ESD and Community Participation:

The Strategic Assessment of the Proposed Kimberley LNG Precinct, 2007 – 2013

Introduction

The importance of public participation in achieving public policies that contribute to Ecologically Sustainable Development (ESD) is well recognised in the literature. Participation can enhance the access of decision makers to critical information; mobilise support for adoption and implementation of policies that are central to pursuit of ESD; and help mitigate or end the alienation of marginalised social groups whose exclusion from policy-making can undermine the pursuit of ESD (Chavez and Bernal 2008; Devlin and Yap 2008; Doelle and Sinclair 2006; Lockie et al. 2008; O’Faircheallaigh 2010). Participation by Indigenous peoples can be particularly important in promoting ESD, for instance because of the time depth of their ecological and social knowledge; their commitment to inter-generational equity; and their tendency to integrate, rather than consider separately, cultural, ecological, economic, and social aspects of life (Mulrennan and Scott 2005; O’Faircheallaigh 2007; Randall 2003). The literature also recognises the obstacles and practical challenges that arise in achieving effective public participation, and in particular the frequent tendency for Indigenous groups to be marginalised from decision making (Baker and McLelland, 2003; Hartly and Wood 2005; Lockie et al. 2008; O’Faircheallaigh 2007; Lane and Corbett 2005).

Australia’s national environmental law, the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)* emphasises the need for community and Indigenous participation in the promotion of ESD. Recent amendments provide for the conduct of joint Commonwealth – State ‘Strategic Assessments’ of policies, plans or programs likely to affect environmental values protected by *Act*. Such ‘Strategic Assessments’ appear to offer considerable potential for public and Indigenous participation in promoting ESD. This article considers whether and under what conditions this potential is likely to be realised, by examining the first Strategic Assessment initiated under the amended legislation, that for the proposed Kimberley Liquefied Natural Gas (LNG) Precinct. Such an assessment is timely given that a large number of Strategic Assessments are now under way

involving developments likely to have major implications for ESD, including expansion of Australian cities, iron ore mining in the Pilbara, and development on the Great Barrier Reef.

The next section briefly outlines relevant provisions of the *EPBC Act* and provides information on Strategic Assessments initiated to date. The following sections discuss the course of the Kimberley LNG Precinct Strategic Assessment over the period 2007 – 2013. The Strategic Assessment initially showed considerable promise as a vehicle for mobilising Indigenous participation and promoting ESD, but as commercial pressures surrounding a key LNG project built, the State government acted in ways contrary to ESD principles and which undermined Indigenous participation. Wider implications arising from the Kimberley LNG case are considered in concluding the paper, particularly the need for Commonwealth – State Strategic Assessment Agreements to pay greater attention to the way in which public participation is to be achieved, and the fact that such participation is unlikely to be sustained or influential in the absence of grass roots community mobilisation.

Strategic Assessments under the *EPBC Act*

The *EPBC Act* aims to promote ‘ecologically sustainable development through the conservation and ecologically sustainable use of natural resources’ and ‘promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples’. It also seeks to ‘to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity’ and ‘to promote the use of indigenous peoples’ knowledge of biodiversity’ (*EPBC Act*, section 3.1). The *Act* seeks to achieve these goals in part by espousing the principle that ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations’ (*EPBC Act*, section 3A).

The requirement to include ‘economic’ and ‘social and equitable’ as well as ‘environmental’ considerations is consistent with the *EPBC Act*’s definition of the ‘environment’ to include ‘ecosystems and their constituent parts, including people and communities’ and the ‘social, economic and cultural aspects’ of ‘natural and physical resources’ and of ‘locations, places and areas’ (section 528). However the substance of the *EPBC Act* focuses heavily on the physical environment and in particular on ‘matters of national environmental significance’ (for example World Heritage places, threatened and migratory species, wetlands of international importance) (sections 12 – 25). How then is it

possible to ensure that ‘social and equitable considerations’, including those affecting Indigenous Australians, can be integrated into the operation of the *Act*? In addition, what processes can or should be employed to ensure collaboration with the community in protecting the environment?

One mechanism that could help address these questions involves the conduct of Strategic Assessments under section 146 of the *Act*, introduced in 2006. A Strategic Assessment may be undertaken by agreement between the Commonwealth and a State or Territory where the latter is considering implementation of a ‘policy, plan or program’ that may have an impact on matters protected by the *EPBC Act*. Where the appropriate Minister of the State or Territory so requests, a Strategic Assessment can also ‘provide for the assessment of other certain and likely impacts of actions under the policy, plan or program’ (sections 146 (1) and (1A)). Terms of Reference (ToR) to govern a Strategic Assessment are agreed between the Commonwealth and the State or Territory, after public comment on draft ToR. The State or Territory prepares a Strategic Assessment Report on the basis of which the Commonwealth Minister may endorse the proposed policy, plan or program, endorse it subject to conditions which may include proposed modifications to the policy, plan or program, or reject it. In making their decision, the Commonwealth Minister must consider ‘matters relevant to any matter protected by a provision of Part 3 that the Minister considers is relevant to the approval’, ‘economic and social matters’, and ‘the principles of ecologically sustainable development’ (*EPBC Act*, section 146F).

The ability for Strategic Assessments to include impacts other than those on matters explicitly protected by the *EPBC Act*, and the need for the Federal Minister to consider ‘economic and social matters’ and the ‘principles of ecologically sustainable development’, create the opportunity to integrate social, equitable, and Indigenous considerations into environmental assessment. In addition while the *Act*’s Strategic Assessment provisions make no specific mention of collaboration with Indigenous or other community actors (other than via the opportunity for public comment on Draft ToR), the fact that the content of a Strategic Assessment Agreement is largely at the discretion of the parties creates the potential to establish mechanisms to support community participation.

