

2009

STATE OF WESTERN AUSTRALIA

and

SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL

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HEADS OF AGREEMENT  
NEGOTIATIONS IN THE SOUTH WEST

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Ref: SSO 1535/09

**THIS HEADS OF AGREEMENT** is made on the 17<sup>th</sup> day of **DECEMBER** 2009

**BETWEEN**

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

**AND**

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

**RECITALS**

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

**THE PARTIES AGREE AS FOLLOWS:**

**1. DEFINITIONS AND INTERPRETATION**

**Incorporation of definitions from the Native Title Act**

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

**Other Definitions**

In this document unless the contrary intention appears:

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

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

**Ballardong** means the Ballardong native title claim.

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

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

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

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

**GKB** means the Gnaala Karla Booja registered native title claim.

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

**Parties** means the State and SWALSC.

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

**Settlement Package Components** means those items listed at clause 5.2.

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

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

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

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

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

**State** means the State of Western Australia.

**SWALSC** means the South West Aboriginal Land and Sea Council.

**SWB** means the South West Boojarah registered native title claim.

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

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

**WK** means the Wagyl Kaip registered native title claim.

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

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

**Yued** means the Yued registered native title claim.

### **Interpretation**

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

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

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

## 2. OPERATION AND STATUS

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

## 3. SCOPE OF NEGOTIATION

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

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

4. **CONNECTION RESEARCH PROCESS**

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

5. **SETTLEMENT PACKAGE FOR THE UNDERLYING CLAIMS**

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

- (b) Governance and Service Provision
  - (i) The establishment of Regional Bodies Corporate representing each underlying claimant group to hold and manage benefits arising from the settlement package;
  - (ii) The establishment of a Central Body Corporate and its role in relation to the Regional Bodies Corporate;
  - (iii) The role of the State in establishing the objects of the Bodies Corporate;
  - (iv) The extent of funding required to support the establishment and maintenance of the governance arrangements for the Bodies Corporate, including office premises, staffing and administration costs.
- (c) Sustainable Economic Base
  - (i) The parameters of a sustainable economic base including defining objectives and quantum;
  - (ii) How the economic fund will be established;
  - (iii) The relationship between the Central Body Corporate and Regional Bodies Corporate in economic management including financial distribution; and
  - (iv) Taxation related issues.
- (d) Land Base
  - (i) The extent of the land component of the settlement package;
  - (ii) A process for the identification of land parcels for inclusion in the settlement package for cultural or economic development purposes;
  - (iii) Appropriate forms of tenure relevant to the objective of the land holding;
  - (iv) The relationship between the Central Body Corporate and Regional Bodies Corporate in terms of land holding, land management and land development ventures;
  - (v) Transfer of Aboriginal Lands Trust estate; and
  - (vi) Financial obligations associated with land holdings.
- (e) Land Access
  - (i) An appropriate land access regime to enable access to State owned land for traditional purposes.
- (f) Revised Heritage Scheme
  - (i) An appropriate heritage protection regime aligning the *Aboriginal Heritage Act 1972* with the Regional Bodies Corporate as the key decision making bodies for heritage processes, providing for a consistent approach in dealing with

heritage issues throughout the region.

- (g) Joint Management of Conservation Estate
  - (i) Development of a joint management model providing for a meaningful role for Noongar people in the management of conservation estate in the region;
  - (ii) Identification of appropriate conservation areas for joint management; and
  - (iii) Employment and scholarship opportunities for Noongar people in land conservation and management.
- (h) Access to Natural Resources
  - (i) The form of recognition of non-commercial customary use of natural resources;
  - (ii) The extent and operation of rights recognised in relation to natural resources; and
  - (iii) Opportunities in relation to the commercial use of natural resources.
- (i) Land Use Activity Regime
  - (i) An appropriate regime to accommodate Noongar interests in the State's use and development of State land.
- (j) Community Development
  - (i) Funding toward the promotion of indigenous culture and improving educational outcomes; and
  - (ii) Relationship between Central Body Corporate and Regional Bodies Corporate in the management of programs and funding distribution.

