

‘Law Below the Top Soil’



Walmadany (James Price Point) and the Question of the
Browse Basin Gas Resources of North West Australia

The publishers wishes to advise members of the Kimberley Indigenous communities including the Yawuru, Goolarabooloo and Jabirr Jabirr people that this report contains the images and names of people who have passed away.



Paddy Roe, OAM; Nyikina, Goolarabooloo Elder; Winner of the Western Australian Literary Award, 1985; Shortlist, National Book Council Award 1985; Shortlist NSW Premiers Literary Award 1983; Shortlist National Book Council Award 1983.

“There is, especially in public life, no more beautiful a characteristic than truth. Truth is of its essence liberating; it is possessed of no contrivance or conceit — it provides the only genuine basis for progress. By overturning the lie of *terra nullius*, the notion that at sovereignty the continent was possessed by no one, the High Court not only opened a route to indigenous land, it rang a bell which reminded us that our future could only be found in truth.” Paul J. Keating, Lowitja O’Donoghue Oration, May 31, 2011.

“Song cycles reflect the travels and creative activities of ancestral beings. Through song cycles, the creation stories, ceremonies, laws and rituals are passed between communities. The area covered by the Lurujarri Heritage Trail incorporates a vital segment of a wider mythology. Any adverse effect on the integrity of the area will have far reaching effects on Aboriginal people throughout the West Kimberley.”

Elizabeth Bradshaw & Rachel Fry, *A Management Report for the Lurujarri Heritage Trail, Broome, Western Australia*, Western Australian Museum, May 1989, p. 7

“Once you break the snake {the dreaming track from One Arm Point to La Grange} in half its gone forever.”

Joseph Roe, ABC 4 Corners, 21 June 2010

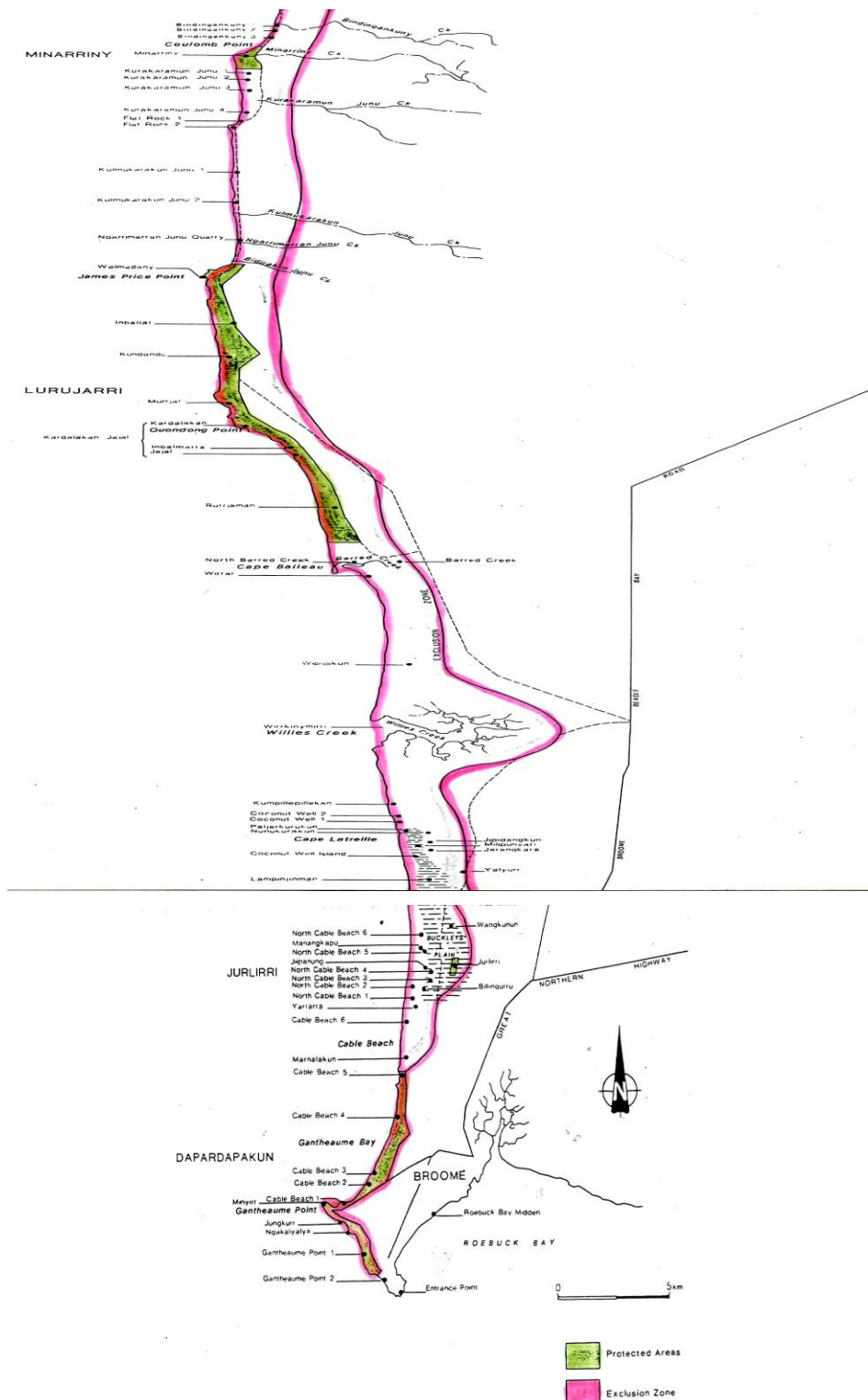


FIGURE 2 : LOCATION OF SURVEY SHOWING EXCLUSION ZONE ,
PROTECTED AREAS AND SITES

The 80 kilometre Kimberley Coast Lurujarri heritage trail put forward by Paddy Roe, incorporating Walmadany (James Price Point), from E. Bradshaw & Rachel Fry, "A Management Report for the Lurujarri Heritage Trail, Broome, Western Australia", Department of Aboriginal Sites, Western Australian Museum, May 1989



The Lurujarri Trail with a very minimalist impression of the port and industrial dimensions of the LNG Liquefaction plant imposed.¹ Note, this shows only the entry point of the 12 pipelines to be located in 14 trenches 2 metres deep in the ocean floor, within a 500 metre corridor stretching out 390 kilometres² and many other details. For more see pp. 75-92

¹ Strategic Assessment Report (SAR), Part 5, pp. 4-39

² SAR, Vol 3, pp. 2-33. Also see SKM, *Benthic Habitat Calculations*, 2011, SAR, Appendix g-2, p. 25

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Foreword

Law Below the Top Soil will stimulate a much needed public debate. It presents a series of findings and recommendations to the Broome and wider Australian community which we fully concur with and are determined to follow through. Explicitly that the proposed James Price Point LNG precinct should never be built and that the Lurujarri Trail should be protected as a model of indigenous tourism for the future.

Former Greens Senator Bob Brown stated the obvious when he said of Walmadany (James Price Point): “This beautiful place, with its historic song lines and deep, ancient indigenous heritage, is also a living ecological treasure that should not be destroyed by a massive gas processing factory.”³ Australians should regard this statement by Brown as not an extremist green view, but a view that would accord with thousands of people who come annually to the Kimberley coast from the southern cities of Australia and internationally and with the expectations of millions of ordinary Australians who care about our environmental and cultural legacy.

Law Below the Top Soil finds that the process of consultation in relation to the proposed LNG liquefaction industrial complex at Walmadany (James Price Point) was fundamentally flawed. This complements the findings of an independent report commissioned by the Kimberley Land Council.⁴ The principle of Indigenous Free Prior Informed Consent (IFPIC) was ignored. It also reinforces the decision of West Australian Supreme Court Chief Justice Martin that the process of compulsorily acquiring land from Goolarabooloo and Jabirr Jabirr traditional owners was unlawful⁵.

The report also finds that there are more efficient and effective ways to harness the precious resources of the North-West than the model which would see an industrial complex built on the pristine Kimberley Coast, potentially the ‘thin edge of the wedge’ for industrialisation of the Kimberley.

In this current resource boom with opportunity to capitalise on buoyant prices, the decision making process to develop country that has indigenous cultural significance should not be rushed. It is in Australia’s interests to clean up the processes of decision making and vested-interest oriented thinking that has driven the process to date. Australia needs to establish a process which honours honest, efficient, trustworthy and transparent mining and processing operations. In many ways our country’s future hinges on what happens next in the North-West. We have a choice between a future with great prosperity that creates a sustainable lifestyle for all Australians or a future where our natural and cultural assets are squandered for short term gain.

It is an imperative for all Australians to become aware of the processes that are driving the development of the North-West, and we consider that this report should stimulate wider interest and understanding of the key issues. Above all, we hope it will provoke a much needed debate than has occurred up to this date about the proposed LNG precinct planned for Walmadany (James Price Point).

We thank the author, Peter Botsman, for his hard work and dedication over the last 2 years.

Save The Kimberley, October 2012

³ 21 November 2010

⁴ KLC, *Traditional Owner Consent and Indigenous Community Consultation: Final Report*, 3 Sept 2010, p12-15

⁵ *McKenzie-v- Minister for Lands* [2011], WASC 335, Martin, CJ, 6 December 2011, CIV 1742 of 2011

Preface

After the United Nations passed the Declaration on the Rights of Indigenous People on 13 Sept 2007, Indigenous Full Prior Informed Consent (IFPIC) (see p. 12)⁶ became the bottom line principle for any economic development of Aboriginal traditional lands. If this is absent then miners, governments and business interests do not have a mandate to proceed. This principle is fundamental for Australians to uphold⁷. In the case of Walmadany (James Price Point) it is clear that the decision to proceed with the LNG precinct did not embody this principle. This conclusion is shared by the Kimberley Land Council's (KLC) own independent consultants⁸.

Some of the questions that drove the research were: was the process of developing the project legitimate? What should the role of Indigenous political organisations be in relation to representing traditional owner's rights and interests? What are the implications of failure to adhere to IFPIC for the project itself? What does failure to adhere to the principles of IFPIC say about the function of native title law in Australia? Are there viable alternatives to the project going ahead? How do we reconcile the national interest with Indigenous economic, social and cultural rights? What does Australia lose when IFPIC principle is not adhered to? Is compromising IFPIC principles the only way that Australian Aboriginal peoples can gain access to land, royalties and capital?

This foundation principle that IFPIC must be adhered to is clearly pitted against what has been referred to as the 'mining uber alles' (mining over all else)⁹ approach. However, it should be noted that the report is not anti-mining or anti economic development. The author recognises that where IFPIC is upheld, Aboriginal people can gain tremendous benefits from participating in the full dimensions of resources development including ownership, management of production, workforce participation and profit sharing. The author has had a direct role in such developments through his work with Ngarda Civil and Mining – the outstanding Aboriginal company of the Pilbara. It is also recognised that the natural resources of the Browse Basin are precious assets that will benefit all Australians, and the world, over coming decades. Adhering to IFPIC and adhering to best practice economic development are complementary to each other. The way Australia develops its precious finite natural resources must similarly involve a rigorous process, with wide ranging, impartial and considered debate of all of the technical options, irrespective of economic interests. The public needs to be provided with a clear view and understanding of this process.

Peter Botsman, B.A. (Hons), Dip. Ed, M.Phil, Ph.d.

⁶ Anotella-Iulia Motoc & The Tebtebba Foundation, **Preliminary Working Paper on the Principle of Free, Prior Informed Consent of Indigenous Peoples in relation to the Development Affecting their lands and Natural Resources that would serve as a framework for the drafting of a Legal Commentary by the Working Group on this Concept** U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), and UN Permanent Forum on **Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples** U.N. Doc (2005) (advance unedited version)

⁷ Ibid.

⁸ **Traditional Owner Consent and Indigenous Community Consultation: Final Report**, 3 Sept 2010, KLC, Prepared by Ciaran O'Faircheallaigh & Justine Twomey, pp. 12-15

⁹ Robert Duffield, **Rogue Bull The Story of Lang Hancock King of the Pilbara**, Fontana Collins, 1979, p. 21

Findings

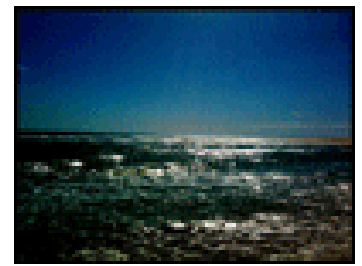
1. For overwhelming economic, social, cultural and environmental reasons the LNG precinct proposed for Walmadany (James Price Point) should not be built. The drivers to complete the LNG Precinct at Walmadany (James Price Point) are narrow: (1) State revenues and an ongoing push to industrialise the Kimberley (2) Woodside Petroleum's potential for increased revenue (3) payments and benefits for the Indigenous community. These are not sufficient to (1) destroy the significant traditional cultural heritage of the area (2) to destroy a pristine and precious coastal environment (3) and to fundamentally undermine the people-centred tourist and cultural economy of the Broome region. Furthermore the hasty processing of the Browse resources will result in diminished revenue and an over-expenditure on infrastructure. In sum, such a project is against the national interest.
2. The Lurujarri Trail — the magic 80 kilometre stretch from Broome's Roebuck Bay Caravan Park, (spanning Gantheaume Pt/Entrance Pt through Daparapakun, Jurlarri, Lurujarri and Minarriny to north of Coulomb Pt), to Bindjankuny — should be preserved in a pristine state forever in accordance with the wishes of the traditional law holders and custodians who know the law and spirit of the land.
3. The Browse Basin gas resources should be distributed by a pipeline to the Burrup Peninsula LNG plant or, if this involves too long a timeline for the gas lessees, then by floating gas liquefaction. The 'use or lose' provisions engineered to fast track the Walmadany (James Price Point) development need to be the subject of a major parliamentary inquiry.
4. All Australian economic development on Aboriginal land needs to be in accordance with the principle of Indigenous Free Prior Informed Consent (IFPIC). The threat of compulsory acquisition of the Walmadany lands and the formal bureaucratic methods of the Native Title process that took place in relation to it need to be reviewed in the light of IFPIC. In short, Australia needs to bring its laws and processes into line with the principles of IFPIC.
5. Traditional Indigenous decision-making is best practice decision making. Decisions are made that are strong, binding and valued. Traditional processes do not occur by majority votes or participation in committees or through political representatives who can work within mainstream decision-making or negotiating frameworks according to a



“For over-whelming economic, social, cultural and environmental reasons the LNG precinct proposed for Walmadany (James Price Point) should not be built.”

timeline. Decisions are made by ‘men and women of high degree’ who have a direct knowledge and expertise of the matters to be decided upon. The decisions of the leaders take time and are then endorsed by consensus as reflected in the *liyarn* of the customary group. Without these ingredients there can be no consent on matters as important as the status of lands and estates. Aboriginal people, or any other people from outside areas have no bearing or right to determine decisions in such a forum.

6. There will be some who view these findings as anti-progressive and anti-development. In fact they are the basis for a more enlightened economic development process. Australia must recognise that destroying the environment is not progress and pursuing the fastest dollar possible is not sound economic development.
7. The hardship and plight of Kimberley Indigenous peoples is well understood. The need to celebrate and practise traditional law and culture as well as participate in the best of the mainstream world is the goal of all Indigenous people supported by all honourable Australians. The package of economic and social benefits negotiated by the KLC on behalf of the Jabirr Jabirr and other Kimberley Indigenous people was a step forward from the travesty of royalty payments in the Pilbara. There will be other opportunities to improve on these developments and to improve on this model, and to improve on it further.
8. Broome and the Kimberley have resisted the dictates of crass commercialism and development at all costs. Broome is the place where the White Australia Policy had only minimal effects on the shape and fabric of the people behind the famous fence that divided the European bosses from the greater community. The behind-the-fence Broome culture has created a wonderful spirit and people who know how to think in ten different cultural ways. This unique quality does not need just to be celebrated in the famous festivals of Broome. It needs to be a foundation for economic, social and cultural development of the region. Miners, economic developers and politicians would do better if they worked together with the people who have made the region so special. If they do so they are sure to have success and to bring wellbeing and prosperity to the region, Australia and the world.



“Broome and the Kimberley have resisted well the dictates of crass commercialism and development at all costs. Broome is the place where the white Australia policy had only minimal effects. It is a place where people know how to think ten different cultural ways. This unique quality does not need just to be celebrated in the famous festivals of Broome. It needs to be a foundation for economic, social and cultural development.”

The Principle of Indigenous Free Prior Informed Consent (IFPIC)

United Nations Declaration on the Rights of Indigenous Peoples
Adopted by General Assembly Resolution 61/295 on 13 September 2007

Article 32

- 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.**
- 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.**
- 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.**

Upholding IFPIC requires following a number of protocols that have been developed over time that were well expressed as follows:

“The principle of IFPIC requires that Indigenous people should have the right, free from duress and in possession of full information regarding proposed developments on their ancestral lands, to provide or withhold their consent to those developments prior to any authorisation of development activity by state authorities or developers.

For this requirement to be given practical effect, decision making processes must:

1. Allow Indigenous people to make decisions in their own time, in their own ways, in languages of their choosing, subject to their own norms and customary laws, and using representative institutions which they determine are entitled to express consent on behalf of the affected Indigenous peoples or communities.
2. Fully inform Indigenous people so that their response to a development proposal is meaningful. Information in relation to any proposed project or activity should include:

 ⌘ Its nature, size, pace, reversibility and scope;

 ⌘ The reasons or purposes for it;

 ⌘ Its duration;

 ⌘ The locality of areas that will be affected;

 ⌘ A preliminary assessment of its likely economic, social, cultural and environmental impact;

 ⌘ Personnel likely to be involved in the execution of the proposed project or activity;

 ⌘ Procedures that the project or activity may entail.



Indigenous people must have available to them relevant expert advice to help them interpret technical and other information. Information should be in a form that is accessible and understandable, and the process of informing Indigenous decision makers must be culturally appropriate.

3. Ensure that consent is sought sufficiently in advance of the relevant decision to allow Indigenous people's own consultation and decision making process to occur;

4. Ensure that Indigenous decision making processes and Indigenous people involved in these processes are free from coercion, manipulation, or inappropriate pressure.¹⁰

Free, prior and informed consent is both:

統 procedural i.e. the process of obtaining consent must sufficiently inform indigenous peoples such that any final decision made by them is made in full knowledge of the consequences of that decision; and

統 substantive i.e. indigenous people may either grant or not grant consent.”¹¹

¹⁰ UNDESA (United Nations Department of Economic and Social Affairs) 2004, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practice*; UNDESA, New York. PFII/2004/WS.2/8; UNESCO (United Nations Economic and Social Council) 2004a, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur*, UNESCO, New York. E/CN.4/Sub.2/2004/30; UNESCO 2004b, *Standard Setting: Preliminary working paper on the principle, of free, prior and informed consent of Indigenous peoples*, UNESCO, New York E/CN.4/Sub.2/AC.4/2004/4; UNESCO 2005, *Report of the International Workshop in Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UNESCO, New York. E/C.19/2005/3.

¹¹ KLC, **Traditional Owner Consent and Indigenous Community Consultation: Final Report**, 3 Sept 2010, pp. 12-15

Introduction: “An Unremarkable Place”

COLIN BARNETT, WA PREMIER: When I used the word unremarkable, I am making the point that this is not the spectacular Kimberley coast that you see in picture postcards.

