefit of access to similar work that had already been done for the community in previous negotiations for the Woodside development on the Burrup. This information, together with the extensive available literature published about the Roebourne Aboriginal Community,¹⁴ played a critical role in sensitising us to the kinds of issues that would need to be addressed in any agreement that set out to minimise the negative impacts of industrial development on the community. A familiarity with such material, together with advice from the Land Council senior anthropologist, meant that we were able to take instructions on the content of the counter offer relatively quickly in a course of community meetings in February and early March 2002.

On 8 March 2002, the community presented State representatives with a comprehensive proposal for the final settlement of all native title issues relating to the acquisition of the Burrup and Maitland Estates and the Karratha land. The proposal was holistic in nature. In return for the full range of acts and activities to be undertaken by the State in establishing the industrial estates, the State was

¹⁴ Edmunds, M., *They get Heaps: A Study of Attitudes in Roebourne, Western Australia*, Aboriginal Studies Press, 1989, Canberra; Gara T.J 'The Flying Foam Massacre: An Incident on the North-west Frontier' in Smith M. (ed.) *Archaeology at ANZAAS*, 1983, WA Museum, Perth; Gibson, J., *The In-Betweeners: A study of changing Values and Relationships in Roebourne, Western Australia, with special reference to Aboriginal School Children*, M.A Thesis, University of Western Australia, 1971; Hess, M. 'The Pilbara Pastoral Workers' Uprising of 1946', *Papers in Labour History*, Vol.3, 1989 ; Howitt, R., 'Resource Development and Aborigines: The Case of Roebourne 1960-1980', *Australian Geographical Studies*, 27 (2): 155-69; Hunt, S.J., *Spinifex and Hessian: Women's Lives In North - Western Australia, 1860 - 1900*, Nedlands, University of WA Press, 1986; McLeod, D., *How the West Was Lost, The Native Question in the Development of the Western Australian*, Port Hedland, 1984; Olive, N. (ed.) *Karijini Mirlimirl: Aboriginal Histories from the Pilbara*, Fremantle, Arts Centre Press, 1997; Rijavec, F. *Know the song, Know the Country. the Ngarda-Ngali story of culture and history in Roebourne district*, Roebourne, Ieramugadu Group, 1995; Turner, J. *We Womans Really Knows a Lot : Aboriginal gender relations in contemporary organisational negotiations, Roebourne, Western Australia*, M.A. Thesis, Department of Anthropology, University of Western Australia, 1990; Wilson, J., "The Pilbara Aboriginal Social Movement: An Outline of

asked to agree to a package of measures and benefits including land, cultural heritage and environmental protection, financial compensation, residential and commercial land, improved roads, housing, education, employment and training that would represent 'just terms' compensation for the acquisition of native title.¹⁵ The presentation of the document was accompanied by a traditional welcome to country and a community presentation summarising the key points of the document. The presentation of the counteroffer performed a useful reference point later on in the negotiation process as it was clearly remembered by everyone as a moment when the community was united in telling government what they wanted from the negotiation. We were also able to gauge the progress of the negotiation as we went by comparing the parties' subsequent positions to the position set out in the counteroffer.

In addition to setting out a proposal for settlement, the counteroffer document made a political and moral case for negotiating a comprehensive agreement with the Ngarluma Yindjibarndi. We argued for the importance of seeing the Burrup development in its historical context, as the most recent in a series of waves of industrial development that have transformed the Pilbara since the 1960s. Each of the previous waves had been built on the displacement and dispossession of the region's Aboriginal population. In making this 'third wave', the Gallop Government had a choice: on the one hand, it could choose to pursue the process and approach inherited from the previous Court Government and thus complete the marginalisation and alienation of the Aboriginal community of the Pilbara; or, alternatively, it could choose to break from the past, and facilitate development in a just and equitable way.

its background and significance" in R.M. and C. H. Berndt (eds.) *Aborigines of the West: Their past and their present*, University of WA Press, Perth.

¹⁵ In setting out a basis for the proposal, the counteroffer document drew upon some of Diane Smith's arguments about the *sui generis* nature of native title compensation. We attempted to argue that, since 'just terms' compensation requires a recognition that land underwrites the law, culture and identity of the traditional owners, the best possible (although never entirely adequate) way to compensate native title holders for the loss of their spiritual relationship to their ancestors' land is to provide the community with the means to build upon or reconstruct their relationship with other parts of their traditional country through the transfer of land and the provision of financial and social benefits to assist the community to use that land. See D. Smith, 'Valuing native title: Aboriginal, statutory, and policy discourses about compensation'. Centre for Aboriginal Economic Policy Research, Discussion Paper 222, 2001, p32.