In practice, how effective are Strategic Assessments likely to be in facilitating an approach that integrates social, equitable and environmental considerations and encourages collaboration and community participation? This article examines the first Strategic Assessment initiated under the 2006 amendments, of a proposed industrial precinct for the processing of Liquefied Natural Gas (LNG) from gas reserves located in the Browse

Basin, offshore from the Kimberley coast (the 'Browse Kimberley LNG Project'). While the Browse Strategic Assessment has yet to be formally completed, it is at an advanced stage and so can provide valuable insights into the potential contribution of Strategic Assessments to ESD. Such insights are important given that 15 other Strategic Assessments are currently (April 2014) under way, including assessments of offshore petroleum activities in Australia, urban growth in Melbourne, Perth and Western Sydney, fire management policy in South Australia, iron ore mining in the Pilbara region of Western Australia, and management of the Great Barrier Reef in Queensland (Australian Government Department of the Environment 2014).

The following sections briefly describe the Browse LNG Project, the ToR agreed by the Commonwealth and Western Australia for its Strategic Assessment, and the Aboriginal context in which it would be established, and outline how the Strategic Assessment unfolded. The author was closely involved in a number of aspects of the Browse LNG Strategic Assessment and the following account draws extensively on that experience.ⁱ He provided advice to the Kimberley Land Council (KLC) and Kimberley Traditional Owners in relation to the Strategic Assessment over the period 2007 – 2013. In this capacity he attended all of the meetings of the Traditional Owner Task Force discussed below, and participated in numerous meetings regarding the Strategic Assessment with Federal and State Government officials and Ministers. In addition he acted as the KLC's Project Manager for the Indigenous Impacts Assessment carried out as part of the Browse Strategic Assessment, and co-authored a number of volumes of the Indigenous Impacts Report (KLC 2010a). In the following account this personal experience is validated by, and supplemented by, reference to published documentary sources.

The Browse LNG project

The Browse Basin is an extensive marine trough off the Kimberley coast. Reserves of natural gas have been located in the Basin by Australian and multinational companies, including Australia's largest energy company, Woodside Energy Ltd ('Woodside'), Shell, Chevron, BP, and Inpex Ltd, in which the Japanese state is the largest shareholder. It is estimated that the Browse Basin holds about 25 per cent of Australia's recoverable reserves. By 2005 rising energy prices and improvements in offshore technology had enhanced the commercial viability of the Browse gas fields. The natural gas would have to be piped ashore for processing into Liquefied Natural Gas (LNG) and by-product LPG and condensate (light

crude) for export to Asian and other markets, requiring the construction of industrial and associated infrastructure facilities on a scale unprecedented in the Kimberley.

The Kimberley region is of great environmental and cultural value and significance. It has a high level of biodiversity and a rich and diverse Aboriginal cultural heritage, both in terms of physical manifestations of historic Aboriginal occupation and of contemporary spiritual beliefs and cultural practice (see for example Australian Heritage Council 2011; Watson 2012). The development of massive industrial facilities to process offshore gas would represent a considerable challenge to the goals of the *EPBC Act* and the pursuit of ESD, and require new ways of doing business to achieve integration of ‘economic, environmental, social and equitable considerations’ based on a ‘co-operative approach ... [with] indigenous peoples’.

Initially the oil companies intended to develop separate LNG plants to process gas from each discovery. Woodside identified Wilson Point on the Dampier Peninsula north of the tourist town of Broome as a possible location for processing gas from three fields some 300 km north of Broome (see Map 1). Inpex Ltd was also seeking a site to process gas from its Ichthys field and identified the Maret Islands, off the north Kimberley coast, as its preferred location. In 2006 the (Labor) WA Government, concerned with the potential impact of multiple LNG plants along the Kimberley coast, decided to seek a single location for an industrial precinct where processing of all gas from the Browse Basin would occur (an ‘LNG Precinct’). This approach was expected to minimise the environmental and cultural impacts of gas processing, both because it would seek to identify the site that was least sensitive to such impacts, and would prevent proliferation of LNG plants along the coast. In addition, the WA Government indicated that, as a matter of policy, LNG processing in the Kimberley would ‘only go ahead with the fully informed consent of the traditional owners and their substantial economic participation’ (ABC 2008; see also Carpenter 2006).

The Strategic Assessment Agreement

During 2007 the WA Government initiated discussions with the Commonwealth for an Agreement to conduct a Strategic Assessment of the proposed LNG Precinct under Section 146(1) of the *EPBC Act*, and an Agreement was signed on 8 February 2008.ⁱⁱ The Assessment would be based on a ‘coordinated and collaborative process’ which would ‘deal with the impacts of actions under the Plan on the environment generally ... including particularly matters of National Environmental Significance’ (4.2, 4.6). Significantly, the ToR agreed by the Commonwealth and WA went well beyond such matters, especially in

relation to Indigenous impacts. They required ‘a description of the potential impacts, including socio-economic impacts, of the Plan on Indigenous people’ (clause 7(a)); and the identification of ‘specific management arrangements, including the possible role of Traditional Owners in those arrangements ...’ (clause 8).

Neither the Strategic Assessment Agreement nor the ToR provided any specific time line or nominated any particular process for the conduct of the Strategic Assessment, stating only that:

6.1 The Western Australian Government will as soon as possible after agreement on the Terms of Reference cause a Draft Report to be prepared ...

