3.2. Case study: Exploration native title issues

This case study is provided by Backreef Oil Limited to highlight native title issues relating to petroleum exploration in Western Australia. The submission provides information about the history of negotiation and company concerns regarding delays and lost opportunities caused as part of the native title negotiation process.

A group comprising Backreef Oil Limited 45%, Net Oil Limited 45% and Northern Oilfield Services 10% made applications for petroleum permits in the Canning Basin south of Halls Creek early March 2007. On 22nd March, 2007, the group was told by the DMP (then DOIR) that they were the preferred applicants for this acreage and that they would be given ten years to reach a native title agreement on it. The Aboriginal group that has sole possession of the area underlying the acreage is the Ngurrurpa. This is determined area WADO357/06, which was determined on 18th October, 2007. The Native Title representative body for the Ngurrurpa in that process was Central Desert Native Title Services (CDNTS).

The Ngurrurpa abandoned the settlement on their country at Yagga Yagga in 2003 and moved 90 km north to Balgo, which they share with the Tjurabalan.

![Figure 1: Location of Application Areas in the Canning Basin](image-url)

**History of the Negotiation**

At the outset, the explorers had thought that CDNTS would want to proceed to a settlement in a timely manner. CDNTS were not good at responding to letters or phone calls though. In late 2007, the State asked for the matter to be put to the National Native Title Tribunal (NNTT) for mediation. CDNTS were reluctant starters at the NNTT. At the NNTT meeting, CDNTS undertook to have a meeting between the Ngurrurpa and the explorers at Balgo in March 2008. CDNTS said that they did not have a draft agreement for oil exploration and invited the explorers to provide one.
The first meeting with the Ngurrurpa was held at Balgo on 30th April, 2008. It became apparent that it is CDNTS' style to state that the Ngurrurpa had decided upon certain conditions prior to meeting. CDNTS ran the meeting to minimise interaction between the Ngurrurpa and the explorers. The meeting ended without agreement. The sticking point was that CDNTS would not agree to it being a conjunctive agreement. When asked why CDNTS did not want a conjunctive agreement, the CDNTS representative said that environmental considerations with petroleum leases were the reason. As that was not a valid reason, no agreement was reached. At the request of the explorers, the matter went back to the NNTT for mediaton on 8th August 2008. That mediation meeting was notable for two things: The DMP representative stated that the DMP had not meant the explorers to have a conjunctive agreement; they only wanted the explorers to conduct exploration and not go on to produce oil and gas.

That meeting did not result in any progress being made. The DMP representative made the statement to support the CDNTS position, rather than to advance exploration in Western Australia. Backreef Oil is recognised as the operator of the acreage applications by the DMP. Subsequent to that NNTT meeting, Native Title section of the DMP and CDNTS decided that they would only negotiate with another party of the JV, Net Oil, based in Darwin. Net Oil, attended a meeting with the Ngurrurpa at Balgo in October in order to introduce himself to them. There was to be a follow-up meeting one month later. CDNTS emailed through notice of that follow-up meeting a few days before it was supposed to be held and gave three hours to agree to a number of conditions set by CDNTS for the explorers to attend that meeting. CDNTS gave the three hour deadline because the representative stated that she would not be contactable in the field. As it was, she was contactable over the following three days, as evidenced by emails. The explorers could not agree to the conditions set by CDNTS and thus did not attend that meeting. Another sticking point in the negotiations with CDNTS is that the explorers want to conduct a heritage survey prior to being granted the licences. The purpose of that is so that petroleum exploration operations can begin as soon as the titles are granted. Under the agreement proposed by CDNTS, there is no requirement for CDNTS to undertake a heritage survey in a timely fashion. In March 2009, CDNTS contacted Net Oil to state that they would seek to have the DMP withdraw the explorers' applications. The explorers believe that they will be able to successfully negotiate a Native Title agreement with the Ngurrurpa. In the very small amount of contact between the parties to date, there has been quite a lot of good will evident between the Ngurrurpa and the explorers. It is evident that progress in negotiations will require face time between these two parties.

It is now evident that it is CDNTS' negotiating style which has delayed progress as they have attempted to keep the Ngurrurpa and the explorers as physically separated as possible. This goes against the spirit of the Native Title Act. As it is more than one year since the Ngurrurpa gained determination, they should have had a body corporate instituted by now. As such, they should be negotiating on their own behalf as owners of their land.

