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The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements

Krysti Guest



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About the Author

Kimberley Land Council lawyer 1999-2008 (including senior lawyer for Miriuwung and Gajerrong-Ord negotiations) and Visting Research Fellow, Native Title Research Unit, AIATSIS January-May 2006.

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Introduction

In 2008, the Commonwealth Government took a great leap forward in embracing the glittering promise of the *Mabo* decision¹ and the potential of native title for Australia. Prime Minister Rudd's eloquent and empathetic apology speech honoured Australia's Indigenous peoples as the world's oldest living culture and apologised for past laws and policies that had caused suffering.² The Prime Minister urged the forging of a new future between Indigenous and non Indigenous Australians with an 'absolute premium on respect, cooperation and mutual responsibility', where we begin the hard work of finding 'new solutions to enduring problems where old approaches have failed.'³

The Commonwealth Attorney General Robert McClelland⁴ and Indigenous Affairs Minister Jenny Macklin⁵ announced that as part of this new future, native title was no longer to be isolated from mainstream Indigenous affairs, languishing as an end in itself after years of tortuous litigation. Instead, native title was recognised as 'critical to economic development'⁶ and that a 'native title system which delivers real outcomes in a timely and efficient way ... is a key priority of the Rudd Labor government'.⁷ Native title has a 'crucial role to play'⁸ in implementing the commitments made by the Prime Minister by providing the foundation for 'comprehensive settlements'⁹ of land related issues. Such comprehensive settlements would be a truly 'whole of government initiative, encompassing housing, economic development, health, law and order and leadership and governance.'¹⁰

By acknowledging this role for native title, the Commonwealth positions itself as embracing the real opportunities of the *Mabo* decision, which Minister Macklin (quoting Noel Pearson) names as the 'best opportunity for the resolution of colonial grievances between Indigenous and non Indigenous Australians ... the cornerstone for reconciliation

¹ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

² Prime Minister Kevin Rudd MP, 'Apology to Australia's Indigenous Peoples', House of Representatives, Debates, 13 February 2005, viewed 29 April 2009, <<http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf>>

³ Rudd, above n 2.

⁴ Hon Robert McClelland MP (Attorney General), paper presented at the Negotiating Native Title Forum, Brisbane, 29 February 2008. The Attorney General reiterated these views in his keynote address to the 2009 AIATSIS Native Title Conference: Hon Robert McClelland MP (Attorney General), Keynote Address, Melbourne, 5 June 2009, viewed 30 July 2009, <<http://ntru.aiatsis.gov.au/conf2009/NativeTitleConferenceWebsite/papers.html>>.

⁵ Hon. Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Beyond *Mabo*: Native Title and Closing the Gap', 2008 *Mabo* Lecture, Townsville, 21 May 2008. Minister Macklin reiterated these views at the AIATSIS 2009 Native Title Conference in her address to conference delegates: Hon Jenny Macklin MP (Minister for Families, Housing, Community Services and Indigenous Affairs), Native Title Conference 2009, Melbourne, 5 June 2009, viewed 30 July 2009, <<http://ntru.aiatsis.gov.au/conf2009/NativeTitleConferenceWebsite/papers.html>>.

⁶ Macklin, above n 5.

⁷ McClelland, above n 4, para.10.

⁸ McClelland, above n 4, para.5.

⁹ Macklin, above n 5.

¹⁰ Macklin, above n 5.

– legally, politically, historically and morally’ and not ‘simply a legal doctrine relating to real estate’.¹¹

In terms of how to harness this potential, Minister Macklin states that we need:

an approach that stringently examines the facts and makes policy decisions based on ‘what works’. To succeed it is essential to develop an evidence base which can deliver solutions across locations and across cultural differences.¹²

Public dialogue on an evidence based approach to comprehensive native title settlements has yet to occur.¹³ I use the term ‘comprehensive settlements’ to refer to agreements necessarily with governments (but could include private interests) which, due to the nature of government responsibilities, have the potential to address governance, economic, social, cultural and/or legal concerns of native title groups.¹⁴ This paper seeks to contribute to such an evidence based dialogue by analysing aspects of three Australian agreements which were the earliest attempts of what could be considered comprehensive settlements:

- the Ngarluma and Yindjibarndi Burrup Agreement (‘the Burrup Agreement’);¹⁵
- the Miriuwung and Gajerrong Ord Global Agreement (‘the MG-Ord Agreement’);¹⁶ and
- the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Peoples Agreement (‘the Wimmera Agreement’).¹⁷

¹¹ Macklin, above n 5. Original quote from Noel Pearson, ‘Peoples, Nations and Peace’, Mabo Oration, Brisbane, 3 July 2005.

¹² Macklin, above n 5.

¹³ The Government has taken steps in develop this evidence base in relation to benefits from resource agreements. In 2008, Minister Macklin convened a Native Title Payments Working Group comprised of experts from interest groups, which provided a report to the Minister resulting in a Government discussion paper on improving benefits from native title agreements. At the time of writing, the Government’s consideration is ongoing. See Attorney-General’s Department, *Optimising benefits from native title discussions paper*, Attorney-General’s Department, viewed 29 April 2009, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements>.

¹⁴ For a discussion of different meanings of the concept of ‘comprehensive agreements’ see Stuart Bradfield, ‘Agreeing to Terms: What is a ‘Comprehensive’ Agreement?’, *Land, Rights, Laws: Issues of Native Title*, vol. 2, no.26, 2004.

¹⁵ Office of Native Title (Western Australia), *Burrup and Maitland Industrial Estates Agreement*, Department of Premier and Cabinet, Perth, viewed 29 April 2009, <http://www.nativetitle.wa.gov.au/agreements_BurrupMaitland.aspx>.

¹⁶ Office of Native Title (Western Australia), *Ord Final Agreement*, Department of Premier and Cabinet, Perth viewed 29 April 2009, http://www.nativetitle.wa.gov.au/agreements_OrdFinalAgreement.aspx.

¹⁷ *Clarke on behalf of the Wimmera, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* [2005] FCA 1795 (No. 1-3) and Extract from Register of Indigenous Land Use Agreements, National Native Title Tribunal, NNTT No. VI2004/008. <<http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx>>.

Notably, the MG-Ord and Wimmera agreements were approvingly cited by the Attorney General in his 2008 speech as examples of the Commonwealth's new vision for native title.¹⁸

My analysis of the three agreements is primarily based on observations made at a two day workshop by representatives of the Ngarluma and Yindjibarndi, the Miriuwung and Gajerrong, the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples and their negotiating teams; the WA government and their negotiating teams; and invited participants from the native title field. The aim of the workshop was to gain firsthand accounts of the role of comprehensive settlements in progressing Indigenous and government aspirations for native title and to identify possible benchmarks for such settlements. Firstly, by way of contextualising these observations, I outline the potential of comprehensive native title settlements advocated by many Indigenous leaders and academics since the *Mabo* decision.

Native Title is 'Not Simply a Legal Doctrine Relating to Real Estate'

The Rudd Government's recognition of native title as 'uniquely placed to acknowledge traditional laws and customs, and the relationship between Indigenous people and the country they have lived on for thousands of years; and to provide opportunities to the present day native title holders and their communities'¹⁹ reflects aspirations Indigenous leaders have always held for the *Mabo* decision, but with one important difference. In addition to native title's symbolic recognition of prior ownership and its economic potential, Indigenous leaders have persistently highlighted the *political footprint* of native title.

This political footprint arises from the fact that recognition of native title is only by virtue of Indigenous Australians' specific existence as 'distinct peoples and as a constitutional entity'.²⁰ As Lisa Strelein explains, this political status means that native title holders are not merely 'a cultural minority within an otherwise homogenous Australian polity'.²¹ Native title is an acknowledgement of the continuation of Indigenous society as a source of political authority. Native title jurisprudence recognises (and indeed requires) that traditional laws and customs generated from societies seeking native title recognition are a legitimate source of native title rights and obligations in relation to each society's cultural, religious and political economy. As Peter Yu aptly observed, since *Mabo*:

the issue of governance for a sovereign group whose members are bound together by a system of laws and customs as opposed to an incorporated

¹⁸ McClelland, above n 4, paras. 50-55.

¹⁹ McClelland, above n 4, para.65.

²⁰ Dr Lisa Strelein, 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government' in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations: Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne, 2004, p 190.

²¹ Strelein, above n 20.

Aboriginal body set up to manage funds and deliver services, is for the first time firmly on the agenda.²²

Similarly, Pearson²³ points out that the High Court's rejection of the doctrine of *terra nullius* was explicitly based on the rejection of 70 year old, racially discriminatory legal authority that some *societies* are 'so low in the scale of social organisation'²⁴ that the common law could not recognise them *as a society with laws and rights* in relation to their land.

Indigenous groups have never desisted from demanding recognition of the political footprint upon which native title is based,²⁵ despite what the Commonwealth Attorney-General describes as a 'spiteful culture war' against native title,²⁶ despite what Pearson describes as 'ruthless, determined and resolute'²⁷ opposition of all respondents to native title claims and despite the High Court's reduction of native title to an exercise in statutory interpretation for remnant rights after all other interests are protected.²⁸ However, this political footprint has been routinely ignored by governments. Almost without exception, governments have isolated native title from policies seeking to improve Indigenous social and economic well being, despite such policies overtly targeting political issues such as partnerships, good governance, capacity building, sustainability and 'whole of government' outcomes. The Aboriginal and Torres Strait Islander Commissioner observes that 'by disregarding native title, the broader policy on Indigenous economic and social development fails to understand the importance of filtering development through the cultural values and structures of the community'.²⁹

In their research on agreements with Indigenous peoples Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain have observed that, whilst the political footprint of native title is not overtly recognised by governments, recognition of political aspects of native title have begun to develop in practice through the culture of agreement making generated by native title. '[I]t is this culture, within and outside the native title process, that begins to engage Aboriginal polities and Aboriginal jurisdictions.'³⁰ Similarly, Strelein comments that whilst native title rights have been narrowed by the courts, paradoxically agreement making has expanded concepts of Indigenous autonomy,

²² Peter Yu, 'Aboriginal Rights and Governance: A Kimberley Perspective', paper presented at Indigenous Governance Conference, Canberra, 3-5 April, 2002.

²³ Noel Pearson, 'Where We've Come From and Where We're At with the Opportunity that is Koiki Mabo's Legacy to Australia', Mabo Lecture presented at the National Native Title Conference, Alice Springs, 3 June 2004.

²⁴ *Re Southern Rhodesia* (Privy Council) [1919] AC 211.

²⁵ Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities', in *Honour Amongst Nations*, above n 20, p.43.

²⁶ McClelland, above n 4, para.14.

²⁷ Pearson, above n 23.

²⁸ For a general discussion on the High Court's treatment of native title, see Noel Pearson, 'Land is Susceptible of Ownership' in *Honour Amongst Nations?*, above n 20, p.83.

²⁹ Tom Calma, 'Promoting Economic and Social Development through Native Title', *Land, Rights, Laws: Issues of Native Title*, vol. 2, no. 28, 2004, p.3.

³⁰ Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, 'Introduction', *Honour Among Nations?*, above n 20, p.20.

authority and jurisdiction.³¹ A significant reason for this appears to be that agreement making, however fraught with power imbalance, forces governments and resource companies to negotiate with Indigenous people face to face. As Strelein suggests, the ability to separate the substance of native title (a living tradition of laws and customs) from its mere symbolic recognition is much more difficult when directly confronted by Indigenous representatives and cultural leaders whose rights and obligations are affected by the agreement.

The Commonwealth's new resolve to include native title as part of its whole of government approach to Indigenous issues, rather than merely a legal doctrine relating to real estate, is a great leap forward. But to effect durable change, governments must also recognise the political footprint of *Mabo* and the living political economy of many Indigenous groups.

What Works? An Evidenced Based Approach for Linking Native Title, Economic Development and Indigenous Governance

Minister Macklin has rightly demanded that the new approach to native title is one that 'stringently examines the facts and makes policy decisions based on "what works"'.³² The most credible research on the nexus between durable Indigenous economic development and political structures is the work of the Harvard Project on American Indian Economic Development ('the Harvard Project').³³

Since 1987, the Harvard Project has undertaken a systematic, comparative study of social and economic development on American Indian reservations in order to assess and foster the conditions under which sustained social and economic development can be achieved. The Harvard Project's key research finding is that economic development is first and foremost a political problem about *what* cultural systems of governance are empowered by economic development and *who* has effective decision-making power in relation to such development. The Harvard Project identifies two contrasting approaches to economic and political development which underpins this finding.

First, the 'standard approach' is primarily responsive to external proposals for economic development on American Indian reservations and dependent upon government funding. The concept of Indigenous culture, traditional laws and authority systems are generally viewed as an obstacle to this external development (except as a tourist opportunity). The Harvard Project identifies this approach as resulting in failed enterprises, internal conflict over control of political resources and perceptions by outsiders of incompetence and chaos, necessarily undermining confidence in Indigenous peoples' ability to engage in the broader community. Unquestionably, this is the experience of most remote Australian Indigenous communities.

³¹ Strelein, above n 20.

³² Macklin, above n 5.

³³ The Harvard Project on American Indian Economic Development, *The Harvard Project on American Indian Economic Development*, John F Kennedy School of Government, Harvard University, viewed 29 April 2009, < www.hks.harvard.edu/hpaied/>.

The second approach is defined as a ‘nation building model of economic development’ where Indian nations are building self determined economies. Key features of this model are:

- effective governing institutions based on the concept of cultural match or governance structures that fit the groups contemporary, culturally based standards of what is legitimate;
- economic developments that have a cultural match by reflecting the needs and aspirations of the community as a cultural entity and not merely isolated individuals or groups; and
- culturally legitimate systems of leadership.

The Harvard Project found that within American Indian communities, the nation building model results in a more effective use of resources, sustained economic development and effective community structures. It is an approach that helps create *communities*, and not just *economies*, that work.