6.2 The parties will agree on a work program and methodology to ensure the Draft Report delivers on its objectives and achieves broad based scientific and community support for the selected location.

No indication was provided as to how the existence or absence of ‘broad community support’ for Precinct location was to be established or, more generally, of how participation from Indigenous or other communities was to be achieved, other than by way of the statutory requirement for public comment on the Draft ToR and on the Draft Strategic Assessment Report.

The Aboriginal context

The Kimberley region occupies some 424,000 sq km in the north west of Western Australia, with a population is about 41,000, some one third of which is Aboriginal. Like many Indigenous groups, Kimberley Aboriginal people suffer serious economic and social disadvantage. Opportunities for wage employment are scarce; incomes are well below the national average; and access to education, health, housing and other human services are limited. On the other hand many traditional owners are still able to obtain a large part of their food requirements from their traditional lands; social relationships are extensive, complex and strong; and cultural and spiritual beliefs and practices are an important source of personal strength and social cohesion for many Aboriginal people (KLC 2010b: 46-50).

The Kimberley began to experience large-scale resource development towards the end of the 1970s. At this time there was no legal recognition of Aboriginal rights in land in WA, and the WA Government had no interest in either ensuring that Aboriginal people shared in the benefits of development or in protecting Aboriginal cultural heritage from its impacts.

Kimberley Aboriginal people established the Kimberley Land Council (KLC) in 1978 to provide a regional political platform from which they could oppose uncontrolled development. While its early attempts in this regard were only partially successful, over the following decades it established a strong presence as a regional grassroots Aboriginal organisation with a significant national profile (KLC 2014a). After the passage of the Commonwealth *Native Title Act 1993 (NTA)*, the KLC was designated as the Native Title Representative Body for the Kimberley, and so added statutory functions under the *NTA* to its existing role as a grass roots organisation.

The KLC and the Traditional Owners it represents have enjoyed considerable success in establishing native title in the Kimberley. Some 65 per cent of the Kimberley is determined native title land, and in addition a number of other claims are at an advanced stage (KLC 2014a). Recognition of native title does not allow Aboriginal people to control commercial development, but does entitle them to a ‘Right to Negotiate’ in relation to proposed commercial development on their lands. Agreements negotiated with developers and/or the state authorities can provide for Aboriginal participation in project economic benefits and measures to protect cultural heritage and the environment. The KLC has in the last decade supported Traditional Owners in negotiating a series of agreements for major mining, agricultural and other projects (KLC 2014b).

The Strategic Assessment process: a promising start

A first step in undertaking the Strategic Assessment was to identify a preferred site for an LNG Precinct which would subsequently become the focus of the Strategic Assessment Report. By late 2007 WA had established a Northern Development Taskforce (NDT) made up of representatives of State Government agencies to conduct the site selection process. By then the signing of the Strategic Assessment Agreement was imminent, and the WA Government had made a policy commitment that LNG development would only occur with the informed consent of Kimberley Traditional Owners. The KLC was concerned about how Traditional Owners could participate in the activities of the NDT and in the Strategic Assessment, and about how WA’s commitment to proceed only with the ‘fully informed consent’ of Traditional Owners could be given effect.

The KLC pressed the WA Government to fund a Traditional Owner consultation and decision making process that would give practical effect to the State’s commitment. WA agreed, an arrangement formalised in January 2008 through a Financial Assistance Agreement with the KLC.ⁱⁱⁱ In December 2007, the KLC convened a two-day meeting of

senior Aboriginal men and women from coastal regions and ‘cultural bosses’ from elsewhere in the Kimberley to direct the KLC on how to engage with decision making in relation to LNG development and to discuss its likely impacts in the Kimberley. The meeting identified culturally appropriate consultation processes and representative structures, and drafted a timetable to begin to consider the WA Government’s proposal for an LNG Precinct. It decided that there should be a Traditional Owner Taskforce (TOTF) representing all native title claims groups along the Kimberley coast, as an equivalent representative and administrative body to the State’s NDT.

Over the wet season (December – February), Traditional Owners began to consider the potential impacts of LNG development and how they could effectively engage with industry and government. In February 2008 another meeting of senior Aboriginal men and women was held in Broome. A Senior Leadership Group selected at the first meeting was expanded and confirmed in its role, in accordance with appropriate cultural practices, including separate men’s and women’s meetings and consensus decision making. The KLC was instructed to undertake a consultative process with all Traditional Owners with native title claims along the Kimberley coast; facilitate selection of representatives for the TOTF; and gain as much information as possible concerning proposed gas development in the Kimberley.

The area within which the State was seeking a location for an LNG Precinct encompasses parts of the traditional country of fifteen different native title claim groups. Senior Aboriginal men and women took the position that all those groups had to be consulted, for two reasons. First, they recognised that the proposed LNG Precinct was a massive project, would have a long life (up to 100 years), and that its impacts, positive and negative would be highly significant, be felt widely, and have intergenerational effects. The second arose from the bonds and commitments inherent in the cultural form that pervades the Kimberley, the *wunan*. The *wunan* embodies a range of social relations that joins together large numbers of people over vast areas of land. It has binding, moral, ritual, economic and supportive elements which were often called on during the process of forming the TOTF and during TOTF meetings. To be consistent with the principles of the *wunan*, decision-making in relation to LNG development would have to be inclusive and involve mutual support between all of the native title groups involved.^{iv}

The KLC organised a series of meetings throughout the Kimberley to discuss LNG development, what it might mean for the Kimberley, both positive and negative, and how the KLC’s consultation process was intended to work. Each coastal native title claim group was

invited to appoint four representatives to the TOTF, and to consider how the TOTF should function. The TOTF was established in May 2008, following a series of (cultural) Bloc Meetings, which brought together clusters of related native title groups. At the Bloc meetings, the KLC provided Traditional Owners with details of 11 possible locations being considered for the LNG Precinct. Further information and advice was also provided regarding gas processing and its likely cultural, social, economic and environmental impacts, and regarding some of the potential economic and social benefits of development. Formal instructions for the KLC to act on their behalf were obtained from each native title claim group.