Summary
Considerable delay and lost opportunity to the State of Western Australia has occurred in negotiating Native Title on this acreage. This has resulted as a consequence of the negotiating style of CDNTS. South Australia was in a similar situation with respect to Native Title negotiations on petroleum titles in the late 1990s. The Petroleum Department of that State solved that problem by instituting a standard agreement with a royalty of 1% and a payment of $150,000 on signing. The standard agreement also has provision for Aboriginal Heritage surveys to be completed in a timely fashion. All agreements in South Australia are posted on the PIRSA website so that the process is open and transparent. The South Australian agreements can be accessed at:

It is suggested that:
• that Western Australia drops the provision for non-conjunctive exploration licences and only allows conjunctive agreements. Otherwise, years would be wasted in negotiating Native Title on subsequent production licences and this will slow down development of the State; and
• that Western Australia adopt the South Australian solution of a standard Native Title agreement in order to significantly speed up the Native Title process and provide certainty to all parties. As South Australia is a Labour state, there should not be any political opposition to this outcome.
3.3. Case study: Exploration Aboriginal heritage issues

In this case study, Backreef Oil Limited has provided further information regarding Aboriginal heritage issues and the involvement of the Kimberley Land Council. A single exploration well site was planned south west of Fitzroy Crossing and Aboriginal heritage clearance for the site was sought. Drilling Reservation 9 (DR 9) was granted to Backreef Oil Limited on 30th June 2007 for a three year term. The work commitment for this permit is the drilling of one well. The permit was taken up based on the Selene prospect identified in the early 1990s. The name Selene could not be used again so the prospect has been renamed Emika.

Upon grant of title, Backreef Oil contacted the Kimberley Land Council (KLC) to conduct an Aboriginal Heritage Survey on the proposed well site. Verbal assurances were made by a KLC officer that the KLC would schedule an Aboriginal Heritage Clearance in the remainder of the dry season of 2007. That did not happen. The KLC was contacted again during the subsequent wet season and Backreef Oil was told that the clearance of DR 9 would be one of the first scheduled activities of the 2008 dry season. That did not happen.

The KLC appointed an officer dedicated to Aboriginal Heritage Clearance. Backreef Oil was told in March 2008 that the clearance of DR 9 would take place in June. One week before the clearance was to take place, the KLC emailed through the budget of the survey. It was for $24,800. This is to clear an area approximately 100 metres by 100 metres. The KLC stated that this clearance was for the area of the drill site only. If any other type of activity was to be undertaken on the area, for example seismic, that would require a further clearance of the same area. Only $1,200 of the $24,000 was to pay the Traditional Owners for their attendance. The rest was to fund the white anthropologists etc of the KLC. This is for ten minutes perhaps examining the well site and a five hour round trip from Fitzroy Crossing. In particular, the female anthropologist was to be employed for five days under the budget. I asked the KLC what on earth she would be doing for five days and did not get an answer.
As the proposed $24,000 budget was obviously inflated, I made a counter offer of $12,000 to the KLC which was received with indignation. The Native Title agreement with the KLC on DR 9 did not specify that the KLC would conduct any subsequent Heritage Survey. I asked contacts in the oil industry for the names of anthropologists who might be able to conduct the survey and was given three names. All three said much the same thing. That is that the Act does not specifically require a survey to be completed and that the KLC would blacklist them if they operated in KLC controlled country without the KLC’s blessing. On the first point, the anthropologists said that a place on flat ground away from a river course would be very unlikely to have heritage values. They recommended that I walk the site; record the fact that I had walked the site and found no Aboriginal objects and then the project would be in the clear. While that might be the intent of the Act, the KLC has a track record of injuncting operations that have started without completing an Aboriginal Heritage survey. The total daily operating rate of an onshore oil rig is at least $60,000 per day.

The area of DR 9 had been the subject of an Aboriginal Heritage survey in 1982 conducted by Dr Erich Kolig of Otago University for I.E.D.C. which held a much larger permit over the area at the time. The original Kolig report is now missing from the Department of Indigenous Affairs library. Extracts from the Kolig report remain available from that library to describe individual Aboriginal Heritage sites. It is evident from those extracts that the Kolig report is a high quality report. I contacted Dr Kolig in Dunedin, New Zealand. He says that it is very unlikely that he still has a copy of that report. In November, 2008, I met the Minister for Indigenous Affairs. On telling him that I was having trouble getting heritage clearance on DR 9, he suggested that I use a Section 18 Notice. I duly went to Wonkajonka, southeast of Fitzroy Crossing the following week and submitted the requisite copies of a completed Section 18 notice to the Aboriginal Cultural Materials Committee. I subsequently received correspondence from that committee saying that they did not recognise Aboriginal Heritage reports more than five years old which effectively means that heritage surveys will be done on the same patch of ground in perpetuity.

Experience of Other Operators in the Canning Basin
One of the worst examples of KLC run heritage surveys impacting badly on exploration outcomes is the experience in 2008 of another operator which set out to clear a 1,000 km seismic survey. The KLC officer in that case told the company concerned that the Traditional Owners wanted to do the survey on foot. The company gave up on the survey after completing 160 km at a cost of $700,000. This translates to $4,000 per km. Onshore seismic costs $9,000 per km to acquire, and thus heritage clearance was consuming nearly half of the budget. After three weeks into the survey, a group of Traditional Owners approached a company officer on the survey and asked why it wasn’t being done by helicopter. Apparently the KLC officer had not asked the Traditional Owners how they wanted to have the survey conducted.