Research in Australia on effective, economic development for Indigenous communities reflects similar findings. A ground-breaking study into Aboriginal participation in the East Kimberley economy undertaken almost twenty years ago by the Kimberley Land Council (KLC) in partnership with the Australian National University identified that public funding of Indigenous organisations was the mainstay of the regional economy.³⁴ However, for Indigenous people, this was a false economy. The beneficiaries of public investment were primarily non local people who delivered government services, public funding circulated in a chaotic manner between government agencies with few linkages and through non-traditionally based Indigenous corporations. This false economy provided little hope of changing the appalling impoverishment of the majority of Indigenous people in the region.

The research argued that this waste of public investment through inappropriate and inefficient service delivery not only failed Indigenous communities but failed the tax payer, a complaint that has unsurprisingly received a sonorous national voice over many years. The research advocated that to ensure a return on public investment a better strategy was to create an integrated, regional approach to Indigenous social and economic development, responsive to the cultural aspirations and traditionally-based governance structures of its community. As Yu, who was involved in establishing the research, has since stated:

The Harvard Project in North America proves with irrefutable empirical data what many Aboriginal Australian people have intuitively known. That the deplorable economic and social circumstances in our communities will change for the better only when Aboriginal communities

³⁴ G. Crough, and C. Christopherson, *Aboriginal People in the Economy of the Kimberley Region*, North Australia Research Unit, Australian National University, Darwin, 1993.

can construct their own systems of governance and plan for their people's long term development.³⁵

Twenty years after the KLC's original research, Kimberley traditional owners continue to advocate for such culturally appropriate governance structures in their negotiations with developers through the international standard of informed consent.³⁶

More recent research by Mick Dodson and Dianne Smith on the political economy of Indigenous communities states that good governance is internationally recognised as a key ingredient for sustainable development, where 'governance' is fundamentally about the legitimacy of decision-making power, processes of representation and accountability.³⁷ After reviewing the evidence of the Harvard Project and other international research, Dodson and Smith argue that:

international evidence for the merits of this approach (for both Indigenous and non Indigenous groups) is clear. It is only when effective governance and holistic development strategies are in place that economic and other development projects have a chance of becoming sustainable ... In other words, sustainable development is - fundamentally – a governance issue.³⁸

Dodson and Smith's research underlines that the legitimacy of effective Indigenous governance is directly related to cultural mandate or the 'cultural match' referred to in the Harvard Project. They note that one of the greatest challenges for Indigenous peoples will be to integrate economic activity with their social and cultural priorities and effective governance systems, so that informed consent to development can occur.

Each community and region will have to find some degree of 'match' or common ground between the types of governing structures and procedures it wants to develop and the culturally based standards, values and systems of authority of community members ... The more a governing body finds some cultural 'fit' or 'match' in these matters, the more it will secure the ongoing mandate of its members. ... Cultural match is not simply a matter of importing romanticised views of traditional Indigenous structures or authority and expecting them to handle economic development decisions, financial accounts and daily business management. Creating a cultural

³⁵ Yu, above n 22.

³⁶ Wayne Bergmann, 'A New Way of Doing Business: Economic Empowerment for Aboriginal People to Ensure Responsible Resource Development in the Kimberley', paper presented to the National Press Club, Canberra, 30 April 2008.

³⁷ Mick Dodson and Dianne E Smith, *Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities*, Discussion Paper No. 250, Centre for Aboriginal Economic Policy Research, Canberra, 2003. See also Patrick Sullivan's findings of the central role of cultural mandate and legitimacy in developing durable agreements with Indigenous communities *Strange Bedfellow: Whole-of-Government Policy, Shared Responsibility Agreements and Implications for Regional Governance*, Background Paper, Centre for Aboriginal Economic Policy Research, Canberra 18 October 2005.

³⁸ Dodson and Smith, above n 37, p.12.

match is more about developing strategic and realistic connections between extant cultural values and standards, and those required by the world of business and administration ... it is about 'cultural appropriateness with teeth'.³⁹

Dodson and Smith emphasise that the hard work of developing such governance structures can only be done at the local level, with appropriate government and other support. They conclude that current research indicates that without a focus on such development, communities will struggle to make informed decisions about what economic developments to locally support. Consequently, sustained development will be unlikely and valuable opportunities squandered.⁴⁰

Specific Agreements

The Burrup, MG-Ord and Wimmera agreements include different levels of economic, social, political and legal benefits and, at the time of the 2006 workshop which forms the basis of this paper, they represented the Australian native title agreements most consistent with the concept of comprehensive settlements.⁴¹ In order to contextualise observations from the workshop, the following provides a brief overview of the history, process and outcomes of each agreement.

Burrup Agreement

Following decades of planning for the expansion of industrial development in the Western Pilbara, the State of Western Australia issued compulsory acquisition notices for the construction of heavy industry estates on the Burrup Peninsula and adjacent Maitland area in January 2000. The notices covered 52 square kilometres and the proposed industrial estates were intended to contain a number of downstream gas-processing plants, associated infrastructure facilities and land for associated residential and commercial requirements in nearby Karratha.

As detailed by Frances Flanagan the area subject to the compulsory acquisition notices presented specific challenges.⁴² Three overlapping, registered native title applications existed – the Ngarluma and Yindjibarndi, Yaburara Mardudhunera and Wong-Goo-To-

³⁹ Dodson and Smith, above n 37, pp.18-19.

⁴⁰ Dodson and Smith, above n 37, pp.18-20.

⁴¹ Since the research workshop in May 2006, two further agreements have been settled which reflect the concept of comprehensive settlements: in March 2007 the Gunditjmarra native title consent determination (*Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 and ancillary agreements < (see Victorian Government Solicitor's Office, *Gunditjmarra native title consent determination*, Victorian Government Solicitor's Office, Victoria, viewed 29 April 2009, <<http://www.vgso.vic.gov.au/news/gunditjmaranativetitleconsentdetermination.aspx>>); and in April 2009 an in principle agreement between the Yawuru native title holders and the WA Government in relation to land use and compensation. Office of Native Title (WA) website, *Whats New*, Department of the Premier and Cabinet, viewed 29 April 2009, <<http://www.nativetitle.wa.gov.au/>>.

⁴² Frances Flanagan, 'The Burrup Agreement: A Case Study in Future Act Negotiation', Agreements Treaties and Negotiated Settlements Projects website, pp.1-3.< <http://www.atns.net.au/papers/>>.

Oo claims – which were part heard by the Federal Court. The Pilbara Native Title Service⁴³ had only recently been recognised as the native title representative body for the region, had established only minimalist relationships with the native title claimants and had inherited a situation where it legally represented only the Ngarluma and Yindjibarndi application. The Burrup Peninsula contains Indigenous rock art of local and international significance. There were five proponents proposing multibillion dollar investments and the State was a newly elected Labor Government keen to establish its economic and native title credentials.

The State set the extremely short timeframe of three months to complete an agreement in these circumstances. This was extended to six months and agreement was reached with the Ngarluma and Yindjibarndi and the Yaburara Mardudhunera on 2 July 2002. Following protected mediation and arbitration by the National Native Title Tribunal, the Wong-Goo-To-Oo also eventually signed the agreement. On 16 January 2003 the Burrup and Maitland Industrial Estates Agreement Implementation Deed was executed between all three registered native title claim groups and the State.⁴⁴

The Agreement provides that, in exchange for the extinguishment of native title for industrial, residential and commercial purposes over 52 square kilometres, all three native title groups received:

- freehold title to Burrup non industrial land subject to:
 - existing interests (such as easements);
 - immediate lease-back of freehold to the State for 99 years (with 99 year option to renew the lease) and prohibition of sale of land unless offered to the State first for a nominal amount;
 - comanagement agreement with WA Conservation and Land Management Department (CALM) with specified conditions (including only recreational development on the coastal strip);⁴⁵
 - funding to CALM for an independent study to develop a management plan (\$500,000) and for management of land (\$450,000 per annum for 5 years);
 - \$5,500,00 for a Visitors Cultural Centre; and
 - infrastructure funding (\$2.5 million);
- 5% of developed lots in Kararatha;
- \$150, 000 upon signing, \$2 million on date of first taking order, \$2.3 million after leases granted to current proponents and proponents make first shipments and ongoing annual payments if current or future proponents use land;

⁴³ The Yamatji Marlpa Bana Baba Maaja Aboriginal Corporation is the representative body for the Yamatji region and manages the Pilbara Native Title Service.

⁴⁴ Documents relating to the agreement variously state that it was signed on 1 November 2002 as well as 16 January 2002.

⁴⁵ Now the Department of Environment and Conservation. Consistent with the language of the the Burrup and MG-Ord Agreements, the paper maintains the reference to the Department of Conservation and Land Management (CALM).

- \$150,000 to a consultant to establish an Approved Body Corporate to hold the freehold grants, receive and distribute financial benefits equally between members and support Aboriginal students in education and training;
- \$5.5 million over 4 years for administration of the Approved Body Corporate;
- \$600,000 over 3 years for Employment Service Provider in Roebourne to conduct an audit of the skills of local Aboriginal people, conduct analysis of employment opportunities and assist people to achieve employment;
- 5% Aboriginal employment target for proponents or payment of \$4,500 to Employment Service Provider per person below target;
- \$3.5 million for the Roebourne Enhancement Scheme to address housing, transport, agency coordination concerns and asbestos removal; and
- a Rock Art Study to monitor emissions.

It was agreed that the benefits endured for all three groups regardless of who the Federal Court determined were the native title holders and regardless if the Court determined that that native title was extinguished. In 2003, the Federal Court determined the Ngarluma and Yindjibarndi as the native title holding group for the area. The Yaburara Mardudhunera and the Wong-Goo-To-Oo were determined to be part of the Ngarluma and Yindjibarndi and not separate groups. Non-exclusive rights were recognised over part of the claim area but native title on the Burrup Peninsula was determined to be extinguished.

MG-Ord Agreement

Since the 1960s, the State of Western Australia has developed land in the East Kimberley for the Ord River irrigation scheme, including damming the Ord River to form Lake Kununurra and Lake Argyle, establishing Kununurra and developing 14,000 hectares of farm land. This development is referred to as Ord Stage 1. The State has been committed to expanding the scheme for many years into what is referred to as Ord Stage 2.

The area subject to the Ord irrigation scheme is primarily the traditional country of the Miriuwung and Gajerrong people. In 1995, the Miriuwung and Gajerrong lodged two native title determination applications and their first claim ('MG#1') was the first litigated under the *Native Title Act 1993* (Cth) ('NTA'). After eight years in litigation MG#1 was subject to a consent determination of native title on 9 December 2003. The second claim ('MG#2' which in 2004 was amended and re-filed as 'MG#4') was subject to a consent determination on 24 November 2006.⁴⁶

During 2001-2002, the State and the Miriuwung and Gajerrong agreed to adopt a partnership approach to the expansion of the Ord Stage 2 scheme. The Miriuwung and Gajerrong made it a threshold requirement for entering into any discussions about Ord Stage 2 that the State fund an Aboriginal social and economic impact assessment (ASEIA) of Ord Stage 1 and that any Ord Stage 2 negotiations include reparations for impacts identified by this assessment. The ASEIA Report, *Fix the Past-Move to the*

⁴⁶ *Ward v Western Australia* [2006] FCA 1848.

Future was presented in March 2004 at the commencement of the MG-Ord negotiations.⁴⁷

On 10 December 2003, the State abandoned its partnership approach and advised that compulsory acquisition notices would be issued for 65,000 hectares of land covered by the MG#1 determination and the (then) MG#2 application to facilitate Ord Stage 2. Although the State set a timeframe of one year for a negotiated outcome before compulsory acquisition would commence, this timeframe stretched into 22 months⁴⁸ and the MG-Ord Agreement was signed on 5 October 2005.⁴⁹

The key benefits for the State from the MG-Ord Agreement are:

- acquisition and extinguishment of native title over 70,000 hectares of land; and
- the Agreement represents full and final compensation for all matters relating to Ord Stage 1, Ord Stage 2, the MG #1 determination and the then undetermined MG#4 application.

Benefits for the Miriuwung and Gajerrong are as follows.

- Miriuwung and Gajerrong Corporation (MG Corporation)
\$100,000 to set up the MG Corporation and \$1 million *per annum* operational funds for 10 years. The composition of the MG Corporation executive is to be the same as the executive of the MG#1 (and subsequent MG#4) prescribed body corporate to rationalize meetings and the prescribed body corporate is to delegate administrative tasks to the MG Corporation.
- Miriuwung and Gajerrong Investment Trust (MG Investment Trust)
Establishment of an MG Investment Trust with \$5 million up front and \$1 million *per annum* over 9 years. 50% of profit from the MG Investment Trust to be remitted back to the Trust and 50% available for Miriuwung and Gajerrong community ventures.
- Ord Enhancement Scheme (OES)
The OES is an innovative partnership between the Miriuwung and Gajerrong and the State and is in response to the *Fix the Past – Move to the Future* Report on the

⁴⁷ Kitty Kahn, *Fix the Past-Move to the Future: An Aboriginal and Economic Social Impact Assessment of Ord Stage 1*, Kimberley Land Council, Broome, 2004.

⁴⁸ During that time, the Miriuwung and Gajerrong and the State entered into a Framework Agreement, a Heritage Agreement, an 'in principle' Memorandum of Understanding and worked through approximately twenty three drafts of the final agreement.

⁴⁹ The MG-Ord Agreement comprises an Indigenous land use agreement and a s31 NTA agreement for compulsory acquisition in certain circumstances and stretches to around 400 pages. In light of the required number of original copies, execution of the two agreements by the Miriuwung and Gajerrong required around two thousand signatures from thirty (mainly elderly) people. This was achieved in difficult circumstances within only seven hours, an indication of the level of commitment of the community to the Agreement.

