Indigenous Rights, Political Mobilization and Indigenous Control over Development: Natural Gas Processing in Western Australia

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Introduction

Since the early 1970s there has been a trend towards growing formal recognition of Indigenous rights in international forums and in many states with significant Indigenous populations. Given that their continued possession and control of their ancestral lands is central to the survival and well being of Indigenous peoples, recognition of Indigenous interests in land and sea has been central to the movement for recognition of Indigenous rights. In the international arena, the principle of Indigenous Free Prior Informed Consent (IFPIC), which asserts that Indigenous peoples must decide whether development occurs on their ancestral estates, and the nature of any development that does occur, has increasingly been reflected in international treaties and declarations including the International Convention on Biodiversity (2002) and the UN Declaration on the Rights of Indigenous People (2007). At the national level, constitutional enactments or legislation providing for recognition of Indigenous rights in land has been introduced in countries as diverse as Australia, Canada, New Zealand, the Philippines, Nicaragua and Colombia.

This growing recognition of Indigenous rights has required widespread political mobilisation by Indigenous peoples and their allies at both international and national levels (Attwood and Markus 1999; Corntassel 2007; Morgan 2004; Muehlebach 2003). The focus of this paper is on another area of Indigenous political mobilisation, that required to ensure that formal recognition of rights translates into Indigenous control over commercial development ‘on the ground’. There are a number of reasons why this might not occur. First, many international instruments that enshrine recognition of Indigenous rights, including the UN Declaration, are not legally binding on states, and governments anxious to secure the economic benefits of development may ignore them in practice (Baluarte 2004). Second, national legislation recognising Indigenous rights may do little more than create opportunities to negotiate with state agencies and developers regarding the terms on which development may occur, and political mobilisation is essential if Indigenous groups are to make effective use of those opportunities (O’Faircheallaigh 2007). Third, non-state parties such as business interests and environmental groups may seek to constrain the ability of Indigenous peoples to control what happens on their ancestral lands, and Indigenous landowners may need to mobilise to counter such attempts. Finally and more generally, the process of recognising Indigenous rights is not linear and cumulative but dynamic and subject to reversal, and Indigenous political mobilisation is required to consolidate existing gains and to resist attempts to ‘roll back’ recognition of Indigenous rights (Baluarte 2004; Corntassel 2007; Morgan 2004).
This chapter focuses on Indigenous political mobilization in the context of one of Australia’s largest proposed resource projects, the establishment of an industrial Precinct for processing natural gas into Liquefied Natural Gas (LNG) in the Kimberley region of Western Australia. It documents the successful mobilization of Kimberley Aboriginal Traditional Owners and their regional organisation, the Kimberley Land Council (KLC), to grasp the opportunities offered by the Australian Labor Party State Government to apply the principle of IFPIC to the selection of a site for the LNG Precinct in 2006-2008. This policy was reversed by a newly-elected Liberal – National Party Government in late 2008, which threatened to use its compulsory acquisition powers to acquire land for the LNG Precinct if Traditional Owners did not agree to its development. The paper discusses the efforts of Aboriginal Traditional Owners and the KLC to maintain the principle of IFPIC in an increasingly hostile and complex political environment, in which a pro-development state government, business interests, and environmental groups and local tourism operators opposed to the LNG Precinct, all sought to deny the right of traditional owners to have the final say over development on their ancestral lands. An important part of this discussion involves the way in which tensions within the Aboriginal group fanned by this rising political hostility threatened the political efficacy of the KLC and Traditional Owners.

The chapter illustrates the extent to which ongoing Indigenous political mobilization is essential if formal recognition of Indigenous rights is to translate into greater Indigenous control of development on Indigenous lands, and the critical role of Indigenous political organization in this regard. It also shows how Indigenous political mobilization is affected by, and generates, interacting sets of politics at many levels, from the micro-politics of inter-group conflict to global contests around recognition of Indigenous rights.

The next section provides essential context by introducing the Kimberley region and its Indigenous peoples and providing a brief background on the proposed LNG Precinct. The following sections outline the successful mobilisation of Kimberley Indigenous people during 2006-2008, and the countervailing pressure exerted against their attempts at achieving control over development on their traditional lands during 2008 – 2011. The chapter highlights the enormous obstacles Indigenous people face, despite growing legal recognition of their rights, in determining whether or in what form development should occur on their ancestral lands.
The Kimberley Region and the proposed LNG Precinct

The Kimberley region (see Map 1) occupies some 424,000 sq km in the north west of Western Australia. Its population is around 41,000, some one third of which is Aboriginal. Like many Indigenous peoples, 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 have maintained their connections to ‘country’ii and are still able to obtain a large part of their food requirements from their traditional lands, while Aboriginal cultural and social values and practices remain vibrant (KLC 2010a: 46-50). Kimberley Aboriginal people established the KLC in 1978 to provide a regional political platform from which they could oppose uncontrolled development being promoted by the Government of Western Australia (WA), and over the following decades the KLC established a strong presence as a regional grassroots Indigenous organisation with a significant national profile (KLC 2011a).

In 1992 Australia’s High Court, in its Mabo decision, recognised the existence of inherent Indigenous rights in land predating white settlement in 1788. Mabo was given legislative effect by the Commonwealth Native Title Act 1993 (NTA) which created a system through which eligible Indigenous people could claim native title and established processes for judicial determination of claims. The NTA also provided for the establishment of Native Title Representative Bodies (NTRBs), which would assist native title claimants to lodge and pursue their claims (Bartlett 2004). The KLC was designated as the NTRB for the Kimberley, and so added statutory functions under the NTA to its existing role as a grass roots representative body.