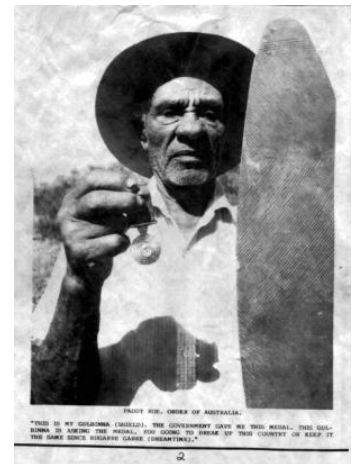
GEOFFREY COUSINS: The only thing unremarkable about that comment is the intelligence of the person who made it.

ABC Radio, 8 Oct 2010

One of the most contentious aspects of the current drive to create an LPG gas precinct at James Price Point, some 40kms north of Broome, is Premier Colin Barnett’s assertion that the site is an “unremarkable” piece of the Western Australian coast.

For the tens of thousands of tourists who come to the region such a proposition is absurd. On anybody’s terms, even those who know nothing of Aboriginal culture, the Kimberley coast is a superb environment. For the multi-cultural residents of Broome the area has been a place to fish and explore since the *bugarrigarra* (dreamtime). Through their blood and cultural ties with the Aboriginal people of the Kimberley, the traditional families of Broome also feel passionately about maintaining the value system that comes from the lands¹².

Far from being “an unremarkable place”, the area earmarked for the gas precinct is a site of much significance for the first nations of the Kimberley. James Prices Point is known as Walmadany. It is an important place in the traditional songlines and each year many people come to the area to travel the Lurujarri heritage trail with traditional custodians, to learn more about the ancient culture of the area. In his book *Reading the Country* with Stephen Muecke, the Nyikina Goolarabooloo elder Paddy Roe started to create a corpus of knowledge for his children and the wider community so that they could appreciate the nature of the land and coast *where the sun goes down*. In 1990 he received the Medal of the Order of Australia. In the photograph of Mr. Roe above, with his Order of Australia medal, he might well be looking into the future inquiring of Colin Barnett, Martin Ferguson and those who are making decisions about his lands: “This is my Gulbinna (shield). The government gave me this medal. This Gulbinna is asking



the medal, you going to break up this country or keep it the same since *Bugarre Garre* (Dreamtime).”¹³ (sic)

Archaeologists Elizabeth Bradshaw and Rachel Fry conducted a major investigation of the coast and reported in 1988 to the Western Australian Museum: “The principal finding of this investigation was that the entire coastal strip {from Bindjankun in the north to Roebuck Bay Caravan Park in the south} ..has a high density of Aboriginal sites of great significance.”¹⁴ They were concerned about the impact of tourism on the precious coastal dreaming trail and they highlighted the area from Cape Baillieu to Walmadany (James Price Point) as of particular importance and in need of protection. That this report was ignored by the Premier, Woodside and other representative organisations is an indication of the shallow nature of the inquiries they have made into the heritage value of the area.

Paddy Roe’s children, grandchildren and other extended family members follow his lead in looking after their country. They combine traditional culture with the best of mainstream society to create an ongoing appreciation of the culture and heritage of the area¹⁵.

Were the Aboriginal custodians of the area fully consulted about the nature of the James Price Point LPG precinct and did they give their full consent to the proposal? Under Australian law the native title representative body for negotiations about land matters is the Kimberley Land Council. But within Aboriginal law men and women of high degree are not lawyers, holders of certificates or pieces of paper or people on committees. They are people who embody the land in their lives, customs and presence. These are the people who must make decisions about what happens to the lands they embody. As former Federal Court Judge Murray Wilcox has concluded: “Although it’s been claimed that the local traditional owners wished to, or support it, when you analyse what really happened, they have not so decided.”¹⁶

From the start Joseph Roe, Paddy Roe’s grandson, has made it clear where he stands: “If you come and damage my country and my culture, get ready for a fight. I’m not going to stand here while you people roll me backwards



“Paddy Roe’s children, grandchildren and other extended family members have continued to follow his lead in looking after their country. They have combined in the best way they could the traditional culture with the best of mainstream society to create an ongoing appreciation of the culture and heritage of the area. So this throws Premier Barnett’s “unremarkable” statement into stark relief.”

¹³ This is the quote below Paddy Roe’s picture above in which he is holding his Order of Australia medal and his Gulbinna (shield) in 1990.

¹⁴ E. Bradshaw & Rachel Fry, “A Management Report for the Lurujarri Heritage Trail, Broome, Western Australia”, Department of Aboriginal Sites, Western Australian Museum, May 1989, p. 1

¹⁵ Goolarabooloo Lurujarri Dreaming Trail, www.goolarabooloo.org.au

¹⁶ SBS News, 10 Feb 2010

and forwards like the tide, in and out. I'm going to stand up now and swim against the current.”¹⁷

But the larger question is: how did the process come to create such division? Perhaps Joseph Roe's position is best reflected in the Nulungu Reconciliation Lecture presented by June Oscar, when she noted: “Not long after the Mabo decision, the Kimberley Land Council convened a meeting on Bunuba country to talk about native title. After listening to the KLC's lawyer talk about the Native Title Act and process of making a native title claim, the old man asked quietly, “Why do we have to go to court to prove this is our country? It is the government that must prove to us. We never gave up our country.”¹⁸

Why were Roe, and the other traditional owners who feel so passionately about these issues, marginalised by the process of locating an LNG processing plant in the Kimberley? There are no easy answers about such questions. However, at the very least the full dimensions of Aboriginal custodianship and consultation with traditional owners must be allowed to emerge if Australia is to develop as a civilised country. That is what this report is all about. But it is also about the use of the precious energy resources of the Browse Basin. These resources are the birthright of all Australians. Using them well will put Australia and the world on the road to a strong and sustainable economic future. Using them impetuously will not only destroy any trust by Aboriginal first nations but will also, at the very least, create another environmental and economic catastrophe for us all.



“...the full dimensions of Aboriginal custodianship and consulting with traditional owners must be allowed to emerge if Australia is to develop as a civilised country.”

¹⁷ ABC News, 10 Feb, 2010

¹⁸ June Oscar, “Bunuba Sovereignty Within Two Worlds”, Nulungu Reconciliation Lecture, University of Notre Dame Australia, Broome Campus, 18 August 2011, pp6-7.

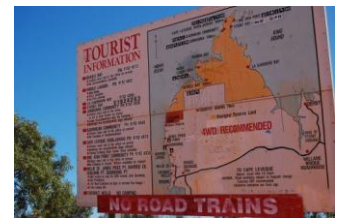
***Representing Aboriginal Rights:
Traditional Custodians & Law, Native
Title Law & Elected/Appointed
Representatives***

“Just like my family group
my family group—
'cos er—
see the top, top soil—
my family group
from Broome to *Minariny*—
that's the thing I gotta look after—
but the top soil is belongs to ANYbody can
walk—
walk around, camp, ANYwhere, we can't tell—
im he got no right to be there—
if he got right to camp because the top soil is
belongs to him—
but the bottom, the bottom soil, the bottom soil
that's belongs to my family, family
trustees, family group—
family trustees—

We never stop it, we not goin' to stop anybody
from goin'. in—
but, long as they ask, anything there? eer, if
they want to dig a hole or something there
well they must ask, you know, we gotta
find out, we only got few things—
what was left over from old people too, we gotta
look after those things—
I gotta look after 'em NOW—
but the childrens, then I gotta, when I go that's
all belong to the children—
my grandsons, daughters, grandson, grand, well
my family group—
my family group—
THEY gotta look after 'im—“

Paddy Roe. **Children's Country**. as told to Stephen Muecke,
1985.

Of all the places to establish an LNG plant, it seems
unbelievable that the WA government, Woodside Petroleum and
its partners and the Kimberley Land Council would pick
Walmadany (James Price Point). It would be like deciding to
build a power plant in Hyde Park, Sydney or demolishing a
cathedral in one of our major cities in order to build a piece of
commercial infrastructure. There are many sacred places in
Aboriginal law which are secret and unknown to mainstream
Australians, but in the case of Walmadany (James Price Point)
an extraordinary effort was made by a unique individual, Paddy



**Paddy Roe's
Documentation of the
Heritage of Walmadany
(James Price Point)**

**1983 Gularabulu:
Stories from the West
Kimberley** by Paddy Roe
published by Fremantle
Arts Press

**1984 Reading the
Country** by Paddy Roe,
Stephen Muecke & Krim
Benterrak published by
Fremantle Arts Press

**1980s Lurujarri Heritage
Trail** inaugurated.

**1989 Elizabeth Bradshaw
and Rachel Fry, A
Management Report for
the Lurujarri Heritage
Trail, Broome**

**1990 Paddy Roe (OAM)
Medal of the Order of
Australia**

27 June 1994
Goolarabooloo native title
claim (WC 94/4) filed
over an area that included
Broome and Waterbank
Station (Goolarabooloo
#1)

Nov 1994 Goolarabooloo
#1 amended Joseph Roe
becomes applicant on
behalf of Goolarabooloo
people.

Roe, to inform and involve mainstream Australian culture and society in appreciating the area and its significance. Since Roe began his efforts there has been a large body of scientific and heritage papers that comprehensively document the special qualities of the place.

In the passage at the front of this chapter, captured and transcribed meticulously by Stephen Muecke in 1985, Paddy Roe talks about the way he saw the rights of all Australians and the special rights and obligations of Aboriginal Australians in relation to Walmadany (James Prices Point). It is a predictably generous view of an Aboriginal traditional custodian: ‘Yes, anyone can walk on the top level of the land. But it is the obligation of the Aboriginal man or woman of high degree to understand the deep law of the land below the top soil and to protect it’. For Paddy Roe, inaugurating the Lurujarri Trail in the later 1970s was a way of establishing a church or national park that would protect the lands. Everyone was free to visit the lands but the traditional custodians had to protect the deep knowledge of the area. Uniquely Paddy Roe also enlisted the best of European commerce, law and culture to help him preserve the area. This was his obligation to the law that had been passed on to him. It was a rather beautiful philosophy of how all Australians can work together for common goals.

The 4 Corners exposé on the 21 June 2010 gave us some clues as to the way Paddy Roe worked. Showing footage of anthropologist Nicholas Green, it documented Roe’s special relationship with Walmadany (James Price Point). The books Paddy Roe co-authored with Stephen Muecke presented to the mainstream world the basis on which law and culture had been passed down to him, his wife and his daughter, in a way that people with no knowledge of Aboriginal law could understand. This was also described by Bradshaw and Fry in 1989 as follows: “The principal traditional custodian for a large part of this country is a Njikana (sic) man {Paddy Roe} from Roebuck Plains. As a young man this custodian was initiated into the law of the coastal people enabling him to gain knowledge of the country of the neighbouring groups at a time when their people were being decimated. In this way the traditional owner attained custodianship over a large area, and an extensive knowledge of country beyond this”.¹⁹ It should be noted that Paddy Roe and his family’s status as the principal custodians of the area were never in dispute. Roe was a celebrated individual in mainstream Australian society as well as amongst the traditional communities of the Kimberley.

The footage shown on 4 Corners displayed Roe’s intricate strategy to enlist the then property and commercial developer of Broome, Lord Mc Alpine, to carefully preserve the heritage of the area.



31 March 1995 Second Goolarabooloo claim (WC 95/10) over Coulomb Point Nature Reserve to the north of Goolarabooloo No 1.

7 October 1995 Goolarabooloo#1 amended to include Jabirr Jabirr people

2 May 1996 Goolarabooloo #2 amended to include Jabirr Jabirr people.

2 August 1999 Joseph Roe and Cyril Shaw authorised as Goolarabooloo and Jabirr Jabirr applicants for Goolarabooloo #1 and #2

October 1999 Federal Court combines Goolarabooloo #1 and #2

27 Oct 2008 KLC write letter to Joseph Roe raising the question of whether he has a ‘native title interest’.

¹⁹ E. Bradshaw and R. Fry, op cit., p. 10

“DEBBIE WHITMONT: It was Paddy Roe who buried the Jabirr Jabirr elders and their leader Walmadan.

JOSEPH ROE: We got about four here but one of them four is old man Walmadan, the boss for this country, he's here too, he's buried here.

NICHOLAS GREEN: Paddy Roe buried him on a sand dune at James Price Point. I was there last year and one of his leg bones had been exposed by the wind, and where that old man is buried and has laid since the 1930s is in, or very close to, the proposed gas hub site.

PADDY ROE (archival): That's why this is why this heritage trail I got. You know I was thinking about how we can come together and this is the only way we can come together to look after the country.

DEBBIE WHITMONT: Paddy Roe wanted the song cycle, the sung story of the land and its law, which had survived incredibly, through 160 years of white settlement, to be preserved for both black and white people.

He turned to the wealthy and eccentric developer, Lord Alastair McAlpine, to help him.

(Archival footage of Lord Alpine and Paddy walking on the land)

LORD ALPINE: The walking and dreaming trail goes all the way along here behind the dunes, right beyond the point there.

PADDY ROE: Yes, right as far as we can see, up this way, that's right, that's right.

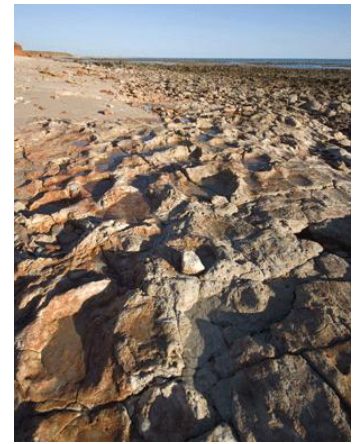
LORD ALPINE: We make a trail for all people your people and European people everybody the tourist and everybody.

PADDY ROE: Yeah, everybody now.

LORD ALPINE: So they can all see it and they can learn what was here before.

PADDY ROE: That's right. What was happening before old people before European ever come to this country. That's true too, that's true too.”²⁰

Not only did Roe document his rightful traditional authority and successfully negotiate and plot the Lurujarri Trail for Lord Mc Alpine and future economic developers of the Broome area, but he also ensured that the most authoritative mainstream heritage institutions including the WA Bicentennial Trails Program and the Department of Aboriginal Studies within the Western Australian Museum also documented the manifold sacred sites, environmental qualities and unique features of the 80km long dreaming track from the Roebuck Bay Caravan Park – (Gantheaume Pt/Entrance Pt through Daparapakun, Jurlarri, Lurujarri and Minarriny to north of Coulomb Pt) – to Bindingankuny.²¹ With scientific diligence Elizabeth Bradshaw and Rachel Fry set out a blueprint for the future in the form of a management strategy of a world class walking track/heritage area that documented middens, significant places within the



A 'mess' of large sauropod footprints in the Broome Sandstone on the Dampier Peninsula, possibly made by a single herd or a procession of animals moving through a narrow thoroughfare. Photo: Steve Salisbury, The University of Queensland.

July 2009

Anthropological evidence by Rubinich and Vachon assert general region of the GJJ and Djabera Djabera claim is Jabirr Jabirr country with some caveats.

December 2009 Jabirr

Jabirr make decision that Goolarabooloo not be incorporated into Jabirr Jabirr society

20 May 2010 Jabirr Jabirr claim (WAD 124/10) filed.

10 June 2010 KLC

formally question Goolarabooloo right to Yawuru and the Goolarabooloo Jabirr Jabirr native title claim

²⁰ Transcript of Archival Footage, ABC 4 Corners, 21 June 2010

²¹ E. Bradshaw & Rachel Fry, op cit, p. 1

ancient song cycle and places of natural value. The vision matched those of the famous walking tracks of New Zealand and would make the Queensland Government's current efforts to plot environmental walking tracks with Indigenous heritage look like amateur affairs²². All this was done 22 years ago. It was a work of vision done in partnership with Paddy Roe that combined a documentation of the active traditional lifestyle and foods, a profound insight into the conservation values and the archaeological qualities of the coastal area. This work has been followed now by an avalanche of studies of the significance of the dinosaur footprints, endangered species and qualities of the environment in the area²³.

How did the major actors in the planning of a Browse Basin LNG plant miss the work that Paddy Roe had done? How did they miss the significant body of scientific and heritage literature about the nature of the coastal region and Walmadany (James Price Point)? The answer to this question goes to the travesty of Australian native title law and the way in which mainstream Aboriginal political representatives are compelled to lie down before the narrow economic agendas that dominate areas like the Pilbara and the Kimberley in Western Australia.
The problem with the day-to-day operation of Australian law is that it ignores the traditional customary law of individual

²² See http://www.derm.qld.gov.au/parks_and_forests/great_walks/

²³ [Australian Heritage Council's final assessment of national heritage values of the West Kimberley](#) (1 August 2011) See also Colbert, E. H. and Merilees, D. 1967. Cretaceous dinosaur footprints from Western Australia. *Journal of the Royal Society of Western Australia*, 50, 21–25., Glauert, L. 1953. Dinosaur footprints near Broome. *The Western Australian Naturalist* 3, 82–83., Long, J. A. 1998. *Dinosaurs of Australia and New Zealand and other animals of the Mesozoic era*. University of New South Wales Press Ltd, Sydney. 188 pp., Page, D. 1998. Stegosaur tracks and the persistence of facies—the Lower Cretaceous of Western Australia. *Geology Today*, 14, 75–77, Siversson, M. 2010. *Preliminary Report upon the Palaeontology (including Dinosaur Footprints) of the Broome Sandstone in the James Price Point Area, Western Australia*. Document 60103995-0000-GE-REP-0009, Browse LNG SEA, prepared for the Department of State Development by AECOM Australia Pty Ltd. January 2010, 14 pp., Siversson, M. 2010. *Report on macro-fossils in intertidal outcrops of the Broome Sandstone, 1.2-2.7 km south of James Price Point (proposed marine infrastructure shore crossing) and 6.2-7.5 km south of James Price Point (proposed southern pipeline shore crossing)*. Record 2010/1. Unpublished report prepared for the Department of State Development. April 2010, 14 pp., Thulborn, R. A. 1990. *Dinosaur tracks*. Chapman and Hall, London. 410 pp., Thulborn, R.A. 1998. Dinosaur tracks at Broome, Western Australia. *Geology Today*, 14, 139., Thulborn, T. 2009. *Dinosaur Tracks of the Broome Sandstone, Dampier Peninsula, Western Australia – interim review*. A report prepared for the Kimberley National Heritage Assessment, Natural & Indigenous Heritage Branch, Australian Federal Department of the Environment, Water, Heritage & the Arts. November 2009, 25 pp. Thulborn, T., Hamley, T. and Foulkes, P. 1994. Preliminary report on sauropod dinosaur tracks in the Broome Sandstone (Lower Cretaceous) of Western Australia. *Gaia* 10, 85–94.

3 August 2010 KLC formally question Goolarabooloo right to Yawuru and the Goolarabooloo Jabirr Jabirr native title claim

21 Dec 2010 Jabirr Jabirr #2 WAD408/10 filed

5 Jan 2011 Goolarabooloo Families native title claim WAD2/2011 made for descendants of Paddy Roe and Mary Pikalili

17 Feb 2011 Federal court orders removal and replacement of Goolarabooloo and Jabirr Jabirr applicant. Rita Augustine, Anthony Watson & Ignatius Paddy replace Joseph Roe.