During the Bloc meetings the roles and rules of the TOTF were discussed, clarified and endorsed. Of critical importance and consistent with traditional decision-making practices, while the TOTF would be the formally endorsed point of contact and engagement with Kimberley Traditional Owners, TOTF members could not make decisions about whether to agree to the locating of a LNG Precinct in the Kimberley or on their traditional land and sea country. These decisions would need to go back to the whole native title claim groups for areas being considered as suitable locations. The TOTF would make decisions about processes of consultation about LNG development; ensure the integrity of the consultation and information delivered by the TOTF and the KLC project team members; and act as a conduit for the flow of information to and from claim group members. TOTF meetings occurred monthly between March and September 2008. During its meetings the TOTF engaged in exchanges with government, non-government and industry visitors all of whom presented information concerning the proposed LNG development and answered some questions raised during the meetings. At each TOTF meeting an agenda was set, minutes were recorded, key issues and tasks to be undertaken were highlighted and questions unanswered or requiring further elaboration and detail were noted. These records formed the basis for preparing TOTF newsletters that were presented at the following meeting as a record of the meeting as well as the basis for discussion within the wider native title claim groups.

Between July and August 2008 the KLC met with relevant native title claim groups to determine which of the 11 potential sites being considered by the NDT should remain in the site selection process. Traditional Owners for these proposed locations participated in scientific and engineering studies in collaboration with specialist environmental staff working for the NDT, a rare example in Australia of Indigenous knowledge being integrated into the conduct of environmental assessment processes. As the process unfolded a number of Traditional Owner groups withdrew their land and sea country from consideration as

potential sites. Traditional Owners withdrew sites in some cases because multiple potential sites existed in their country and they only wished a single site to be considered, in others because of their serious concerns about the potential impact of a Precinct on the environment and on their cultural and economic lives. The NDT site selection processes also removed some of these same sites from consideration for environmental and/or technical reasons. By September 2008 only four potential LNG Precinct sites remained that the TOTF recommended for further consideration.

In July 2008 a State election was called and six weeks later the election was held. Shortly before the election campaign Inpex Ltd indicated its intention not to pursue processing of gas from its Ichty's field on the Kimberley coast, but instead to investigate the feasibility of constructing a pipeline to Darwin and building a stand-alone LNG plant there. During the election campaign the opposition leader Colin Barnett was highly critical of the Labor Government, claiming that Inpex's decision resulted from the Government's failure to identify a Kimberley site for LNG processing in a timely manner. He promised that if elected he would ensure that a Precinct site was quickly identified and further delays to LNG development avoided (O'Brien and Barras 2008).

In early September 2008 the TOTF formally announced the remaining four locations still being considered by Traditional Owners: Anjo Peninsula, North Head, Quondong to James Price Point and Gourdon Bay (see Map 1). Following the establishment of the Liberal/National State Government on 13 September 2008 and the lack of certainty or engagement with the new government the KLC and the TOTF were confronted with very serious financial and political considerations. In an effort to retain the TOTF process in some form, the KLC decided to reduce the active participation of TOTF members to those involved with the remaining four potential locations ('TOTF 4').

The new Premier Colin Barnett announced on 15 October 2008 that his preferred site for the LNG Precinct was North Head. He stated that it was unacceptable for government to, in his words, give 'a right of veto to local Aboriginal people' (Government of Western Australia 2008a). The State Government indicated that while it would consult with Traditional Owners regarding measures for impact mitigation and community benefits, the existing site selection process would be discontinued. The nomination of North Head, which was not among the potential sites rejected by their Traditional Owners, did mean that these latter sites would remain excluded from consideration.

‘Business as usual’? Compulsory acquisition and the LNG Precinct Agreements

In December 2008 the State Government, after receiving advice on the short-listed sites from the WA Environmental Protection Agency, announced another site that had also not been excluded from consideration by its Traditional Owners, James Price Point, as its preferred site for the LNG Precinct. The Premier indicated that he would allow a period of three months ending on 31 March 2009 for the negotiation of a binding ‘Heads of Agreement’ between the State, Woodside, and Traditional Owners represented by the Goolarabooloo and Jabirr Jabirr (GJJ) native title claim group, that would provide Traditional Owner consent for the LNG Precinct to proceed. If this was not achieved a process of compulsory acquisition under the WA *Public Works Act 1902* would be initiated to acquire land at James Price Point (Government of Western Australia 2008b).

Changes in State policy on Traditional Owner consent and the State’s position on the timing of negotiations altered the basis of Aboriginal participation in fundamental ways. Previously participation was centred on the question of whether or not an LNG Precinct site could be found that met relevant engineering, technical and environmental requirements and also had the support of Traditional Owners for the area concerned. Now the central issue was how negative impacts associated with a choice of site made by the State without Aboriginal consent could be minimised, while at the same time allowing Traditional Owners and other affected Aboriginal people to share in the benefits of development (KLC 2010c).