Aboriginal social and economic impacts of Ord Stage 1.⁵⁰ \$11.195 million over 4 years is provided to develop partnerships with the public and private sector to address priority economic and social issues identified in the Report. Projects are approved by a committee of seven Miriuwung and Gajerrong representatives and one State representative (the Chief Executive Officer of the Kununurra based Kimberley Development Commission). The OES is housed within the Kimberley Development Commission and reports to both the MG Corporation and the Minister for the Kimberley.⁵¹

- Commercial land
5% of irrigated farm land with 5% buy in option at cost through the Aboriginal Development Package (if private developer) and up to 2.5% buy in at commercial rates. 5% of town land released for housing and industrial development with 5% buy-in at cost through the Aboriginal Development Package (if private developer) and up to 5% buy in at commercial rates in certain circumstances.
- Freehold grants
Freehold title to 50,000 hectares (known as Yardungarrl) which includes eight community living areas. Freehold title to a further eleven community living areas. MG Corporation to pay stamp duty and transfer costs. Three additional grants of freehold inside and outside Kununurra with some funds for stamp duty, transfer costs and an access road to one block. Native title extinguished by all grants.
- Environmental buffer
Freehold title to the environmental buffer zones around the largest agricultural areas with lease back for 1000 years (100 years with a 9 by 100 option to renew) to an Environmental Management Entity (EME) for not rent. Miriuwung and Gajerrong representation on the EME. Native title subject to non extinguishment principle and Miriuwung and Gajerrong retain access for traditional purposes.
- Aquaculture lease
First option for an aquaculture lease on Lake Argyle subject to time limits.
- Conservation Parks
 - Freehold to 150,000 hectares of current and new conservation parks with lease back to the Department of Conservation and Land Management (CALM) for 200 years (100 years with an option to renew for 100 years) at no rent. Joint management with CALM with \$1 million to set up joint management plan, \$1m for infrastructure and \$4 million over 4 years to run parks. All funds channeled through CALM.
 - Miriuwung and Gajerrong hold veto regarding leases and licenses for commercial interests.

⁵⁰ Kahn, above n 47.

⁵¹ MG Corporation, *Ord Enhancement Scheme*, Yawoorroong Miriuwung Gajerrong Yirrgab Noong Dawang Aboriginal Corporation (MG Corporation) website, viewed 29 April 2009, <yawoorroongmgcorp.com.au/oes/oes.html.>.

- At least 50% of parks jobs for Miriuwung and Gajerrong.
 - Right of access for Miriuwung and Gajerrong culture.
 - Native title subject to non-extinguishment principle, however compensation for compulsory acquisition is limited to compensation for acquisition of freehold *or* native title, whichever is higher.
- Reserve 31165
Joint management with Waters and River Commission (WA) of a large reserve adjacent to Lake Argyle. Access permitted to Miriuwung and Gajerrong for traditional purposes.
 - Aboriginal Development Package
No employment targets set. MG Corporation must set up a register of potential contractors or employees, and developers are to target ‘registered’ Miriuwung and Gajerrong people. Equity rights in commercial lands at cost as set out above.

Wimmera Agreement

Three native title applications were lodged between 1995-1997 on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wegaia and Jupagalk peoples over 9642 square kilometres of Crown land located throughout the Wimmera region in western Victoria.

In October 2002, the State reached an ‘in-principle’ agreement to settle all three applications by consent and an Indigenous Land Use Agreement (ILUA). The Commonwealth agreed one year later. Following lengthy National Native Title Tribunal (NNTT) mediation with the other 400 parties with minor interests, the ILUA was signed in July 2005 and registered in November 2005 and consent determinations recognised by the Federal Court in December 2005.⁵²

Consent Determination

Recognition of non exclusive native title to Crown reserves over 269 sq km of land (but not waters) along the Wimmera River (2.8% of the native title application area). This title is comprised of the right to hunt, fish, gather and camp for personal, domestic and or non-commercial needs in accordance with both traditional law and customs and an agreed coexistence protocol which co-ordinates the exercise of rights.

ILUA

The key aspects of the ILUA are as follows.

- It covers 35,859 square kilometres of land.
- The validation of future acts otherwise invalid because of the NTA (other than intermediate period acts).
- No right to future compensation for any future acts as ILUA in settlement of all previous and future ‘future acts’.

⁵² Above n 17.

- Recognition of close cultural ties to approximately 30% of the original claim area and consultation rights about certain development in this area.
- Streamlined approval processes for traditional owners to obtain licenses to hunt, fish, gather and conduct cultural events in area in excess of 30% of original claim area.
- Cooperative management arrangements for state forests and national parks (approximately 20% of original claim area), with traditional owners being a majority in decision-making process (7 traditional owners, three State representatives).
- Freehold to three culturally significant areas (15.7 hectares).
- Funding for a cultural/community centre (\$793,000).
- Funding for administration of Barengi Gadjin Land Council Aboriginal Corporation RNTBC (\$1.6 million over 5 years).

Observations from the Workshop and Analysis

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) convened a two day workshop in Canberra on 9-10 May 2006 on the process and outcomes of the Burrup, MG-Ord and Wimmera agreements. As previously noted, the aim of the workshop was to assess the utility of comprehensive settlements in progressing Indigenous and State aspirations for native title and where possible to identify benchmarks (in relation to both process and outcomes) for future settlements.

The workshop participants were representatives of: the Ngarluma and Yindjibarndi, the Miriuwung and Gajerrong, the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples and members of their negotiation teams; State native title offices of Western Australia, New South Wales and South Australia; the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney General's Department; the Federal Court; the NNTT and native title representative bodies. Mr Chris Athanasiou, lead negotiator for the State of Western Australia in the Burrup and MG-Ord negotiations attended in his personal capacity. Professor Marcia Langton,⁵³ Professor Ciaran O'Fairchellaigh,⁵⁴ Mr Roger Cook,⁵⁵ Mr Bill Lawrie⁵⁶ and Ms Maureen Tehan⁵⁷ attended as invited experts.

At the time of the workshop, the Victorian Government was in the process of developing a new approach to native title agreements and no officer felt in a position to attend. Mr John Caitlin, former head of the Victorian native title office who oversaw the Wimmera

⁵³ Chair, Australian Indigenous Studies, University of Melbourne and Chief Investigator- Agreements, Treaties and Negotiated Settlements Research Project.

⁵⁴ School of Politics and Public Policy, Griffith University.

⁵⁵ Former Executive Director of Yamatji Marlpa Bana Baba Maaja Aboriginal Corporation, including during the Burrup negotiations, and former Executive Director of the South West Land and Sea Council during discussions about a comprehensive settlement of the Noongar native title application.

⁵⁶ Manager Native Title, South West Land and Sea Council, former Manager Native Title Ngaanyatjarra Council and former Kimberley Regional Manager, NNTT.

⁵⁷ Chief Investigator, Agreements, Treaties and Negotiated Settlements Research Project and Senior Lecturer, Law School, University of Melbourne.

negotiations and currently a Member of the NNTT, attended in his personal capacity to present his experience of the Wimmera negotiations. An annotated workshop attendance list is provided at Attachment A.

The first day of the workshop was devoted to traditional owners discussing their experiences, with their respective negotiating teams and invited experts adding their views. Markedly, the traditional owners' comments focused on the political aspects of native title rather than the minutiae of specific benefits. Traditional owners highlighted the need for negotiating parties to recognise and respect:

- their political status as traditional owners with a living tradition of laws and customs;
- native title as a valuable property right;
- adequately funded, culturally appropriate, decision-making processes and realistic timeframes to exercise such processes;
- adequate funding of implementation strategies which built capacity in traditional owner communities;
- the political aspects of negotiating with a community of native title holders, particularly the ease with which individual members of the community can seek to disrupt negotiations.

These key issues, along with the perspectives of the Office of Native Title (WA) representatives and Caitlin on the strengths and weaknesses of the Burrup and MG-Ord agreements and Wimmera agreement respectively were subject to very lively discussion at the plenary session on the second day of the workshop. The following analysis is structured around these key issues and in that sense is weighted towards the views of the Indigenous participants. However, the paper seeks to reflect all aspects of the workshop, primarily in the words of participants to avoid misrepresentation. For ease of reference the representatives of the Miriwung and Gajerrong, Ngarluma and Yindjibarndi and Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk are designated throughout the paper (as MG, NY or W). The observations are only the opinions of participants at the time of the workshop based on their experiences. Interestingly the opinions of relevant parties and invited experts was remarkably uniform across the different agreements. The analysis of these opinions are mine and do not necessarily represent the views of any participant.

Respect for Status as Traditional Owners

Positive Recognition of Right to Speak for Country

The overarching, positive outcome for each traditional owner group was that each negotiation marked the first time the state had recognised their fundamental native title right to speak for their country.⁵⁸ The process of negotiation was experienced as an emotionally raw opportunity to rectify historical injustice. Desmond Hill (MG) said people were ‘fighting from the heart’, negotiating for a future out of welfare and socioeconomic marginalisation whereas the State were seen as just ‘fighting for money’. Jenny Beer (W) succinctly observed ‘I said to the government people this is only your job. For us it is our life, our lifetime.’

The right to speak for their country was not experienced by traditional owners as mere recognition of a formal legal requirement that may lead to some material benefits. The right to speak was experienced as an historic, formal acknowledgement of their political identity as traditional owners. Michelle Adams (NY) stated that ‘the most encouraging thing about the Burrup Agreement was the opportunity to sit at the table. That was more than we have ever had before’. Jenny Beer (W) identified recognition of Wimmera law and custom through a consent determination as *the* critical benefit of the Wimmera negotiations, despite the recognition area being less than 3% of their native title application and the significant compromises made by the traditional owners in consenting to the State’s offer. Jenny Beer (W) stated that the consent determination and ILUA ensured the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples’ identification as traditional owners by both Indigenous and non Indigenous groups. She also noted that the agreement assisted the broader local community to recognise that traditional owners have ‘to walk a hard road between two cultures’ and, in this sense, recognition became part of a local reconciliation process.

For the Miriuwung and Gajerrong, the most positive aspect of the negotiations was establishment of the Ord Enhancement Scheme. As described above, the Ord Enhancement Scheme is in response to the *Fix the Past-Move to the Future* report on the Indigenous social and economic impacts of Ord Stage 1. The Report described the damming of Lake Argyle as akin to a natural disaster for local Indigenous people, detailed the shelved reports that described the negative impacts for Indigenous people of this natural disaster and made recommendations on health, housing, education and other social issues that must be addressed to alleviate these impacts. According to Desmond Hill (MG), when the Report was presented at the commencement of the MG-Ord negotiations it ‘wrong-footed the State and made everyone look up and take notice of us’. The Ord Enhancement Scheme is the State’s primary response to this report. In a real recognition of the Miriuwung and Gajerrong’s right to speak for their country on matters other than future acts, the Ord Enhancement Scheme ensures the Miriuwung and

⁵⁸ *Western Australia v Ward* (2002) 213 CLR 1 para.13.

Gajerrong have a level of direct control in regional decisions affecting their socio-economic wellbeing.

Similarly, the Wimmera ILUA was identified as providing a right to speak for country on issues not prescriptively limited to formal future acts. Jenny Beer (W) stated that whereas the former State cultural heritage legislation only required Government departments to talk to Indigenous people (and not necessarily traditional owners) about developments that may affect sacred sites, the ILUA requires the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk to be formally involved in a range of decision-making processes affecting all the area where they are recognised as having close cultural ties. Jenny Beer (W) stated that:

for a long time we have been locked out of decision-making. In our area, salinity is very high due to clearing. Now we are going to have a say, not just over sacred sites or cultural sites scattered over the place, but a say in the whole landscape.

Failures to Respect Traditional Ownership and Native Title

Despite the positive aspects of recognition of their political status as traditional owners, significant sadness, frustration and anger was expressed by traditional owners at the ongoing failure of the State to step outside narrow legal boundaries and engage with them as political partners in negotiations over their country, where their traditional laws and customs were meaningfully acknowledged and respected.⁵⁹ Patrick Dodson⁶⁰ observed that:

the State approaches native title agreements in two ways. Firstly it issues section 29 notices, which place native title holders under duress and grants the legal advantage to the State. Secondly, by doing so, it locks us into negotiations ... We need to find creative ways to deal with Government.

Similarly Cook noted that governments approached negotiations from a purely legal angle of statutory obligations, rather than a more expansive recognition of rights. Athanasiou agreed that the State of Western Australia characterised the Burrup and Ord negotiations as future act determinations and that this was a legitimate exercise in 'standing in on behalf of the proponent and handling the land use issues in advance of the final proponents development the land' rather than more expansive negotiations'.

The most explicit frustration came from the Ngarluma and Yindjibarndi representatives. Describing his experience of the negotiations, Trevor Solomon (NY) did not choose to list items in the benefits package, but instead stated the following.

⁵⁹ Lisa Strelein has similarly commented that 'the failure of governments to understand the connection between the recognition of native title and agreement making on a sovereign-to-sovereign scale can be a source of immense frustration.' Strelein, above n 20, p.201.

⁶⁰ Lead negotiator for the Miriuwung and Gajerrong.

How do you get through to government, to white man, when they don't want to hear, not interested. We fight hard, stand united yet the white man doesn't listen. Our law and our culture put aside. In the Burrup agreement, we got some stuff, but not what we wanted – no independence to do what we wanted to do. The spirit of the country is dying, so is the country around it. We are connected to the land, it speaks and talks to us. We can hear it. It cries out in pain when being bulldozed, blown up.

Similarly, Michelle Adams (NY) described her experience of the negotiations as follows.

There is deep resentment, distrust, deaths in custody, removal from land, no apologies. 30-40 % of State GDP comes out of the Pilbara yet the traditional owners live in poverty, third world conditions. What does that say about agreement making, compulsory acquisition and extinguishment?

Being part of the negotiations was liked being stabbed in the stomach constantly. Negotiating under duress – the State has issued compulsory acquisition notices and will take your land anyway. Burrup is a highly religious, spiritual site. We didn't want development but understood we had no veto. How do you value the loss of your cultural heritage? You can't put a figure on that. Most stressful time imaginable – that's our experience, that's what we lived through.