Today, over half of the Kimberley is recognised as native title land, and a number of additional claims are at an advanced stage (KLC 2011b). Recognition of native title does not allow Aboriginal people to control development, but rather confers on them 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 sharing of project revenues and/or landowner equity in projects; employment and business development programs to benefit Aboriginal people; and measures to protect cultural heritage and the environment. The KLC has supported traditional owners in negotiating a series of agreements for major mining, agricultural and other projects (KLC 2011c). If native title holders oppose
development in principle, or are unable to reach agreement on terms, the developer can refer
the matter to a government statutory authority, the National Native Title Tribunal, which
determines whether, and on what conditions, project proponents may be granted the interests
they require to allow a project to proceed.

Conservative Liberal – National Party Governments in Western Australia have been overtly
hostile to the recognition of native title. The WA Government introduced legislation in 1994,
eventually deemed unconstitutional by Australia’s High Court, to prevent the Commonwealth
NTA from applying in WA. Liberal – National Party Governments have opposed native title
claims, including claims in the Kimberley region, as a matter of principle, and have spent
many millions of dollars fighting claims in the courts (Bartlett 2004: 35-36, 42-43).

The Browse Basin is an extensive marine trough which lies between 250 and 500 km off the
Kimberley coast (see Map 1). Starting in the 1970s reserves of natural gas were located in the
Basin by a succession of 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 some 25 per cent of Australia’s recoverable natural gas reserves, and new
discoveries continue to be made.

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. 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 (Torosa, Brecknock and Calliance) it had located some 300 km north of
Broome (see Map 1). While the gas reserves themselves are offshore and not subject to native
title, the establishment of an LNG plant onshore would require the grant of interests in land
subject to native title claims, and Woodside approached the KLC and the traditional owners
of Wilson Point to initiate negotiations. Senior Traditional Owners indicated to Woodside
that they were not prepared to enter negotiations at that point and Woodside’s CEO stated
that Woodside would not proceed with the project against the wishes of the traditional
owners.
Map 1: Kimberley Region, the Browse Basin and Short-listed Sites for an LNG Precinct
Source: Department of State Development Western Australia
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. During 2006 - 2007 the KLC and traditional owners for the Maret Islands negotiated with Inpex but were unable to reach an agreement. In addition, environmental studies undertaken by Inpex and cultural heritage work undertaken by traditional owners and the KLC raised serious issues regarding the suitability of the Maret Islands as a site for LNG processing.

The Site Selection Process and the Traditional Owner Task Force

In 2006 the (Labor) WA Government decided that, rather than have individual proponents identify and develop their own sites for LNG plants along the Kimberley coast, the Government would seek a single location for an ‘LNG Precinct’ where processing of all gas from the Browse Basin would occur, an approach expected to minimise the environmental and cultural impacts of processing. The then Western Australian Premier, Alan Carpenter, stated that LNG development in the Kimberley would not proceed unless it created significant economic and social benefits for Aboriginal people and unless it had the support of Kimberley traditional owners (Carpenter 2006). The Deputy Premier and Minister for State Development reiterated this position in February 2008 and indicated the need for informed consent, stating that ‘LNG processing ... will only go ahead with the fully informed consent of the traditional owners and their substantial economic participation’ (ABC 2008).

In 2007 the State established a Northern Development Taskforce (NDT) to conduct the site selection process for an LNG Precinct. The KLC approached the WA Government and requested funding to support a Traditional Owner consultation and decision making process that would give practical effect to the State’s requirement for Indigenous informed consent. The WA Government agreed to provide the necessary funds.

In mid December 2007, the KLC convened a meeting of senior Aboriginal men and women from coastal regions, as well as senior ‘cultural bosses’ from elsewhere in the Kimberley to direct the KLC on how to proceed. The meeting discussed LNG development and its likely impacts in the Kimberley over two days. The senior Aboriginal men and women present outlined a consultation process and culturally appropriate representative structures, and drafted a timetable to begin to consider the Government’s proposal for an LNG Precinct.
They decided that there should be a Traditional Owner Taskforce (TOTF) representing all native title claims groups along the Kimberley coast. Following this meeting the KLC established a Senior Leadership Group to advise and assist Traditional Owners of the Kimberley coastal regions and the KLC in their deliberations about gas development.

Over the wet season (December – February), Traditional Owners of the Kimberley coastal regions began to consider the potential impacts of LNG development and how they could effectively engage with industry and government to achieve positive outcomes and realise opportunities to improve socio-economic conditions for Aboriginal people in the Kimberley. In January 2008 the KLC and the WA Government formalised a Financial Assistance Agreement (FAA) pursuant to which the State committed to fund the KLC to undertake a comprehensive consultation process with Kimberley Traditional Owners about LNG development.

On 6 February 2008 the WA and Australian Governments signed an Agreement which provided for the two Governments to jointly conduct strategic assessments of the proposed LNG Precinct under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and WA Environmental Protection Act 1986 (WA). The strategic assessments would conclude with a decision or decisions by the relevant Government Ministers that:

(a) the LNG Precinct as described in the Plan for the LNG Precinct could proceed as proposed;
(b) the LNG Precinct could proceed subject to modifications of the original Plan and/or the imposition of conditions on the development; or
(c) the proposed development could not proceed.