17 March 2011 Jabirr Jabirr #2 dismissed by Federal Court.

7 Sept 2011 KLC proposes removal of Goolarabooloo people from Goolarabooloo Jabirr Jabirr claim.

30 Sept 2011 submissions to Federal Court claim Goolarabooloo are subgroup of the joint claim and protected by the general claim group.

26 October 2011 Goolarabooloo families seek clarity from KLC offer to go it alone if ???

Aboriginal clan nations. Most Australian institutions, let alone the courts that are encouraged to include them, do not acknowledge or understand Aboriginal customary law as living cultural practices within the European nation state. It takes a special commitment to recognise or even see the units and forms of Australian Aboriginal customary representation.²⁴

This applies particularly to Native Title Law. As June Oscar has argued in relation to the Bunuba peoples' sovereignty: "The Bunuba have yet to have our inherent rights recognised in the western legal system of Australian law. What matters is the constant extinguishment of our rights to our Traditional Country and our complete insecurity to protect and maintain our unique identity as Bunuba people. We have no constitutional recognition or security as sovereign peoples within our Nation."²⁵

Paul Keating has recently argued that this runs counter to the whole intention of the Native Title Act. One of the main functions of the Native Title Act "is to *provide for the recognition and protection of native title*; that is, those rights and interests finding their origin in indigenous law and custom; not finding those rights and interests arising solely or peculiarly from the Act itself." He goes on: "Indeed, it is worth my taking this opportunity to say that as Prime Minister, I had always intended that native title be determined by the common law principles laid out in Mabo (No 2). That is, I saw the Native Title Act giving expression to native title as native title had evolved; in the same organic and dynamic sense that the common law itself had evolved. The common law, derived from European custom and tradition, was never frozen nor did its development stop with Federation."²⁶

Increasingly, an array of traditional owner groups and voices have emerged from 'below' the mainstream organisations that have been formed to represent their interests to assert their customary law and culture. June Oscar recently concluded her Nulungu Reconciliation Lecture: "... there is a future, there are ways that we can achieve self determination without dependency. Recognition of the sovereignty of us as the Bunuba people is essential to this future. Surely it is not too much to ask".²⁷ Chief Billy Wasaga of the Kaurareg people of the Torres Strait expressed it as follows: "We got Native Title on the 23rd May 2001 ...but the work is not done yet. ..When Cook put his flag on Tuidin — Possession Island — and claimed it for the Crown, he did more than take our land; ... when you start a fire the smoke will move in direction of the wind blows. Those

²⁴ See Greg McIntyre, SC, "Aboriginal Customary Law: Can it Be Recognised?", Background Paper 9 for the Australian Law Reform Commission of WA, 2002

²⁵ June Oscar, *ibid*, p. 7

²⁶ Paul Keating, "Time to Revisit Native Title Laws", Lowitja O'Donoghue Oration, May 31, 2011

²⁷ June Oscar, *op cit.*, p. 25

smokes represent a cultural destruction that accumulated throughout this country. Now we must proclaim our {cultural] sovereignty back to us..”²⁸ Kuku Yalanji elder Bennett Walker has argued that in relation to “what the mainstream society calls ‘important matters of state’ it is essential for {Yalanjiwarra} customary laws and practices to be followed” and the Yalanjiwarra people have issued a directory to inform mainstream institutions about the best ways to consult with their people. This involves talking directly to people on country without representative intermediaries such as the prescribed body corporates legislated under Native Title Law and without votes and head men or women speaking for the group²⁹. Similarly in Arnhem Land and in many other Aboriginal clan nations, there have been successive calls for the mainstream law and society to recognise the fundamental basis of traditional law: *ḷuku*, (foundation) *maḍayin* (sacred) and *rom* (proper practice) as ways of working through major issues and decisions.³⁰ Despite this, for most Australian mainstream institutions, Aboriginal customary law is as invisible as it was in 1788.



Even within the formal process of Native Title Determinations the main Aboriginal machinery that is recognised by courts, governments and bureaucracy are artificial institutions that were created by the mainstream law and frequently have no strong relations with customary leaders and/or traditional laws and culture. When Lowitja O’Donoghue brought together heads of the land councils and other eminent Indigenous political leaders from around Australia to negotiate with the Prime Minister over the operation of Native Title, these leaders were never expected or envisioned to be leaders of Aboriginal customary law. They were there to facilitate the recognition of Aboriginal customary laws of the 380 Aboriginal language groups around the country. As Paul Keating said in his recent lecture in her honour, Lowitja had done something no-one else had done before: “Without any position of mandated authority from her people, she caused their mobilisation in what was the first time that Aboriginal people were brought fully and in an equal way to the centre of national executive power. In the 204 year history of the formerly colonised Australia, this had never happened. Never before had the Commonwealth Government of Australia and its Cabinet nor any earlier colonial government laid out a basis of consultation

²⁸ Waubin Richard Akin, “Cultural Sovereignty The Vision and Legacy of Chief Billy Niba Wasaga”, **Australian Prospect**, (Winter 2006), pp. 1-11

²⁹ Yalanjiwarra Jalunji Marrjanga Aboriginal Corporation “Guide for Outside Aboriginal Organisations, Private Organisations, Government Groups and Officials wanting to Consult with the Traditional People of Eastern Kuku Yalanji Country”, Mossman, 2011

³⁰ For example, Aaron Corn & Neparra Gumbula, “Now Balanda Say We Lost Our Land in 1788’: Challenges to the Recognition of Yolngu Law in Contemporary Australia”, in Marcia Langton et al **Honour Among Nations? Treaties and Agreements with Indigenous People**, Melbourne University Press, 2004, pp. 101-117

and negotiation offering full participation to the country's indigenous representatives; and certainly not around such a matter as the country's common law, where something as significant as native title rights could arise from a collection of laws which had themselves developed from European custom and tradition.³¹



Mainstream did not recognise the constellation of leaders that Lowitja O'Donoghue brought together as the representatives of *Aboriginal men and women of high degree* in all Aboriginal communities, but rather as the leaders of Aboriginal Australia in their own right. Mainstream institutions ventured and could see no further than those Aboriginal leaders who came to the cross-roads of contemporary culture to advocate on behalf of traditional Aboriginal customary law. This placed great pressure on the new representatives.³² It was unsustainable expectation. Even in the best of circumstances the lot of an Aboriginal leader representing his or her people's interests is a hard one.³³

Noel Pearson observed this impossible mission from the perspective of someone also caught in the middle, on 11 December 2010: "There are few places harder in the world to stand than in the shoes of Wayne Bergmann, the young Aboriginal director of the Kimberley Land Council. Like all leaders of native people who stand at the crossroads of ancient traditions and modern development, the labourer turned lawyer carries the weight of leadership at a time when the fate of his people is caught on the sharp horns of a dilemma. The responsibility is excruciating, and there is every temptation to capitulate in one easy direction or another."³⁴

However, the unsatisfactory contemporary denouement of Aboriginal leadership had other effects apart from the toll it took on political leaders. The grinding halt in the recognition of Aboriginal customary law that was promised by Mabo and quickly brought to heel in 1998 created another kind of conflict and pressure. So many Aboriginal organisations, elections, representative bodies and agreements hold no sway with Aboriginal communities because they are simply tokens that

³¹ Paul Keating, op. cit, p. 1

³² Noel Pearson said: "People were burned out, I think. We had a very intense period of united Aboriginal leadership, dealing with the federal government on the Native title legislation. And it was extremely intense in '93 and '94. And I think after that, it was really hard. I remember being frustrated that we couldn't get people together again after that, you know. It was really, really hard to sustain that commitment to, um...a united direction and so on, you know, because people had responsibilities back home and so on." Mick Dodson said: "And you can despair, you can feel defeated. You can feel absolutely miserable at times. But you've got to pick yourself up again and have another crack at it, you know. Um...yeah. I mean, tenacity, persistence, staying power — um, they're all sort of other ways of describing courage, I think. And that's what good leaders need." **Positions Vacant**, 4 Corners investigation of Indigenous Leadership., 28 July, 2003

³³ On this see Quentin Beresford, **Rob Riley: An Aboriginal Leader's Quest for Justice**, Aboriginal Studies Press, 2006

³⁴ **The Australian**, 11 Dec 2011

have no significance for Aboriginal people in their day to day lives and in relation to their customary law and culture. The opposite problem to which Pearson refers above is also keenly felt: namely, traditional people and those who take their customary law seriously are overlooked. Too often the laws and knowledge of traditional people are ignored and in the grind of political negotiations the wisdom of men and women of high degree is trampled into the dust.



If we have a two-speed economy we also have a two speed Aboriginal polity – the world of high-speed political negotiations and the world of life and community that goes for the most part uninterrupted by the mainstream political world. In the interstices are many profound dilemmas, judgements and cruel twists of fate.

This is too big a topic to satisfactorily cover in a report like this. But this unresolved conflict between the political process of representing Aboriginal rights in the mainstream and the need to recognise Aboriginal customary law and leaders in grass roots communities is the context in we have to view the events that transpired between 2005 and 2011 in relation to the negotiation of the so-called LNG precinct in the Kimberley region of North West Australia.

Sitting Pretty? The KLC, the Carpenter Government and Inpex

The Kimberley Land Council (KLC) was formed and cut its teeth in a mining dispute in 1979. It was very much a modern day political organisation that took up the issues of traditional people. The Yungngora people of Noonkanbah launched a series of protests against oil exploration drilling on their sacred lands, despite government pressure for it to proceed. The protests were supported by church groups and the union movement, and received international attention. Permission to drill Fitzroy River No 1 was first given by the Under Secretary for Mines, Western Australia, on June 13, 1979. However, physical resistance on Noonkanbah Station and legal delays prevented the drilling. Ultimately, the Western Australian Government took over the organisation of transport for the rig, and on August 29th 1980 also assumed the role of Operator. The Government then transferred the Operator's interest back to Amax three weeks later, and the well drilling operations were completed on November 23, 1980 without further significant incident – and without any oil being found.³⁵

Thirty years after Noonkanbah the relentless search for mineral resources continued to involve the Kimberley Land Council. The Carpenter Labor government had a sympathetic relationship with the Aboriginal leaders of the Kimberly region. The Minister for State Development, Eric Ripper, wanted a close relationship with the key Aboriginal organisation of the Kimberley and had granted traditional owners a veto power over any development proposal on their lands. This was a right taken up in 2005 by the traditional custodians of the Dampier Peninsula, who made it clear to their native title representative body the KLC and Woodside Petroleum that there was no appropriate place on the Dampier Peninsula for an LNG plant. At the same time the Carpenter government had developed a plan to industrialise the Kimberley, and the Browse Basin hydrocarbon province was the key to this development.

Discovered in the 1960s, the Browse Basin was expected to deliver 31 trillion cubic feet of natural gas to the citizens of Western Australia and the world. This on top of other mineral and energy resources including diamonds, iron ore, copper, lead, zinc, silver, nickel, uranium, coal, tin, mineral sands and on-shore petroleum was to be a major impetus for the economic development of the Kimberley.

In August 2005 the Department of Industry and Resources found in its report **Developing the West Kimberley's Resources**³⁶ that what it called a medium growth industrialisation of the



1960-1980 Discovery of the 180,000 sq km Browse Basin, within Australia's North West Shelf hydrocarbon province, holds more than 20 Tcf of discovered gas. The area consists of four sub-basins: Caswell, Barcoo, Scott and Seringapatam.

1990 Dr John Long curator of vertebrate palaeontology at the WA Museum opens up a lost world of plant and meat-eating dinosaurs that once roamed an area from 60km north of Broome at Walmadany (James Price Point) to Crab Creek, 20km south of Broome. (West Australian, 9 Oct 2004)

2005 Woodside and the KLC are told by traditional custodians that there is no place on the coast of the Dampier Peninsula where an LPG plant can be built; Woodside departs

³⁵ Hawke, S and Gallagher, M, **Noonkanbah**, Fremantle Arts Centre Press, 1989 Also see <http://klc.org.au/about/history/>

³⁶ (DIR) Regional Minerals Program, **Developing the West Kimberley's Resources**, August 2005

Kimberley was likely over the next ten to twenty years. It saw a continuation of existing mining projects, the development of the Browse Basin gas through an on-shore processing facility and with a possible extension of the transcontinental pipeline to take the gas to the Eastern States that would also fuel the minerals and energy developments in the West Kimberly, including the mining of bauxite and the manufacture of alumina and several other developments.

The revival of the dream of the North-West as a hub of industry, which had captured politicians' hearts for over a century, was back on the boil. In this view Broome should be WA's capital in the north and was brimming with unexploited opportunities for wealth³⁷. Aboriginal people have seen the proponents of such ideas come and go.

But the Carpenter Government offered something more than just a pipedream. It recommended

- "Further development of relationships between the petroleum and mining industries and companies, and Aboriginal peoples and organisations should be facilitated through early and proactive engagement by proponents and all levels of government with Traditional Owner stakeholders and the Kimberley Land Council to provide a platform for successful project development and a sense of stakeholder ownership.
- Project proponents should plan realistic time-frames for negotiating native title agreements, and should commence discussions as early as possible to address specific issues, establish certainty for all parties and building relationships for the long term.
- Native title negotiations and heritage clearances should be facilitated through cooperation between companies, governments, traditional owner groups and the Kimberley Land Council to ensure that Aboriginal people and organisations have adequate resources and capacity. Native Title Prescribed Bodies Corporate need to be recognised as an emerging between companies, governments, traditional owner groups and the Kimberley Land Council to ensure that Aboriginal people and organisations have adequate resources and capacity. Native Title Prescribed Bodies Corporate need to be recognised as an emerging commercial institutional layer within the Kimberley economy and land administration that needs to be resourced and to function effectively".³⁸

The Carpenter Labor Government wished to cooperate with Aboriginal landholders in the Kimberley. The report detailed the



2005 "Developing the West Kimberley Resources"

recommends medium density industrialisation for the Kimberley plus close and early consultations with Indigenous landowners

2005 Kimberley Appropriate Economics Roundtable Forum,

"Appropriate and sustainable land use works with country, not against it. If we continue to believe that country is central to who we are, how can we possibly treat it badly? The big thing we need to think about first is our attitude to country. All of Australia needs to look deep and long about its attitude to country. We in the Kimberley have the opportunity to start caring for country before too much damage is done. The 'ways of thinking' about country need to be redefined so that we can all build a strong culture that includes recognition and respect for traditional knowledge and rights, and for owners of country. It should be a culture where people are proud to speak up for country, where everyone agrees on the importance of fairness and equity. Traditional land management practices must be used to maintain a balance between the past, the present and the future." Wayne Bergmann, Wunyumbu

³⁷ See Lord Mc Alpine, "From hellhole to town with a future", 8 January 2011 **The West Australian**

³⁸ DIR, op. cit., p. xvii-iii

process of consultation and the necessity of seeking early dialogue with Aboriginal stakeholders. As the Native Title Representative Body for the Kimberley, the KLC became a central intermediary organisation for mining companies and governments.

In July 2007 Kimberley Land Council Executive Director Wayne Bergmann wrote to the then State Development Minister Eric Ripper requesting a resource development plan for the region³⁹. This became the job of the Northern Development Taskforce, which had been formed a month before Bergmann wrote to the Minister. Several studies under the auspices of the Northern Development Taskforce were commissioned. In the Senate Debates on the issue Liberal Senator Michaelia Cash contended that “Minister Ripper was keen to trumpet the terms of reference for the Taskforce but failed to tell the people of Western Australia the special role he had planned for the Kimberley Land Council, including giving them a right of veto over the project. In particular, he failed to tell the people of my state that the then WA Government intended to pay the Kimberley Land Council more than \$7 million for their involvement and advice on a potential site for the project.”⁴⁰

To its credit the Aboriginal native title holder veto power was honoured by the Carpenter Government. In 2005 at a meeting organised by the KLC, Woodside Petroleum met with traditional custodians of the Lurujarri Coast. Woodside asked them for a place on the Kimberley coast where a gas liquefaction plant could be located without disturbing cultural sites. The traditional custodians told them there was no appropriate place for such a plant to be sited on the Dampier Peninsula. They told the KLC and Woodside representatives to go on their way. At this time the KLC and mining companies came to consult with the traditional custodians according to the principle of Indigenous Free Prior Informed Consent. But the boom in the North was gaining pace and industry, government and the native title representative body of the Kimberley were all keen to be part of the action. The focus would come back to the Dampier Peninsula.

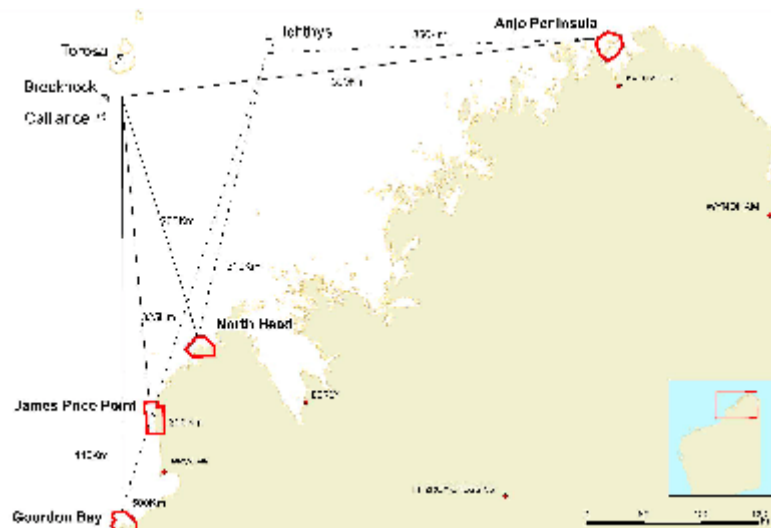
Initially the Northern Taskforce identified nine potential LNG hub sites. Again the Carpenter government kept its word in consulting with Aboriginal organisations. Upon the advice of the KLC the possible sites for an LNG facility were whittled down to four: Anjo Peninsula, North Head, James Price Point and Gourdon Bay. But it may well be asked why, given an earlier refusal, and all the work that had been done to preserve the traditional knowledge and culture of the area by Paddy Roe and his family, could Walmadany (James Price Point) be left on this short list of potential sites?



“The role of the Traditional Owner Task Force was not to make decisions about whether or not development should happen. These decisions were to be taken by the relevant Traditional Owners whose land was being considered.”

³⁹ ABC. 6 July, 2007

⁴⁰ WA Senate Debates 12 Nov 2008)



The KLC described its role in this process as follows:

“In June 2008, the KLC convened the first meeting a Traditional Owner Task Force (TOTF), which was established by the KLC and Traditional Owners to play a part in examining different potential sites. The TOTF was made up of representatives of the native title groups along the Kimberley coast, and Kimberley Aboriginal cultural bosses. Their role was to ensure the TOTF’s business was done in a way that respected Aboriginal law and custom. The role of the TOTF was not to make decisions about whether or not development should happen. These decisions were to be taken by the relevant Traditional Owners whose land was being considered. The role of the TOTF was to make sure that Traditional Owners had all the information they needed to make decisions and to support the Traditional Owners, whatever decision they made. During 2008 the number of potential sites was reduced from about 40 to 11, and then later to 4, and then finally 3. Some of the sites were deemed unsuitable by the State’s experts on technical and/or environmental grounds (for example too far from deep water, or in a rich environment that could not be protected). Some were deemed unsuitable by the Traditional Owners because they decided they were too important from a cultural or environmental point of view and so could not be developed. The KLC supported each decision made by Traditional Owners, whether this was to take a site on their land off the list or to leave it on”.⁴¹

But if this was the case, how could the substantial cultural legacy of the Walmadany (James Price Point) area have been disregarded? How could the Roe family’s substantial cultural and traditional legacy, more open and visible than that of many other traditional areas of the Kimberley, be ignored?