These comments indicate that for traditional owners, negotiations with the State carry an expectation of recognition by the State of a history of colonisation and an opportunity for dealing with the 'unfinished business' of this history. Negotiations are not seen by traditional owners as merely an opportunity for the State to 'stand in the shoes of a proponent' on strategic land use matters and to give only so much as is required by the NTA, a law that has been assessed by international human rights bodies as racially discriminatory in favour of non-Indigenous interests.⁶¹

For the Miriuwung and Gajerrong, the State's imposition of a narrow legal template during the negotiations was an affront to their unprecedented legal battle for native title. The MG#1 claim, filed in 1995, was subject to a Federal Court trial and determination,⁶² Full Federal Court appeal,⁶³ High Court appeal⁶⁴ and then remitted back to the Full Court. Following intensive mediation, a consent determination was recognised by the

⁶¹ For example, in 1999, acting under its early warning and urgent actions procedure (which had never previously been used against a developed country) the UN Committee on the Elimination of Racial Discrimination which monitors implementation of the UN Convention on the Elimination of Racial Discrimination stated that the *Native Title Act 1993* as amended in 1998 was racially discriminatory as it increased protection for non Indigenous interests through changes to the future act regime, confirmation of extinguishment provisions and validation of non compliant acts. Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/comments*, 18 March 1999, viewed 29 April 2009. <UN Doc CERD/C/54/Misc.40/Rev.2.CERD/C/54/Misc 40/Rev 2.>

⁶² *Ward v State of Western Australia* (1998) 159 ALR 483.

⁶³ *Western Australia v Ward* (2000) 99 FCR 316.

⁶⁴ Above n 58.

Full Court on 9 December 2003⁶⁵ at a special sitting in Kununurra. The very next day, the State notified the Miriung and Gajerrong of its intention to issue compulsory acquisition notices for the extinguishment of native title over 65,000 hectares of land in both the MG#1 determination and the (then undetermined) MG#4 application, an intention which made the previous day's consent determination a bitter, pyrrhic victory.

Lack of Recognition of Native Title as a Valuable Property Right

Across all three agreements, the lack of respect for traditional owners as political partners was most obvious in a failure by governments to recognise native title as a valuable property right that must be afforded commercial considerations during any negotiation.⁶⁶

Dodson described the States' choice not to recognise native title as a valuable property right as the 'fundamentally discriminatory way in which the State deals with Aboriginal people with regard to tenure'. This criticism is not new. Government respondents to native title applications have consistently sought to define native title as something other than a property right and the High Court has romantically described Indigenous peoples' relationship to country as primarily a 'spiritual affair'.⁶⁷ Seeking to empty native title of its economic, social and political basis undermines the *Mabo* decision's rejection of the doctrine of *terra nullius* and justifies States treating native title as inferior to non-Indigenous property rights with little commercial value during negotiations.

The Ngarluma and Yindjibarndi and Miriung and Gajerrong teams illustrated this discriminatory treatment of native title by identifying the ways in which various grants of land were treated in their benefits package. In these exchanges, native title is not treated as a commercially valuable property right, that can be traded for a valuable income stream and/or treated in a like manner to non-Indigenous property rights. These outcomes fail the standard of non-discriminatory treatment of competing interests that Pearson has identified as critical to ensuring native title negotiations are in the real interests of *all* parties.⁶⁸ Consequentially, some participants characterised the negotiations as a retreat from 'negotiation' to welfare and largesse.

Freehold with immediate leaseback

- The only freehold grant to the Ngarluma and Yindjibarndi was subject to an immediate leaseback to the Department of Conservation and Land Management (CALM) for 99 years (with a 99 year option to renew) at no rent. The freehold cannot be sold without the consent of the Minister. The land is subject to a management plan for environmental and Indigenous cultural heritage purposes. The State paid transfer costs and stamp duty.

⁶⁵ *Attorney-General of the Northern Territory v Ward* (2003) 134 FCR 16.

⁶⁶ Peter Yu has also expressed this view privately to the author.

⁶⁷ Above n 58, para. 13.

⁶⁸ Pearson, above n 23.

- 150,000 hectares of freehold grants to the Miriuwung and Gajerrong over conservation parks were subject to an immediate lease back to CALM for 100 years (with a 100 year option) at \$1 rent per term and joint management is to be instituted between the State and the Miriuwung and Gajerrong. The freehold cannot be sold without giving first option to the State for \$1. The non extinguishment principle applies to native title but the Miriuwung and Gajerrong have no future act rights for mining only ‘freeholder rights’. Compensation for any compulsory acquisition (subject to the future act right to negotiate) is only for the freehold interest or native title interest but not both. The Miriuwung and Gajerrong pay stamp duty and transfer costs.
- Freehold grants to the Miriuwung and Gajerrong over environmental buffers around certain farm areas are subject to an immediate lease back to an Environmental Management Entity for 1000 years (100 years with 9 times 100 year options) for \$1 per term. The Miriuwung and Gajerrong are not able to sell the freehold without giving first option to the State for \$1. The non extinguishment principle applies to native title but there are no future act rights for mining tenements only ‘freeholders rights’ and a future act ‘right to negotiate’ only for compulsory acquisition. Compensation for compulsory acquisition is only for freehold interest or native title interest, not both. The Miriuwung and Gajerrong have a role in the management of the buffer area and access for traditional enjoyment and use is ensured. The Miriuwung and Gajerrong to pay stamp duty and transfer costs.

For each of these freehold grants, the distinctive characteristics of freehold are so absent that the term ‘freehold’ is little more than a legal shell. The legal restrictions on the grants deny the Ngarluma and Yindjibarndi and the Miriuwung and Gajerrong the fundamental rights of a freeholder to impose appropriate lease terms (a term of 1000 years is meaningless), to impose rent and to commercially deal with their land by market sale. At the same time, the Miriuwung and Gajerrong have the financial obligations of a freeholder to pay stamp duty and transfer costs of large areas of land. In relation to the conservation parks, the lack of meaningful rental arrangements are out of step with some other Australian parks.⁶⁹

Restricted use community living areas with no basic services

- The Miriuwung and Gajerrong had the option of either unconditional or conditional freehold for 11 community living areas, with the condition being that the freehold could only be used for Aboriginal community living areas with limited economic use. Given this limitation on economic development,

⁶⁹For example, the Northern Territory Government provides \$100,000 per annum rent to the traditional owner corporation (Jawoyn Association) for the leaseback of the Nitmiluk (Katherine Gorge) National Park and 50% of park revenue. The government also funds infrastructure costs, public liability expenditure and Board administration costs. Other Australian parks with rental provisions include Uluru – Kata Tjuta, Kakadu, Booderee and Mutawintji.

unconditional freehold was the preference of the Miriuwung and Gajerrong. However if unconditional freehold was chosen, the State would not fund the legal requirement to construct a road to the community living area and therefore unconditional freehold could only be obtained by the Miriuwung and Gajerrong at significant financial cost. If conditional freehold was chosen, the State would pay for an access route. The Miriuwung and Gajerrong were required to pay transfer costs and stamp duty. Native title extinguished.

- On either option, the State refused to commit to the provision of other basic services such as electricity. As Edna O'Malley (MG) commented, the irony of this was that 'some communities sit along a power line [from the Ord dam hydro-electric scheme] but are not connected to it, and have to rely on a generator.'

The Miriuwung and Gajerrong representatives stated that in their opinion, the restrictions placed on the grants of freehold over their community living areas stood in contrast to the terms of a freehold grant made to a corporate pastoral lessee during separate negotiations related to Ord Stage 2. Other MG team members noted that it also stood in contrast to the land that would be offered for future irrigated agriculture, which would be fitted up with all relevant infrastructure prior to sale. Whilst one explanation for this is that these private interests would pay for these 'upgraded' aspects of their freehold grants through the sale price, whereas the Miriuwung and Gajerrong were receiving such grants as a negotiated benefit, this perspective is based on commercially devaluing the wide scale extinguishment of native title for which the grants of community living areas were partially exchanged.

Grant of 5% of Residential Development

The Burrup and MG-Ord agreements include grants of 5% of residential lands developed by the State. However, unlike commercial negotiations where percentages are generally based upon a set of financial principles relative to the negotiation, the figure of 5% is unprincipled and unrelated to the specific facts of each situation.

Participants commented that in relation to the release of residential lands, it would be logical for the State to grant a percentage of those lands that is closer to the relevant proportion of Indigenous people within the local population who are disproportionately reliant on State for housing. Given the current political emphasis on Indigenous home ownership, such a principled model would be a concrete way to assist traditional owners to engage in home ownership, whilst ensuring housing remains managed by a community corporation for community benefits.

Imposition of 'Extinguishment'

Another example of the failure of the State to respect traditional ownership and native title is the imposition of the legal concept of extinguishment. Dodson, advocating outside the workshop for recognition of the political footprint of native title, has argued that 'the concept of extinguishment has replaced the previous legal lie of *terra nullius*':

We have to learn to celebrate native title rather than to encourage its extinguishment. We have to acknowledge that it's not just property law, it's not just a bundle of rights, but it's about Aboriginal people. It's about Aboriginal people's rights to be the unique kinds of people that they are within our country.

Extinguishment is a terrible word ... for Indigenous people when extinguishment is applied it is not just about the right you hold in property. It is, in fact, about the nature of your being, of who you are, and how you relate and derive your meaning from a tract of land from which your spirit has arisen.⁷⁰

Similarly, Michelle Adams (NY) stated during the workshop that 'what's different between our laws and customs and native title is extinguishment', arguing that extinguishment is a 'racist element' of native title.

As noted above, the Miriuwung and Gajerrong received compulsory acquisition notices for 65,000 hectares of their traditional lands the day after historic consent determination in MG#1. This potential level of extinguishment of their native title was incomprehensible to the traditional owners. Desmond Hill (MG) explained how the Miriuwung and Gajerrong Steering Committee resisted the imposition of extinguishment month after month at negotiation meetings, 'we wouldn't let go'. Eventually, the freehold grants over the conservation parks and the buffer zones of land were subject to a restricted non-extinguishment principle (as described above).

This energetic resistance to the legal concept of extinguishment indicates that traditional owners did not accept the State's terms of the debate concerning native title and actively sought to renegotiate such terms in ways more aligned to their laws and customs. This renegotiation is legally possible in many instances under ILUAs but requires political will by governments and private interests to make agreements focused on respect for traditional laws and customs.

Decision-Making Processes and Timeframes

Traditional owners identified the key governance principle of culturally appropriate decision-making processes, facilitated through reasonable timeframes and adequate funding, as critical to the successful completion and durability of an agreement.

Providing time and funding for culturally appropriate decision-making processes ensures traditional owners have the best opportunity to 'own' negotiated outcomes by developing the skills to understand and implement agreements in the long term. Developing these tools of self-reliance avoids further institutionalising reliance on non-Indigenous professionals to manage Indigenous affairs. As John Roberts⁷¹ noted in the workshop:

⁷⁰ Patrick Dodson, 'Reconciliation: Confronting the Truth', keynote address presented to The Age Melbourne Writers Festival, 25 August 2000.

⁷¹ Senior policy adviser for the Miriuwung and Gajerrong negotiating team.

There is no quick fix. Big bang, big buck agreements are not an investment in the long term. It is better that people are equipped to deal with disputes in the community, better to be able to ensure the agreement lasts and can be implemented.

Forging the ability for traditional owners to directly manage agreements concerning their lives mirrors the Rudd Government's emphatic commitment to a new Australian future 'based on mutual respect, mutual resolve and mutual responsibility'.⁷²

Burru Agreement

In the Burru negotiations, the nexus between time, resources, culturally appropriate decision-making and durable agreements is most clear.

The Ngarluma and Yindjibarndi decision-making process was primarily dictated by the very short timeframe imposed by the State on the negotiations. Whilst the compulsory acquisition notices had been issued during early 2000, the State became serious about negotiating in December 2001 due to pressure from five multi-national corporations interested in gas exploitation in the area. Flanagan comments that:

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. Expenditure on capital alone was large enough to have a perceivable impact on the value of the Australian dollar in international currency markets.⁷³

Keen to prove their ability to attract such investment, the new WA Labor Government gave the traditional owners four months to reach an agreement, a possibility Flanagan states one experienced negotiator described as 'simply inconceivable',⁷⁴ and which later rolled over into six months. This timeframe occurred during the time assigned for 'law business', when traditional owners generally refuse to engage in external matters and expect respect for their cultural beliefs. Flanagan writes that the Ngarluma and Yindjibarndi were advised that the four month deadline 'was a consequence of the immutable commercial deadlines of the five international companies',⁷⁵ and that the timeframes were out of the State's hands.

The State's deadline prohibited development of an agreed, culturally appropriate decision-making process which was relevant to such a large development. Helen Lawrence⁷⁶ advised the workshop that to enable transparency, the Ngarluma and Yindjibarndi defaulted to the daunting option that the whole community would be the negotiating committee. This proved an extremely difficult decision-making process for

⁷² Rudd, above n 2.

⁷³ Flanagan, above n 42, p.4.

⁷⁴ Flanagan, above n 42, p.4.

⁷⁵ Flanagan, above n 42, p.4.

⁷⁶ Principal Legal Officer, Yamatji Marlpa Bana Baba Maaja Aboriginal Corporation and senior lawyer during the Burru negotiations.

participants. The amount of meetings was intensive: the Pilbara Native Title Service conducted over thirty meetings in four months (approximately two per week), including night and day meetings to accommodate both employed and unemployed people and separate women's meetings. Meetings would comprise approximately one hundred people in the room (together with children, dogs and the consequent distractions) trying to discuss complex issues and make informed decisions.⁷⁷ The previously noted dispute about the correct native title group for the area exerted further pressure upon this fraught-decision-making process.