Unlike previous environmental assessments conducted under State and Commonwealth legislation, the Terms of Reference (ToR) for the Strategic Assessments required a major focus on impacts on Indigenous peoples and culture, and on how these impacts would be managed. The Strategic Assessment Report that would provide the basis for Ministerial decisions on the proposed LNG Precinct would have to include ‘a comprehensive analysis of the potential impacts of the Plan [for the LNG Precinct] on Indigenous people’; ‘a description of the potential impacts, including socio-economic impacts, of the Plan on Indigenous people’; and details of ‘the specific measures intended to avoid, minimise and mitigate for the
potential environmental and Indigenous impacts of the Plan (ToR Clauses 7 and 9). As discussed later in the paper, the Strategic Assessments represented another significant avenue through which Kimberley Aboriginal people would mobilise in seeking to influence LNG development.

In mid February 2008 a further meeting of senior Aboriginal men and women confirmed the KLC’s Senior Leadership Group in its role, in accordance with appropriate cultural practices, including separate men’s and women’s meetings and consensus decision making. Some more senior men and women were added to the Group. The Senior Leadership Group would provide advice and leadership to the KLC’s consultation process, and attend meetings with coastal native title claim groups. 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 a TOTF equivalent of the established State Government’s NDT; and
- gain as much information from as many sources as possible concerning proposed gas development in the Kimberley.

The area of the Kimberley Coast within which the State was seeking a single suitable location for an LNG Precinct encompasses parts of the traditional country of 15 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 development is a massive long life project, 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 can be viewed as an overarching foundational practice of local and regional Indigenous governance, like a blueprint for living. It 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, as a mediating and re-affirming practice, one considered to be greater than local groups, or even larger native title groups, and to encompass ‘the Kimberley’ (Doohan 2007: Chapter 7). 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.

The KLC commenced a series of meetings involving all 15 Kimberley coastal native title groups. The meetings discussed the limited information about LNG development then at hand, what LNG development might mean for the Kimberley, both positive and negative, and how the KLC’s consultation process was intended to work; and sought advice, suggestions, questions and direction from Traditional Owners and to establish what was important for them. Each native title claim group was invited to consider the selection of four representatives to form the TOTF, and how the TOTF should function, including how it should report back to native title claim group members. 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 Cultural Bloc meetings, the KLC provided Traditional Owners with details of the possible locations being considered for development. 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 benefits of development, including, for example, equity participation, employment and training, business opportunities and education.

At the meetings each native title claim group selected four representatives to participate in the work of the TOTF. Formal instructions from the native title claim group members to the KLC to act on their behalf were affirmed by 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, it was decided that the TOTF members could not make decisions on behalf of their native title groups, and nor could they make decisions about whether to agree to the locating of a LNG hub in the Kimberley or on their traditional land and sea country. Any of these decisions would need to go back to the whole native title claim group for an area being considered as a suitable location. TOTF members were selected to ensure the integrity of the consultation and information delivered by the TOTF and the KLC project team members; to act as a conduit for the flow of information to and from the larger native title claim group membership; and to provide a mechanism through which the native title claim groups would support each other, whatever decision individual groups made about LNG development on their traditional country.
Managing what became a large group with members from all over the Kimberley was a major logistical exercise and an indication of the respect and attention paid to the cultural processes that Aboriginal men and women insisted must happen. It was also an expensive exercise in terms of funding and energy, given the costs and level of administrative organisation required to move more than 60 people from throughout the Kimberley using small aircraft, vehicles and buses to meet the very demanding meeting timetable. But the establishment and management of the TOTF process re-affirmed Kimberley Aboriginal people’s cultural practices, and their right to make decisions about their country, in the context of contemporary large-scale resource development.

The initial TOTF meetings were conducted every second week with Monday and Friday allocated as travel days. All meetings were held in Broome to simplify logistics and ensure adequate space and facilities for the large group of participants. This was a demanding schedule, especially as the majority of TOTF members had to travel to Broome to attend meetings and some had to travel long distances. The TOTF meetings continued until September 2008 when only four potential LNG Precinct sites remained that the TOTF recommended for further consideration (see below).

Throughout the meetings the members of the TOTF engaged in exchanges with government, non-government and industry visitors all of whom presented information and responded to questions concerning the proposed LNG development. 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 families and 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 remaining 11 locations chosen for further consideration by the NDT, from 42 original possible locations, could remain in the site selection process. Traditional Owners for these proposed locations participated in a number of scientific and engineering studies in collaboration with the NDT. As the process unfolded a number of Traditional Owner groups withdrew their land and sea country from consideration as potential sites, though these decisions were not made public until the four remaining locations were made known on 10 September 2008 (see below). Traditional Owners withdrew sites in some cases
because multiple potential sites existed in their land and sea country and they only wished a single site to be considered. In other cases they withdrew sites 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 due to environmental and/or technical considerations.

The process of information provision and the ability of Traditional Owners to decide which sites would and would not continue to be considered highlights the application of the principle of IFPICT through the TOTF process. It represents a significant achievement in terms of translating recognition of Indigenous rights into control over development ‘on the ground’. That achievement reflects, in turn, the extensive political mobilization undertaken by the KLC and Kimberley Traditional Owners.

In July 2008 a State election was called and six weeks later the election was held. During this period it was unclear whether the NDT process and the TOTF would continue and, if it did not, what would replace it. Nonetheless the KLC and TOTF continued to meet and progress the consultations and decision making about LNG development and possible Precinct locations. The TOTF also continued, despite the uncertainty, to engage in formal meetings with the four native title claim groups that had decided to leave the locations within their traditional country for further consideration. These groups reaffirmed instructions to the KLC to leave their locations in the process, to seek further detailed information and to continue the consultation processes. By early September 2008 and before the results of the State Government elections were finalised 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, and in light of the funding and process uncertainty, the TOTF members and the KLC decided to reduce the active participation of TOTF members to those involved with the remaining four potential locations (the ‘TOTF (4)’).