5. The Negotiation Process

The March counteroffer was an emphatic success. It radically broadened the matters that were canvassed in negotiation from that point on and, ultimately, led the parties to reach an agreement that was far more comprehensive than the kinds of agreement contemplated by the State's previous offers. Intensive negotiation lasted approximately four months.¹⁶ The negotiation placed incredible demands on the community, who were called on to attend over thirty community meetings in that time. Not only did they negotiate intensively for the Burrup, Maitland and Karratha acquisition, but were required, as a precondition to entering negotiations with the State, to reach a separate agreement with one of the proponent companies Burrup Fertilisers Pty Ltd, for the acquisition of their 72ha lease area within their timeframes.

The community were also placed under high pressure by intense media attention. A major confidentiality breach led to a front page newspaper article in *The West Australian* on the 23 May 2002 which inaccurately set out details of the State's offer and implicitly characterised the negotiations as a kind of Labor party conspiracy to push through development on the Burrup and freeze out local government and community interests: the Ngarluma Yindjibarndi community were characterised as 'a group with several links with the Labor Party' who were 'keen to sign up to the package' that would 'ruin pristine beach at Hearson's Cove' and 'cut off the northern parts of the Burrup.' The Wong-Goo-Tt-Oo group, who were said to be 'in dispute with the Ngaluma Injibandi [*sic*]', were, by contrast, described as simply 'wait[ing] for the Federal Court decision.'¹⁷ Such reporting obviously failed to grasp the basic characteristics of the right to negotiate under the *Native Title Act* (namely, that it was not a right of veto, that negotiations were confidential, at arm's length and, at this stage at least, had

¹⁶ The details of the negotiation process remain confidential and cannot be described in this paper. However, as a consequence of litigation arising from the negotiation, some aspects of the negotiation are described in *Daniel v State of Western Australia* [2002] FCA 1147 (13 September 2002) and in the NNTT decision of *State of Western Australia/Daniel/Holborow/ Hicks* WFO 02/17 and WFO 02/18 (12 November 2002)

¹⁷ Clery, Daniel, '\$27M Native Title Offer', *The West Australian*, Thursday 23 May 2002, p.1.

absolutely nothing to do with the Federal Court) and can only be understood as a manifestation of the desire of particular persons to deliberately derail the negotiations. Unfortunately, similarly misconceived and inaccurate reporting followed in print, TV and radio, and permeated the views expressed at a well-attended community rally on the Burrup. One Nation MLC John Fischer asked questions in parliament about the negotiations and the conduct of individual Land Council staff. Political parties and lobby groups that opposed industrial development on the Burrup (which included the Greens, the Roebourne Shire, One Nation and others) each (either through ignorance or deliberate intent) tended to exploit perceptions of Aboriginal interests in the Burrup to bolster their arguments and political aims, with complete disregard for the statutory basis for the negotiations or the views of Aboriginal people themselves. The mythology that was developed of the Ngarluma Yindjibarndi's role in the negotiations eventually led the group to give a press conference of their own, where they explained that, far from 'selling off' their heritage to government, they were using their statutory rights to *protect* the Burrup from further development and minimise the negative environmental and cultural heritage consequences as best they could. Their right to negotiate did not give them the right to stop the development altogether or to determine where it went. Needless to say, the quantity of public misinformation that was put about did little to assist the Land Council in helping the community to stay united in their negotiation position and informing all members of the community about the progress of the mediation to enable them give informed consent.

6. Content of the Agreement

The Burrup agreement was not made subject to any confidentiality restrictions, and so it is possible to describe its contents here. Importantly, the benefits contained in the agreement endure regardless of whether any of the native title parties are determined by the Federal Court to hold native title over the Burrup or Maitland.

In exchange for the native title parties' agreement to the surrender and permanent extinguishment of native title on the industrial land on the Burrup and Maitland Estates and the land required for the State for residential and commercial purposes in Karratha, the native title parties receive:

(a) *Burrup Non-Industrial Land*

- (i) Freehold title to Burrup Non-Industrial Land to the high-water mark conditional upon:
 - The freehold title being subject to existing easements and other interests including roads;
 - The land being leased back to the State for 99 years (+ 99 year option). One of the terms of the lease is that the Contracting Parties cannot sell the land to anyone else without offering it to the State first;
 - An agreement between Ngarluma Yindjibarndi and CALM to manage the land in accordance with a Management Plan; and
 - A promise by the native title parties on the title that there cannot be any buildings on the coastal strip, except for recreational purposes.
- (ii) Commissioning and funding (\$500,000 over 18 months) of an Independent Study to develop a Management Plan for the land in accordance with specified terms of reference and advised by an Advisory Committee;
- (iii) Management funding of \$450 000 per year over 5 years for management of the land;
- (iv) A Visitors/Cultural/Management Centre on the land worth \$5,500,000; and
- (v) Infrastructure funding on the land worth \$2,500,000.