The Carpenter government’s generosity and willingness to fund the KLC as an economic agent in its Kimberley economic development strategy created a conundrum. The question was:

“LNG processing will only go ahead with the fully informed consent of the traditional owners and their substantial economic participation.”

Eric Ripper, Deputy Premier, Minister for State Development, 2008

⁴¹ KLC, Annual Report, 2009, p67

what did this new role of economic agent mean for the KLC's ability to discharge its obligations as the sole native title representative body for the Kimberley? This dilemma became even more pronounced after the election of the Barnett government.

The KLC, like many Aboriginal organisations, was influenced by the doctrine of economic self-reliance and independence that was aggressively pursued by Noel Pearson and other Aboriginal elders on Cape York Peninsula. However, the difference was that on Cape York, very early on Aboriginal leaders had recognised that they needed to differentiate between native title claims and economic and social development. It is significant that the Cape York Land Council was formed eleven years after the Kimberley Land Council and sixteen years after the formation of the Northern Land Council. It had the benefit of learning from the experiences of those that had come before it. Notably, the Cape York leaders made the sensible decision to separate out the functions of Native Title Representative Body and Economic development agency into different organisations.⁴²

Around the Cape York Land Council, Cape York Aboriginal leaders had created Balkanu as an economic development agency, and later, the Cape York Institute as a think tank for developing leading ideas and projects, and several social and health organisations with their own charter and responsibilities. In the Kimberley, the KLC took the economic development mandate into its own operations. This arguably created a range of tensions and a potential entanglement of conflicting obligations and fiduciary duties.⁴³

In 2003 Wayne Bergmann spoke of the problems of running the KLC on a \$4 million budget, handling 21 registered native title applications over an area bigger than several States, and of the need to be in receipt of funds from mining companies to function:

“The mining companies seem to have a view that they do not mind paying as long as they know that, at the end of the day, they will get an outcome—they will have a yes or no decision,



⁴² See Peter Botsman, “Remaking the Cape York Culture, Economy and Society: An Early Insight into Noel and Gerhardt Pearson’s strategies on Cape York Peninsula”, 21 October, 2003 Working Papers Collection.

⁴³ It is notable that on 4 March 2011 Wayne Bergmann resigned his position as CEO of the Kimberley Land Council to become the head of a new organisation the Kimberley Regional Economic Development organisation (KRED) If this organisation had been established in 2008 or earlier and wanted to put a position that the only way for Indigenous people to get ahead in the Kimberley was through industrialisation – then this might have avoided a great deal of controversy. Such an organisation might have also lobbied traditional owners to accept the LNG precinct as the best option for the future of the Kimberley without any possible conflict of interest.

have an agreement or something. It is a bit of a business risk that they factor in. In all the cases that I know of, that has been the procedure. They have started the process, there has been an agreement to negotiate over an agreement and we have managed to stick generally to the time frames. In some cases, we have run over those time frames and the companies have continued to fund us because they could see that it was moving along. The attitude of the companies has changed. They see Indigenous people, making up the larger percentage of the population in the Kimberley, as a valuable resource and they see the need to have good community relations with the local community, being predominantly Indigenous people, and the wider community as well. They are the potential resource to work in the mines and so on. There has been, in my view, an opening of those companies to work more closely with the land council to get the job done.”

44

In 2008 the Carpenter government paid the KLC \$7 million excluding GST and in 2009 the Barnett government provided \$9.15 million to “*meet the costs associated with obtaining consent from registered native title claimants; enabling the development of a benefits sharing model; establishing a decision-making structure amongst Indigenous groups to support negotiations; obtaining the participation, support and cooperation of the claimant group in negotiations; ensuring information about the state government’s objectives and approach relating to the project is conveyed to the Indigenous groups; and furthering intra-Indigenous relationships in relation to the nominated area for locating the LNG processing precinct*”.⁴⁵ (emphasis added)

Without a detailed audit there is no way of determining the various sources of income provided to the KLC over this period. The KLC’s financial statements for the years 2008 & 2009 indicate that grants received for Native Title Representative Body Functions were \$4,674,300 in 2008 and \$5,614,699 in 2009. In addition to this, \$6,125,985 in 2008 and \$11,820,204 was received for non-Native Title Representative Body functions. A further sum of \$2,448,849 in 2008 and \$3,901,150 in 2009 was received for ‘KLC Services’. Unfortunately, in the 2010 Annual Report the grants for Native Title Representative Body Functions and non-Native title Representative Body Functions are lumped and summed together, listed as \$23,750,024 – a forty per cent increase on the previous years.⁴⁶ This further creates an impression of economic development functions and native title representative functions being fused together.

⁴⁴ Hansard, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 11 June 2003, Broome, NT297

⁴⁵ Reply from the Hon. Norman Moore to Question Without Notice No. 149 asked in the Legislative Council on 21 April 2010 by Hon Robin Chapple.

⁴⁶ KLC, Annual Report, 2008/9, 2009/10, Note 2, Financial Statements



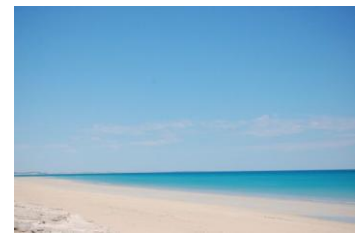
“The mining companies seem to have a view that they do not mind paying as long as they know that, as the end of the day, they will get an outcome-they will have a yes or no decision, have an agreement or something.”

Wayne Bergmann,
2003

The Native Title Act recognises “a need for Aboriginal and Torres Strait Islander organisations to be given the statutory function of organising and presenting native title claims”.⁴⁷ So-called native title representative organisations were to facilitate claims for the determination of native title, and for compensation, or for resolving disagreements and assisting claimants by representing them if so requested. In 1998 the functions of representative bodies were augmented to include certification of applications for native title and Indigenous Land Use Agreements and becoming a party to an Indigenous Land Use Agreement. Seventeen bodies, including the Kimberley Land Council, were recognised. Representative bodies do not have a monopoly on representation of native title holders and claimants but they are the preferred mechanism for government funding to be directed towards claimants. However, it has been consistently observed that ‘resourcing equality’ has been a major problem in the operation of native title representative bodies. Governments have just not been prepared to fund them enough to do their job.⁴⁸

In 2007 the Japanese company Inpex was negotiating with the KLC in relation to its proposed Icthyus LNG project. The proposal was to use South Maret Island for the project’s liquefaction facility. In a period of months the KLC, negotiating for the Uunguu community, turned from opposition to support for drilling on the islands. KLC Executive Director Bergmann said at the time: “It was not like (signing) a normal mining agreement. This agreement was about a strategic location and the use of that land. We’re calling on all players who want to bring gas ashore to come and talk to us.”⁴⁹ The plan was for Inpex to come to an agreement with the KLC and the traditional owners within 18 months. It seems clear that the KLC were pinning their hopes on a substantial economic benefits package for the KLC and its constituency.

By the end of 2007 KLC Executive Director Bergmann argued that the Western Australian government needed to rethink its approach towards Aboriginal disadvantage in the region: “The solution for Aboriginal people will come from Aboriginal people being equals at the table, there needs to be first an attempt by government to empower Aboriginal people to engage with them as equals to determine the way forward.”⁵⁰ The KLC also called on Prime Minister Kevin Rudd to boost investment in Aboriginal education.⁵¹



December 2007

Kimberley Environmental Alliance is formed involving KLC, ACF, Environs Kimberley, WWF "We're trying to find the balance between looking after our culture and environmental values as well as building a capital base to look after our people for the future so that we can do the things that are important to us," Wayne Bergmann. "This is about making sure development is steered in a sensible, responsible direction so that the environment and cultural values of the Kimberley are protected," Paul Gamblin, WWF

⁴⁷ Commonwealth of Australia, *Mabo: The High Court Decision on Native Title* 1993, p. 99

⁴⁸ Australian Human Rights Commission, *Native Title Report*, 2001, Chapter Two: Resourcing Equality, also see the consistent theme of the Native Title Reports 2001-2011.

⁴⁹ **The Australian**, 5 July, 2007

⁵⁰ ABC, 23 Nov 2007

⁵¹ ABC, 30 Nov 2007

In December 2007 the KLC reached an agreement with the Australian Conservation Foundation, Environs Kimberley and the World Wildlife Fund to protect the cultural and environmental significance of the Kimberley when it was negotiating with resources companies. This followed a roundtable discussion on “appropriate economies” at Fitzroy Crossing 11-13 October 2005 but significantly, though focusing on several Indigenous conservation projects, this did not involve the Roe family or the Lurujarri Trail.⁵² Nevertheless, the common approach of the KLC and the environmental groups seemed to have been a positive step forward and it seemed to give the green light to the Inpex option of building an LNG precinct on the Maret Islands. The WA Director General of Industry and Resources and Head of the Northern Development Taskforce, Jim Limerick, observed at the time: “What we are looking for at the end of the day is a site for processing gas which has community support, and the fact that the position statement has come out and shown there is a consistent approach by these important stakeholders is a real step forward.”⁵³



3-7 Dec 2007 KLC visit Woodside in Perth and ask them to come back with a proposal to build an LPG plant in the Kimberley

At the same time as these positive moves were being made, more ominous developments were occurring. The KLC began to directly intervene to bring an LNG processing precinct back to the Dampier Peninsula. It is significant that the KLC Indigenous Report on Traditional Owner Consent and Indigenous Community Consultation that was commissioned as part of the Kimberley LNG Precinct Assessment process began its analysis and timeline of events from Dec 2007.⁵⁴ Yet it fails to even note the fact that the KLC made a direct overture to Woodside to reopen talks “with the traditional owners of One Arm Point, north of Broome, one of several sites suggested as possible locations for an onshore plant to process the Browse Basin resources”.⁵⁵ This was despite the clear view expressed two years earlier by traditional owners that there would be no LNG plant on the Dampier Peninsula. Victoria Laurie documented this, writing: “.. Bergmann introduced a rival player this month by returning to the negotiating table with Woodside, which was emphatically told by traditional owners two years ago that it could not locate a plant on the remote Dampier Peninsula”⁵⁶ Wayne Bergmann was quoted by **The Australian** as saying:

⁵² “Conservation Organisations Welcome Joint Statement with KLC on Gas Development in the Kimberley”, 6 December, 2007 See also **A Cultural and Conservation Economy for Northern Australia** January 2008 A Proof-of-Concept Study Hill, R., Harding, E.K., J, Edwards, D. , O’Dempsey, J., Hill, D., Martin, A., Land and Water Australia, Australian Conservation Foundation.

⁵³ ABC News, 7 December, 2007,

⁵⁴ Traditional Owner Consent and Indigenous Community Consultation Report, op cit., p. 79

⁵⁵ Victoria Laurie, “Kimberley Council meets Woodside on Gas Project”, **The Australian**, 10 December 2007, Petroleum News Net, “Woodside in Talks with WA Land Council”, Dec 10, 2007

⁵⁶ Victoria Laurie, “Kimberley Crunch Time”, **The Australian** 15 December 2007

“The meeting was significant because the same senior leaders who told Woodside to go last time were at last week's meeting”⁵⁷ But there were clearly no members of the Roe family involved in the meeting in which the KLC had flown its delegates to Perth to directly ask Woodside to come back to consider the merits of the Dampier Peninsula as a site for the LNG precinct.



This was the first of a series of controversial initiatives by the KLC that was omitted from the official report into the process of consulting traditional owners⁵⁸. For the fact is that through this one meeting the KLC effectively invited Woodside and the government to establish the LNG plant on the Dampier Peninsula. The question is: on what grounds did the KLC reconvene a meeting with Woodside? How much was select traditional custodians and the KLC acting independently of the wider group? Was it wearing its economic development hat or its native title representative body hat when it reconvened the meeting? It might be argued in the KLC's favour that it was responding to traditional owner representatives but how representative were they of the wider community? Furthermore, the functions and powers of the native title representative body are mandatory and must be performed in a timely manner. “The body's structures and processes must promote satisfactory representation of native title holders and effective consultation with Aboriginal and Torres Strait Islanders living in the area. The body must ensure that the structures and processes operate in a fair manner, *but must give priority to the protection of the interests of native title holders: NTA ss203BA(2)©, 203AI(2), 203B(4)*. The body's decisions must comply with the principles of natural justice, and in particular the avoidance of bias.”⁵⁹

“Our preliminary engagement with Woodside has been very positive, and they have expressed a strong willingness to work closely with the land council and senior people in finding the right way to find a site in the Kimberley, rather than dictating their preferred location.” Wayne Bergmann, 11 December 2007

The KLC was working hard to find a site for the gas hub. It said at the time: “Our preliminary engagement with Woodside has been very positive, and they have expressed a strong willingness to work closely with the land council and senior people in finding the right way to find a site in the Kimberley, rather than dictating their preferred location.”⁶⁰ At the same time KLC Executive member Frank Sebastian signalled a much more aggressive approach: “We've got a voice now and some of the best lawyers in the land. We're gonna use them.”⁶¹

No-one could question the aspiration of the KLC to ensure that Kimberley Indigenous people gained from the mainstream economic development process; however, the pursuit of economic gain, aided and abetted by State and Federal

⁵⁷ Ibid.

⁵⁸ Report on Traditional Owner Consent and Indigenous Community Consultation, op cit.

⁵⁹ *Hicks v Aboriginal Legal Service of Western Australia* [2000], Carr J at [16]-[21]. Bartlett, **Native Title in Australia**, p. 679

⁶⁰ Op cit. Laurie, **The Australian**, 10, Dec 2007, p9

⁶¹ Victoria Laurie, “Oil and Gas groups face Kimberley Title Claim”, **The Australian**, 11 December 2007

Governments as well as private corporations may well be seen as independent of the primary interests and customary law of native title applicants. The problem of having an organisation in which there was no separation between economic development and native title representation was that there were no boundaries for spill-over effects to occur. Furthermore, even looking at the economic development side of the equation, there was no capacity or possibility for the KLC to develop a vision of what an economy that would benefit Aboriginal people would look like. The impression is that the KLC were simply responding to pressures. The other impression that one has of the KLC at this time is that it was conducting consultations with communities that were very much top down rather than places where grass-roots communities could be a part of the planning and development process. This may be a harsh judgement and there is no doubt that this was a function of the complexity of the issues involved as well as the funding that the KLC received, but as later events would show, a very significant number of the Dampier Peninsula Indigenous community members were not on the KLC bus. Moreover, as time went on they felt increasingly outside and hostile to the decision-making process.

Things would not turn out so well. Bergmann and Eric Ripper may have unwittingly created a sense of uncertainty with the Japanese company Inpex. For reasons that are only known within the company, Inpex would later withdraw from its proposal to build an LNG processing plant on South Maret Island and move from Western Australia to Darwin and the Northern Territory. However, the fallout from this decision would create even more pressure for the KLC to get at least one major Browse Gas processing project within its ambit that would provide the basis for economic development funds for the Indigenous community.

The first signs of tensions within the Kimberley community emerged when two prominent traditional custodians, Albert Wiggan and Neil McKenzie, were criticised by the KLC for appearing at a Conservation Council protest against a gas hub on the Maret Islands that had been approved by the KLC.⁶²

At the same time the then WA Labor Government made it clear that the development of a gas hub would depend on approval by the land's indigenous owners.⁶³ Bergmann contended: "Gas development in the Kimberley presents major opportunities and major challenges for Aboriginals. Better than anyone, traditional owners know the beauty and value of the Kimberley environment and their responsibility to protect it and their cultural heritage. At the same time, our responsibilities must also include bringing our people out of poverty. Aboriginal



7 July 2008 Nine WA Sites Identified for LNG Hub: Gourdon Bay; Quondong Point; James Price Point; North Head; Perpendicular Head; Packer Island; Kola Island; Wilson Point; and the Market Islands. (Oil gram News)

14 July 2008 Woodside narrows development options for LNG plant to an onshore facility in the Kimberley region; a facility at Karratha on the Burrup Peninsula, which already hosts the North West Shelf LNG joint venture's infrastructure; and a facility sited on an offshore reef. The company hopes to make a final investment decision on the project in 2010, with first gas production targeted for 2013-2015 (International Gas Report)

⁶² ABC, 6 March 2008

⁶³ **West Australian** 28 March 2008

children born today in WA face life expectancies up to 20 years less than non-indigenous children.”⁶⁴

Later in the month Bergmann said: “In the Kimberley we are pioneering a new way of doing business with mining companies. Our focus is on building economic partnerships that give us greater control and responsibility and mean we don’t rely on government the way we do today.”⁶⁵

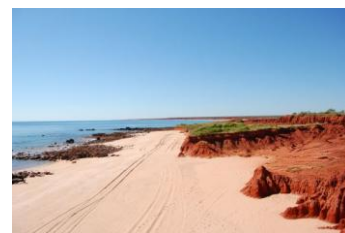
On the 10th September 2008 the KLC maintained that traditional owners were willing to negotiate with the WA and Federal governments and the resource companies on the sites — Gourdon Bay, **James Price Point**, North Head and Anjo Peninsula — before the selection of one or at the most two of them. The KLC were clearly confident, noting Kimberley indigenous people were seeking “multi-billions” in compensation and a community development package. “We have been advised that the Commonwealth can expect to get more than \$100 billion in royalties over the life of the project if the fields are fully developed.”⁶⁶

But in less than a fortnight the KLC world view came tumbling down. Inpex announced that its Ichthys LNG facility would be built in Darwin. The newly elected WA Premier, Colin Barnett, went on the war path: “The straw that broke the camel’s back was the region’s indigenous groups being effectively handed the right to veto the site selection.”⁶⁷

The KLC wrote to Barnett, arguing: “Inpex’s approach to its development options clearly reflects a desire to avoid environmental and native title regulation, and is reminiscent of an outdated, unacceptable approach to development. This approach is not acceptable to traditional owners or to the general community.”⁶⁸ Privately, Bergmann and the KLC were very disappointed. The incoming Premier made it his personal priority to build an LNG gas precinct in the Kimberley region.

With Inpex’s withdrawal the game changed completely for the KLC. It had to deal with an aggressive new State Liberal Government and, at the same time, it had to pick itself up off the floor and negotiate a new agreement with the remaining player in the Kimberley, Woodside.