The process placed extraordinary pressure on the Ngarluma and Yindjibarndi's ability to realistically negotiate whilst coming to terms with the prospect of wide scale destruction of their land and culture. Michelle Adams (NY) stated that the community was:

pushed into a corner – take it or leave it. We didn't know how to negotiate. When you look at the population most couldn't read or write. Few could articulate what they want or represent their people. We were under duress. I hate the government for doing that to us. No respect. They wanted meetings to discuss their business, but what about our business?

This last comment again points to a view of native title negotiations as an opportunity for government to address the historical experience of traditional owners and to provide hope for a more self-reliant future, rather than a view that negotiations are merely a narrow future act matter. Michelle Adams (NY) further explained that the community's concerns about their future extended to fears of how future generations would view their role in the agreement. She explained that:

every meeting was video-taped and recorded due to our concern that our grandchildren would not know what had happened during the negotiations. We wanted a permanent record.

Commenting on the State's failure to appreciate this broader perspective, Cook stated that prior to the negotiations the Ngarluma and Yindjibarndi had watched:

20 years of grotesque amounts of money being spent around Roebourne [where many traditional owners lived] for mining and traditional owners did not receive a cent of it. Then finally when traditional owners have the right to negotiate, the State imposes oppressive time lines to make decisions regarding what may be the only shot in the locker for generations. It was an extraordinary achievement for the community to go from 0-150km per hour. But we must not lose sight of the stress for traditional owners owners and land council staff and what such timeframes cost in human capital terms.

Whilst the Ngarluma and Yindjibarndi and their negotiation team managed to comply with the deadlines set by the State, Lawrence noted that the State would often fail to meet

⁷⁷ Flanagan, above n 42, p.8.

its own deadlines due to its internal processes, a situation that did not assist in nurturing good faith. Due to the challenge of negotiating with a politically complex community (as opposed to a stable corporate entity) tardiness by the State potentially impedes negotiations. For example, Lawrence advised that a delay by the State in attending a meeting with one member of the Yaburara and Mardudhunera during authorisation inadvertently contributed to the outcome that the individual decided against signing the agreement, triggering an expensive, time-consuming and then unprecedented Federal Court application to amend the native title applicant.⁷⁸

Athanasίου agreed the timeframes for the Burrup agreement were too short but that the agreement was the first of its kind and that the State was indebted to the good faith of the traditional owners to the process. He noted that the State had sought to implement more appropriate timeframes in the MG-Ord negotiations. However, it is unclear how this fits with the State's comment that the timeframes in the Burrup agreement were 'out of their hands' due to the deadlines of commercial interests. Ironically, the original proponents never pursued these urgent interests, leaving open the question of what the real timeframe could have been if traditional owners and corporate interests were treated equally.

In terms of the structure of the Burrup negotiations, Lawrence told the workshop that the initial months proceeded with a range of departmental officers taking contradictory positions and offering minimalist benefits such as the right to name roads. The Ngarluma and Yindjibarndi team identified two turning points in the process: the appointment of a State lead negotiator experienced in native title (Athanasίου) to channel one position from Government; and the traditional owners presenting a proposed benefits package contextualised by their historical experience in the region. Flanagan describes the presentation of this historical account and the proposed benefits package as an 'emphatic success'⁷⁹ which led to Cabinet committing to the negotiation of a more comprehensive agreement than previously anticipated. In terms of adequately funding the negotiations, Flanagan writes:

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.⁸⁰

However, Lawrence noted to the workshop that the *process* for obtaining these funds was flawed. There was no agreed budget from the State and funding had to be applied for every couple of weeks, a cumbersome exercise redirecting precious human resources away from the substantive negotiations.

⁷⁸ Section 66B of the NTA sets out the process for amending the applicant group for a native title claim in circumstances where a person or persons are not complying with the decisions of the group. Two 66B applications were required to be pursued by the representative body and both were successful.

⁷⁹ Flanagan, above n 42, p.13.

⁸⁰ Flanagan, above n 42, p. 6.

MG-Ord Agreement

The Miriuwung and Gajerrong were able to develop the most successful, culturally appropriate decision-making process primarily because the State agreed to adequately fund the decision-making process established by the traditional owners and partly because the timeframes for negotiation, whilst tight, were manageable.

Lead Negotiator

The Kimberley Land Council deviated from the standard model of appointing a non-Indigenous lawyer as the lead negotiator and put together a negotiation team led by Dodson. As well as a nationally recognised Indigenous leader, Dodson is a cultural law boss within his Yawuru community and by virtue of this cultural role was familiar with general aspects of Miriuwung and Gajerrong law and custom. Dodson's appointment as lead negotiator for the Miriuwung and Gajerrong proved crucial in facilitating the negotiations in a number of respects.

- Dodson was able to win the trust of senior Miriuwung and Gajerrong law bosses more easily than a non-Indigenous appointee in light of his ability to knowledgably engage with issues of traditional law and custom.
- Dodson's cultural and public standing generated trust with the Miriuwung and Gajerrong which was essential given a rocky historical relationship between the Kimberly Land Council and the Miriuwung and Gajerrong.⁸¹ By the end of the negotiations, certain individuals who had previously refused to instruct the Kimberley Land Council signed the MG-Ord Agreement.
- Unlike a cultural outsider, Dodson was able to comprehend at a subtle level what was being articulated by the Miriuwung and Gajerrong and to translate such information, and the State's response to it, in culturally appropriate ways.
- Dodson's status as a political leader rather than a lawyer focussed the negotiations away from narrow legal debates and onto broader political possibilities.

Negotiation Rules and MG Steering Committee

At the beginning of the negotiations, the Miriuwung and Gajerrong agreed upon two key rules based on the communal nature of native title:

⁸¹ The Aboriginal Legal Service (WA) and not the Kimberley Land Council was the primary legal representative for the lodging of MG#1 and MG#2 native title applications and the litigation of MG#1. However, the Kimberley Land Council separately represented some members of the claim group. During the litigation period, there was significant tension between the KLC and the ALS (WA) and the differently represented claimants. When the High Court remitted MG#1 back to the Full Court, the ALS (WA) was no longer recognised as a native title representative body and the Kimberley Land Council was required to become the solicitor on the record for all claimants.

- they would negotiate one agreement over all affected country and hence all benefits would be shared by all Miriuwung and Gajerrong and not just those whose traditional areas were to be worst affected; and
- no individual benefits only community benefits.

The lead negotiator was guided by a 26 person Miriuwung and Gajerrong Steering Committee. In accordance with traditional law and custom, the Steering Committee was only empowered to guide, or make interim decisions on, negotiated outcomes. All final decisions were to be taken to the senior law bosses with ultimate responsibility for Miriuwung and Gajerrong country.

The Steering Committee was a critical part of the machinery of the negotiations. It both advised the negotiating team and directly negotiated with the State at monthly meetings. This direct level of negotiation over all key aspects of the agreement (and the related work of the ASEIA sub-committee⁸²) assisted the Steering Committee in gaining ownership and understanding of agreement outcomes and ensured individuals became increasingly confident in negotiation skills and the agreement's implementation requirements.

Desmond Hill (MG) identified the Steering Committee's ability to directly negotiate with the State as a way of opening negotiation pathways outside of narrow legal parameters.

The negotiation team would brief us, but the Steering Committee would argue with the State. Not the lawyers, not the team. This was good because the State's negotiator had no idea what we would say - not professional to professional, not lawyer to lawyer. The team would then try to push State on specific issues we wanted.

Dodson reiterated this point, advising that it was an important principle that the Steering Committee engage directly with the State's lead negotiator.

When I spoke, if we won a point on the basis of law, we lost on the basis of policy which operated as a screen for the State. But when the Committee grilled the State personally, the State was confronted.

The Steering Committee was appointed and operated in accordance with traditional decision-making processes as instructed by senior Miriuwung and Gajerrong law bosses. It was comprised of a 'senior' and a 'junior' member of each *dawang* (local land owning group), where 'senior' and 'junior' were not designations of age, but references to an individual's position in Miriuwung and Gajerrong law, with junior delegates generally better able to engage with the language and concepts used during the negotiations.

Workshop participants identified that a crucial outcome of the negotiations was the increased skills and capacity developed by Steering Committee whilst being involved in a

⁸² The Aboriginal Social and Economic Impact Assessment sub-committee was established to progress the recommendations of the report *Fix the Past – Move to the Future*, above n 47.

a culturally appropriate decision-making processes. This situation allowed a person's developing skills to be grounded in a traditional identity whilst being capable of flexibility to non-Indigenous commercial and political requirements. As noted above, the Harvard Project and others have identified that a key benefit of negotiating within a native title context is engaging in a non-Indigenous political, social and economic environment whilst remaining grounded in a community defined through traditional laws and customs. Roberts aptly observed that whilst the development history in the Kununurra region had impacted heavily on Miriuwung and Gajerrong cultural knowledge, and that the differential in such knowledge initially caused confusion and dissension within the Steering Committee:

the Miriuwung and Gajerrong people were fortunate to have had strong senior law people to establish culturally appropriate decision-making protocols and dispute resolution procedures. Ultimately the labour-intensive preparatory process that established the basis for decision-making, combined with the disciplined negotiation process, proved very positive in building knowledge and confidence amongst the Miriuwung and Gajerrong. Many new leaders emerged during the process.

An independent review of the Ord negotiations commissioned by the Office of Native Title (WA) similarly highlights the crucial role this culturally appropriate decision-making process played in the success of the negotiations.⁸³

The focus on traditional decision-making processes has contributed to a strengthening and rejuvenation in respect of Miriuwung and Gajerrong law over land. Participants gave a recent example of a long running internal dispute over land which was resolved in accordance with traditional laws adjudicated by senior law bosses. Following national research on Indigenous decision-making and conflict resolution in the context of native title, Toni Bauman has observed that a community's ability to effectively respond to internal disputes and enforce their decisions is a key ingredient for durable agreements.⁸⁴

Athanasίου took a different view on the dynamic between the Steering Committee and the State. Whilst considering that the split between the negotiation team and the Steering Committee was advantageous in allowing focused engagement with the Steering Committee, the disadvantage was that almost all of the real negotiation occurred at a technical level with the negotiation team away from the Steering Committee. This then led to frustration and accusations of lack of respect from the Steering Committee when impasses referred from the negotiation team to the Steering Committee were not resolved. Athanasίου suggested a solution was a change of the relationship between the negotiation team and the Steering Committee – either an acknowledgement that the real

⁸³ The State's independent review of the process also highlights the critical role this traditionally based process played in the negotiations success. Ron Bogan and Stuart Hicks, *Lessons Learned: An Evaluation of the Framework of the Negotiations for the Ord Final Agreement 2006*, Office of Native Title, Perth, 2006, p53.

⁸⁴ Toni Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, AIATSIS, Canberra, 2006.

negotiation occurs with the negotiation team away from the Steering Committee with unresolved issues being raised by the Committee as an issue to be reconsidered or allowing all negotiations to be conducted with the Steering Committee with assistance from the technical team.

Adequate Preparation

Participants identified that the need for adequate preparation prior to the commencement of formal negotiations was important to an effective negotiation process.

Adequate preparation was identified as appropriate notice of the negotiation to ensure construction of an effective decision-making process, including what Cook described as a ‘capacity audit’ of the resources of the Indigenous side to enable an effective response. Adequate preparation was also identified in terms of funding for research on the potential scope of the negotiation prior to the settling of documents such as framework agreements. Framework agreements are not merely procedural - they establish the scope of negotiation. A standard mechanism for such research is a social and economic impact assessment of a proposed development on the relevant community. As noted previously, after the Miriuwung and Gajerrong identified ‘fixing the past’ of Ord Stage 1 as a threshold issue for negotiations over Ord Stage 2, the State funded the *Fix the Past: Move to the Future*⁸⁵ report which was pivotal in achieving a successful final agreement. However, the State then controversially chose not to undertake an Aboriginal social and economic impact assessment of the Ord Stage 2 developments, seen by the Miriuwung and Gajerrong team as a significant deficiency in generating standard information available in commercial negotiations.

Consistent with the experiences of the Ngarluma and Yindjibarndi team the Miriuwung and Gajerrong team noted that despite the State imposing highly demanding time frames, the State then misjudged their own timeframes and would routinely require the Miriuwung and Gajerrong team to get across extensive documents the night before a meeting. Such inadequate preparation by the State militates against informed consent, undermines good faith and creates barriers to timely resolution of agreements.

Workshop participants observed that the MG-Ord funding process was a significant improvement on the fortnightly applications required during the Burrup negotiations. Budgets were agreed for long periods, although negotiations for these budgets were often pernickety and hampered by the State’s unrealistic negotiation timeframes. Roberts noted that there were also some inappropriate attempts to restrict the composition of the negotiation team and access to external expertise by limiting the budget, which if successful would have impacted upon the Miriuwung and Gajerrong’s adequate preparation.

⁸⁵ Kahn, above n 47.

Wimmera Agreement

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples asserted that they had significant control over the decision-making process and timing of their negotiations.⁸⁶ Traditional owners initially obtained funding to organise themselves as a community in response to inappropriate meetings imposed by their then native title representative body and State representatives. Jenny Beer (W) described that:

We were required to make decisions on the day. This was not right. We decided to hold our own meetings to include all families. At the first meeting everyone walked away from the table. I organised a second meeting and asked everyone to commit to a native title process. They did and we then directed our counsel to do what we wanted ... We changed the way things were done in Victoria.

The traditional owners then approached their representative body and the State to assist them in making an agreement over their country. They resisted pressure from their legal adviser to litigate, resisted government pressure to have matters decided over inappropriately short time periods and sought substantive outcomes that would develop a skills base and assist the community to achieve self determination in the future. As Jenny Beer (W) stated:

At the first meeting with the State they went into speed mode, have to do this, do that. We had to say to them 'hold on, pull up, we don't work so fast, don't have the resources' ... We had to tell the State that we are not like a corporation where you go to talk to one representative. In Indigenous communities you have lots of people to talk to.