(b) *Karratha Commercial and Residential Land*

5% of Developed Lots in Karratha to be transferred to an Approved Body Corporate.

(c) Financial Compensation

- (i) A total of \$5,800 000 in upfront payments comprising:
 - o \$1,500,000 from the State on signing of the agreement and \$2,000,000 from the State on the date of the first taking order for a lease; and
 - o \$1,150,000 20 days after leases are granted to Current Proponents; and
 - o \$1,150,000 20 days after the Current Proponents make their first shipments.

- (ii) Ongoing Annual payments:
 - o For Current Proponents: The State will pay \$700 per hectare per year, escalated annually after 5 years at CPI+2%;
 - o For Future Proponents: Half of Market Rent (as determined using a formula devised with Market Valuation principles).

(d) Approved Body Corporate

The State will provide \$150,000 to a Consultant to establish an Approved Body Corporate (ABC) and \$100,000 per year in operating costs for four years. The ABC will hold the native title parties' rights and obligations under the agreement, will hold the freehold title to the Burrup Non Industrial Land, and allocate and distribute the money on the basis that each member of the ABC is entitled to an equal share. Membership will be open to members of the native title parties who enter the agreement.

(e) Employment, Training and Contracting

- (i) The State will pay an Employment Service Provider based or operating in Roebourne \$200,000 per year for three years. The State, native title parties and the Employment Service Provider will negotiate an agreement which requires the Employment Service Provider to:
 - o conduct an audit of the skills of available Aboriginal people and contractors;

- conduct a needs analysis;
 - conduct an analysis of the opportunities for employment and enterprise; and
 - assist people and contractors to achieve their desired employment and enterprise outcomes.
- (ii) The Proponents must meet a 5% Aboriginal employment target for their Operations Workforce, or, if they are unable to meet the target, pay to the Employment Service Provider a levy of \$4,500 per year for every Aboriginal person below the 5% target.

(f) Education

The State will pay \$75,000 per year for 2 years to Approved Body Corporate to:

- support students to ‘realise their school, vocational, training and tertiary ambitions.’
- Create a cohesive pathway between primary, secondary, vocational education and training and tertiary sectors; and
- Introduce cultural matters into education as appropriate.

(e) Benefits outside the Burrup Agreement

In assessing the overall impact of the negotiations, regard should also be had to a number of matters that were agreed to by the State but were not included within the formal Burrup Agreement. As a result of the Ngarluma Yindjibarndi community’s negotiation position, the State also agreed to commission a Rock Art Study to monitor the emissions from industry, identify impacts on the rock art and identify potential mitigation measures. Further, the State responded to Ngarluma Yindjibarndi requests for improved housing, transport, agency co-ordination and asbestos removal by implementing the Roebourne Enhancement Scheme, a scheme with a budget allocation of over \$3.5 million to address these issues for the Roebourne community.

7. Executing the Agreement

The Ngarluma Yindjibarndi community resolved to enter the agreement in July 2002. However, the final agreement was not executed until approximately six months later, on the 16th of January 2003: over double the amount of time it had taken to negotiate the agreement. There were a number of reasons for the delay. Firstly, the community were faced with the situation of having resolved to enter the agreement, but having one applicant who declined to follow the community's resolution and execute it. After extensive attempts to mediate a solution, the community decided to ask the court to remove the person as a registered claimant. This was a decision of last resort. It was the only choice available to the Ngarluma Yindjibarndi community under the law if they wanted to proceed with the agreement. It was also a testing time for the Land Council, since the State had ceased to provide resourcing for the matter and the relevant section of the *Native Title Act*, s66B, had never been successfully used to remove an applicant. Meanwhile, the State had commenced the National Native Title Tribunal arbitration process to take the land without native title party consent. The Ngarluma Yindjibarndi could not afford to not participate in the arbitration (in case the Federal Court application was unsuccessful and the agreement was not executed) yet it was extremely reluctant to oppose the taking after having worked so intensively to negotiate an agreement. The Yaburara Mardudhunera group were in a similar situation, with one of their applicants declining to follow the claim group's decision to execute the agreement. The agreement stated that it would not be binding unless it was executed by at least two of the three native title parties.