Barnett came onto the scene wielding a big stick: ‘compulsory acquisition’ of land listed for native title in order to build the LNG plant. In 1998 the State and Territories gained the right to extinguish or impair native title in their jurisdictions. In particular States gained the right to compulsorily acquire native



10 September 2008 14 Native Title groups across Kimberley consulted. KLC whittles down list of sites to four potential areas that Traditional Owners are willing to consider for further consultation regarding gas development. (Mark Davis, SMH)

14 Sept 2008 Wayne Bergmann: “We are trying to get away from un-co-ordinated development like where the Burrup Peninsula became an industrial junkyard.” Traditional owners willing to negotiate seek multi-billions in compensation. (Michelle Grattan, the Age)

22 Sept 2008 Albert Wiggan, traditional owner: “And I’ve got a great concern for it’s going to divide us because that’s all money has done to my people... it’s made my people greedy. The more money, the bigger the tension.” (Bran Nue Deal 4 Corners, ABC)

⁶⁴ **West Australian**, 8 April 2008,

⁶⁵ AAP, 30 April, 2008

⁶⁶ Mark Davis, **SMH**, 10 Sept 2008

⁶⁷ AAP, 1 October 2008

⁶⁸ Upstream, 2 October 2008

title land for private infrastructure (NTA 1993 s24AMD(6B)). This was the brain child of the Howard government and, as Paul Keating has recently argued, it set back native title rights a decade. After the Carpenter government lost power in Western Australia this, along with the political shaming of the Kimberley Land Council for the loss of the Ichthys pipeline to Darwin and the Northern Territory, 'compulsory acquisition' became a gun to the head of the traditional owners to negotiate on terms that suited Woodside and the Barnett government.

However, we should not cast the WA Labor government in too favourable light. In fact they set a precedent, for the Gallop government had used the threat of 'compulsory acquisition' to negotiate the existing LNG precinct to be built on the Burrup Peninsula in the Pilbara.⁶⁹ In truth, the question of compulsory acquisition remained a complex one if the native title parties would not agree to it. No-one had explored the situation where native title groups would contest the process of negotiating compulsory acquisition.

In response to the question of whether the Premier could go down the 'compulsory acquisition' route or not, there was no question that he could. The KLC posted advice on their website in 2010 noting that the Premier was in a powerful position.⁷⁰ But it was also the case that no-one had ever legally tested the 'compulsory acquisition' process. None of the envisioned appeal mechanisms had ever been created. It would have taken great determination and resourcefulness to have challenged 'compulsory acquisition'. The KLC, after the Inpex decision, were not even considering that possibility.

If the KLC had been sitting pretty, it was now caught between a rock and several hard places: the aggressive Barnett, the divisions within its own community, the prospect of a re-energised Woodside and the challenge of paving the way for an LNG precinct within the Dampier Peninsula. All these were daunting prospects. The Inpex decision made the KLC realise it would lose the economic development resources for the Kimberley Aboriginal community as a whole if an LNG processing project was established outside the Kimberley. Wayne Bergmann admitted the Inpex decision was a real low point in his career.⁷¹ The whole game was about to change.



1 Oct 2008 "Western Australia's Loss is Darwin's Gain" - Ichthys LNG facility to be located in Darwin "The straw that broke the camel's back was the region's indigenous groups being effectively handed the right to veto the site selection." (AAP)

2 October 2008 Bergmann KLC criticises Inpex "The KLC believes that Inpex's approach to its development options clearly reflects a desire to avoid environmental and native title regulation..." (Upstream)

⁶⁹ Burrup and Maitland Industrial Estates Agreement, 2002

⁷⁰ (<http://klc.org.au/2010/09/03/compulsory-acquisition-frequently-asked-questions/>)

⁷¹ Inpex 13 March, 2009

Law below the Top Soil

“See, that's the things—
because we know these people—
all the top, top soil—
in this country—
this belongs to the—
this belongs to the government—
government got the place—
and er, government—
we only gotta find little places for ourselves, to
live—
but the bottom part of the soil again—
THIS belongs to the tribal people—
because the LAW is there—
that's why, these people must understand—
or we TRY to get them to understand, but they
can't, they can't stand up to listen—
to these stories—
I think, look like to us they think we're talking
out of place—
but we DON'T talk outa place—
we want to straighten these people
up—“

Paddy Roe, **Children's Country** June-July 1985 as transcribed
by Stephen Muecke, 2011

The events after the demise of the Carpenter Labor government in Western Australia on the 26 September 2008 seemed to rush over the Roes and other traditional owners like a tidal wave. The decision by Inpex to situate its LNG facility in Darwin was like a red rag to a bull. It seemed to enrage the incoming Premier Colin Barnett, who was determined to ensure that no Indigenous interest group would ever again get in the way of the industrialisation of the Kimberley.⁷² If the conditions under which the KLC began evaluating the possibility of an LNG processing precinct in the Kimberley were problematical under the Carpenter regime, then the whole process became like a highly charged pressure cooker under Barnett.

Premier Barnett was elected in his own right, owing no favours to anyone. He was singularly determined to move forward with the LNG precinct in the North. In his first month in office he announced that his preferred site for the LNG processing precinct was North Head – a well known breeding ground for the humpback whale⁷³. He also made it clear that he believed the



15 October 2008 Premier Colin Barnett names North Head, about 120 kilometres north of Broome, as preferred site for an LNG processing hub. (WA Business News)
17 October 2008 Barnett ends traditional owner veto power over LNG site: "Once a site has been selected, it will become government-owned. The right of veto created such on-going uncertainty it made it impossible." (Bloomberg)

11 Nov 2008 Barnett and KLC at loggerheads. Compulsory acquisition mooted: "You can't bulldoze and ride roughshod over people," Mr. Bergmann said. "The proper way to do this is to commit to the process. He (Mr. Barnett) won't deliver on any site without the full participation of indigenous people." Save the Kimberley spokesman Kevin Blatchford says opponents to the project will not be intimidated. "Nothing's done — this has got a long, long way to go yet," he said. "If anyone thinks it's going to happen just because the Premier's threatening local communities with compulsory acquisition, [they have] got another thing coming." (ABC News)

⁷² O'Brien A., 'I'll take native title land: Barnett', *Australian*, 11 December, 2008

⁷³ Chris Thomson, "Government targets Aboriginal site for LNG precinct", *WA Today*, October 15, 2008

ability of the Indigenous community to veto the development site of an LNG facility was the reason why Western Australia had lost the Inpex Ichthys facility and made it clear that Indigenous interests would have no such power in the future. He wanted an ILUA negotiated within three months. An outrageous proposition by any standards.

The environmental movement was also worried at the recent turn of events with Barnett in power and seemingly driving a steamroller towards the industrialisation of the Kimberley. Green groups immediately slammed Barnett's proposal to site the LNG plant at North Head and WA's Environmental Protection Authority was also quick to move against the proposal.⁷⁴

Meanwhile, Woodside offered \$500 million to Indigenous landowners for the right to develop an LNG facility in the region.⁷⁵ This was immediately rejected by the KLC who viewed it as "taking Aboriginal compensation back three decades".⁷⁶ The KLC were hoping for \$1 billion plus, and this was simply Woodside's first ambit claim but it showed they were keen to develop an on-shore processing facility on the Kimberley coast.

Barnett, in a pattern that would become monotonous, threatened to compulsory acquire a site for the LNG plant if Aboriginal traditional owners objected. The KLC responded: "We thought we'd moved on from the days of standing over people, Colin Barnett is not about making an informed decision but about stealing land for big, rich mining companies."⁷⁷ But more was to come on this front.

One of the things that has to be decided at this point in the analysis of the saga of the Walmadany (James Price Point) LNG Precinct is whether traditional owners represented through the KLC had no choice but to go along with the new Premier's zeal for a gas processing plant in the Kimberley or whether they had a choice to hold out and fight. The KLC's commissioned assessment of the decision-making process was that after December 2008 Premier Barnett's power to seize the James Price Point land allowing three months, ending on 31 March 2009, for the negotiation of a Heads of Agreement between the State, Traditional Owners and Woodside was real. At this point they argued the role of the traditional owners changed from having a say over lands to simply determining



5 Dec 2008 KLC rejects Woodside offer of \$500m (Global Insight)

19 Dec 2008 Broome Shire Council rejects LNG processing precinct on coastline within its boundaries EPA recommends James Price Point or Gourdon Bay

22 Dec 2008 Chevron announces Ashburton North as site for Wheatstone LNG project. (Petroleum Economist)

⁷⁴ Chalpat Sonti, "Barnett's Kimberley plan slammed", *WA Today*, December 11, 2008

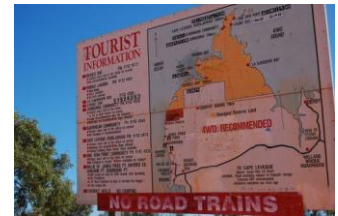
"Barnett Refuses to Rule Out North Head Gas Hub", *Hand off Country*, Dec 11, 2008, ABC News, 16 April 2009

⁷⁵ Global Insight, 5 Dec 2008

⁷⁶ Ibid.

⁷⁷ *The Australian*, 27 December, 2008

how “the 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”.⁷⁸



But it was more than just signing off on a deal in which they had no choice. The KLC and the traditional owners it represented were being asked to endorse and effectively partner the LNG precinct. The assessors of the process note that in accepting Barnett’s terms: “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 ILUA negotiations for less complex projects**. This resulted in a situation in which the KLC and Traditional Owners were negotiating under enormous pressure, and under increasing pressure as the Premier’s deadlines for conclusion of a key Terms Agreement approached.” (emphasis added)⁷⁹

In accepting that they could do nothing about the Premier’s determination to compulsorily acquire James Price Point and in accepting these terms, the KLC and its negotiators were giving away much more than this. They were giving away the capacity for traditional owners to stand up and fight for their rights on their own lands. They were also giving way the authority of Aboriginal traditional owners to know what is best and wise for their lands and their peoples. Once they accepted the Premier’s terms they had no more capacity to act. This was the tragedy of the capitulation to Premier Barnett. What may have been a legitimate process of consultation and negotiation before December 2008 became effectively a stand-over situation and subsequent capitulation.

Patrick Dodson later acknowledged the tough situation the KLC and its negotiating group, like all previous Aboriginal political groups, were in. He said: “There’s no no. There never has been a no. There’s never been a no in indigenous land rights in this country.”⁸⁰ But this did not mean that it was necessary to capitulate. Nor did it mean that an Indigenous organisation should falter in promoting its vision and values. The problem of the whole process of negotiating the LNG precinct was that it virtually required the KLC and Aboriginal customary law to drop its own capacity to have an economic, social and environmental vision of its own. This was why the objections of Joseph Roe and others, who would not go along with the process, were and are so important.

Having lost Inpex, the KLC’s priority was to not lose again the opportunity to negotiate with a major private corporation for

⁷⁸ O’Faircheallaigh & Twomey, op. cit., p38

⁷⁹ Ibid, p. 38

⁸⁰ ABC 4 Corners,

native title entitlements and compensation. Carrying on with their charter inaugurated by the Carpenter government and by a process of elimination, the KLC, native title groups up and down the coast, Broome Shire, the EPA and the government had effectively moved the LNG plant into Joseph Roe's backyard. After objections by the environmental movement and the community about North Head, the recommended site became James Price Point – at the apex of the Lurujarri Heritage trail – the place where Paddy Roe had buried several of the Goolarabooloo and Jabirr Jabirr men and women of high degree, including the revered traditional custodian Walmadany. It was an incredible and swift turn of events.

On the face of it, until the election of Colin Barnett the process of considering where an LNG processing site should be sited in the Kimberley seemed to be an innovative combination of traditional and modern consultative processes. But after the election of the Barnett government it was a *fait accompli* – the last site standing. At this point Joseph Roe, as the senior law man, and his family departed from the consultations and decision-making.

At a broader level this was a clash between what Paddy Roe would have called mainstream 'top soil' law and 'below the soil deep customary law' of Aboriginal culture. The traditional custodians of the Walmadany area did not owe their authority to the KLC, the State Government, Woodside or the Australian Government. They had no choice but to fight; they had to 'straighten up' the mainstream law.

The KLC commissioned report on "Traditional Owner Consent and Indigenous Community Consultation" found that before the advent of Barnett government, the process of consultation about the LNG precinct did involve traditional decision-making structures. It found that the Traditional Owner Taskforce (TOTF) which drew on "traditional governance and decision-making structures while incorporating contemporary meeting procedures, decision-making and information transfer practices, to create a unique, culturally appropriate, consistent and comprehensive consultation and engagement process" was "best practice."⁸¹ It found that the common bond which bound the TOTF together was the *wirnan* or *wunan*. Kim Doohan describes this bond as follows: "The *wirnan*, at its simplest, can be thought of as both a trade route and the trade that takes place along it. However, *wirnan* is not limited to what, in contemporary capitalist societies, is labelled 'economics'. It embodies a range of social relationships expressed geographically and so is like a map that includes information about those relationships within economic, social, political and ritual arenas. These relationships entail exchanges of items,



23 Dec 2008 James Price Point named as preferred site. Green groups immediately slam proposal. PM Rudd backs Barnett (ABC News) Spokesman Kevin Blatchford says gas from the Browse Basin should be piped to the Pilbara where suitable infrastructure is already established. "The two sites that they say stack up the best in relation to James Price Point and Gourdon Bay would be the lesser evils of the four that were chosen. Nevertheless they're still evil." (ABC News)

27 Dec 2008 Joseph Roe makes it clear that Barnett would have to negotiate with him separately from KLC (Victoria Laurie, The Australian)

3 Jan 2009 Joseph Roe critical of KLC; Neil Mackenzie scared about effect of plant on coast; Richard Costin says a gas precinct at James Price Point would put a brick wall in the migratory path of the humpback whale (The West Australian)

⁸¹ O'Faircheallaigh, op cit., p. 27

including everyday objects such as bamboo for spear-making, cloth and spinifex resin, along with ritual items including sacred objects, performances and knowledge.”⁸²



But, while the wirnan may have been legitimate process for determining how the benefits of accepting Barnett’s deal would be shared, it was not a process that was appropriate for sanctioning the building of an LNG precinct at Walmadany (James Price Point). The problem with the KLC’s commissioned study of its process of consultation about the LNG precinct negotiations was that it was very much about assessing whether the process met a set of legal/administrative requirements. In this the concept of the wirnan as the basis for framing the TOTF is contentious. The wirnan relationships depended on the capacity for “below the soil” or traditional authority structures and environments to be in place. There was no doubt that for many parts of the Kimberley, where the relationship between the KLC and traditional owners was strong, this existed. But the wirnan itself could not be the basis for traditional owners of one part of the Kimberley to appear to condone what happened in another part of the country. Nor could the wirnan work if the representatives of one part of the country did not have the authority to make authoritative “below the soil” decisions about the country they represented. We respectfully contend that the concept of wirnan was overlaying a traditional law framework on what was really a governmental process of winning support for a preferred outcome, namely the siting of an LNG precinct in the Kimberley. The co-chair of the Traditional Owner Negotiating Committee (TONC), Wayne Barker, said: “Before saying ‘Yes’ to negotiate an Indigenous Land Use Agreement (ILUA) at James Price Point, we categorically said ‘No’ to 39 proposed sites along the Kimberley coastline”.⁸³ But when in the past could the combined Aboriginal nations of the Kimberley make or even participate in decisions about matters on another group’s country? This concept did not come from traditional law; rather it came from a modern idea of democracy, where elected representatives acted as political representatives for communities as a whole and had the power to make decisions about other people’s country and the benefits it might provide to the whole. Customary law does not recognise this way of doing business. Worse, this seemed to endorse the decision of Barnett and Woodside.

Doohan suggests, “Whoever can or cannot ‘speak for’ and make decisions about ritual, story, performance and country is determined by seniority, gender and descent based connections to country. People who have the greatest authority to ‘speak’

⁸² Kim Doohan, **Making Things Good Relations between Aborigines and Miners at Argyle**, Backroom Press, 2008, p.65

⁸³ Wayne Barker, “We’re at the negotiating table with a heavy heart but a clear head”, 9 October 2009, <http://klc.org.au/2009/09/10/we%E2%80%99re-at-the-negotiating-table-with-a-heavy-heart-but-a-clear-head/>

about a particular place are those with a descent based connection to that country – that is, one of their ancestors belonged to that country... Where there are no senior men or women alive who do ‘belong’ to the country or have responsibilities for particular sites, closely related groups or individuals might take on the country-based responsibilities.”⁸⁴ I would go further; seniority is not just about family relations, it is about a demonstrated ability to live on and demonstrate the land in ceremony and actions in life. Seniority is not about holding a title deed, it is about deep knowledge of a landed estate. Doohan goes on to say not only is traditional authority important in ensuring a good decision but so is time, place⁸⁵ and I would add, following Walker, the feeling of the people is also part of this foundation of good traditional decision-making.⁸⁶ Certainly modern meetings in motels with power point presentations might well look comprehensive, votes around board tables or in bough shades might seem fair but if they do not take into account the rigours and requirements of customary law they will invariably fail to be respected by Indigenous people. This is compounded by the tendency for leaders who have mastered European education and communications to have a louder voice on these matters than those who are well versed in traditional law and culture.

Well before the question of an LNG plant emerged, Joseph Roe and his family had demonstrated their seniority in relation to Walmadany. In 1999 he and Cyril Shaw lodged the first native title claim for the region and they successfully fought off challenges by sand mining companies and quarries to excavate in the Walmadany (James Price Point) area. In 1998 Joseph Roe testified against some random quarrying and mining in the Walmadany (James Price Point) area. He told the court: *“My maternal grandfather, Paddy Roe, was the boss for both law s around Broome – the southern tradition and northern tradition and the senior traditional custodian of Jabirr Jabirr country, Ngumbal country and Djungan country. There is a song cycle that runs from One Arm Point to Bidyadanga which makes up the northern tradition. As law boss for the northern tradition, I protect sites all up and down the coast including the area covered by the exploration tenement. There are some parts of the country where I can go but where other people can’t go. Even my sons can’t go to some of these places because they aren’t at that stage in their lives. When they get a certain level*



14 Jan 2009 Premier ‘no’ to gas pipeline Colin Barnett has dismissed an ambitious \$1.5 billion to \$2.5 billion plan by the influential owners of the Dampier-to-Bunbury gas pipeline to shift a proposed Kimberley LNG precinct to the Pilbara. (The West Australian)

16 Jan 2009 West Australian Government gives Aboriginal stake holders three months to come to an agreement over a location for the much anticipated gas precinct in the Kimberley region of Western Australia. (SBS World News)

3 Feb 2009 Djabera Djabera spokesman Greg Francis says traditional owners are being sidelined by the Kimberley Land Council (KLC), which has been funded to negotiate land access with Government and industry. (ABC News)

⁸⁴ Doohan, op cit, p. 62 The truth is in every Indigenous community the situation is different. In places where traditional culture is undisturbed the family connections, mastery of song lines, the ability to ceremonially demonstrate knowledge and to embody the spirit of the land are all part of the traditional authority and seniority system.

⁸⁵ Ibid., p. 62

⁸⁶ Walker, op cit.

of knowledge about culture and law they can go to these places”⁸⁷



At this point we have to ask ourselves how in a best practice process embodying traditional values was Joseph Roe, signatory to the original Goolarabooloo and Jabirr Jabirr native title claim, and a man with clear authority as the cultural law man for the Walmadany area⁸⁸, increasingly marginalised by the whole consultation and decision-making structure?

We must also consider why he would not accept the deal to allocate land at Walmadany (James Price Point) for the LNG precinct. The reason he could not sign up to the process was because he could not. His obligations to the land were ‘below the top soil’ as a guardian and protector. There was no compulsion or payment on earth that could compel him or his family or many of the Goolarabooloo families to forget their traditional obligations, and if it meant fighting government, or anybody else, then the fight could not be half done. It had to be all the way.