Jenny Beer (W) further explained that the strength of their culturally appropriate decision-making process, based on traditional family groups, allowed the clans to deal with significant internal disputes, including in relation to authorisation.

We became so strong as everyone owned the process. Short circuited the renegades in order to see the ILUA signed ... Tried to eliminate greed – any time money comes across the table it is for the whole community.

This situation reflects the Miriuwung and Gajerrong's experience with dissident claimants but highlights the fractious situation still faced by the Ngarluma and Yindjibarndi. As with the Miriuwung and Gajerrong, the reinvigoration of culturally appropriate decision-making processes granted traditional owners a level of control over their community's future. Jenny Beer (W) stated:

We had forgotten how to communicate as a community. The claim and agreement focused back on our laws and customs ... Our long term goal is

⁸⁶ In terms of timeframes, this may primarily be because the Wimmera agreement was not triggered in response to future act notices.

to become self-sufficient. Welfare stuff is destroying our people. The agreement is about capacity building and partnerships, building the skills base.

In response to a question at the workshop about whether rejuvenation of the traditional owner's identity through the positive recognition of native title and associated decision-making rights were more important than money, Jenny Beer (W) replied:

Yes. Culture is more important ... People are coming back after being dispersed from the missions. There is a growth in our identity. We can't survive without our mob.

Community reinvigoration simultaneously strengthened their negotiation position with other parties. Jenny Beer (W) explained that 'once we got ourselves together we had people willing to help us.'

At the local level there were people willing to come to the table, the Parks Department, the Department of Sustainability and Environment – they were on top of the Cultural Heritage Act but didn't know the native title process... On a local level we achieved. The process has to start from the ground. That is where it will all be implemented.

Caitlin described the community as 'a binding force that had a positive influence on the State's engagement' as they were able to impress relevant players of their seriousness and ability to engage. Caitlin also noted that a key driver for the agreement was the Attorney-General Rob Hulls MP, who had a strong commitment to land justice and broad based settlements of native title in Victoria. As many participants noted, this strength of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples and the commitment of the Attorney-General resulted in an agreement and consent determination, which whilst limited, is the antithesis of the disastrous *Yorta Yorta* decisions,⁸⁷ the first Victorian native title application.⁸⁸

Complexity of Negotiating with Governments

The Office of Native Title (WA) participants commented that a negative aspect of the Ngarluma and Yindjibarndi and Miriuwung and Gajerrong negotiations from their perspective was that when impasses were reached, Indigenous parties occasionally stepped outside the negotiation framework and made direct approaches to Ministers. They commented that:

⁸⁷ *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606; *Yorta Yorta v Victoria* (2001) 110 FCR 244; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; 194 ALR 538.

⁸⁸ Whilst the State committed to the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk Peoples agreement a few months shy of the High Court *Yorta Yorta* decision, all other parties including the Commonwealth signed on afterwards.

The politics is at the first stage when flushing out threshold issues and agreeing on the scope of negotiations. Reintroducing politicisation after this stage is counter-productive.

Conversely, the Indigenous teams considered political lobbying of senior politicians as a productive step and that in the Miriuwung and Gajerrong and Ngarluma and Yindjibarndi negotiations this step was taken after discussion with the State's lead negotiator. Dodson commented that unlike negotiations with corporate interests where everything is on the table for discussion, negotiations with the State are unique in that they are generally subject to a pre-determined Cabinet position. This locks in the scope of discussions and provides Indigenous parties little room to move, a situation Dodson described as 'a serious flaw in the negotiation structure'. He considered judicious approaches to Ministers on contested issues were the only option for responding to this flaw and that such approaches legitimately politicised (not repoliticised) issues not previously subject to negotiation. Roberts similarly noted that it is critical to deal with impasses on key issues as they arise otherwise the quality and success of the negotiations may be compromised. He cited the example of the Miriuwung and Gajerrong demand that the State respond to the impacts of Ord Stage 1 before they would agree to negotiate Ord Stage 2, a position eventually acknowledged by the State and which facilitated the MG-Ord Agreement. Athanasiou agreed these political approaches were important acknowledgments that, at crossroads in the negotiations, the State negotiating team is the messenger and not the ultimate decision-makers. Flexibility to allow for such approaches was a sign of respect for the negotiation process.

Implementation

The nexus between culturally appropriate decision-making processes, community development and the durability of an agreement was again revealed in the different strategies taken to implementation. To ensure an agreement's success, all Indigenous participants and other experts identified as essential that implementation be controlled by traditional owners (and where relevant their native title representative bodies) with appropriate support from the State. Caitlin also identified the importance of ensuring implementation occur expeditiously because:

agreements do rust if not put into place quickly enough. Personalities change and corporate knowledge is lost.

Burrup Agreement

Preparation for the Canberra workshop led to a review of the Burrup Agreement files by both the Pilbara Native Title Service and the State. These reviews revealed that implementation of the Burrup Agreement had fallen off the agenda.

The main vehicle for implementation of the Burrup Agreement was the Approved Body Corporate (ABC).⁸⁹ The State agreed to provide \$150,000 for an independent consultant (nominated by the State after consultation with the parties) to incorporate the ABC. Little detail was included in the Agreement as to how the ABC would be structured.

It took the State nine months to determine the tender for the consultant and a further three and a half years for the consultant to establish the ABC. At the workshop, the Ngarluma and Yindjibarndi team commented that this delay was primarily due to the consultant's unfamiliarity with the fractious history and cultural processes of the three Indigenous parties. The delay left the community in abeyance with the threat of internal breakdown. It was strongly argued that a far more effective process would have occurred if the native title representative body had responsibility for implementation.

A representative from the Office of Native Title (WA) agreed that establishment of the corporation was too slow and that their preference would also have been for the representative body to have responsibility for implementation however, as explained by Athanasiou, this was not considered possible in the circumstances:

If the Pilbara Native Title Service was going to be the body to put together the corporation and implement the agreement, then the State would not have got the Wong-Goo-To-Oo to sign.

Criticism was directed at the State for privileging the formal legal success of all native title parties signing the agreement over what would have been a more rapid incorporation if managed by the representative body. In reply to this criticism, Athanasiou explained that because of the urgent timeframes the State 'didn't want to go to arbitration. Rather, the State desperately wanted to get agreement [with all native title parties] and go to the next phase' and that appointment of an independent consultant was viewed as an appropriate option in these circumstances. However the State did eventually go to arbitration because of the tactics of the Wong-Goo-To-Oo (discussed below). In these circumstances, participants commented that reverting to a more robust implementation process controlled by traditional owners, rather than continue with a flawed implementation model to attract the Wong-Goo-To-Oo, was an appropriate option.

On 19th April 2006, the Murujuga Aboriginal Corporation was finally incorporated and on 31 July 2006 the first financial benefits from the Burrup Agreement, approximately \$4 million, were transferred to the Corporation,⁹⁰ five years after the Ngarulma and Yindjibarndi had consented to the State's proposal. The corporate structure is as follows: Wong-goo-tt-oo four places, Yaburara two places, Mardudunhera two places, Yinjibarndi two places and Ngarluma two places. The chairman and treasurer are Wong-goo-tt-oo

⁸⁹ Clause 17, although some benefits were to flow through an independent Employment Service Provider – see clauses 15 and 16.

⁹⁰ Office of Native Title (WA), *Factsheet, Burrup and Maitland Industrial Estates Agreement, Burrup and Maitland, Agreements*, Department of the Premier and Cabinet, viewed 29 April 2009, <[http://www.nativetitle.wa.gov.au/uploadedFiles/Agreements/Land_Use_Agreements/FACT_SHEET_BURRUP_AND_MAITLAND_INDUST...\(1\).pdf](http://www.nativetitle.wa.gov.au/uploadedFiles/Agreements/Land_Use_Agreements/FACT_SHEET_BURRUP_AND_MAITLAND_INDUST...(1).pdf)>.

members and the secretary is Yaburara. This result is curious given the Federal Court determination that the Ngarluma and Yindibarndi are the traditional owners for the area, and that the Wong-goo-tt-oo and Yaburara and Mardudunhera are part of this traditional owner group, not separate entities. This corporate structure has since been questioned by Ngarluma and Yindibarndi representatives as lacking informed consent.⁹¹

Implementation of other key aspects of the Burrup agreement that were not discussed at the workshop are as follows.

- The management plan over the Burrup freehold remains incomplete. The Ngardangarli Advisory Group was established in July 2004 to assist a consultant to draft the management plan and the Draft Management Plan for the Burrup Conservation Reserve was released for public comment on 11 July 2006.⁹² The Department of Environment and Conservation (WA) website states that the Management Plan is yet to be finalised.⁹³
- No participants were aware of the outcomes of the Roebourne Enhancement Scheme. A web search reveals that the Roebourne Enhancement Government Agency Committee first met in November 2001 and was wound up after the scheduled four year term. Curiously, the documents listed on the website (which include two media releases from Premier Gallop and Premier Carpenter⁹⁴ and departmental reports) make no mention of the links between the Scheme and the Burrup negotiations or indeed any Indigenous specific concerns. For example, the Pilbara Development Commission site states that the:

Roebourne Enhancement Scheme (RES) was established by the State Government with the aim of improving community infrastructure and the coordination of services to Roebourne residents. The State Government allocated a total of \$3.5 million to the project which was managed through the Pilbara Development Commission in partnership with the Shire of Roebourne and the Roebourne Community.⁹⁵

Scheme projects included redevelopment of streets, tidy town programs and 'bush tucker' interpretative signs. The Department of Housing and Works also undertook a \$1m program to remove asbestos from contaminated sites and a \$1m program to upgrade public housing.

⁹¹ 'Burrup Boom a Bonanza for Some', *The West Australian* 11 August 2007.

⁹² Above n 90.

⁹³ Department of Environment and Conservation, *Burrup Peninsula Conservation Reserve, Land Management Planning, Management and Protection*, Western Australian Department of Environment and Conservation, viewed 29 April 2009, <www.dec.wa.gov.au/management-and-protection/land-management-planning/burrup-peninsula-conservation-reserve-management-plan.html>.

⁹⁴ Government Media Office, *Mediastatements*, Government of Western Australia, viewed 29 April 2009, <www.mediastatements.wa.gov.au/ArchivedStatements/Pages/CarpenterLaborGovernmentSearch.aspx>.

⁹⁵ Pilbara Development Commission, *Roebourne Enhancement Scheme, Funding Schemes*, viewed 29 April 2009, <www.pdc.wa.gov.au/funding--schemes/roebourne-enhancement-scheme.aspx>.

- In 2008, over five years after execution of the Burrup agreement, Pilbara Joblink was appointed as the Employment Service Provider.
- Periodic monitoring of the effect of industrial emissions on rock art commenced in 2004.

Athanasidou acknowledged at the workshop that implementation was the biggest lesson learnt from the Burrup Agreement.

MG-Ord Agreement

The approach taken to implementation of the the MG-Ord Agreement was significantly better.

MG Corporate Structures

The MG-Ord Agreement provides funding from the State to the Kimberley Land Council to develop the MG Corporation and various subsidiary trusts post execution of the Agreement. However, prior to execution the Miriuwung and Gajerrong team advocated that it was more efficient to undertake the intensive work required to develop the corporate structures *during* the negotiations. Such an approach was efficient as it took advantage of the momentum generated by the negotiations, the expertise of the Steering Committee and negotiation team in dealing with the community and the ready availability of the State to hammer out any concerns. The Miriuwung and Gajerrong team saw these as the most likely conditions to achieve focused and careful debate on a range of corporate structures.

Whilst the State initially resisted expending implementation funds during the negotiations, the proposal was eventually supported. Consequently, the final MG-Ord Agreement sets out detailed structures and responsibilities for the MG Corporation (including its role as formally assisting the Miriuwung and Gajerrong prescribed bodies corporate) and the various subsidiary trusts. As the Steering Committee and broader community were required to participate directly in and take ownership of corporate development as an integral part of their negotiations, this strategy also continued to entrench the principle of Miriuwung and Gajerrong capacity building as a goal of the negotiations.

As a clear indicator of the success of this approach, the Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation ('MG Corporation') was incorporated on 2 February 2006 less than five months after the signing of the Agreement. Consistent with the negotiations, the MG Corporation embraces a culturally appropriate decision-making process: the 32 member Governing Committee is comprised of two representatives from each of the 16 *dawang* (traditional land holding areas) that comprise the land subject to the Agreement. In August 2008, the MG Corporation received the Highly Commended award in the category of Best

Governance for an Aboriginal organisation at the National Australian Indigenous Governance Awards.⁹⁶

Whilst efficient development of corporate structures was an important success of the negotiations, a consequential issue arose in terms of funding development of the remaining corporate structures. The Agreement included a milestone called the 'Satisfaction Date' at which time the majority of the benefits under the Agreement would flow from the State to the MG Corporation. The 'Satisfaction Date' was the date at which all remaining corporate structures had been developed to the satisfaction of the State. However, two thirds of the implementation money under the agreement was spent developing the MG corporate structures during the negotiations, leaving insufficient funds to finalise outstanding matters required to reach the Satisfaction Date. As the State did not release sufficient additional funds, the Miriwung and Gajerrong were required to spend around 65% of its 'post-Satisfaction Date' implementation budget to reach the Satisfaction Date, necessarily leaving a significant shortfall for other aspects of implementation. Desmond Hill (MG) argued that it should be the State's responsibility to fund any agreement to the stage where benefits accrue. A 2007 report⁹⁷ commissioned by the MG Corporation found that the corporation was unable to implement its post Satisfaction Date responsibilities under the Agreement without further implementation funding, a situation that put the new MG Corporation at significant risk. The State has since provided additional funding.

A conclusion from this situation is that priority be given to realistic implementation budgets in comprehensive agreements and that flexibility as to agreed budgets be a priority to ensure agreements do not fall over before they have barely begun.

MG Prescribed Bodies Corporate

A novel mechanism for implementation in the MG-Ord Agreement was the creative approach to developing an operative prescribed body corporate (PBC) for MG#1 (and the later PBC for MG#4).