## 6. TIMEFRAME FOR RESOLUTION

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

## 7. LEGAL ENTITIES AND GOVERNANCE ARRANGEMENTS

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



**8. FULL AND FINAL RESOLUTION OF NATIVE TITLE CLAIMS**

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

**9. PERTH METROPOLITAN AREA**

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

**10. RESOLUTION OF OVERLAPS**

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

**11. CONFIDENTIALITY AND FUNDING**

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

**12. TERMINATION BY THE STATE**

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

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

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

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

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

12.3 Upon receipt by SWALSC of a State Termination Notice:

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

**13. TERMINATION BY SWALSC**

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

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

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

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



per The Hon C. Christian Porter MLA

17 December 2009  
Date

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



\_\_\_\_\_  
Graeme Miniter  
Chairperson

17.12.09  
Date

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



\_\_\_\_\_  
Glen Kelly  
Chief Executive Officer

17/12/09  
Date

**SCHEDULE 1**

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

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

## CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made on the \_\_\_\_\_ day of April 2010.

**BETWEEN:** The South West Aboriginal Land and Sea Council of  
1490 Albany Highway Cannington Western Australia (**SWALSC**)

**AND:** Name \_\_\_\_\_ of  
Address \_\_\_\_\_ a  
member of the Negotiation Team for the Noongar Native Title  
Negotiations (**Team Member**).

**PROJECT:** Negotiations to resolve native title claims in the South West of  
Western Australia through an Alternative Settlement as  
contemplated under the Heads of Agreement document dated  
17 December 2009 between the State of Western Australia and  
the South West Aboriginal Land and Sea Council.

**Confidential Information** means any and all information, in whatever form,  
whether oral, written, electronic, pictorial or otherwise acquired by the Team  
Member that describes or is related to

- (i) the Project;
- (ii) the existence or contents of this Agreement or information which may have  
come to the knowledge of the Team Member in the course of the  
negotiations concerning the Project;
- (iii) the operations, dealings, transactions, commercial or financial  
arrangements, potential land acquisitions, land schedules, corporate  
strategies or affairs of SWALSC

whether factual or interpretive and howsoever obtained by the Team Member  
and includes any and all notes, memoranda, summaries, analyses, reports,  
documents and other information developed by or for SWALSC

but does not include information which:

- (a) was in the public domain;
- (b) comes into the public domain without the fault of the Team Member after  
the date of this Agreement;

- (c) is supplied to the Team Member by another party who is under no obligation of confidence to SWALSC.

## TERMS OF AGREEMENT

1. The Team Member acknowledges that the Confidential Information provided or conveyed to it concerning the Project is made available by SWALSC for the purpose of considering, advising on, and / or evaluating the Project.
2. The Team Member undertakes that it will not use the Confidential Information so provided for any other purpose than as stated in clause 1 above without the consent of SWALSC.
3. The Team Member undertakes that it will not disclose the Confidential Information provided to any person other than such of SWALSC's directors, officers, employees, consultants and advisors who have a need to know such Confidential Information for the sole purpose of the Project. Disclosure of and access to the Confidential Information shall, at all times, be at the complete discretion of SWALSC.
4. The Team Member undertakes that it will not publish, use, reproduce or copy the Confidential Information, nor allow it to be published, used, reproduced or copied by any other person without the prior consent of SWALSC except:
  - (i) as necessary for the purpose outlined in clause 1;
  - (ii) as required by law;
  - (iii) as permitted by SWALSC.
5. The Team Member undertakes to maintain effective security measures to protect the Confidential Information from unauthorised access, use or disclosure.
6. On the request of SWALSC the Team Member undertakes to deliver up all the Confidential Information provided by SWALSC within 14 days (fourteen days).
7. The Agreement shall begin on the date it is signed by the Team Member and shall continue for a 2 year (two year) period provided however that either party shall have the right to terminate the Agreement upon 10 days (ten days) written notice. Upon termination the Team Member shall return to SWALSC all Confidential Information and cease to be a member of the Team.

8. The provisions of this Agreement shall survive and continue after expiration or termination of this Agreement with respect to any Confidential Information disclosed to or obtained by the Team Member prior to the date of such expiration or termination.
9. The Team Member acknowledges that any breach of the terms and conditions of this Agreement may result in legal action.