The new Premier Colin Barnett announced on 15 October 2008 that it was unacceptable for government to, in his words, give ‘a right of veto to local Aboriginal people expressed in the following terms, that projects would not go ahead unless there was informed consent by
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.

Funding under the FAA was sufficient to allow the KLC and the TOTF (4) to continue to conduct meetings in November and early December, but failure to secure further funding jeopardised any future TOTF or native title claim group meetings after a Karajarri native title claim group meeting on 16 December 2008. At this meeting the Traditional Owners decided to remove the Gourdon Bay location from consideration following their interpretation of newly released NDT environmental survey results and their own body of traditional ecological knowledge.

In summary, the site selection process conducted between December 2007 and September 2008 embodied the principle of IFPIC to a substantial degree. In particular, a number of Traditional Owner groups were able to take informed decisions as to whether or not their land and sea country would continue to be considered as potential LNG Precinct sites. However the change of government in September 2008 changed the landscape fundamentally, and presented the KLC and Traditional Owners with major problems in maintaining IFPIC.

**Resistance to Indigenous control: Compulsory Acquisition and the LNG Precinct ‘Heads of Agreement’**

As noted above, on 15 October 2008 the newly-elected Liberal/National Party Government reversed the former State Government’s policy position on Indigenous consent. In December 2008 the State, after receiving advice on the short-listed sites from the WA Environmental Protection Agency, announced James Price Point as its preferred site for the development of the LNG Precinct. The Premier indicated that compulsory acquisition powers under the WA *Public Works Act 1902* would be used to acquire land needed for LNG processing facilities if Traditional Owners failed to reach agreement with the State for location of the Precinct at James Price Point. He indicated that he would allow a period of three months ending on 31 March 2009 for the negotiation of a Key Terms Agreement or Heads of Agreement between the State, Traditional Owners and Woodside, that would provide Traditional Owner consent for the LNG Precinct to proceed. If this was not achieved the process of compulsory acquisition would be initiated (O’Brien 2008; Government of Western Australia 2008b). As
detailed below, the James Price Point site was subject to a native title claim combining Goolarabooloo and Jabirr Jabirr people. It was this combined group whose consent would be required.

Changes in State policy on Traditional Owner consent and the State’s position on the timing of negotiations altered the basis of Indigenous participation in relation to the proposed LNG Precinct in fundamental ways. Previously Indigenous 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 whose selection as the LNG Precinct site 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 Indigenous consent could be minimised, while at the same time allowing Traditional Owners and other affected Indigenous people to share in the benefits of development.

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 similar negotiations for less complex projects. This resulted in a situation in which the KLC and Goolarabooloo and Jabirr Jabirr (GJJ) Traditional Owners would be negotiating under enormous pressure, especially as the Premier’s deadline for conclusion of a Key Terms Agreement approached.

While the Premier had indicated a willingness to engage in negotiations with the GJJ, the KLC was seriously hampered in establishing an appropriate representative structure and in preparing for negotiations by the absence of any agreed framework for engaging with the State and Woodside or any funding to support negotiations. (A formal funding agreement with the State was not finalised until 11 March 2009). Partly for this reason the first formal negotiation meeting 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 appears to be fundamentally inconsistent with the requirements for IFPIC.\[^v\]
On 19 and 20 February 2009 a meeting of the GJJ native title claim group authorized the KLC to act on their behalf in relation to LNG development and unanimously endorsed motions that:

1. Traditional Owners would enter into negotiations with the State and Woodside for a Key Terms Agreement about a LNG processing facility on their country, if the KLC and Traditional Owners were properly resourced to do so.
2. A Traditional Owner Negotiation Committee [TONC] was authorised to negotiate the Key Terms Agreement, subject to authorisation of Traditional Owners. The KLC was authorised to act for and on behalf of Traditional Owners on LNG matters.

The meeting nominated members of a TONC to represent the Goolarabooloo / Jabirr Jabirr native title claim group in negotiations with the State and Woodside. Over the following weeks the TONC and the KLC met formally on a number of occasions with the State and Woodside, while technical teams from the KLC, the State and Woodside continued discussions in the periods between these meetings. The State and Woodside presented positions across a range of relevant issues, but did not present fully developed proposals until towards the end of the seven-week period. The TONC and KLC put forward counter-proposals to positions put by the State and Woodside, and in addition made repeated representations to the State and Woodside that the State should not threaten them with, or resort to, compulsory acquisition.

On 14 and 15 April 2009 the KLC held a meeting of the GJJ native title claim group to consider the current offers of the State and Woodside in relation to establishment of an LNG Precinct at James Price Point, and to facilitate a decision by the GJJ claimants on whether to accept the offers, sign a ‘Heads of Agreement’ providing consent to the location of an LNG Precinct in the area of James Price Point, and continue negotiations towards a comprehensive Indigenous Land Use Agreement under the Native Title Act that would give final legal form to the offers and the GJJ consent. The alternative was to refuse the offers, conclude negotiations and face the threat of compulsory acquisition. At the end of the second day of the meeting, the GJJ made a decision that the KLC should, on their behalf, enter into the Heads of Agreement. 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 (see below).
The ‘Heads of Agreement’ is confidential, but it provides for:

- Agreement on the area where proposed LNG Precinct will be located;
- Transfer to the Traditional Owners of freehold land equivalent in area to the land needed for the LNG Precinct;
- Financial benefits provided by Woodside both to the Traditional Owners of James Price Point and to a Kimberley regional fund;
- Substantial financial commitments by the WA Government;
- Broad principles and some key commitments on Indigenous training, employment, and business development opportunities;
- Participation of Traditional Owners in environmental and cultural heritage management.