The unproductive stoush between the Commonwealth and the State as to who should fund PBCs is well documented and has been subject to negative judicial comment, including by Justice North during the Full Court's sitting in Kununurra for the MG#1 consent determination.⁹⁸ Acknowledging (whilst not accepting) the stasis in government policy on this critical issue, the Miriwung and Gajerrong decided that the resourced MG Corporation be effectively utilised to undertake PBC work. The executive of the MG#1

⁹⁶ The awards were created by Reconciliation Australia and BHP Billiton to identify, celebrate and promote strong leadership, effective partnerships and creative thinking in Indigenous organisations.

⁹⁷ Professor Kathy Alexander, 'Organisational Review of the Yawoorroong Miriwung Gajerrong Corporation (MG Corporation)' April 2007.

⁹⁸ Unreported. Justice North formally made comment on the issue in the Karajarri #2 consent determination: 'It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC.' *Nangkiriny v State of Western Australia* [2004] FCA 1156.

PBC and the MG Corporation is deliberately identical and the PBC rules explicitly recognise the right to delegate to the MG Corporation all their administrative functions. Final execution of future act matters required to be undertaken by the PBC can therefore be done during an MG Corporation meeting by the executives ‘changing hats’ and operating as the PBC executive. This process not only ensures that the PBC has *de facto* funding but efficiently utilises the Miriuwung and Gajerrong’s meeting time.

This creative and practical response to the fraught issue of PBC funding is another benefit of focused, comprehensive negotiations. As Dodson commented at the workshop:

If we argue about who is going to pay for the PBC, States or Commonwealth, the issue is never going to be resolved. I hope that the States and Commonwealth can see the beneficial good that results from the Ord negotiations, can see the seamless move from negotiation to implementation and realise that the timely establishment of a functioning PBC is a benefit to both levels of government.

Update on Implementation of Other Benefits

- Initial Benefits at Satisfaction Date: in July 2006 initial benefits of money and land valued at over \$7 million was transferred to the MG Corporation and the MG Charitable Trust.⁹⁹
- Ord Enhancement Scheme: in mid-2006 the Ord Enhancement Scheme commenced and early priorities identified by the OES Committee are: renal health and health education; education; early childhood learning and family support; youth at risk; cultural maintenance; housing, infrastructure, training and employment.¹⁰⁰
- New conservation reserves: whilst the six new conservation reserves to be jointly managed by the Miriuwung and Gajerrong and the Department of Environment and Conservation have yet to be created, important steps have been taken towards this aspect of the MG-Ord agreement. In 2006, the Yoorrooyang Dawang Regional Park Council (‘Park Council’) was established to facilitate a Parks Management Plan for the conservation areas, to develop local Indigenous training and employment opportunities and to enable on-going management of the Conservation Parks.¹⁰¹ In 2008, an extensive report entitled *Miriuwung and Gajerrong Peoples’ Guidelines for Developing Management Plans for Conservation Parks and Nature Reserves under the Ord Final Agreement* was presented to the Department of Environment and Conservation by the Park

⁹⁹ Office of Native Title (WA), *Milestone, Overview, Ord Final Agreement, Ord Final, Agreements*, Department of the Premier and Cabinet, viewed 29 April 2009, http://www.nativetitle.wa.gov.au/agreements_OrdFinal.aspx.

¹⁰⁰ Above n 51.

¹⁰¹ Department of Environment and Conservation, *Yoorrooyang Dawang Regional Park Council, Land, Management and Planning, Management and Protection*, WA Department of Environment and Conservation, viewed 29 April 2009, <www.dec.wa.gov.au/management-and-protection/land-management-planning/oorrooyang-dawang-regional-park-council.html>

Council.¹⁰² On 31 March 2009, Consolidated Pastoral Company relinquished almost 200,000 hectares of its pastoral lease, the bulk of which will be utilised for the new conservation parks.¹⁰³ However, advice from the MG Corporation is that progress on the parks have now hit a legislative roadblock as the commitments made by the State in the MG Agreement in terms of joint management cannot be met under current legislation.

- Reserve 31165: on 26 October 2006 the Water and Rivers Commission entered into an agreement with the MG Corporation for the joint management of Reserve 31165. The Reserve covers approximately 127,000 hectares of land at the southern end of Lake Argyle.¹⁰⁴
- Freehold grant over Yardungarrl: 31 August 2007 the State granted freehold over 50,000 hectares (known as Yardungarrl) to the MG Corporation to be managed for the specific *dawang* (traditional land holding groups) of Yardungarrl.¹⁰⁵
- 5% of Kununurra Residential Lots: in April 2008 Landcorp released 35 lots in Stage 3 of Lakeside Park Estate. MG Corporation received 5% of the sale price.¹⁰⁶

Wimmera Agreement

With the assistance of Native Title Services Victoria, the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples established the Barengi Gadjin Land Council Aboriginal Corporation RNTBC in early 2005 (prior to their consent determination and execution of their ILUA). The Barengi Gadjin Land Council is the prescribed body corporate (PBC) for the positive determination of native title under the consent determination and the body responsible for receiving and implementing the benefits of the ILUA (including the holding of freehold, holding of financial benefits and representative function on behalf of traditional owners). The ILUA provides operational funding for the PBC and three full time positions.

Jenny Beer (W) states that the momentum and focus of the negotiation process, and the re-invigoration of their identity as traditional owners, ensured the PBC reflected a culturally appropriate governance model, based on family group representatives.

[We] put our laws and customs into our corporation. This was not easy.
We did lots of role plays to see how it might work.

Since the workshop, a website search indicates that the Barengi Gadjin Land Council has been involved in a range of local development issues including cultural heritage

¹⁰² Above n 101.

¹⁰³ Above n 99.

¹⁰⁴ Above n 99.

¹⁰⁵ Above n 99.

¹⁰⁶ Above n 99.

discussions and a formal agreement in relation to the Wimmera Mallee Pipeline Project.¹⁰⁷ In November 2007 the Corporation was recognised as as Registered Aboriginal Party under the new Victorian *Aboriginal Heritage Act 2006*, granting them a legal role in relation to protection of their cultural heritage. Several times during the workshop, Jenny Beer (W) noted the destructive effect of the former Victorian heritage legislation as the legislation empowers individuals who are not necessarily traditional owners to agree to disturb cultural sites. Acceptance of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples right to speak in relation to cultural heritage issues under the new legislation is a significant flow-on effect of their recognition as as traditional owners.

In a similar move to the MG Corporation, the Barengi Gadjin Land Council also commissioned an independent assessment of organisational capacity in 2008. Reflecting the findings of the MG Corporation review, the assessment identified that the organisation lacks the capacity to implement the Agreement, establish appropriate governance systems, attract appropriate staff and respond to intra-Indigenous disputes, including for the reason of insufficient and uncertain funding.¹⁰⁸ As noted above, it is critical that realistic implementation budgets are provided to these Indigenous corporations to ensure that such hard fought for agreements do not fall over before they have barely begun.

Capacity of Governments to Undertake Comprehensive Settlements

Commitment to Comprehensive Settlements

Many in the workshop identified that capacity building for comprehensive settlements was not only required for Indigenous parties but also for governments, as a lack of government capacity had hampered all three negotiations. By way of benchmarking outcomes, workshop participants on the first day identified specific issues they considered governments needed to address. These included:

- comprehensive settlement policy frameworks;
- appropriate funding arrangements;
- skilled negotiators;
- legal capacity to provide certain specific outcomes such as inalienable freehold to accommodate communal ownership;¹⁰⁹
- standard inclusion in agreements of native title group succession post determination and review provisions following more successful native title settlements;¹¹⁰

¹⁰⁷ GWM Water, *Piping It Factsheet*, GWM Water, viewed 29 April 2009, <www.pipingit.com.au/pdfs/factsheets/Construction.pdf>.

¹⁰⁸ Sandy Hodge, Executive Officer of Barengi Gadjin Aboriginal Land Council RNTBC, during a public discussion at the 2009 AIATSIS Native Title Conference.

¹⁰⁹ WA does not have a model for inalienable freehold. For the Miriuwung and Gajerrong to obtain a commensurable grant of tenure required a tortuous legal process. To then ensure that communities located within that freehold had access to basic development grants required leases from sub-trusts.

- amendments that aligned State heritage laws with native title.¹¹¹

However, this aspect of the workshop foundered as representatives from the WA and NSW governments indicated that a model of comprehensive native title settlements was not consistent with their native title policy. The South Australian representative explained that their native title office focused on ILUAs by not funding parties who have filed native title claims against it, but did not expand on whether such ILUAs were broad based in nature. Commonwealth participants noted that they saw potential in comprehensive settlements but did not elaborate.

As previously noted no Victorian Government representative attended the 2006 workshop due to a policy review of native title settlements, however in pre-workshop discussions Victorian Government representatives expressed concern at the minimalist benefits in the Wimmera Agreement. In June 2009, Attorney General Rob Hulls MP announced the new Victorian Native Title Settlement Framework, which seeks to comprehensively settle traditional owners' concerns outside of a legal framework and which reflects many of benchmarks identified by traditional owners in the workshop.

Comprehensive Settlements are Outside State Budgets

The absence of a clear commitment to agreements akin to comprehensive settlements by the State governments in attendance generated significant discussion. Whilst representatives of the Office of Native Title (WA) identified that a major issue learnt from the Burrup and MG-Ord negotiations was the benefit of a 'whole of government approach', the tag 'comprehensive agreements' for either agreement was rejected. Instead, the Office of Native Title (WA) emphatically characterised these agreements as unique, isolated responses to specific future acts in relation to strategic land use needs. They advised that the two agreements were not precedent setting in terms of a policy approach to native title and that any further such negotiations would only arise in limited, if any, circumstances.¹¹²

By way of explanation, the Office of Native Title (WA) emphasised its work is focused on 'consent determinations' not future act negotiations. They advised that the policy basis for this position is that they are not funded to undertake future act negotiations, which are predominantly administered by the Department of Industry and Resources, and hence in

¹¹⁰ Desmond Hill raised the possibility of reviewing the Roebourne Enhancement Scheme in light of the more far reaching approach in the Ord Enhancement Scheme, a proposal supported by Patrick Dodson from a public policy perspective of equitable accountability mechanisms for State departments. Lisa Strelein noted that in New Zealand there is a clause in land settlements that groups can revisit an agreement if better agreements have been made.

¹¹¹ Helen Lawrence and Jenny Beer noted the destructive impact of State heritage laws on traditional owners' native title rights, because (due to the timing of their enactment) they fail to reflect the inextricable relationship between traditional laws and customs and cultural heritage.

¹¹² It was noted that the negotiations with the Yawuru native title holders of Broome may reflect the approach taken in the MG-Ord Agreement. The Office of Native Title (WA) is seeking to implement an 'alternative settlement' process, however this process does not propose to include recognition of native title. See Office of Native Title (WA), *Alternative settlements*, viewed 29 April 2009, <http://www.nativetitle.wa.gov.au/Alternative_Settlements.aspx>.

the context of current budget allocations such negotiations are ‘too expensive’. Representatives from the NSW Government’s native title office noted that their funding and administrative arrangements also require they take this approach. The Office of Native Title (WA) further noted that the Commonwealth and not the State was responsible for funding native title representative bodies to negotiate future acts, a position reminiscent of the PBC funding debate and one which triggered Dodson to ask:

Is there an erudite point between consent determinations and future acts?
The State issues future acts to get an outcome. I don’t see how a policy position that the Commonwealth funds NTRBs is relevant. The State is advancing future acts for the State’s purposes. The State is wishing to get use of land for itself or for corporate interests.

In light of the Office of Native Title (WA) comments on financial constraints, participants sought their views of the nexus between access to adequate funding and culturally appropriate, informed decision-making processes. The Office of Native Title (WA) observed that:

having very strong Indigenous decision-making is central and clearly needed. But it is very expensive to structure negotiations in this way. It is unsustainable for a state government to continue to fund negotiations at that level *ad infinitum* into the future.

Athanasίου further explained that:

Everyone is in furious agreement about the nexus between adequate funding of traditional owners and appropriate decision-making which will be durable and make agreements work. What WA is saying is that the Commonwealth is supposed to fund future acts. I don’t think the states are saying you should clamp down on the quality of negotiations, but that the States cannot fund it. The States are currently supplementing where the Commonwealth is not allocating funds.

Advantages and Disadvantages of Comprehensive Settlements for Governments

Participants sought to unpack the concept of ‘too expensive’ within the context of comprehensive native title settlements. If ‘too expensive’ meant that governments were required to go outside their allocated budget to receive additional funding for comprehensive settlements, then the real issue was that governments were currently constrained by their mandate and budgeting frameworks. Roberts noted that these impediments could be fixed with political will and suggested that such political will should be based upon a cost-benefit analysis of comprehensive native title settlements.

For example, the Office of Native Title (WA) advised that the projected regional economic and social stability to be achieved through the Burrup and MG-Ord negotiations created significant government impetus to reach these agreements.

- In the Burrup Agreement, the State facilitated the native title negotiations to avoid the uncontrolled situation of multiple proponents negotiating with multiple registered native title groups, a situation not in the public interest for crucial economic development nor in the interest of maximising traditional owner outcomes.
- In the MG-Ord Agreement, the key policy driver was the government commitment to expand the Ord irrigation scheme. Although concerns were held about the level of commercial viability of Ord Stage 2, the State considered the regional economics of the East Kimberley would go backwards unless large scale commercial developments proceeded. A negative East Kimberley economy would create significant social and economic dislocation to which the State would eventually have to respond.

The Burrup and MG-Ord Agreements also ensured that the State benefited from the certainty that compensation was settled for all agreement-related future acts, and further in relation to the MG#1 determination and MG#4 claim, certainty that compensation was settled for any extinguishment of native title. In the Wimmera Agreement, certainty for the State could not have been more complete with the Agreement settling past extinguishment of native title and all future ‘future act’ extinguishment of native title.