We have to look beyond traditional decision-making and authority to understand how Walmadany (James Price Point) became the preferred site for the LNG precinct. One of the reasons why Walmadany may have been chosen was because on the Dampier Peninsula the Goolarabooloo and Jabirr Jabirr claims were the two major claims yet to be determined. The native title process is a notoriously difficult and onerous procedure that tests the metal of the most determined Indigenous claimants. Between 1993 and 2008, 1300 claims were lodged but there have been only 121 native title determinations, at a cost to the taxpayer of over \$900 million. It is usual for a native title claim to go on for many years.⁸⁹ There are usually objections and appeals and many Aboriginal elders have died in the process of seeking native title for their country of birth. So if a company and a government offer to recognise native title and pay out royalties and/or compensation in return for using Indigenous land, it is a considerable inducement to native title claimants. It means money in the bank and potentially circumvents years in the courts. From a ‘top soil’ perspective this is a pretty compelling reason to consider a deal with a company like Woodside and/or, if there was a suggestion that the land would be taken away in the first place. But none of this would sway someone concerned with below-the-soil law.

⁸⁷ Joseph Roe and Cyril Shaw on behalf of the Goolarabooloo & Jabirr Jabirr Peoples/Western Australia/Kimberley Quarry Pty Ltd, [2008] NNTTA

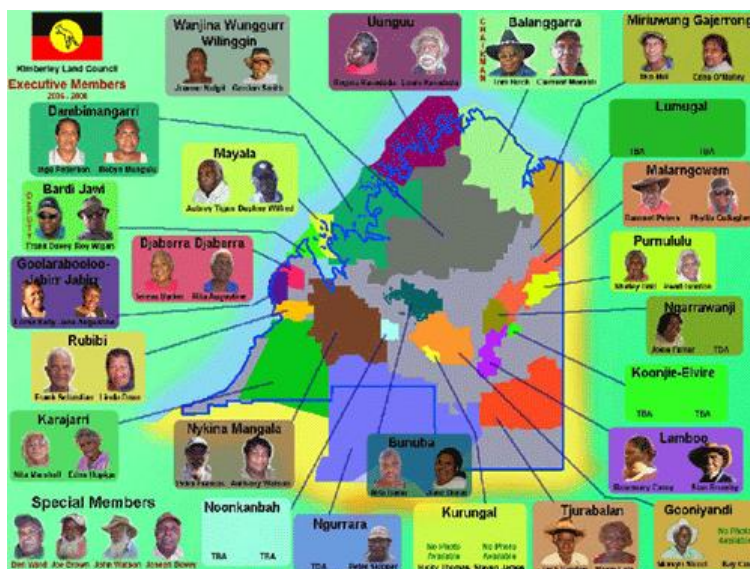
⁸⁸ For Paddy Roe’s account of the way he, his wife and daughter and their children became connected to Walmadany (James Price Point) and the Lurujarri trail see Stephen Muecke et al, **Reading the Country**, op cit.

⁸⁹ Australian Human Rights Commission, Native Title Reports, 2001-11

Did the LNG precinct arrive at Walmadany (James Price Point) because these two claims were the only claims yet to be determined on the Dampier Peninsula? Certainly it would be an advantage for the claimants to settle their claim without going to court, and from another perspective, it may be that with an unresolved claim Woodside and the government may have also considered the Goolarabooloo and Jabirr Jabirr people the weakest link in the array of Kimberley native title claims. However, though they may have had unresolved land tenure within Australian law, because of Paddy Roe's hard work the Roe family and other Goolarabooloo and Jabirr Jabirr traditional owners may well have been the toughest opponents that Colin Barnett and Woodside could take on. Joseph Roe had already made clear that as far as he and his family were concerned the KLC had no capacity to represent them as the traditional owners of the area.⁹⁰



“...because of Paddy Roe's hard work the Roe family and other Goolarabooloo and Jabirr Jabirr traditional owners may well have been the toughest opponents that Colin Barnett and Woodside could take on.”



KLC Executive and Senior Leaders

⁹⁰ (Victoria Laurie, The Australian, 27 December 2008)

Determined Areas

The map displays the Northern Territory of Australia, with various regions color-coded and labeled to represent different Indigenous groups. The labels and their corresponding areas are as follows:

- Wanjina Wunggurr Wilinggin**: A large grey-shaded area in the north-central part of the territory.
- Miriuwung Gajerrong #1 and #4**: A small yellow-shaded area in the northeast.
- Bardi Jawi**: A green-shaded area on the northwest coast.
- Rubibi combined and #6**: A yellow-shaded area on the west coast, south of Bardi Jawi.
- Karajarri**: A green-shaded area in the southwest.
- Noonkanbah**: A small blue-shaded area on the south coast.
- Ngurrara (Martu)**: A large blue-shaded area in the south and west-central parts.
- Tjurabalan**: A red-shaded area in the east-central part.

KLC Native Title Determinations

The ‘below the soil’ guardians would never consent to what the Yolngu, who famously battled against the Alcan bauxite plant in Arnhem land, still call “the monster” – an industrial processing plant – being sited on a sacred site, in this case amongst the sand dunes near where the very guardians of the country who Paddy Roe had learned from, were buried. Such a decision had nothing to do with traditional decision-making and more to do with the pressure that Colin Barnett had placed the KLC under and the fact that the KLC was working from a fundamentally defensive position. For Joseph Roe such decisions were being made by people who were forsaking their culture and law. But others might maintain that the new KLC powerbrokers were the future. Certainly Barnett, Woodside and the Federal Government cultivated the latter view.

Disregarding the importance of the Lurujarri Heritage Trail and ignoring the knowledge that Paddy Roe had passed down to his children is an indicator of the process of negotiating with Woodside and the government. If the native title process is about recognising customary law then at the very least these issues should have been the first and foremost concerns of those wanting to do business on the Jabirr Jabirr and Goolarabooloo lands.

Meanwhile, Chevron also announced plans for a Wheatstone LNG project and, in his wisdom, Prime Minister Rudd backed Premier Barnett. Resources Minister Martin Ferguson added to the pressure on the KLC and trotted out an old chestnut: “These issues have to be pushed along. Time is not on our side. Australia is an attractive site for the purposes of the development of the LNG industry and so are a lot of other sites throughout the world. We have to compete in a global market in a very tough economic situation to actually attract investment and the Browse LNG province is very important to Australia's



“There are a number of different families and communities in the Dampier Peninsular and there are a whole number of views so I’m not surprised,” the Premier said. “I’ve met with him [Joseph Roe] on at least on two occasions. I understand he is hesitant about the Walmadany (James Price Point) proposal. At our first meeting, he expressed his hesitation and basically said at the end of the meeting that he would go along and be supportive of it. He’s said that to me on other occasions and now he has obviously got some more hesitations. I would never expect to get 100 per cent of the Aboriginal people in the area positively supporting this project but Joseph Roe has been closely involved throughout and I understand his concerns. However, the Kimberley Land Council is the legally designated authority to negotiate and make those decisions.”

Premier Colin Barnett, 23 Nov
2009

future, in terms of the development of the LNG industry.”⁹¹ In fact there was a major debate going on within the resources companies themselves about what would be the right time to bring the Browse Basin resources on stream. The preference of companies like BHP was to do so after the North-West Shelf gas had been fully exploited and then to use the processing plant which had already been controversially established on the Burrup Peninsula.⁹²

But in 2009 it was a case of stacks on the mill. Walmadany (James Price Point) was the site and Colin Barnett was not for turning. The advocates all had a vested interest in the site. For Barnett the LNG precinct was the gateway to the industrialisation of the Kimberley and the development of a string of giant resource development projects. The State government would gain rent and operating fees as well as taxes from the site. Martin Ferguson and his Federal colleagues were also on board the Kimberley industrialisation express. In Ferguson’s case it seemed to be more a matter of a blind adherence to the size of the project than anything else.

Woodside would have a majority ownership of the LNG processing as well as a substantial stake in the Browse Point gas. If the processing was tied back to the North-West Shelf, Woodside would lose up to half of its discounted cash flow returns from the liquefaction process and commercialisation would occur at a later date. Of course, if the LNG plant were sited outside the Kimberley the KLC would lose the potential revenue for landholders and its strategy of working with business to improve the Aboriginal economic and social position would once again be in tatters. For Wayne Bergmann it would be yet another, ‘once in a lifetime’ opportunity lost.⁹³

But of course this judgement was clouded by self interest, for there were other options being floated. In January 2009 the owners of the Dampier to Bunbury Natural Gas Pipeline put forward a plan to link the Browse Basin Gas to the Pilbara and then to the Southern domestic network. The plan would have meant there would be no LNG plant in the Kimberley. The Carpenter government had introduced a regulation that 15 per cent of the North West Shelf gas be reserved for domestic usage. The proposal put forward by the DBNGP proponents would have locked the Browse Basin gas into the Perth domestic



6 Feb 2009 U.S. major Conoco Phillips and Melbourne-based Karoon Gas have spudded the Poseidon-1 well about 480 kilometres north of Broome. (Global Insight)

13 Feb 2009 Barnett tries again to convince Japanese company INPEX to create US\$20 billion Ichthys LNG project in WA not Darwin (West Australian)

18 Feb 2009 Woodside "chomping at the bit for James Price Point" Don Voelte (FY 2008 Woodside Petroleum Earnings Presentation and Webcast - Final)

21 Feb 2009 Traditional Owners reported to back LNG Precinct (AFR)

24-26 Feb 2009 Goolarabooloo and Jabirr Jabirr consultation

⁹¹ ABC, 24 December 2008

⁹² **West Australian**, 23 Dec, 2009

⁹³ “The low-point of recent times was Inpex's decision to relocate the \$20 billion Ichthys LNG project from the Kimberley to Darwin in the neighbouring state of Northern Territory. Bergmann is still hurt by Inpex's decision and says Inpex was "let down by the former state government". W. Bergmann in Russell Searancke, “Fighting for his corner”, Upstream, 6 March 2009

network and the Pilbara liquefaction plant on the Burrup Peninsula. It was a \$1.5 to 2.5 billion project, compared to a \$30 billion project in the Kimberley. Premier Barnett said: "It's not what we are proceeding with ... the issue of the Government is to identify and develop an LNG precinct at Walmadany (James Price Point). In the long term I would hope, in fact there must be a pipeline (linking to the DBP). And I have long supported the development of gas pipelines in WA."⁹⁴



So why did Barnett not support the pipeline proposal? The answer was clear. An LNG precinct in the Kimberley that was owned by the WA government would be a major revenue earner for its own financial coffers. Even if the pipeline was ultimately in the State and national interests, in the political short term for the State government's own finances the LNG precinct was the hands down winner. Did this mean that the Barnett Government had the right to make it difficult for a tenement agreement for future pipelines? Certainly not. However, the Premier wanted to send a clear message to all concerned: It was going to be all the way with the Kimberley LNG precinct so far as the WA government was concerned.

Throughout 2009 the rhetoric about the need for an LNG gas processing plant in the Kimberley increased substantially. Federal Minister Ferguson told whoever would listen in Broome that: "The benefits of any future gas development must flow through to housing, education, better medical and community services, employment, training and business opportunities for indigenous people"⁹⁵. Local Indigenous Labor MP Carol Martin told anti-gas celebrities to go home. At the presentation of Woodside's earnings for 2008, Don Voelte told shareholders "We're just chomping at the bit to be able to get moving on the Walmadany (James Price Point) opportunity."⁹⁶ Premier Barnett, still using the argument that the Indigenous community had forced Inpex to flee the Kimberley to Darwin, gave the KLC three months to reach agreement over a site for the LNG precinct.

At the same time in 2009 the Barnett government paid the KLC \$9.15 million "to meet the costs associated with obtaining consent from registered native title claimants".⁹⁷ This was a greater sum than that provided to the KLC by the Carpenter Government and, of course, the Carpenter payment came with no strings attached and the right of Indigenous veto over any site. Under Carpenter, Indigenous native title claimants had the right to say no to any proposal if they saw fit to do so. "No

.. In 2009 the Barnett government paid the KLC \$9.15 million "to meet the costs associated with obtaining consent from registered native title claimants". Quote from the reply from the Hon. Norman Moore to Question Without Notice No. 149 asked in the WA Legislative Council on 21 April 2010 by Hon Robin Chapple

⁹⁴ **West Australian**, 14 Jan 2009

⁹⁵ Global Insight, 11 Feb 2009

⁹⁶ **Global Insight**, 11 Feb 2009

⁹⁷ Reply from the Hon. Norman Moore to Question Without Notice No. 149 asked in the WA Legislative Council on 21 April 2010 by Hon Robin Chapple

means no” had been one of Wayne Bergmann’s themes in his address at the annual Native Title conference in 2009.⁹⁸ But under Barnett it seems no meant yes. By accepting the nine million dollar payment “to obtain consent from native title claimants”, the KLC was doing so as an economic agent and an advocate and lobbyist alongside Woodside and the Barnett government for an LNG plant in the Kimberley.

On 25 Nov 2008 it was noted that the KLC had a meeting with the Jabirr Jabirr and Goolarabooloo representatives. This was followed by another meeting on 24-26 February 2009. It was then reported that: “On 14 and 15 April 2009 the KLC, as required by the resolution of the Goolarabooloo/Jabirr Jabirr native title claim group meeting of 20 February, held a meeting of the Goolarabooloo/Jabirr Jabirr native title claim group to consider the current offers of the State and Woodside in relation to the establishment of an LNG Precinct at James Price Point, and to facilitate a decision by the Goolarabooloo/Jabirr Jabirr claimants on whether to accept the offers and continue negotiations towards an ILUA or ILUAs, or to refuse the offers and conclude negotiations”⁹⁹ This was the meeting that Joseph Roe describes as being ‘a stunt’, in which he saw the KLC playing games. The whole meeting was clouded by Barnett’s threat of ‘compulsory acquisition’, which he had extended from March to mid-April — ie the time of the meeting. Roe saw the whole thing as a contrivance to push traditional owners to a particular position:

JOSEPH ROE: And Wayne Bergmann got up. He looked at me and he said, well I'll ring up Barnett and tell him to take the threat away.

DEBBIE WHITMONT: Roe says Bergmann went outside for only a few minutes.

JOSEPH ROE: With his telephone. Then he came back inside all smiling and said Na, if you take the deal, Barnett's not going to come and take it. So to me he just went down the phone, talked to who I don't know, got the gun off Barnett and pointed it at us now. That's the way I read it.”¹⁰⁰

Much has been written about this controversial meeting and the KLC have not released the minutes. The independent assessors made a number of points about the process. Significantly, there was no notice of any vote to be taken in the invitations that were sent out to Goolarabooloo and Jabirr Jabirr traditional owners or in the meeting notice advertised in the Broome Advertiser on 30 March 2009. Attendance sheets noted that “representatives of all family groups were present”¹⁰¹ but did this mean that everyone who wanted to vote could vote? It also noted that other senior



13 March 2009 Bergman: Low point of recent times Inpex decision (Upstream)

19 March 2009 National Native Title Council urges Barnett to rethink (Kalgoorlie Miner)

23 March 2009 TOs walk out of negotiation (West Australian)

31 March 2009 Carol Martin tells anti-gas celebrities to go home (West Australian)

1 April 2009 Barnett gives KLC more time to reach agreement (Asia Pulse)

⁹⁸ Wayne Bergmann, “Successful Negotiation A Kimberley Story. June 2008

⁹⁹ O’Faircheallaigh, op cit., p. 41

¹⁰⁰ Transcript, 4 Corners, ABC, 21 June 2010

¹⁰¹ O’Faircheallaigh, op cit., p. 44

law bosses were in attendance who did not vote. The assessors simply note that at the end of the second day of the meeting a decision was made to authorise the KLC to enter a Heads of Agreement on their behalf: “The decision of the Traditional Owners was that the KLC should enter into the Heads of Agreement with the State of Western Australia and Woodside in relation to the LNG development in the vicinity of James Price Point, for and on behalf of the Traditional Owners, for the negotiation of an ILUA.”¹⁰²

It was a hell of a meeting, by any account. The independent assessors concluded:

“It is clear from the minutes and recordings of meetings between the TONC, the KLC, the State and Woodside that the Traditional Owners and KLC had the opportunity to vigorously and repeatedly press their views with State and Woodside representatives. TONC members and the KLC also pressed their case in numerous, less formal meetings with senior State and Woodside representatives, including with the Premier, Colin Barnett and with Commonwealth ministers and officials. However in only seven weeks of negotiations it was not possible for the parties to have a robust engagement on every topic and, ultimately, elements of the Woodside and State proposals were not negotiated before the State imposed a deadline for an agreement. Traditional Owners were forced to decide whether to accept or reject the offers that the State and Woodside had put on the table. Indeed it was not possible in some cases to even fully explore the practical ramifications of certain elements of the State and Woodside’s offers, for example the State’s grant of an equivalent area of freehold land to that required for the industrial precinct. The records of TONC meetings also make it clear that the Traditional Owners and the KLC did not believe that negotiations were being conducted in a culturally appropriate manner, because of the short time frame available for negotiations; the threat of compulsory acquisition by the Premier; and the 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). During the meetings leading to the signing of the Heads of Agreement, Traditional Owners and the KLC frequently noted, and brought to the attention of Woodside and the State, the limited information available to them regarding the proposed LNG Precinct. Key gaps in information included 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. Again it should be stressed that many of these issues did not involve matters of detail that could only emerge

¹⁰² Ibid., p. 41

project-level assessments were conducted, but related to the 'strategic' issue of where an LNG Precinct should be located. An informed decision on this matter could hardly be made, for instance, in the absence of information on the environmental impacts of dredging and water use, or on the location of worker accommodation and on the nature of the workforce. In summary, it is apparent that the Traditional Owners did give their consent to the Heads of Agreement that established principles necessary to obtain native title and cultural heritage consents for the proposed LNG Precinct at James price Point. However that consent:

統 was not free, because it was given under the threat of compulsory acquisition and within time frames that were unduly and severely truncated ;

統 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;

統 resulted from a negotiation process that denied a fundamental cultural assumption and principle of Traditional Owners, that only they have the right and the responsibility to determine whether development occurs on their land and sea country.” (emphasis added)¹⁰³

Within seven days of the meeting on the 21 April 2009 Don Voelte, Woodside, Wayne Bergmann for the KLC and Colin Barnett for the WA government had signed a comprehensive Heads of Agreement (HOA) on the 'Kimberley LNG Precinct'.¹⁰⁴ The agreement involved executing an Indigenous Land Use Agreement (ILUA) by the end of 2009 and for the parties to identify the approximate location of the precinct by the 31 May 2009. At the same time the agreement noted that the Commonwealth had to finalise its own responsibilities before any ILUA could be executed. (To date the environmental approval for the site has still not been given.) The total area of land involved in the agreement was 3500 hectares at Walmadany (James Price Point)¹⁰⁵.