Another basic change resulted from the imposition of very tight time frames on the negotiation process. The three months nominally allowed by the Premier for negotiation of a Heads of Agreement contrasts with the several years taken to reach an equivalent point in other negotiations for less complex projects. The KLC and GJJ Traditional Owners would be negotiating under enormous pressure, especially as the Premier’s deadline approached. In addition, a funding agreement with the State to support KLC and TO participation in negotiations was not finalised until 11 March 2009 and formal negotiations did not occur until 26 February 2009. This left only 5 weeks (later extended to seven weeks on the basis that a final agreement could be reached by 15 April 2009) for the KLC and the GJJ to negotiate a Key Terms Agreement for one of the largest and most complex industrial projects that has been the subject of negotiations involving Indigenous people in Australia. This situation and the threat of compulsory acquisition appears to be fundamentally inconsistent with the *EPBC Act*’s requirement for a ‘collaborative approach’.

At a meeting on 14 and 15 April 2009 the KLC the GJJ native title claim group accepted offers from the State and Woodside in relation to establishment of an LNG Precinct

at James Price Point. The alternative facing the GJJ was to refuse the offers and face the threat of compulsory acquisition. Members of an extended family associated with the Goolarabooloo group left the meeting before a decision was taken, and subsequently expressed their opposition to the outcome. Over the following two years the KLC, Traditional Owners, Woodside and the WA Government undertook extensive negotiations to develop comprehensive legal agreements giving effect to the provisions of the Heads of Agreement. As negotiations proceeded the James Price Point project faced increasing opposition from environmental groups and from some families within and the GJJ native title claim group. Despite these difficulties, in May 2011 a substantial majority of the GJJ approved the project and the associated agreements, which were signed on 30 June 2011.

We discuss later the issue of whether or not, and how, these agreements may contribute to ESD. What is clear is that the process leading to their conclusion created extensive conflict within the GJJ native title group and undermined their sustainability as a social entity (see O’Faircheallaigh in press for a detailed discussion of the sources and impact of this conflict).

Continued Aboriginal participation: the *Indigenous Impacts Report*

The Strategic Assessment process continued after the election of the Barnett Government, with the focus shifting to preparation of a Strategic Assessment Report on the proposed James Price Point LNG Precinct. The KLC and Kimberley Traditional Owners had little faith, based on their previous experience, that a conservative WA Government or commercial proponents would ensure that the Precinct’s negative impacts would be minimised and its positive impacts maximised. From their perspective the Strategic Assessment and the *EPBC Act* were critical in this regard, because they provided an opportunity for the Commonwealth Minister for the Environment either to reject the Precinct Plan if it failed to adequately address Indigenous concerns, or to attach conditions to any approval of the Plan designed to ensure that those concerns were dealt with. However the KLC believed that the Strategic Assessment Report on which the Commonwealth Minister’s decision would be based would only reflect Aboriginal priorities and concerns if Aboriginal people themselves conducted the relevant parts of the impact assessment for the Precinct. The KLC negotiated with the WA Government that the KLC would prepare an *Indigenous Impacts Report* which would address the ‘Indigenous’ components of the Strategic Assessment ToR, and would constitute part of the Strategic Assessment Report submitted to the Commonwealth Minister for the Environment pursuant to the Strategic Assessment Agreement and the *EPBC Act*.

During July 2009 and June 2010 the KLC undertook a series of impact assessment studies addressing economic, social, cultural, archaeological and ethno biological impacts potentially associated with an LNG Precinct (KLC 2010a). Given constraints of time and resources (see below), these assessments sought to maximise participation by Traditional Owners and other affected Aboriginal people in every stage of the impact assessment process, in part to mobilise their knowledge regarding likely social, cultural and environmental impacts and effective strategies for managing these. The way in which this approach was pursued in one of the studies, the Aboriginal Social Impact Assessment (ASIA) (KLC 2010b), is discussed here by way of illustration.

Draft ToR for the ASIA were discussed in detail with and endorsed by the Traditional Owner Negotiating Committee (TONC) established to represent the GJJ native title claim group. The ToR called for a consultation approach which recognised Native Title Claim Groups or Registered Native Title Bodies Corporate as the key decision makers in matters affecting land, and also accepted the need to consult with bodies that represent other Aboriginal people affected by LNG development, such as Community Councils. The ASIA project team included three Aboriginal staff with extensive knowledge of the affected native title groups and communities, and their participation was critical in undertaking effective consultation. The ASIA team was constituted with an appropriate gender balance (three women, two men) so that it was always possible to discuss relevant issues in single-gender groups if participants preferred, an important cultural requirement in the Kimberley. Native title claim groups with interests in Broome and the Dampier Peninsula were invited to participate in the ASIA. In some cases this participation took the form of widely-advertised, day-long meetings of the group concerned, which in some cases attracted attendees from throughout the West Kimberley and from outside the region. In other cases the group preferred meetings to occur with a native title claim group steering committee or equivalent body, or were happy for a meeting of the native title group to be combined with a community meeting (see below). At meetings attendees were provided, through PowerPoint presentations, with information on the proposed LNG Precinct. Large colour maps and graphic illustrations of the LNG Precinct site were displayed on meeting room walls. Information was also provided on relevant Aboriginal and government decision-making processes, including the Strategic Assessment; and on the LNG Precinct Heads of Agreement. Fact sheets prepared by the ASIA were provided to all attendees. Each meeting also included a separate session specifically designed to allow attendees to express aspirations or concerns in relation to the LNG Precinct, or to suggest management strategies

to address likely impacts. Community meetings were also held, in Beagle Bay, One Arm Point, Lombadina, Djarindjin and Derby, following appropriate community protocols for obtaining permission to visit communities and hold meetings. Initial community meetings were held in September/October 2009, with the format mirroring that described above for native title group meetings. A second round of community meetings was held in late November and early December. At these meetings a condensed version of the project information provided at the first round of meetings was presented, and the ASIA team then provided feedback on issues raised at other meetings, and a larger part of each meeting was set aside for attendees to raise and discuss aspirations and concerns in relation to the LNG Precinct and its likely impacts, and to suggest management strategies to deal with these impacts. Numerous less formal engagements with community and native title group members provided additional input for the ASIA. Extensive consultations were also undertaken with Aboriginal organisations, and with organisations providing services to Aboriginal people, in Broome, Derby and the Dampier Peninsula communities.