The Traditional Owners were not successful in achieving some outcomes from the negotiations that they had established as prerequisites for an acceptable agreement. In addition, they accepted only reluctantly certain components of the Heads of Agreement. However, the Traditional Owners determined that the Agreement they had negotiated was the best that could be achieved under the circumstances, and that it was preferable to the outcomes likely to be achieved if the State proceeded with compulsory acquisition of the Precinct site. One important consideration in this regard was that the Heads of Agreement allowed them a major and continuing role in the selection of a specific site for the LNG Precinct and in determining the location of Precinct components within that site, and in the ongoing management of the Precinct as it is developed, while it is operating, and when it is eventually decommissioned and rehabilitated. For the Traditional Owners, such a role was essential if they were to fulfil their obligations to look after their land and sea country, including cultural sites. There was no certainty that they would have any significant role in project design or management if the State acquired the LNG Precinct by compulsory acquisition. The Heads of Agreement also included a commitment to a State Agreement between the State and Traditional Owners to exclude LNG development elsewhere on the Kimberley Coast, and to provide for the return of the LNG precinct to the Traditional Owners at the end of the project life (KLC 2010b).
The process leading to the signing of the Heads of Agreement clearly departs from the principle of IFPIC in important respects. Traditional Owner consent was not given freely, because it was given under the threat of compulsory acquisition, within time frames that were unduly and severely truncated, and in the context of a lack of any continued funding for the TONC to meet or for the KLC to provide support for Traditional Owners after 31 March 2009 (or, later, after 15 April 2009). It was only partially informed, because while the TONC did have access to a range of information and advice, it did not have access to critical information regarding the proposed LNG Precinct, particularly regarding potential environmental impacts. During the meetings leading to the signing of the Heads of Agreement, Traditional Owners and the KLC frequently brought to the attention of Woodside and the State the limited information available to them, including the specific location of the Precinct and its layout; detail of its operation including, in particular, use of water resources and any emission of noxious gases; critical aspects of its environmental impact, for instance as a result of dredging; the nature of the workforce and the location of worker accommodation; and the timing of development.

The Heads of Agreement were given detailed and legally-binding expression in a series of agreements concluded between the GJJ, the KLC, the State and Woodside in June 2011.iii Because of constraints of confidentiality it is not possible to discuss Woodside’s role, as lead proponent for the LNG Precinct, in the negotiations surrounding the Heads of Agreement or in the State’s reversal of its policy on Indigenous consent. However Woodside is on the public record as supporting the State’s initiation of the compulsory acquisition process in September 2010. The company stated that compulsory acquisition maintained the opportunity for a negotiated outcome to be secured, while at the same time it would ‘provide a greater deal of certainty for the development’ (AAP 2010). Senior traditional owners believe that the State Government was in fact responding to pressure from Woodside in initiating the compulsory acquisition process. For example Frank Parriman, co-chair of the TONC, stated:

I believe a lot of this stuff was orchestrated by Woodside - my anger is at Woodside more than the Premier. They [Woodside] want this project and they're prepared to do anything to get it. But [Mr Barnett] should have had enough courage to stand up to Woodside and say you do the right thing by Aboriginal people and we'll be right. Instead, he's happy to knock down Aboriginal people - and he knows he's going to get
public support, because it's easy to knock the old blackfella down. He's prepared to take land from us - he's not prepared to stand up to the company (cited in Prior 2010).


Following the signing of the Heads of Agreement, serious and protracted internal conflict, expressed in part through ongoing litigation, emerged within the GJJ native title claim group and between sections of the group and the KLC. This was to have a profound impact on the prospects for ongoing Indigenous political mobilization. A brief history of the GJJ native title claim is essential background to an understanding of this development.

During the 1930s an Aboriginal man, Paddy Roe, and his wife came to live on Jabirr Jabirr country; both were members of other native title groups. Roe was admitted to some cultural knowledge by Jabirr Jabirr elders, but the extent and significance of this knowledge, and the degree to which this knowledge was also passed on to others, is contested. In July 1994 shortly after the passage of the Native Title Act 1993, Roe’s grandson, Joseph Roe, lodged a native title claim over part of what became the GJJ native title claim, with himself as the native title applicant (see below for a discussion of this role). Jabirr Jabirr people opposed this claim on the basis of their exclusion from it, and in October 1995 after mediation facilitated by the KLC they were added to the Goolarabooloo claim (Federal Court of Australia 2011: 33). This claim was re-registered in 1999 as the Goolarabooloo Jabirr Jabirr native title claim, to meet a new registration test required by 1998 amendments to the NTA. Joseph Roe remained as a named applicant, and a second applicant was added. Little occurred to progress the claim over the following decade, but it became the focus of considerable attention as a result of the proposal to establish the LNG Precinct.