**AUTHORISATION**

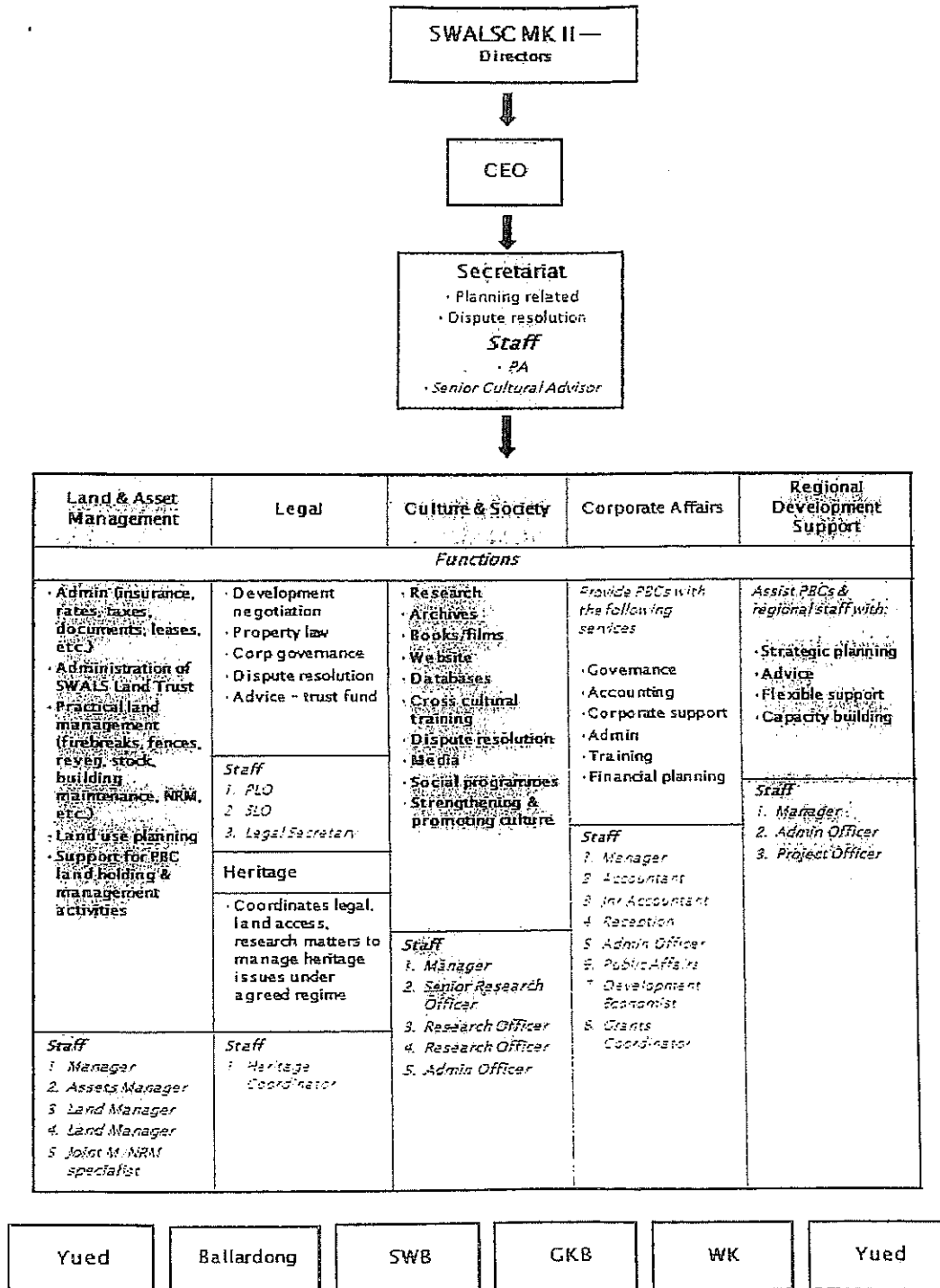
**Signed for and on behalf of the** )  
**South West Aboriginal Land** )  
**and Sea Council** ).....  
Name