The GJJ TONC received extensive briefings on the Draft ASIA Report and its input was incorporated into the Final Report, which it then approved.

The *Indigenous Impact Report* (KLC 2010a) had to be completed under severe time constraints. For example the ASIA commenced in August 2009 and concluded in February 2010, limiting its geographical scope to Broome and the Dampier Peninsula rather than the wider area potentially affected by the LNG Precinct; the extent of consultation it was possible to conduct; the range of matters considered; and the depth and detail in which these matters are considered. As a result, much additional work remained to be done, and a key element of the ASIA Report was to identify the additional social impact assessment work that was not able to be completed, and recommend that completion of this work must constitute a condition of any approval by the State and Commonwealth of an LNG Precinct (KLC 2010b). These severe time constraints reflect, in large measure, the decision of the State that studies for the Strategic Assessment Report, including the ASIA, should be completed by early 2009 (KLC 2010b, p. 44). The State's position in this regard reflected its determination to expedite the Strategic Assessment process so as to facilitate the commercial needs of Precinct investors (AAP 2010; O'Brien and Barras 2008).

Despite these constraints, the Strategic Assessment provided an opportunity to undertake one of the most comprehensive assessments of Indigenous impacts undertaken in Australia to date (KLC 2010a). In addition to documenting information in relation to the proposed LNG Precinct, Aboriginal understandings of its potential impacts and of how these

might be managed, the *Indigenous Impacts Report* contains nearly 100 recommendations in relation to conditions that the Federal Minister for the Environment should apply to any approval of an LNG Precinct. These relate to a wide range of social, cultural, economic and environmental issues from minimising the risk that exotic species might be introduced in ballast from LNG tankers; to maximising Aboriginal business development opportunities from LNG construction; to strategies for reducing the potential effects of growing social inequity on youth suicide; to protection of Aboriginal cultural heritage and medicinal plants. They certainly represent a basis on which a Federal Minister for the Environment could have sought to 'effectively integrate both long-term and short-term economic, environmental, social and equitable considerations' in reaching a decision on the proposed James Price Point LNG Precinct.

Analysis and conclusion

It now appears uncertain whether a Federal Minister will be required to make that decision. In April 2013 Woodside announced that the consortium it leads would not proceed with its investment in James Price Point for commercial reasons (Chambers 2013). While the WA Government has recently acquired the land for the Precinct and proposes to proceed with it, commercial realities seem likely to render its actions moot and the completion of the Strategic Assessment process unlikely.

What conclusions can be reached on the basis of the components of that process that were undertaken? The application of the *EPBC Act*'s Strategic Assessment provisions, in combination with the legal recognition and of native title and the WA Labor Government's policy position on Traditional Owner consent, provided substantial opportunities for collaboration with Aboriginal interests and for Traditional Owner participation in decision making. For example there have been few if any precedents for active Aboriginal participation with government scientific experts in assessing potential development sites, and no precedents in the Australian context and few in the international context for Traditional Owners being able to withdraw potential industrial sites from consideration on cultural and social grounds. The TOTF and its participation in the site selection process were based on cultural values and decision making protocols by senior Kimberley Aboriginal men and women.

In summary, decision making in the period to September 2008 seems to have occurred in a way consistent with the *EPBC Act*'s commitment to the integration of environmental, social, cultural and equitable considerations and to a collaborative approach facilitating

public and specifically Indigenous participation. As noted in the Introduction, such participation is widely recognised as essential in promoting ESD.

Subsequent decision making took a different course. Party political considerations associated with the State election and the Liberal State Government's determination to prioritise short-term benefits for the State economy resulted in decision making under the duress of State compulsory land acquisition, and within time frames that made any careful balancing of economic and non-economic or of short- versus long-term considerations very difficult. Despite this the Agreements negotiated by the KLC and the GJJ were in important ways consistent with the need to balance environmental, economic, social, and equitable considerations. Constraints of space preclude an extension discussion here, but the following points can be highlighted. (The agreements are publicly available: State of Western Australia et al. 2011a, 2011b, 2011c).

While the GJJ and the KLC agree to the establishment of an LNG Precinct at James Price Point, Western Australia undertakes to prevent any further development for offshore gas processing on the Kimberley coastline, and that use of the Precinct will be limited to petroleum processing, ruling out, for instance, establishment of chemical or fertiliser plants that have been co-located with LNG plants in other parts of the world. These undertakings by the State place significant limitations on industrial development and its impacts, and they are enshrined in legislation (a 'State Agreement Act'), the first agreement between the State Government and Indigenous people to be ratified by Parliament.

The Agreements guarantee the GJJ a substantial role in environmental management of the Precinct, including the power to direct Woodside to construct a desalination plant if the GJJ believe that use of groundwater would cause unacceptable environmental damage. The State must employ a compliance officer specifically for the LNG Precinct throughout its life, to ensure GJJ input into environmental management and to monitor compliance with environmental conditions. The Agreement establishes a management regime to minimise any impacts on Aboriginal cultural heritage, and provides funding for the life of the Precinct for an Aboriginal ranger program to undertake environmental and cultural heritage monitoring. These 'life of Precinct' provisions reflect a long-term approach to consideration of cultural and environmental impacts.