The Wong-Goo-Tt-Oo native title party actively opposed the State's taking in the Tribunal. They publicly denounced the agreement because they said that they wanted to have the opportunity to negotiate exclusive agreements with each of the proponents directly, rather than be included in an agreement that was for the benefit of all three native title claimant groups. In order to achieve their aims, they attempted to argue that the State had not negotiated with them in good

faith¹⁸ and adduced evidence about the negative effects of the proposed development on the environment and their asserted native title rights.

During the course of the arbitration, the Federal Court made orders that the Ngarluma Yindjibarndi applicant who refused to sign the agreement be removed.¹⁹ A number of weeks later, it ordered that the Yaburara Mardudhunera applicant in the same position be removed also. The second decision was the point at which the Ngarluma Yindjibarndi could formally withdraw its opposition to the State in the arbitration proceedings, leaving the Wong-Goo-Tt-Oo to oppose the State's taking on their own. The arbitration became an elaborate and high profile affair involving public submissions and weeks of evidence from claimants, environmental experts, rock art experts, proponent company representatives, senior government bureaucrats and a number of days of site visits on country. Counsel for the Wong-Goo-Tt-Oo, Ian Viner QC, vigorously cross examined senior government bureaucrats and others who had been instrumental in facilitating the industrial development. However, days before Deputy President Sumner was due to hand down his decision, the Wong-Goo-Tt-Oo withdrew their opposition to the taking and announced their intention to sign up as a party to Burrup agreement. It transpired that, during the course of the arbitration, they had been secretly negotiating with two proponent companies and had managed to broker two agreements that provided for exclusive benefits to go to the Wong-Goo-Tt-Oo group only.

8. The Legacy of the Burrup Agreement

It is obviously too early to tell how much of a difference the agreement has made to the lives of Ngarluma Yindjibarndi people. Implementation has proceeded at a moderate pace to date. The independent study for the use of the non-industrial land has commenced, but the majority of the agreement cannot be implemented

¹⁸ An argument that was dismissed by Deputy President Sumner only days after it was heard in *State of Western Australia/Daniel/ Holborow/ Hicks* WFO 02/17 and WFO 02/18 (12 November 2002)

¹⁹ *Daniel v State of Western Australia* [2002] FCA 1147 (13 September 2002)

until the establishment of the Approved Body Corporate, which is still pending. However, some of the benefits of the Roebourne Enhancement Scheme, such as new housing and the commencement of asbestos removal are already being experienced in Roebourne. The community also have the assurance of knowing that, regardless of the outcome of their native title claim determination, the rest of the Burrup will be protected from future industrial development.

Other native title claim groups in Western Australia may have also gained a particular benefit from the Burrup Agreement. The Burrup negotiations smashed the paradigm of how the WA Government did business with native title claimants. It stimulated what appeared to be a dramatic reassessment of the way that State policy and legislation on (apparently unrelated) matters such as conservation, finance, roads, land administration and education fit with the idea of a government commitment to comprehensive native title agreement making.²⁰ The task undertaken by the State's lead negotiator, Chris Athanasiou, appeared, from the Land Council perspective at least, to be a bit like that of a captain navigating a large and slow moving ocean liner through arctic waters. Some policy ice floes were delicately avoided, some were deliberately crashed through, and some that appeared to be ice floes actually turned out to be enormous icebergs that caused near catastrophic damage. Whether the State chooses to sail more comprehensive agreements through the clear waters that were left behind by the 'Good Ship Burrup' remains to be seen. Certainly it is an opportunity that all WA native title claimants should be keen to see taken up.

The Burrup Agreement is, to the best of our knowledge, the most comprehensive agreement ever made by any government with an Aboriginal group over land in Australia. Its value as a precedent for other native title groups negotiating with government cannot be underestimated. There can be no doubt, after the Burrup Agreement, that with experienced negotiators, the right resources, strong

²⁰ In some instances, the negotiation was a catalyst for significant legislative change. For example, one of the matters that the parties hoped to include in the agreement was a form of inalienable Aboriginal title to areas of the northern

community relationships and a good measure of political will, it is possible for a State Governments to facilitate resource development in a way that benefits the people whose land and lives who are affected by it most.

Burrup. However, it became apparent that such title did not exist under the State legislation and, consequently, moves are now afoot to amend the Land Administration Act to enable such kinds of tenure to be granted in the future.