**Signed by the Team Member** )  
In the presence of ).....  
Name

.....  
Witness Signature

.....  
Witness Name

Figure 3: Central organisation structure





2010 (cont.)			
MONTH	ITEM	DETAILS	PARTICIPANTS
Oct 2010	3rd round of negotiation meetings	A third meeting of each of the coupled areas, the aim being to agree proposals in detail and to explore the forms agreement could take on each of these proposals	SWALSC, ONT & SSO attend all
TBA	Couplet 1: Land Base Land Access	As above - details to be determined at second meeting	DoW DSD DMP DIA RD&L DEC
TBA	Couplet 2: Revised Heritage Scheme Land Use Activity Regime	As above - details to be determined at second meeting	DoW DMP RD&L DSD DIA DEC
TBA	Couplet 3: Joint management of C Estate Access to natural resources	As above - details to be determined at second meeting	DEC RD&L DoF DMP DoW
Nov 2010	3rd round of negotiation meetings	As above	SWALSC, ONT & SSO attend all
TBA	Couplet 4: Governance & Service Provision Economic Base	As above - details to be determined at second meeting	DIA DLG RD&L DoW Tourism W. DIA
TBA	Couplet 5: T/O Recognition Community Development	As above - details to be determined at second meeting	Tourism WA DIA
	11th Regional Planning Meeting	Report on negotiation plan progress	SWALSC Parties SSO
Dec 2010	10th Negotiation Area Meetings	A plenary meeting to report on and review progress in each of the 10 negotiation areas with specific meetings thereafter as required	SWALSC SSC
	EC Regional Case Management Conference	Report on negotiation plan progress	SWALSC Parties SSO
2011			
Jan 2011	Development of Draft Agreement	Draft of agreement in principle for consideration by decision makers with issue meetings as required	SWALSC SSO

NEGOTIATION SCHEDULE 2010 - 2012

2010			
MONTH	ITEM	DETAILS	PARTICIPANTS
April 2010	Negotiation Final Meeting	Draft Negotiation Plan Consider Protocols	SWALSC SSC
	Finalise Negotiation Plan	To be provided to NNTT& FC; circulated to parties	SWALSC SSC
May 2010	1st round of Negotiation Meetings, couplets 1 - 3	A first meeting about each of the coupled negotiation areas, the aim being to identify all interests and issues pertaining to each area and the means to progress these	SWALSC, ONT & SSO attend all
17.5.2010	Couplet 1 Land Base Land Access	Extent of land component; process to identify land parcels to include; forms of tenure; ALT land, land holding arrangements; access to State land for traditional purposes	DoW DSD DMP DIA RD&L DEC
18.5.2010	Couplet 2 Revised Heritage Scheme Land Use Activity Regime	An appropriate heritage protection regime aligning the AHA 1972 with bodies corporate as decision makers; an appropriate regime to accommodate Noogar interests in the State's use and development of land	DoW DMP RD&L DSD DIA DEC
19.5.2010	Couplet 3 Joint management of C Estate Access to natural resources	Development of joint management model; identification of areas for joint management; employment & training opportunities; recognition of non-commercial customary use of natural resources; opportunities for commercial use of natural resources	DEC RD&L DoF DMP DoW
24.5.2010	NNTT Regional Planning Meeting	Report on negotiation plan progress	SWALSC Parties SSO
June 2010	1st round of Negotiation Meetings, couplets 4 & 5	As above	SWALSC, ONT & SSO attend all
14.6.2010	Couplet 4 Governance & Service Provision Economic Base	Regional & central bodies corporate, their objects, roles and relationships; funding support for the bodies corporate	DIA DLG RD&L DoW Tourism W. DIA

2010 (cont.)

MONTH	ITEM	DETAILS	PARTICIPANTS
15.6.2010	T/O Recognition Community Development		DIA
25.6.2010	FC Regional Case Management Conference	Report on negotiation plan progress	SWALSC Parties SSO
July 2010	2nd round of negotiation meetings, couplets 1 - 5	A second meeting of each of the coupled areas; the aim being to ascertain the scope for inclusion of specific matters in the settlement	SWALSC, ONT & SSO attend all
12.7.2010	Couplet 1 Land Base Land Access	As above - details to be determined at first meeting	DoW DSD DMP DIA RD&L DEC
13.7.2010	Couplet 2 Revised Heritage Scheme Land Use Activity Regime	As above - details to be determined at first meeting	DoW DMP RD&L DSD DIA DEC
28.7.2010	Couplet 5 T/O Recognition Community Development	As above - details to be determined at first meeting	Tourism WA DIA
29.7.2010	Couplet 3 Joint management of C Estate Access to natural resources	As above - details to be determined at first meeting	DEC RD&L DoF DMP DoW
30.7.2010	Couplet 4 Governance & Service Provision Economic Base	As above - details to be determined at first meeting	DIA DLG RD&L DoW Tourism W. DIA
Aug 2010	Research consultation advice & review	This includes SWALSC conducting meetings with underlying claim working groups, the ONT briefing the Attorney General and/or Cabinet, individual agencies reviewing their authorities, and further research and development of negotiation positions.	All parties/ participants
Sept 2010	Party Stakeholder briefings	Meetings with parties on a sector by sector basis to advise of progress & seek input into the negotiations	SWALSC & ONT
	Research consultation advice & review continued	As above	All parties/ participants