The State commitment included transferring the title and other interests within the LNG precinct to the relevant native title body at the end of the project. The State of WA would be the operator of the site and it would work with the native title party to “design, construct, decommission and rehabilitate the LNG precinct” to avoid impacts on Aboriginal sites, including,



“..it is apparent that the Traditional Owners did give their consent to the Heads of Agreement that established principles necessary to obtain native title and cultural heritage consents for the proposed LNG Precinct at James price Point. However that consent:
 * was not free, because it was given under the threat of compulsory acquisition and within time frames that were unduly and severely truncated;
 * 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;
 * resulted from a negotiation process that denied a fundamental cultural assumption and principle of Traditional Owners, that only they have the right and the responsibility to determine whether development occurs on their land and sea country.” (emphasis added) Report on Traditional Owner Consent and Indigenous Community Consultation, 2010



¹⁰³ O’Faircheallaigh, op cit., p. 46

¹⁰⁴ Kimberley LNG Precinct “Heads of Agreement between the State of Western Australia and Kimberley Land Council Aboriginal Corporation and Woodside Energy Ltd”, 21 April, 2009

¹⁰⁵ Ibid.

“without limitation”, songlines.¹⁰⁶ Ironically none of the Lurujarri heritage trail guardians was ever consulted about whether this was in fact possible.

The most controversial aspect of the State commitments was its view that the Browse Point gas reserves were “a rare opportunity to address Indigenous disadvantage across the Kimberley”. The agreement went on: “The State is therefore *keen to see* the Native Title Party receive a generous and enduring benefits package to be applied on local and regional bases. The State would be looking to industry to provide the bulk of those benefits.”¹⁰⁷ (emphasis added) Some saw the agreement was essentially a way for the WA government to abrogate its own responsibilities for education, health, and social and economic development¹⁰⁸.

It is worth pausing here to detail why the Barnett Government was so keen to pursue the LNG precinct on the Kimberley coast. First, as the owner and operator of the site for the duration of the project it would be paid a substantial annual rent for the life of the project, based on each cubic foot of gas processed. Second, it expected the companies concerned to effectively take over many of its financial responsibilities in the spheres of Indigenous education, health and infrastructure development. Third, the plant would be a gateway for the further industrialisation of the Kimberley – a recurring dream of State Premiers from John Forrest on. Fourth, it would enjoy the array of stamp duties and State taxes arising from the expenditure on the development of the site as well as the ongoing production once the plant on site was completed. In other words there were three dimensions of income that would come to the State if the LNG precinct was built that would not arise if a pipeline to Karratha was constructed and the gas was processed on the Burrup Peninsula. But again the question arises: Did this extra income that the State would derive from the LNG precinct equal the price of destroying forever the pristine Kimberley coast or the efficiencies of processing the gas at existing facilities? In the short term the Barnett government might look fiscally healthier, but was the LNG precinct necessary or in the long term interests of the people of Western Australia and the world?

Given that the agenda for the State government was to use the LNG precinct as a cash cow for its own coffers and to ensure that the gas industry paid for extra social and economic obligations, then the payments offered under the HOA were modest. On registration of the ILUA the State government offered to pay \$10,000,000 into an economic development fund to be administered by the KLC with a further \$20,000,000 to be invested in the fund over the life of the project and a



15 April 2009 In principle agreement reached with KLC on James Price Point site (ABC News)

16 April 2009 "I'm not one to enter the politics of the KLC - it's not my place - but I would suggest that not all of the traditional owners are represented by the KLC. And a lot of the players — a lot of the people — who could have been involved, or should have been involved, were probably not involved. And so, that is why there is just as much opposition from traditional owners in the area as there was, or there is support for it. So it really is a split situation." Save the Kimberley Chairman Peter Tucker (ABC News)

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Murray Wilcox, op cit

\$20,000,000 Indigenous Housing Fund to support indigenous home ownership through low interest loans and housing developments. A further \$30,000,000 would be paid into the fund over the life of the project. After the project the land and the precinct would revert to ownership by the native title holders. The State offered to make available 1400 hectares of freehold land to Goolarabaloo and Jabirr Jabirr claimants, 1050 hectares to Dampier Peninsula native title parties and 1050 hectares to Kimberley-wide native title parties. It promised to reform Indigenous lands to allow for home ownership and economic development. The government would pay \$1 million for 20 years to support scholarships and training programs for Indigenous participants, \$0.5 million for 16 years into a cultural preservation fund and \$5 million per annum for 16 years and a further \$2 million for 14 years into a Kimberley Enhancement Fund, \$1.5 million for 10 years into the creation of conservation and heritage reserves on the Dampier Peninsula, \$2 million per year for 10 years to support the establishment and operation of a body corporate and the development of an Indigenous employment strategy to maximise Indigenous employment on site. It also promised to help the native title claimants to extract payments from the partners in the project and work to resolve the native title of the area and work to limit further LNG developments on the Dampier Peninsula. The agreement included an acknowledgement that the State Government would cover the KLC costs of negotiating any agreements.



“Aboriginal people are expected to give up their cultural heritage for the sake of basic rights such as education and health. That isn’t a rule that is applied to the rest of the population. I don’t see why it should be applied to Aboriginal people.”
Murray Wilcox, 10 Feb 2010

It was a \$251,000,000 cash package plus lands, but how much of it replicated existing government spending? Moreover a substantial part of the funding would occur over decades. Again, it was a significant inducement to the KLC to approve the LNG Precinct development. Some commentators, including Native Title expert and former Federal Court Judge Murray Wilcox, were critical of the arrangements, noting that the WA Government was double-counting money they were already obligated to invest in the Kimberley and Aboriginal communities.¹⁰⁹

The significant parts of the HOA were the Woodside commitments to the Browse LNG project. This amounted to be between 1.7 and 1.9 billion dollars, adjusted for inflation over the life of the project. In addition to this, other operators of the LNG precinct were expected to make similar commitments to the native title groups.

Under the terms of the HOA Woodside were to provide a series of incentive payments including several milestone payments: \$1m for ILUA registration, \$2m on commencement of the Front End Engineering and Design (FEED) Phase, \$5m when a Final Investment Decision was made, \$10m when the first LNG cargo

¹⁰⁹ Murray Wilcox, **Kimberley at the Cross Roads The Case Against the Gas Plant**, 2011

was loaded and delivered to a customer, \$5m for any new train of gas sanctioned beyond the project's final investment decision. It was to provide \$3.6m per annum from the Final Investment Decision to the final year of commercial production to the traditional owners associated with Native Title claim WC99/36 and WAD 6002/98 — originally, Joseph Roe and Cyril Shaw on behalf of the Goolarabooloo and Jabirr Jabirr native title groups and later disputed by the KLC. In addition Woodside agreed to establish a Regional Benefits Fund consisting of payments of \$4m per annum for the life of the project. For each new LNG train of gas processed at the precinct over and above the sanctioned development capacity Woodside agreed to pay \$4m. Woodside agreed to set up an education trust of \$1.3m per annum for the life of the project and an employment and training strategy guaranteeing training and employment up to the value of \$1.3m per annum for the life of the project, a business and contracting strategy which guaranteed \$5m per annum in contracting opportunities for suitably qualified Indigenous businesses and Indigenous joint ventures and finally \$400,000 per annum to allow the traditional owners to properly implement the agreement and run the trusts.¹¹⁰

KLC chief executive Wayne Bergmann said that the HOA "sets the standard" for Aboriginal involvement "in making decisions about what happens on their land. Traditional owners have spoken in favour of jobs and economic opportunities for all the people of the Kimberley".¹¹¹ But which traditional owners had been consulted? Who were in agreement and who were not? At the time of the agreement, Save the Kimberley Chairman Peter Tucker said, "I'm not one to enter the politics of the KLC — it's not my place — but I would suggest that not all of the traditional owners are represented by the KLC. And a lot of the players — a lot of the people — who could have been involved, or should have been involved, were probably not involved. And so, that is why there is just as much opposition from traditional owners in the area as there was, or there is, support for it. So it really is a split situation."¹¹² Tucker was not speaking out of turn, as many native title claimants had joined hands with the Save the Kimberley cause and were preparing to take on the KLC directly.

The problem for families like the Roe family was profound. Their law and culture had not been recognised and their view that the LNG precinct should not be built was ignored. They were dependent on the KLC as their sole native title representative body to act on their behalf. Before they could have their native title recognised they had to go along with a monster development being built on their lands, put forward by the KLC in which they had little input. As can be seen from the

¹¹⁰ HOA, op cit.

¹¹¹ Upstream, 1 May 2009

¹¹² ABC, 16 April 2009

nature of the agreements between the KLC, Woodside and the State government, once it had signed the agreement the KLC became party to a commercial memorandum to develop the LNG precinct at Walmadany (James Price Point). Recognition of native title was conditional on the LNG precinct being allowed to go ahead. It should be observed that at this stage no formal meeting or discussion had occurred with all original native title claimants who had a right to participate. Apart from the KLC's own initiative at the behest of some Jabirr Jabirr and Goolarabooloo representatives in meeting with Woodside and the WA government in Perth, the decision of the native title holders was to disallow any major development on their traditional lands. Without such consultations taking place, one of the significant problems of the whole process was that it created a dominant situation for the sole native title representative body to persuade native title holders to accept the negotiated Indigenous Land Use Agreement.

In all of this the KLC's primary function under Native Title law was to certify applications for native title and resolve disputes to assist agreements and notification. The KLC was within its rights to develop an ILUA but "as far as possible practicable (six)" it needed to consult and give due regard to persons who held native title. It also needed to have developed internal review functions for native title holders who disagreed with or were not happy with the actions of the representative body. As established in *Hicks v Aboriginal Legal Service of Western Australia* [2000] FCA 544, 28 April 2000, Carr J at [16]-[21] the KLC's job was to represent the interests of native title holders in compliance with the provisions of natural justice and without bias.

The KLC had accepted that Western Australia was to become "the Saudi Arabia of natural gas" and above all it wanted the economic developments to be on Aboriginal land and for Aboriginal people to share in the wealth and resources derived therefrom. It believed that the dispossession of Aboriginal lands and the gross inequalities that had occurred in other mining regions of Australia, most notably its neighbouring region, the Pilbara, would not occur in the Kimberley. It had heard of the terrible consequences of traditional owners agreeing to mining on sacred areas but was confident that it could avoid this situation in the Kimberley.



11 May 2009 Unions KLC agreement on Indigenous participation (The Australian)
12 May 2009 Pearl Farmers threatened by Gas (West Australian)

16 May 2009 Wayne Bergmann criticizes Missy Higgins and John Butler
Aboriginal and Environmental alliance cracks (SMH)

30 May 2009 Garrett told Cost of Shifting LNG Plant prohibitive (The Age)
2 June 2009 Chevron Wheatstone LNG hub Ashburton North near Onslow, up to 7 LNG hubs planned Voelte (Platts Commodity News)

2 June 2009 Chevron Woodside diverge on Browse strategy and combining infrastructure (Dow Jones)
5 June 2009 Kimberley LNG hub unlikely to proceed, Pluto 2 could face delays (AAP) Old Country, New Country airs
17 June 2009 WA Releases exploration acreage in Canning Basin (Platts Commodity News)

21 June 2009 Geoffrey Cousins joins campaign against JPP; Environmental groups call for Kimberley plan; demand JPP stop until plan developed (Sunday Times)

“The Saudi Arabia of Natural Gas”¹¹³

It was not only the Aboriginal community that was being hurried towards an agreement about the LNG precinct for Walmadany (James Price Point).

In June 2009 Federal Minister for Resources Martin Ferguson entered the fray. Browse Point lessees had differing agendas for the development of the gas fields. Ferguson argued: "The challenge we face is to realign the national interest of Australia with the commercial interest of investors. I have already flagged that my department and I will apply a 'use it or lose it' principle to retention lease applications. That means we will rigorously apply the commerciality test to ensure gas fields are developed at the earliest possible times".¹¹⁴

Woodside's Don Voelte wanted Browse Gas on line sooner rather than later and was right behind Ferguson's 'use or lose it' proposition. He had no hesitation in supporting what would be a fourth processing facility on the Western Australian coast because "We're told by both governments, state and commonwealth, repeatedly that the time for Browse is now, not ten years from now.. We at Woodside don't think that under the 'use it or lose it' commonwealth retention lease policy, that a minority eight per cent partner will be allowed to cause a 10-year delay in getting Browse off the mark."¹¹⁵ For Voelte it had to be sooner rather than later. Such a prospect appealed to Martin Ferguson and Colin Barnett.

The effect of Ferguson's pronouncement was to place pressure on Woodside's potential partners in the Walmadany (James Price Point) development. All apart from Woodside had reservations about the quick development of Walmadany (James Price Point). The cost of \$30-50b was one consideration, the technical difficulties associated with the environment were another, the consideration of native title claimants was another and, of course, there were other options including the floating gas processing technology pioneered by Shell and the possibility of a far less costly pipeline to the Karratha facilities on the Burrup Peninsula. But none could afford to lose their rights to access over a billion dollars in gas reserves. At the same time as Ferguson announced his "use it or lose it" strategy, Colin Barnett was meeting with the Browse Basin partners, encouraging them to invest in the Walmadany (James Price Point) Gas Precinct. At the end of 2009 Ferguson gave the Browse partners 120 days to sign up to the LNG processing



22 June 2009 Ferguson pressures producers on gas leases "use it or lose it"; Barnett pressures JPP partners; Oil and Gas Industry promise billions in royalties, tens of thousands of jobs Barnett (International Gas News)

26 June 2009 KLC lobbies Fed government for 1 billion of 65 billion in royalties; KLC starts anti environmental campaign (West Australian)

29 June 2009 "People think that we're selling out, but we're not selling out, we've got to go down this road," he said. "If we don't participate or say yes or no or negotiate, then we'll be left how we were when colonisation left us - with nothing." "We're being shot at by our own people, environmentalists and other individuals and Government." Henry Augustine, (ABC News)

2 July 2009 Report of \$50b Cost Blow Out; Woodside lobbies Feds to strip leases from those who don't agree to JPP project (The Australian)

¹¹³ "WA set to become the 'Saudi Arabia' of natural gas: Barnett", WA Today, August 19, 2009

¹¹⁴ Christine Forster "Australia pressures producers", International Gas Report 22 June 2009

¹¹⁵ **The Australian**, 22 August 2009

precinct or lose their leases. In the end all gave a commitment to develop the site, but there were serious misgivings.

However, BHP's Marius Kloppers continued to adopt a cautionary approach to the Walmadany (James Price Point) precinct project noting: "The history of these large projects is that the best economic option normally emerges, but it is very early days in that project and we will see what comes out of the feasibility studies that are being conducted."¹¹⁶ On many occasions BHP spokespersons had noted the importance of also considering piping the Browse gas up to 800 kilometres to Karratha. At every point this was raised Premier Barnett would throw a spanner in the works, noting: "That requires pipeline easements, all sorts of things, and the state policy is that the Browse gas will be developed at Walmadany (James Price Point). To the best of my knowledge, that is also the Federal Government's policy." Barnett made it clear that he would oppose any alternative: "People just need to appreciate that the world has changed. With the global financial crisis it changed. You will find governments both here and elsewhere will take a far more direct role in policy and development of natural resources."¹¹⁷

BHP maintained a consistent line right through the crucial first stages of the project. BHP Chief of Petroleum Mike Yeager confirmed the Kloppers view: "Obviously at the end of the day the idea of building a brand new green-field Kimberley infrastructure and having right down the road from it North-West shelf infrastructure that may or may not be full is the real dilemma. That's why we wanted to not declare whether Kimberley or the North-West Shelf should be the right option at this time. Concept selection is so vital, we wanted to work both of those options simultaneously. As you know, it's really three fields offshore, very complex, a long way from the beach, about 14 trillion cubic feet. There are a number of technical issues on Browse that are not yet solved. These are things that can be solved, but it does indicate that we've got a little bit more work to do before we can have a firm project schedule."¹¹⁸

Shell's chairperson Russell Caplan said: "Governments can say no to things ... but at the end of the day, (the Premier) can't say that a project must be delivered...He can only say that a project can't be delivered. He has all the power in the world within his mandate. But that power is to stop something, not to make something go ahead. And those who are going to make it go ahead have to be prepared to invest (billions) to make it go ahead. They won't go ahead because Colin Barnett says it has to



3 July 2009 Woodside partners favour Karratha, Gorgon processing against \$50 billion LNP; Cheaper to build pipeline to Karratha but this would threaten Woodside's supply side deals with China and Taiwan set to commence in 2013 (The Australian)

27 July 2009 Traditional owners who signed off on the Kimberley gas hub in-principle agreement have likened the process to having a gun held to their head. But several traditional owners have told the ABC the Kimberley Land Council signed a document preventing them from speaking out about the process. They say they only voted for the project because they thought the land would be compulsorily acquired by the Government if they objected. (ABC News)

28 July 2009 KLC pushes Woodside partners to develop JPP project; Barnett says he would block pipeline to Karratha by not granting easement (AAP)

¹¹⁶ Thomas Pearmain, "Western Australia's Premier Calls for Tenders for Browse LNG Report", **Global Insight**, 18 August 2009

¹¹⁷ Ibid.

¹¹⁸ Angela Macdonald-Smit, AFR "Discord mounts in Browse LNG venture", 31 May 2010

go ahead.” Walmadany (James Price Point) hub was an excellent initiative that had created an option not previously available. “But whether it’s good enough to make everything fall in place, we are a long way from knowing that.” Mr Caplan went on: multiple floating LNG facilities could also be possible at big fields like Browse, if environmental, economic or social considerations made onshore development unattractive. Mr Caplan also confirmed Shell’s smaller Prelude field nearby was a frontrunner to become the first of several Shell-owned fields globally to be developed using innovative FLNG technology.”¹¹⁹

All of the Browse Basin partners questioned the merits of solely focusing on the Walmadany (James Price Point) gas precinct. In August 2009 the proposal received the following editorial comment: “Woodside is keen to proceed with an LNG plant at Walmadany (James Price Point) , to process gas from the Browse Basin gas fields off the Kimberley coast. However, its joint venture partners, including Chevron and Shell, appear to have other priorities for the next few years. These include Australia’s largest ever resources development — the fifty billion dollar Gorgon gas project — which is expected to get a formal go-ahead in the next few weeks. In light of this, it is widely surmised that they would like to keep open the long-term option of piping the Browse gas to the Burrup Peninsula, where it could be used as feedstock for the existing LNG factories. Last week, Mr Barnett took the extraordinary step of ruling out that option. ‘That gas will be developed in the Kimberley,’ he told reporters outside a Woodside function. ‘Take a reality check, recognise the policy position and deal with it.’ What is Mr Barnett trying to achieve? For one, he wants to justify the enormous political capital he has invested in Walmadany (James Price Point) . He is also itching to see big resources projects proceed. But his comments go beyond promotion and facilitation; they constitute direct involvement in a commercial matter. Given the apparent commercial differences within the Browse joint venture, his comments might even be described as interference. Worryingly, he foreshadowed more of the same. ‘You will find governments here and elsewhere will take a far more direct role in policy and development of resources,’ he said. Taking a direct role may be okay, if it involves facilitating private sector development. But if it involves arbitrarily ruling out private sector development opportunities, that is a strange policy stance for the leader of a free enterprise party.”¹²⁰

Chevron Vice President Kirkland was also concerned at the way in which the LNG development of the Browse resources was headed: “We want a Browse solution that makes the most economic sense, we want to see those reserves produced for the



28 July 2009 Woodside secures lease of 15 hectares of Broome Port Authority Ltd (Asia Pulse)

31 July 2009 Chevron pushes Wheatstone operational by 2016 (WA Business News) 6 August 2009 The Shire of Broome is concerned the Government’s plan for a liquefied natural gas (LNG) processing facility just north of the town could snowball into a larger industrial estate (ABC News)

11 Aug 2009 Aboriginal rights to land in and around Western Australia’s premier tourist town of Broome have been recognised after more than a decade of uncertainty and legal limbo. (The Australian)

12 Aug 2009 Barnett releases Social Impact Report calls for tenders for Strategic Assessment Report of LNG Precinct (WA Business News)

¹¹⁹ John Phacease, “Shell chief questions pipeline ban” 6 August 2009, WA Business News

¹²⁰ Mark Beyer, “What do Barnett’s Libs stand for?” 6 August 2009 WA Business News

benefit of this country and the benefit of the shareholders that own these resources."¹²¹

In the media world, for every negative story about the Walmadany (James Price Point) gas precinct a positive story was produced. There were reportedly dozens of people working on the Walmadany (James Price Point) gas precinct project, with many working on public relations. It was Don Voelte and Colin Barnett moving forward at all costs, dragging their partners and Wayne Bergmann and his KLC team with them.