In addition to setting out a range of benefits that will accrue to the GJJ, a Regional Benefits Agreement (RBA) was negotiated, designed to ensure that the Precinct would generate substantial economic and social benefits for Aboriginal people throughout the Kimberley. The RBA is unique in the Australian context and has few international parallels.

It grew out of the understanding of the KLC and the TOTF that a project on the scale of the LNG Precinct would have impacts across the whole Kimberley, and that benefits arising from the LNG Precinct should also be distributed widely, an important recognition of the need to consider ‘equitable considerations’.

The conduct of the Indigenous Impact Study as a critical input into the Strategic Assessment Report constitutes an additional dimension of collaboration in impact assessment. The ability of Kimberley Aboriginal people and organisations to drive its conduct, content and recommendations increased the possibility that decision makers and, in particular the Federal Minister for the Environment, would consider cultural, social and environmental as well as economic matters in reaching a decision regarding whether, or on what conditions, to approve a Kimberley LNG Precinct.

The basis on which Aboriginal participation was achieved raises important, general issues regarding community participation and collaboration. The Commonwealth – WA Strategic Assessment Agreement failed to set out any specific requirement for public or Aboriginal participation and failed to provide any resources to support it. This constituted a fundamental omission in giving practical effect to the *EPBC Act*’s commitment to community and Indigenous collaboration and one which, if repeated in relation to other Strategic Assessments, is likely to seriously undermine their potential contribution to pursuit of ESD. Further research focused on the 15 Strategic Assessments currently under will be important in assessing outcomes in this regard.

Aboriginal participation occurred in the Kimberley case only because of the determination, tenacity and skills of the KLC and Traditional Owners in insisting that they be involved and that Government provide sufficient funding to support that involvement. The KLC played a key role in securing the resources for the TOTF site selection process and in helping Traditional Owners to mobilise around the opportunity provided by the Strategic Assessment and the WA Labor Government’s policy commitment to Traditional Owner consent. The ability of the KLC to facilitate this mobilisation reflected, in turn, its legal status as a Native Title Representative Body; its history as a grass roots community organisation; and the substantial organisational capacity and experience it had developed through running native title claims and negotiating project agreements.

Experience with the Kimberley LNG Precinct Strategic Assessment shows clearly that there is no certainty that Government will actually use Strategic Assessment Agreements or any other mechanism to ensure that the community collaboration and public participation espoused by the *EPBC Act* will actually occur. This will depend in part on the nature of the

government in power at particular points in time, but regardless of their political complexion, governments intent on promoting economic growth are likely to constrain public participation 'within tightly circumscribed limits' (Lawrence 2003, p. 273). Reflecting this reality, the Kimberley experience shows that only where communities mobilise politically to *demand* a collaborative approach will community participation in decision making be substantial. This lesson is likely to resonate well beyond the specific context of Strategic Assessments, and beyond Australia.

References

- AAP 2010, 'Woodside says Browse LNG on track', AAP Newswire 2 September, viewed 7 January 2014 <http://news.theage.com.au/breaking-news-business/woodside-says-browse-lng-on-track-20100902-14p1g.html>
- ABC (Australian Broadcasting Commission) 2008, 'Minister accuses Opposition of ignoring Kimberley concerns', ABC News Online 28 February.
- Australian Government Department of Environment 'Strategic Assessments', viewed 16 April 2014, <http://www.environment.gov.au/topics/environment-protection/environment-assessments/strategic-assessments>
- Australian Heritage Council 2011, *Potential National Heritage values of the proposed West Kimberley National Heritage place, as recommended by the Australian Heritage Council*, viewed 6 January 2014, <http://www.environment.gov.au/node/19188>
- Baker, DC & McLelland, JN 2003. Evaluating the effectiveness of British Columbia's environmental assessment process for first nations' participation in mining development, *Environmental Impact Assessment Review*, 23, 581-603.
- Carpenter, A 2006, West Kimberley Onshore Liquefied Natural Gas Processing Facilities: Statement by Premier. Legislative Assembly, Western Australia, 21 November.
- Chambers, M 2013, Woodside says giant onshore Browse plant 'not commercially viable', *Australian*, 12 April, viewed 6 January 2014 <http://www.theaustralian.com.au/business/mining-energy/woodside-says-onshore-browse-plan-not-commercially-viable/story-e6frg9df-1226618830536>
- Chavez B & Bernal A 2008, 'Planning hydroelectric power plants with the public: a case of organizational and social learning in Mexico', *Impact Assessment and Project Appraisal*, vol. 26, pp. 163-176.