For traditional owners, the tangible benefits delivered through comprehensive settlements with the State are of a different nature to benefits from developer driven future act negotiations because of the nature and capacity of the State. Grants of tenure, income streams from a range of developments, joint management of conservation parks, the promising Ord Enhancement Scheme and rights to comment on developments outside the future act regime (as in the Wimmera ILUA) are all benefits *only* deliverable by the State.

The intangible benefits of an appropriately funded, comprehensive process are the strengthening of culturally appropriate governance structures and Indigenous capacity building.

This analysis of the overall advantages and disadvantages of comprehensive native title settlements avoids what some participants described as a disingenuous cost shifting from States to the Commonwealth for its own future act negotiations. Professor Ciaran O’Fairchellaigh stated it was timely for States to recognise that native title agreements were part of core business and include a standard agreement budget line in their budgetary process, which could be varied as appropriate. Otherwise, States place themselves in the curious position of discounting the significant possibilities of comprehensive native title settlements merely because they do not fit into the current budget process of one departmental office. In support of this proposal, Professor Marcia Langton noted that most mining companies now include such a budget line as part of their forward planning strategy, reflecting the reality of mining business in Australia. Taking account of the views of the State governments, it may also be appropriate for the

Commonwealth to commit to bipartisan funding arrangements with State governments for future comprehensive agreements.¹¹³

Enforcing the Integrity of Negotiations

A final issue raised at the workshop by way of benchmarking effective processes during native title negotiations was the importance of all parties enforcing the integrity of the negotiations. This issue arises because part of the political context of communal native title negotiations is that some traditional owners, lawyers and anthropologists will exploit the native title system to lever economic and political gain for small groups of individuals. Whilst spoilers can play a role in any negotiation, the nature of native title negotiations *with a community* (often a community not yet recognised by a court) makes such negotiations more susceptible to internal division. Political organisations or media antipathetic to native title can use these breakaway individuals to advance a particular agenda.

All Indigenous participants experienced spoiler behaviour during negotiation of their agreements. They observed that how the State and other institutional participants (such as the NNTT) respond to this behaviour is critical to the coherence and integrity of negotiations. They stated that whilst they expected the State and the NNTT to respect legal rights, it was crucial that the real politic of the situation was meaningfully acknowledged rather than an agreement sought at whatever cost.

The most fraught example of spoiling was during the Burrup negotiations. The NTA required the State to enter into good faith negotiations with the three registered native title parties - the Ngarluma and Yindjibarndi, the Yaburara Mardudhunera and the Wong-Goo-To-Oo. However, the NTA does not require that the State reach an agreement with all parties – any negotiating party can apply to the NNTT for an arbitral determination that an act can be done if no agreement has been reached 6 months after a future act has been notified.¹¹⁴ Almost without exception, such applications are granted. Whilst this mechanism is generally used against the interests of native title parties, it is also a useful tool for the State for short-circuiting disingenuous and destructive native title parties.

The State initially advised the Ngarluma and Yindjibarndi they required sign off from all three native title parties on a single agreement. Positively, the Yaburara Mardudhunera quickly folded into the negotiation process established between the Ngarluma and Yindjibarndi and the State. However, the Wong-Goo-To-Oo made it clear they would not participate in a unified negotiation. In recognition of this, the State changed tactic and required only two out of three of the native title parties to sign the agreement.

After the State had struck an agreement with Ngarluma and Yindjibarndi and Yaburara Mardudhunera groups, they applied to the NNTT for a determination that the future acts be granted if agreement could not be reached because two members of the Ngarluma and

¹¹³ This appears to be the approach pursued by the Victorian Government in their groundbreaking Native Title Alternative Settlement Framework.

¹¹⁴ s 35 NTA.

Yindjibarndi and Yaburara Mardudhunera applicant groups did not consent.¹¹⁵ In good faith, the Ngarluma and Yindjibarndi and Yaburara and Mardudhunera did not actively contest the State's application.¹¹⁶ However, the Wong-Goo-To-Oo *did* contest the application on the basis that the State had not negotiated with them in good faith. The matter went to extended NNTT arbitration which Flanagan notes 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.

Mediation was also intensively pursued by the NNTT. One day before the arbitrated decision was to be handed down, the Wong-Goo-To-Oo decided to sign the agreement negotiated with the Ngarluma and Yindjibarndi and Yaburara and Mardudhunera with certain amendments achieved through the NNTT mediation process. Flanagan comments that:

It transpired that, during the course of the arbitration, [the Wong-Goo-Tt-Oo] 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.

At the workshop, State participants advised that they were aware of these side discussions but had unsuccessfully sought to rein them in. Ngarluma and Yindjibarndi team members directed criticism at the State for not immediately disclosing these discussions to them during the negotiations in the context of good faith.

At the workshop, the perspective of both sides of the Burrup Agreement was that the Wong-Goo-To-Oo utilised its status as a registered native title party to create time and pressure to pursue side deals as well as achieve amendments to the final agreement. In lights of these tactics, the Ngarluma and Yindjibarndi team stated that the role of the NNTT in intensively mediating with the Wong-Goo-To-Oo and the State's decision to allow the Wong-Goo-To-Oo to enter the agreement were highly unjust. As Strelein commented at the workshop:

It appears that the end result of both the NNTT and the State in pursuing inclusion of the Wong-Goo-To-Oo is that the Burrup Agreement breathes continuing life to a bitter dispute.

¹¹⁵ The two members of the applicants groups were later removed from that position following successful applications to the Federal Court. Above n 78.

¹¹⁶ Flanagan, above n 42, p.18.

This bitter dispute continues and is undermining durable implementation of the Burrup Agreement and any sense that the Ngarluma and Yindibarndi as the recognised native title holders have achieved a level of justice through the Agreement.¹¹⁷

In relation to the Wimmera Agreement, Jenny Beer (W) also voiced frustration that it took over two years after the State and Commonwealth had given in-principle agreement for the NNTT to mediate with minor respondents (beekeepers, fishers, farmers, mining interests). This delay was seen by some participants as unnecessary trepidation by the NNTT to take a harder line with these respondents, especially given their interests will always prevail over native title rights. In some circumstances, such a delay could threaten the coherence of the native title group and/or a final agreement.

Conclusions

Indigenous peoples have always understood that the real potential of *Mabo*'s recognition of prior sovereignty is the transformation of their relationship with governments from one of supplication to one of partnership, working together to take down the myriad of legal, social, governance and economic brick walls that have trapped so many into a life of bleak, unremitting hardship.

This understanding is not merely the refined theoretical perspective of an Indigenous elite. It is the clear perspective of the traditional owners who attended the workshop, in some instances to the exclusion of any other comment. From personal experience, it is the consistently repeated perspective of every native title group I have worked with in the Kimberley over the past decade.

The resistance to comprehensive native title settlements for the past sixteen years has not been from Indigenous people. It has been at a political level. The fact that the Rudd Government so early in its term rhetorically matched the Indigenous perspective is a sign of its genuine grasp of Australian Indigenous affairs. But as the Commonwealth Government has underlined, achieving this new partnership takes hard work from all participants, with a premium on respect, cooperation, mutual responsibility and a stringent evidence-based approach.

The evidence of the two decade Harvard Project on sustainable Indigenous economies tells us that what is successful is a 'nation building model' in which culturally appropriate Indigenous governing institutions are a central aspect of development. This model develops communities rather than merely facilitating the economic interests of others. The rather more modest research for this paper tells us the same thing. A nation building model whilst not a 'new solution' internationally, is a new approach for Australian governments to come to terms with the enduringly shameful Indigenous situation. Significantly, the Commonwealth Government's current research into native title payments from resource agreements identifies Indigenous governance, partnerships,

¹¹⁷ Above n 91 and public comments by Mr Stephen Dhu, CEO of the Ngarluma Aboriginal Corporation, at the AIATSIS Native Title Conference 2009.

sustainable development and community and intergenerational wealth creation as primary factors in a new Indigenous economic strategy.¹¹⁸

The hard work is, of course, to figure out how to make such agreed concepts practically operative and not simply rhetorical triumphs. The experiences of participants in the Burrup, MG-Ord and Wimmera agreements provide some benchmarks for procedural and substantive matters including the following.

Procedural Benchmarks

- The nexus between adequately funded, culturally appropriate Indigenous governance structures, adequate time frames and durable agreements.
- Adequate and funded preparation time.
- Direct interaction with senior members of relevant governments where required.
- Adequately funded and Indigenous controlled implementation mechanisms.
- A united negotiation front against spoiler elements.

Substantive Benchmarks

- Commitment to the non-discriminatory recognition of native title as a valuable property right, not merely a burdensome statutory procedure.
- Non-discriminatory ‘exchanges’ of native title for other tenures or benefits.
- The creative Ord Enhancements Scheme as a model for regional approaches to specific forms of social and economic disadvantage.
- Review of all cultural heritage legislation to ensure traditional owners are the primary participants in such processes.
- Standard agreement terms that benefits be revisited if better agreements made within the same jurisdiction and post-determination succession of agreements to a party recognised as holding native title in relevant circumstances.

But perhaps the really hard work is coming to grips with the critical question of at what level should negotiations for comprehensive settlements commence? A ‘whole of government’ approach (housing, health, employment, training) cannot be efficiently responded to on a claim by claim basis without significant limitations and duplication. In light of these limitations, regional agreements have been identified over many years as the appropriate level for comprehensive settlements.¹¹⁹ For example, Indigenous leaders in the Kimberley have persistently advocated that the most efficient way forward is for the political footprint of native title to be the foundation of a regional approach to economic development and service delivery, driven by a culturally appropriate governance structure.¹²⁰ Whilst this approach to comprehensive native title settlements

¹¹⁸ Above n 13.

¹¹⁹ See for examples Patrick Sullivan, ‘Regional Agreements in Australia: An Overview Paper’, *Lands, Rights, Laws: Issues of Native Title*, no. 17, 1997; Ciaran O’Faircheallaigh, ‘Process, Politics and Regional Agreements’, *Lands, Rights, Laws: Issues of Native Title*, Regional Agreements paper no.5, 1998; Yu, above n 22.

¹²⁰ Yu, above n 22.

can be expected to raise a political pulse, it is intuitive that a regional model will be more efficient than comprehensive-style settlements at a claim level triggered either by large future acts or by virtue of the incremental settlement of all native title claims.

This is an embrace of the possibility of new solutions to enduring problems where old approaches have failed. As Yu wryly commented almost eight years ago in advocating for such an approach:

People are not interested in incremental change whereby service programs can be rationalized and combined with State services to achieve a more effective delivery service. They want to re-write history. Not simply add to the chaos of what already exists.¹²¹

This is the legacy that the *Mabo* decision deserves.

¹²¹ Yu, above n 22.

Attachment 1: Workshop Attendance List

Representatives from Burrup negotiations

Michelle Adams	Yindjibarndi traditional owner
Trevor Solomon	Ngarluma traditional owner
Helen Lawrence	Principal Legal Officer, Yamatji Marlpa Bana Baba Maaja Aboriginal Corporation and Senior Legal Officer during the negotiations
Chris Athanasiou	State Lead Negotiator (attended in personal capacity)
Jo-Anne Franz	Office of Native Title (WA)
Christie Hawker	Office of Native Title (WA)

Representatives from MG-Ord negotiations

Desmond Hill	MG Steering Committee, ASEIA Sub-Committee and Steering Committee Ord Enhancement Scheme
Edna O'Malley	MG Steering Committee, Chair of the MG Corporation
Patrick Dodson	MG Lead Negotiator
Krysti Guest	Senior Legal Officer during the negotiations, Kimberley Land Council
John Roberts	MG Senior Policy Adviser
Chris Athanasiou	State Lead Negotiator (attended in personal capacity)
Jo-Anne Franz	Office of Native Title (WA)
Christie Hawker	Office of Native Title (WA)

Representatives from the Wimmera negotiations

Jenny Beer	Wimmera traditional owner
John Caitlin	former Director Victorian Native Title Office (current Member of the National Native Title Tribunal)
Katie O'Brien	Legal Officer, Native Title Services Victoria

Invited Experts

Roger Cook	former Executive Director of Yamatji Marlpa Bana Baba Maaja Aboriginal Corporation including during the Burrup negotiations and former Executive Director of South West Land and Sea Council during early negotiations for the comprehensive settlement of the Noongar native title application
Professor Marcia Langton	Chair Australian Indigenous Studies, University of Melbourne and Chief Investigator, Agreements, Treaties and Negotiated Settlements Research Project
Bill Lawrie	Manager Native Title, South West Land and Sea Council, former Manager Native Title Ngaanyatjarra Council and former Kimberley Regional Manager, National Native Title Tribunal
Professor Ciaran O’Faircheallaigh	School of Politics and Public Policy, Griffith University and advisor to number of representatives bodies on negotiations with public and private interests
Maureen Tehan	Chief Investigator, Agreements, Treaties and Negotiated Settlements Research Project and Senior Lecturer, Law School, Melbourne University

Federal Court

Kristie Dunn	Assistant to Native Title Registrar
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National Native Title Tribunal

Graeme Neate	President
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Commonwealth Government

Iain Anderson	Attorney-General’s Department
Greg Roche	Department of Housing, Community Services and Indigenous Affairs

State Governments (other than WA)

Jennifer Jude	NSW Aboriginal and Native Title Unit, Attorney-General’s Department
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Marion Moyes

NSW Department of Lands

Peter Tomkin on behalf of Peter Hall Director Office of Native Title, South Australia

Other NTRB Representatives

Fiona Campbell

Gurang Land Council

Kym Elston

North Queensland Land Council

Philip Vincent

Goldfields Land and Sea Council

Two representatives from NSW Native Title Services

Australian Institute of Aboriginal and Torres Strait Islander Studies

Toni Bauman

Research Fellow, Native Title Research Unit

Dr Lisa Strelein

Director, Native Title Research Unit