The position of named applicant is of considerable significance under the NTA. Named applicants are responsible for directing conduct of the claim, and for giving instructions to the NTRB. A process is provided for a native title claim group to remove named applicants if they exceed their authority or are no longer acting in the interests of the claim group, but unless they are removed, an NTRB is required to take instructions from them, even if consultation with the wider native title group indicates support for an alternative course of action (Federal Court of Australia 2010, 14). On this basis and claiming that his status as a
‘Law Boss’ also conferred on him a central role in decision making in relation to proposed developments on the GJJ claim area, Roe argued that the KLC’s decision to sign the Heads of Agreement against his opposition and on the basis of approval by the majority of people attending the meeting of 14-15 April 2009 was unsound (Federal Court of Australia 2010, 8). Roe initiated action in the Federal Court of Australia in April 2010 to challenge the validity of the meetings in February and April 2009 which authorised the formation of the TONC and the KLC’s signing of the Heads of Agreement and to restrain the KLC from acting on behalf of the GJJ claim group on the native title claim or in negotiations concerning the LNG Precinct. Additional matters came before the Court as a result of the second named applicant’s unwillingness to support Roe’s course of action, and of a decision by a GJJ native title claim group meeting in August 2010 to replace Joseph Roe as a named applicant. The Jabirr Jabirr members of the claim group took the position that Roe was not descended from Jabirr Jabirr ancestors and had not been adopted into the native title group, and so could not be a member of the group (Federal Court of Australia 2011: 31). The Court has found against Roe in these proceedings (Federal Court of Australia 2010, 2011).

It is impossible to overestimate the impact of this conflict and the associated litigation on Indigenous political mobilization around the LNG Precinct. The litigation has consumed extensive resources in terms of money, time, human skills and emotional energy, both for members of the native title claim group and the KLC. These resources could otherwise have been deployed in pursuing positive outcomes from negotiations and from the Strategic Assessment process (see below). The conflict has, according to Executive Director of the KLC, Wayne Bergmann, ‘undermined the power and authority of the KLC to negotiate’ (cited in Barrass 2010). In addition, the conflict has been a major, and at times the only, focal point for media coverage of LNG-related issues. For example when the conflict spilt into the public domain after a claim group meeting in April 2010, it drew scores of reports in print and electronic media. The media’s focus on the conflict makes it difficult to ensure coverage of other issues critical to the achievement of positive outcomes for Indigenous people, and makes it harder to mobilise public and stakeholder support in pursuit of these outcomes.

In addition, in communicating with the GJJ native title claim group the KLC was forced to focus on resolution of matters related to the claim and, in order to have any prospect of achieving a resolution, to avoid discussing the politically-sensitive LNG Precinct. While the KLC continued to work closely with the TONC, this situation seriously hampered its ability to secure mobilization of the wider native title claim group in support of positive outcomes.
from the negotiations and the Strategic Assessment process. Finally, the existence of the conflict has been used by the Government of Western Australia to raise questions regarding the ‘mandate’ of the KLC and the TONC and to justify the initiation of a compulsory acquisition process in September 2010 (Government of Western Australia 2010), which in turn threatens to undermine the Indigenous negotiating position (see below).

The scope for and efficacy of Indigenous political mobilization was also greatly affected by the actions of environmental groups and high-profile individuals opposed to LNG development in the Kimberley. Some larger environmental groups such as the Australian Conservation Foundation and the World Wildlife Fund, while opposing the location of LNG processing on the Kimberley Coast in principle, accepted the right of Traditional Owners to make decisions about proposed developments on their traditional country. Other groups such as the Wilderness Society, and a Broome-based alliance of environmentalists and local tourist operators called ‘Save the Kimberley’, vehemently opposed the location of an LNG Precinct at James Price Point and denied the right of traditional owners to have the final say about development on their traditional country (save the Kimberley 2012a; Wilderness Society 2012a). A number of high-profile individuals including musicians Missy Higgins and John Butler, actor Michael Catton and former Federal Court Judge Murray Wilcox also publicly opposed the development. In Broome, individual opponents regularly posted anti-LNG notices around town; put graffiti on the KLC office; vandalised the KLC Executive Director’s vehicle; and regularly confronted KLC staff and Traditional Owners at public events and in private settings such as shopping centres (Burrell 2010; Laurie 2010).

This opposition, particularly its local component, caused considerable distress to the Aboriginal people involved (Bergmann 2010; Laurie 2010). It also threatened to undermine the legitimacy of their decision to support development of an LNG Precinct, especially as the environmental groups and local opponents failed to acknowledge that coastal Traditional Owner groups had in fact protected sites that were regarded both by themselves and by scientists as considerably more sensitive, environmentally and culturally, than James Price Point (Bergmann 2010). Typical of numerous statements ignoring this fact and questioning the legitimacy of decisions by Traditional Owners is the following by the musician Missy Higgins in a ‘Save the Kimberley’ video clip:
The only people who are saying it [the LNG Precinct] is the right thing to do have dollar signs flashing around their heads. And if that’s your only way of justifying it, then I’m sorry that’s just wrong (cited in Laurie 2010, 35).

What rendered this opposition to the LNG Precinct much more potent from the point of view of the KLC and Jabirr Jabirr people was that these environmental groups and high-profile individuals provided extensive support and encouragement to Joseph Roe, despite the fact that Roe is not opposed to the establishment of an LNG Precinct or to gas development more generally, but only to the specific location proposed for the Precinct. They assisted in financing his legal action, with John Butler, for instance, donating part of ticket sales from his national concert tour in 2010. They provided extensive coverage to and support for Roe’s position on web sites and in the media. For instance Roe appeared on stage with John Butler and Wilcox hosted media events in Sydney, and supported Roe and criticised the KLC on the Australian Broadcasting Corporation’s flagship current affairs program, 4 Corners. Wilcox also provided legal advice (ABC 2010; Burrell 2010; Laurie 2010; Save the Kimberley 2012b). The national leader of the Greens Party, Bob Brown, visited James Price Point with Roe in October 2010, where he ‘planted his feet in the ground’ and vowed to fight the development (McGough 2010).

This support for Roe continues (Save the Kimberley 2012a; Wilderness Society 2012a) even after the Federal Court dismissed his action against the KLC, the GJJ native title claim group voted by a majority of three to one to replace him as a native title applicant, and the Federal Court gave legal effect to this decision (Federal Court of Australia 2011: 19-20, 44).