- Devlin JF & Yap N 2008, 'Contentious politics in environmental assessment: blocked projects and winning coalitions', *Impact Assessment and Project Appraisal*, vol. 26, pp. 17-27.
- Doelle M & Sinclair J 2006, 'Time for a new approach to public participation in EA: Promoting cooperation and consensus for sustainability', *Environmental Impact Assessment Review*, vol. 26, pp. 185-205.
- Doohan, K 2008, *Making things come good: relations between Aborigines and miners at Argyle*, Backroom Press, Broome.
- Government of Western Australia 2008a, 'Premier Colin Barnett: Interview Transcript: Report of the Northern Development Taskforce, 15 October 2008', Department of the Premier and Cabinet, Government Media Office, Perth.
- Government of Western Australia 2008b, 'Liberal-National Government makes decision on LNG Precinct', viewed 7 January 2014
[http://www.dsd.wa.gov.au/documents/Browse - Media Statement - 23 December 2008 - Liberal National Government makes a decision .pdf](http://www.dsd.wa.gov.au/documents/Browse_-_Media_Statement_-_23_December_2008_-_Liberal_National_Government_makes_a_decision_.pdf)
 accessed 7 January 2014
- Hartley N & Wood C 2005, 'Public participation in environmental impact assessment - implementing the Aarhus Convention', *Environmental Impact Assessment Review*, vol. 25, pp. 319-40.
- KLC 2010a, *Kimberley LNG Precinct Strategic Assessment Indigenous Impacts Report: Six Volumes*, viewed 7 January 2014 <http://klc.org.au/2010/12/09/james-price-point-indigenous-impacts-report-released/>
- KLC 2010b, *Kimberley LNG Precinct Strategic Assessment Indigenous Impacts Report Volume 3: Aboriginal Social Impact Assessment*, viewed 7 January 2014
[http://www.dsd.wa.gov.au/documents/Appendix E-3.pdf](http://www.dsd.wa.gov.au/documents/Appendix_E-3.pdf)
- KLC 2010c, *Kimberley LNG Precinct Strategic Assessment Indigenous Impacts Report: Volume 2: Traditional Owner Consent and Indigenous Community Consultation*, viewed 7 January 2014 [http://www.dsd.wa.gov.au/documents/Appendix E-2.pdf](http://www.dsd.wa.gov.au/documents/Appendix_E-2.pdf)
- KLC 2014a, *History*, viewed 7 January 2014 <http://klc.org.au/about/history/>
- KLC 2014b, *Agreements*, viewed 7 January 2014 <http://klc.org.au/agreements/>
- Lane, M & Corbett, T 2005, 'The Tyranny of Localism: Indigenous Participation in Community-Based Environmental Management', *Journal of Environmental Policy & Planning*, vol. 7, pp. 141-159.
- Lawrence D 2003, *Environmental Impact Assessment: Practical Solutions to Recurrent Problems*, John Wiley and Sons, New Jersey.

- Lockie S, Franetovich M, Sharma S, Rolfe J 2008, 'Democratisation versus engagement? Social and economic impact assessment and community participation in the coal mining industry of the Bowen Basin, Australia', *Impact Assessment and Project Appraisal*, vol. 26, pp. 177-188.
- Mulrennan, M & Scott, C 2005, 'Co-Management – An Attainable Partnership?', *Anthropologica*, vol. 47, pp. 197-214.
- O'Brien, A & Barras T 2008, 'Japanese firm flexes poll muscle', *Australian*, 30 August, viewed 6 January 2014 <http://www.dailytelegraph.com.au/japanese-firm-flexes-poll-muscle/story-e6freuy9-111117342189>
- O'Faircheallaigh, C 2007 'Environmental Agreements, EIA follow-up and aboriginal participation in environmental management: The Canadian Experience', *Environmental Impact Assessment Review*, vol. 27, pp. 319-342.
- O'Faircheallaigh, C 2009, 'Effectiveness in Social Impact Assessment: Aboriginal Peoples and Resource Development in Australia', *Impact Assessment and Project Appraisal*, vol. 27, pp. 95-110.
- O'Faircheallaigh, C 2013, 'Extractive Industries and Indigenous peoples: A Changing Dynamic?', *Journal of Rural Studies*, vol. 30, pp. 20-30.
- O'Faircheallaigh, C In Press 'Indigenous Rights, Political Mobilization and Indigenous Control over Development: Natural Gas Processing in Western Australia', in Berg-Nordlie, M, Saglie, J & Sullivan, A (eds) *Indigenous Politics: Institutions, Representation, Mobilisation*, ECPR Press, Colchester.
- Randall, B 2003, *Songman: the story of an aboriginal elder*, ABC Books, Sydney.
- State of Western Australia & Goolarabooloo Jabirr Jabirr Peoples, 2011a, *Browse (Land) Agreement*, viewed 7 January 2014 http://www.dsd.wa.gov.au/documents/Land_Agreement_web.pdf
- State of Western Australia, Goolarabooloo Jabirr Jabirr Peoples, Woodside Energy Limited, Broome Port Authority, LandCorp, 2011b, *Browse LNG Precinct Project Agreement*, viewed 7 January 2014 http://www.dsd.wa.gov.au/documents/Project_Agreement_web.pdf > (accessed 7 January 2014)
- State of Western Australia, Minister for Lands, Conservation Commission of Western Australia, Kimberley Land Council, Woodside Energy Limited, 2011c, *Browse LNG Precinct Regional Benefits Agreement*, viewed 7 January 2014 http://www.dsd.wa.gov.au/documents/Regional_Benefits_Agreement_web.pdf

Watson, J 2013, *Never Stand Still: Stories of Life, Land and Still in the Kimberley*,
Jarlindungan Burru Aboriginal Corporation, Derby.

ⁱ In doing so the author complies with confidentiality requirements mandated in contractual arrangement between Griffith University and the Kimberley Land Council.

ⁱⁱ The Strategic Assessment Agreement and the Final Terms of Reference are available at <http://www.environment.gov.au/epbc/notices/assessments/pubs/kimberley.pdf>, viewed 6 January 2014.

ⁱⁱⁱ For reasons of space this section outlines only the main features of Aboriginal participation in the LNG Precinct Site Selection Process; for a detailed discussion see KLC 2010b, and O’Faircheallaigh 2013.

^{iv} For a detailed discussion of the *wunan* including its relevance in another commercial context, see Doohan 2008.