According to Wayne Bergmann, the environmental groups have engaged in a ‘new paternalism’, seeking to pit the ‘noble savage’ (in the form of Joseph Roe) against the ‘greedy blackfella’ (in the form of the KLC and the Jabirr Jabirr):

This new paternalism underpins the actions of individual green activists ... who have played politics in our communities and helped split native title groups ... “Save the Kimberley” and the Wilderness Society are pretending to champion the Indigenous cause in order to bolster their own positions and credibility ... There are all these people who make throwaway lines about “selling out”. I don’t see any of these people ... knocking on my door and saying, “What can we do about the homeless people in Broome? or the high suicide rates or the people on dialysis machines”’ (cited in Laurie 2010, 36).
Ongoing political mobilisation

The Jabirr Jabirr Traditional Owners and the KLC have continued to mobilise in the defence of the right of Traditional Owners to control development at James Price Point. At one level they engaged in extensive negotiations with the State and with Woodside, seeking to obtain as much control as possible over how the LNG Precinct is developed and operated, to ensure that any negative impacts are minimised and positive opportunities maximised. They have consistently lobbied State and Federal politicians and senior government officials in pursuit of these goals. At another level, they have sought to use the media to maximum effect, for instance to fight against the threat of compulsory acquisition. This is not an easy task, requiring as it does the communication of complex narratives to journalists and their potential audiences, narratives that encompass Indigenous rights, the cultural obligations of Traditional Owners, the native title claim process, protection of the environment, the desire of Traditional Owners to improve their living conditions, compulsory acquisition, State and Federal Government policies, and the actions of environmental groups. The KLC and Traditional Owners have however enjoyed some success gaining, for instance, extensive and often favourable media coverage in response to the WA Premier’s initiation of the compulsory acquisition process in September 2010 (see for example Jones 2010; Murphy and Manning 2010; Taylor 2010).

The KLC and Kimberley Traditional Owners have also sought to use the Strategic Assessment process, briefly outlined earlier, to influence outcomes in relation to LNG development. In particular, the KLC negotiated with the State Government that the KLC would manage the studies required to address the Indigenous components of the Terms of Reference for the Strategic Assessment. It prepared a six-volume Indigenous Impacts Report, which documents in detail the expected cultural, social, and economic impact of an LNG Precinct on Traditional Owners and other affected Indigenous people, and includes numerous recommendations for management arrangements designed to minimise negative impacts and maximise Indigenous opportunities (KLC 2010c). The KLC is using both representations to relevant Government Ministers and senior officials, and the Public Submission process in relation to the Draft Strategic Assessment Report, to press for these recommendations to be the basis for enforceable management arrangements accompanying any Government approval of an LNG Precinct. At the time of writing, the Federal Minister for the Environment had yet
to release his response to the Draft Strategic Assessment Report, and so the final outcome of these ongoing efforts at Indigenous mobilisation remains to be seen.

**Conclusion**

This chapter highlights the opportunities created by recognition of Indigenous rights, the extent of the Indigenous political mobilization required to convert this recognition into control over development on Indigenous lands, and the strength and tenacity of the resistance that Indigenous people encounter from the State, business and opposing political groups in seeking to achieve that control.

In response to the WA State Government’s short-lived policy of accepting the need for Indigenous consent to LNG development in the Kimberley, the KLC and Traditional Owners combined customary law with 'modern' forms of representation, communication and organization to gain a real measure of control over development. As a result a number of Traditional Owner groups were able to decide that development should not occur on their traditional lands. These decisions survived the subsequent policy reversal by the WA Government, and they represent a major achievement for the groups involved and for the other Traditional Owners and the KLC, who supported their decisions. The central role of the KLC in securing the resources to support the TOTF site selection process and in helping Traditional Owners to mobilise around the opportunity provided by the WA Government’s policy commitment to Indigenous consent, highlights the absolutely central role of Indigenous political organization. The role of the TOTF in supporting individual Traditional Owner groups emphasises the importance of Indigenous political unity.

The forms of political mobilization used by Kimberley Aboriginal people emphasised use of state-sponsored planning, impact assessment and regulatory processes, and also relied largely on provision of government funding. This stands in contrast to forms of mobilisation involving direct opposing state and developer plans and decisions, and in some cases involving violence, described for example by McNeish in this volume in relation to Bolivia (see also Evans et al. 2002; Oxfam America 2009). Kimberley Aboriginal people avoided the costs, including death and injury, often associated with direct confrontation with the state, while at the same time gaining substantial control over development and securing a share of its benefits. In addition, given the remoteness, size and sparse Aboriginal population of the
Kimberley region, it would have been difficult for the KLC to support traditional owner mobilisation in the absence of external funding. On the other hand reliance on state funding creates a crucial vulnerability, because there is always the possibility that the state may, as WA did in October 2008, refuse to renew funding and so seriously undermine continued political mobilisation. It is also the case that regulatory regimes can create obstacles as well as opportunities for Indigenous political mobilisation, as illustrated by Western Australia’s use of compulsory acquisition powers to pressure the GJJ into negotiating an agreement for the LNG Precinct.

More broadly, events since the change in government in WA in September 2008 emphasise the fragility of government policy commitments and the strength of the forces that can mobilise to resist Indigenous control over development. Faced with compulsory acquisition, serious time pressures and limited information, the GJJ native title claim group decided to sign an in-principle agreement that provided their consent for an LNG Precinct on their traditional country and offered them, and Kimberley Aboriginal people, significant benefits and an ongoing role in the planning and management of the LNG Precinct. Their decision caused division within the GJJ native title group, and was met with widespread resistance from environmental and other groups opposed to LNG development. The combination of the two created formidable problems for the KLC and the Jabirr Jabirr Traditional Owners in continuing to mobilise around ongoing negotiations with the State Government and commercial proponents. The KLC and the Traditional Owners continue to use the means they have available, including the media, political lobbying, and the regulatory avenues provided by the Strategic Assessment process to pursue their goal of ensuring Traditional Owner control of development on Indigenous land. Whatever the eventual outcome, the difficulty of achieving this goal, despite the growing international recognition of Indigenous right, is all too clear. A final point is that the complexity of the political forces that mobilised around the LNG Precinct proposal, and the divisions that emerged among Indigenous people, illustrates McNeish’s point (this volume) regarding the contrasting, overlapping and at times conflicting demands and interests that surround Indigenous resource contestation.
## Appendix 1: Explanation of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>GJJ</td>
<td>Gollarabooloo Jabirr Jabirr Native Title Claim Group, the entity representing native title claimants for the area of the proposed Kimberley LNG Precinct at James Price Point.</td>
</tr>
<tr>
<td>IFPIC</td>
<td>The principle of Indigenous Free Prior Informed Consent, which asserts that Indigenous people should be able to determine whether and in what form development should occur on their ancestral lands, without duress, in possession of relevant information regarding the proposed development, and in advance of any actions by state authorities or developers.</td>
</tr>
<tr>
<td>KLC</td>
<td>Kimberley Land Council, a grass roots organisation representing Kimberley Aboriginal established in 1979, and exercising statutory functions as a Native Title Representative Body under the <em>NTA</em>.</td>
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<tr>
<td>LNG</td>
<td>Liquefied Natural Gas, natural gas that has been liquefied at very low temperature to enable its transport by sea</td>
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<tr>
<td>NDT</td>
<td>Northern Development Taskforce, body established by the Government of Western Australia to recommend a site for a single common user LNG facility on the Kimberley coast.</td>
</tr>
<tr>
<td>NTA</td>
<td><em>Native Title Act 1993</em>, Australian Federal legislation that provides for the recognition of Indigenous rights in land that survive the process of colonisation, and confers a ‘right to negotiate’ on native title claimants and holders in relation to proposed developments.</td>
</tr>
<tr>
<td>NTRB</td>
<td>Native Title Representative Body, a legal entity responsible for assisting Indigenous Australians to establish and exercise native title rights under the <em>NTA</em>.</td>
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<tr>
<td>TONC</td>
<td>Traditional Owner Negotiating Committee formed in February 2008 to represent the Goolarabooloo / Jabirr Jabirr native title claim group in negotiations with WA and Woodside regarding the proposed LNG Precinct at James Price Point.</td>
</tr>
<tr>
<td>ToR</td>
<td>Terms of Reference for the joint WA and Australian Government Strategic Assessments of the proposed Kimberley LNG Precinct under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 and WA Environmental Protection Act 1986.</td>
</tr>
<tr>
<td>TOTF</td>
<td>Traditional Owner Task Force, the representative body established by the KLC on the instructions of Kimberley cultural leaders to ensure that the site selection process for a Kimberley LNG Precinct reflected Kimberley cultural values and the principle of IFPIC.</td>
</tr>
<tr>
<td>TOTF (4)</td>
<td>TOTF representing the four native title groups which still had potential LNG Precinct sites under consideration after withdrawal of WA Liberal Government support for the site selection process in September 2008.</td>
</tr>
<tr>
<td>WA</td>
<td>The State of Western Australia</td>
</tr>
</tbody>
</table>
References


Oxfam America (2009) Mining conflicts in Peru: Condition Critical, Boston, MA.: Oxfam America MA.


1 The term ‘traditional owners’ is used in Australia to describe those Indigenous people who have primary affiliations with, and responsibility for, areas of land and water and the cultural and spiritual sites they contain.

2 The unity of land, sea, sites, knowledge, law, culture and people is often expressed by Kimberley (and other) Aboriginal people through the use of a single English word, ‘country’, to refer to all of them.

3 This section of the paper draws on relevant parts of a KLC Aboriginal Social Impact Assessment Report, which is publicly available (KLC 2010a). That Report drew, in turn, on a confidential report to the KLC regarding Traditional Owner involvement in the LNG Precinct site selection process: Kim Doohan and Ciaran O’Faircheallaigh, ‘Hydrocarbon Processing in the Kimberley Region: Laying the Foundations for an Aboriginal Social Impact Assessment’, Broome, December 2008. Any confidential information contained in relevant sections of this latter report are not included here.

4 Cases where it required several years to reach key terms agreement in ILUA negotiations include the Argyle Diamonds Ltd ILUA (Western Australia) and the Western Cape Communities Co-existence Agreement (Queensland).

5 This account of events leading to the KLC’s signing of the LNG Precinct ‘Heads of Agreement’ is based on a publicly available report prepared by the author for the KLC: KLC 2010b.

6 It is rare for such agreements to be publicly available, but they are in this case (State of Western Australia et al 2011a; State of Western Australia et al 2011b; State of Western Australia and Goolarabooloo Jabirr Jabirr Peoples 2011).

7 For a specific illustration of the extent of resources the KLC has had to devote to resolution of the claim issues, see for example the Federal Court’s summary of preparations for the August 2010 claim group meeting: Federal Court of Australia 2011, 16-20.
Roe expressed this position very clearly, for instance, in an interview with the ABC’s 4 Corners program: ABC 2010.