However, when we look through the smoke and mirrors, we see a rather disturbing reality. The effect of the “use it or lose it” provision enacted by Martin Ferguson pushed the investors and owners of Browse Point gas reserves into a fast track that did not ensure that the optimal infrastructure and development of the Browse Point gas resources. On these grounds alone there needs to be at minimum a parliamentary inquiry into the “use it or lose it” policy. The whole effect was to fast track a number of processes including the consultation and Indigenous Land Use Agreement negotiations which were in accordance neither with good ethics nor with good practice.



15 Aug 2009 The fight between US giant Chevron and home-grown Woodside over Australia's booming liquefied natural gas (LNG) industry has become increasingly hostile in recent months. (AFR)

26 August 2009 Woodside's partners favour processing the Browse gas through the North West Shelf's Burrup Peninsula plant. Mr Voelte said a Kimberley-based operation could be running by 2017, possibly earlier, but Burrup would mean 2022. Woodside has offered to buy its partners gas rights. (West Australian) West Atlas Oil and Gas leaks (ABC News)

28 Aug 2009 Voelte pumps JPP option; offers to buy partners out; partners want to use Browse gas to take over from NWS gas in 2017-18 (Upstream)

29 Aug 2009 LNG thin end of industrialisation of Kimberley (The Age)

¹²¹ ABC, 7 Dec 2009

***David, Goliath & an Independent
Indigenous Economic Vision for the
Kimberley***

The great problem at the end of 2009 and onwards, articulated by both sides of the debate over the LNG precinct within the Indigenous community, was that there was no sense of choices about the future. Aboriginal people had been here before. It was all about cutting deals. Everything was contingent.

Colin Barnett had engineered an outcome in terms of nominating Walmadany (James Price Point) as the site for the LNG precinct. From this some thought that the Kimberley Indigenous people's problems might be over. At one of the workshops convened by the KLC a senior Bardi man had said:

"On my left is our past and all of our culture, our heritage and my history; on my right is our future, my children and my grandchildren. I am in the middle making sure that the best of my past and my culture is kept strong as we make our way into the future."¹²²

It seemed to be a choice of one or the other.

The trajectory of negotiations from Carpenter to Barnett and the loss of the Inpex opportunity to Darwin had created a sense of urgency for all who participated in the KLC workshops and consultations. It was as if the future hinged on being able to 'catch and kill' the opportunities arising from the Browse Basin gas. This tended to override the considerations of traditional cultural heritage. In this bubble of expectations many forgot that traditional law preserved a way of life as well as a unique, interconnected series of eco-systems. The unique way of life that had been forged around Broome in a true multi-cultural community had to be discounted against what the future might bring. And of course there were some who thought that they had done it tougher than others and wanted a piece of the cake that they had previously been denied. The Lurujarri trail to some seemed to be a family business benefiting a relatively small group of traditional owners, whereas \$1.5b. of investments could benefit all of the Goolarabooloo and Jabirr Jabirr people as well as all of the other Indigenous communities throughout the Kimberley.

On top of this, the dominant discourse that held sway was that articulated by Noel Pearson. Aboriginal people needed their own sources of income. They needed to move away from government funding and welfare. Wayne Bennett championed this rhetoric and was a sincere and innovative advocate of this belief. On the 6th June 2011 Bergmann wrote an article for the **Canberra Times** replying to a critical piece by Kathie Muir that had been published the previous Monday. Bergmann argued



1 Sept 2009 Shell finds more Browse gas; promotes floating gas liquefaction (Petroleum Economist)

2 Sept 2009 162 Humpbacks sighted off James Price Point; Premier says whales won't be harmed by project (SMH)
3 Sept 2009 Conoco Phillips buys in to Browse (BMI Industry Insights)

5 Sept 2009 "James Price Point is scrub. It's a tableland. Flat as a table. An unremarkable beach. There are no cliffs, there are no hills, and there are no communities probably within 30-40 kilometres. It is not the Kimberley that Qantas uses for its ads. Nothing like it." Colin Barnett (The Age)

15 Sept 2009 Gorgon work starts and is expected to generate \$300 billion in export revenue (The Australian)

3 Oct 2009 Irene Davey, Wayne Bergman talk of better future from Gas (West Australian)

¹²² O'Fairchealiagh, op cit., p. 28

“Self determination for indigenous people can only work if we have an economic base. Culture cannot be preserved in a vacuum, we must be allowed to bring our unique knowledge to the modern economy.”¹²³ He went on: “This was a David and Goliath battle, Indigenous people were up against a State Government that, at the time, would rather push for ‘compulsory acquisition’ of indigenous land than sit down and talk to us, and a legal system that makes it difficult for indigenous people to say no. In this context we were able to negotiate a world class agreement that the whole of Australia can be proud of. The agreement we negotiated starts with a minimum of 300 jobs in the construction phase of the project for Indigenous people. This is just the start of what partnerships will do for future generations.” He went on to say: “It is frustrating that the loudest voices in the debate seem to be from people who do not live in the Kimberley. When they have moved on to the next fashionable environmental cause, indigenous people will still be here, trying to preserve the world’s oldest living culture amidst poverty and deprivation.” Bergmann went on to argue that: “Opponents of the Walmadany (James Price Point) development have made false claims about the process that led to indigenous people voting to approve the development, and its effect on our traditional country. The traditional owners’ vote in favour of development is the result of a thorough process of consultations run by the Kimberley Land Council and of tough negotiations with Woodside. We have spent three years ensuring that traditional owners were informed about the proposal and that their views were included in negotiations. Traditional owners have been clear throughout that no development will be supported unless the environmental and cultural values of the site were protected and the development delivered gains for our communities. One of our key demands which has been agreed to is for traditional owners to be involved in all phases of precinct development and management. Traditional owners did not make this decision lightly. In the lead-up to the vote, issues were debated in detail but the final vote was clearly in favour of the development.” He went on to say that those who criticise the process of decision-making “are doing injustices to the generations of indigenous people who have fought to have control of their own land”.¹²⁴

It was a powerful article but its logic was flawed.

Throughout 2010 the KLC piggy-backed on and mirrored the campaign by Noel Pearson that had been running on Cape York Peninsula against the Queensland government’s Wild Rivers legislation. In fact the issues were very different. In Queensland Government legislation, “the Wild Rivers Act” threatened to weaken the rights of Indigenous people to decide about what



5 Oct 2009 State government and Woodside sign agreement to fast track LNG JPP site (WA Business News)

9 Oct 2009 Global technical and professional services consultancy AECOM contracted for environmental assessment of JPP (WA Business News) Shell's decision to build an offshore gas processing plant in the Browse Basin has raised questions about the need for industrial development on the Kimberley coast. (ABC News)

12 Oct 2009 Woodside surveys Dampier Peninsula marine biodiversity (ABC News)
13 Oct 2009 Shell FLNG Ship FID 2011 (BMI Industry Insights)

23 Oct 2009 KLC lobbies Canberra says lack of Fed Funding threatens project (West Australian)

30 Oct 2009 Broome Shire approves 30 metre weather tower for James Price Point (ABC News)

12 Nov 2009 West Atlas leak, 400,000 barrels a day, finally plugged (WA Business News)

¹²³ Bergmann, “Help Kimberley People progress in the world”, **Canberra Times**, 6 June 2011

¹²⁴ Ibid.

kind of activity could occur on their own lands. Noel Pearson wrote on October 2 2010: "This week at St John's Cathedral, Dean Peter Catt of the Anglican Diocese of Brisbane launched the Social Justice Committee's report on the Queensland Wild Rivers laws, repeating their call for the declarations made in Cape York Peninsula to be revoked and for the "free, prior and informed consent" of Aboriginal landowners to be obtained before any Wild River declarations are made over Aboriginal land."¹²⁵ **Ironically, in the Kimberley it was precisely 'free prior and informed consent' that was at the heart of the Walmadany dispute.**

In an article expressing sympathy at the position in which Wayne Bergmann and the KLC found themselves, Noel Pearson wrote: "The Native Title Act establishes the legal framework for recognising and affording traditional owners their right to make decisions affecting their lands. It is not a perfect law, but it is the best available. Bergmann and the KLC are obliged to follow the Native Title Act. If anyone believes they are not complying with the law, then they are able to take legal proceedings. There have been legal challenges already, but they have not been upheld. However genuine are the arguments of Bergmann and the KLC's opponents, and I offer no opinion one way or the other, there is no doubt that non-Aboriginal interests have contributed to and exploited the divisions between Aborigines. It is not just anti-development interests that drive wedges between Aborigines but indeed development interests (not the least governments) were the pioneers of these tactics. It is just that the environmentalists have caught up with these same tactics and they don't care if they exacerbate divisions within the Aboriginal community. They just want the division so they can win their own cause."¹²⁶

In this case Pearson was plain wrong. In fact the Kimberley environmental groups had signed an undertaking to respect the decisions of the traditional owners in 2007 and had abided by this agreement. It was the environmentalists who recognised, like the independent review set up by the KLC, that there was no Indigenous Free Prior Informed Consent in the LNG precinct machinations overseen by the KLC after the election of the Barnett government.

This did not stop the KLC taking up the rhetoric of the Cape York campaign that environmentalists were restricting the rights of Aboriginal people to determine their own fate. They failed to see that the issue of Aboriginal self-determination that was at the core of the Pearson case in Cape York against the Bligh government was also at the heart of Joseph Roe's Goolarabooloo case against the KLC and the WA Government



23 Nov 2009 "A group of traditional owners of James Price Point in the Kimberley has withdrawn support for the State Government's plans to build an LNG processing facility at the site. Native title claimants voted to support the project in April, but the Break Away group has said most people continued to oppose it and were manipulated into approving. The group said the Kimberley Land Council, appointed to represent them in negotiations with Woodside, is pandering to the WA Govt. Spokeswoman Laura Cox said she's hoping most of the claimants will sign a petition to oppose it." (Media Monitors)

24 Nov 2009 Concept selection Browse Woodside (Platts Commodity News) Woodside say Front end engineering and design (FEED) phase 2010, Final Investment Decision 2011. Goal: 20 million mt/year of LNG by 2020. (AAP)

25 Nov 2009 "Woodside Petroleum chief executive Don Voelte claimed his United States rival Chevron had negotiated a 'stupid' gas supply deal with US company Apache Energy and Kuwait's Kufpec." (AFR)

27 Nov 2009 Broome Shire reverses position and now supports gas Vote 5/3 (ABC News)

¹²⁵ Noel Pearson, "Decision is in: Wild Rivers laws stink", The Australian, 2 October 2010

¹²⁶ The Australian, 11 Dec 2010

and the LNG precinct. Over and above any mainstream rhetoric about the good of industrialisation or the good of environmental conservation, the traditional owners had a right to say what happens on their own country. It was their land, their customary laws which had been recognised by the Mabo case and so far as is possible the protocols and principles of Aboriginal decision-making had to be followed.

Even the KLC-commissioned independent ‘Traditional Owner Consent and Indigenous Community Consultation Report’ found that from the time the Barnett government came to power the appropriate protocols for consulting with traditional owners were not met. It found that the “site selection process conducted between December 2007 and September 2008 and involving the KLC and the TOTF (Traditional Owners Task Force) embodied the principle of Indigenous Free Prior Informed Consent (IFPIC) to a substantial degree.” However from that time, the so-called ‘consent’ of traditional owners “did not conform with the principle of IFPIC because:

- Traditional owners faced the threat of compulsory acquisition by the State in the absence of an agreement and so their consent was not given freely. (On 2 September 2010, the Western Australian government announced that a compulsory acquisition had been commenced)
- Traditional owners and the KLC were required to negotiate with severe time constraints, and as a result insufficient time was available to negotiate certain issues fully with the State and Woodside and for Traditional Owners to fully understand the ramifications of certain components of the Heads of Agreement
- Traditional Owners and the KLC faced the threat of loss of State funding to support any further participation in relevant processes if an agreement was not concluded;
- Traditional Owners lacked adequate information about important aspects of the Proposed Precinct, including its design, the location of associated facilities, and its likely environmental impacts.”¹²⁷

Any semblance of a responsible approach to economic development respecting Aboriginal rights was now gone. Premier Barnett had imposed his will that Walmadany (James Price Point) would be the site for the LNG Precinct. The KLC and its negotiating parties had accepted that they had no capacity to stop Barnett. The process then fell into a pressurised race to develop an ILUA and to ensure that the benefits package was suitable for all parties to sign. Barnett created a dictate that an ILUA be delivered. But the legitimacy and moral authority of the whole process and all of the actors was questionable. The



“Our job is to respect this land, it’s in our Dreaming. Why can they not just appreciate this is blackfella country? What are we going to spend money on? We already belong to this country ... we don’t need a flash house... this is our home, this country owns us.” Roy Wiggan, *Old Country, New Country*

1 Dec 2009 Chevron Executive VP Kirkland says: "We want a Browse solution that makes the most economic sense. We want to see those reserves produced for the benefit of this country and the benefit of the shareholders that own these resources." (AAP)

2 Dec 2009 Martin Ferguson & Colin Barnett give Browse partners 120 days (April 2010) to pick LNG plant location or lose leases (Dow Jones)
17 Dec 2009 US Pew and Nature Conservancy fund WA projects (WA Business News)
17 Dec 2009 Shell calls for more studies of LNG facility at JPP (AFR)



¹²⁷ O’Faircheallaigh, op cit, p. 9)

KLC was reduced to negotiating about how revenues and benefits would be distributed.

Through this period many began to realise that the concept of Indigenous Full Prior Informed Consent was not just an end in itself. It was the basis for the wisdom of Indigenous people to shape the future economy and society. This was lost with Barnett. It was not just that the KLC was confusing its roles of native title representative body and economic development agency, whatever the deal; by going along with Barnett it was restricting the capacity for Kimberley Indigenous communities to determine their own futures.

There was clear division within the Indigenous community and potential native title claimants for the Walmadany (James Price Point) region. 150 Aboriginal claimants for the Walmadany (James Price Point) area declared that the KLC had no right to negotiate on their behalf. Representing this group, traditional owner Neil Mc Kenzie said: "There are a lot of issues that are of concern to us and we will challenge them in whatever way, if it's legally or whatever other challenge we can find, we will use it."¹²⁸ The consensus agreement that the KLC, Woodside, the WA and Federal Government had hoped for in relation to an LNG precinct in the Kimberley was shattered.

Of course so far as Woodside and Colin Barnett were concerned this was just a hiccup on the pathway to the development of the LNG precinct. On 5 October 2009, the State Government and Woodside agreed to fast-track the LNG development. Woodside was to proceed at full steam ahead to its Front End Engineering and Design phase in 2010 and was preparing for a Financial Investment Decision in 2011. It had commissioned surveys of marine diversity, leased land in the port of Broome, commissioned a metocean study of the route from the gas fields to the Walmadany (James Price Point) LNG precinct, contracted an environmental assessment of the Walmadany (James Price Point) area, offered to buy any sceptical Browse Basin partners out of the development and began offering the first of \$A1.25 billion in design phase contracts. By February Ferguson's 'use it or lose it' proposal had its desired effect, with all of the Browse joint venturers agreeing to support the Walmadany (James Price Point) precinct. But BHP chief Marius Kloppers continued to make it clear that the Kimberley LNG precinct was a low priority for the company.¹²⁹

However, within the larger Indigenous and Broome community many began to ask on what basis the KLC had developed the ILUA and on what basis was it representing the Goolarabooloo and Jabbirr Jabbirr traditional owners?

The next milestone that the KLC, Barnett and Woodside had to negotiate was the approval by the Goolarabooloo and Jabbirr

¹²⁸ ABC, 22 Dec 2009

¹²⁹ **West Australian**, 22 Feb 2010

Jabirr traditional owners of the ILUA itself. But as time went on many began to ask how the KLC worked out who had the right to participate in the decisions about Walmandany (James Price Point). The problem was that no attempt had been made to do the first thing that most native title agreements required: establish a connections report that clearly and properly established the legitimacy of the claimants to their land. The demands of the parties in trying to create a site for the LNG facility over-determined the nature of the native title claim and the nature of the claimants.

In the Miriuwung Gajerrong native title case it took four years for the legitimacy of the claimants to be established. Incredibly, in the case of Walmandany (James Price Point) there had been no connections report and no public statement of who had the right to decide about the area or the issue. The whole process was held tightly within the KLC purview.

Walmandany (James Price Point)	Miriwung Gajerrong
2007 Site for LNG Precinct Needed	1994 Claimant lodges application
2008 Determine location of site with native title groups	1997 Claim contested; two further applicants join the claim
2009 Offer payments to prospective native title claimants via ILUA	1998 Federal court determine native title exists in the region
2010 Conduct meetings of prospective native title claimants to vote to execute ILUA	2000 Full Court appeal
2010 State government threatens compulsory acquisition unless native title claimants cooperate	2002 High Court Appeal
2011-12 Determine legitimate native title claimants to divide up royalties and payments	2003 Determination by consent; Negotiations for Ord River Settlement Begin
2011-12 Grant native title with the cooperation of commercial parties at the successful beginning of project if applicants agree to commercialisation process.	2005 Ord River Final Settlement 2006 Final determination by consent
2011-12 Native title advisory groups formed	2009 Native Title Body Corporates formed ¹³⁰

After an ABC 4-Corners special and a NITV documentary clearly documented the consistent opposition of the

¹³⁰ Information for this table came from Howard Pedersen, "The Ord River Agreement and Miriuwung Gajerrong Native Title Organisation", unpublished draft received with thanks to the author.



23 Dec 2009 Royal Dutch Shell, Chevron and BHP Billiton have made clear that they do not intend to hand over their equity in the controversial Browse LNG project without compensation after this week accepting a highly onerous set of retention lease conditions. In a move ahead of a government-imposed January 2 deadline, the Woodside-led group of five said on Thursday that it had agreed to accept the terms imposed by WA and the Commonwealth in order to retain the Browse gas field permits. (West Australian)

3 Jan 2010 Woodside Petroleum's agreement to supply between 2 million and 3 million mt/year of LNG from its Browse project in Western Australia to Petro China has lapsed, but the company is now in talks for the potential sale of 1.5 million mt/year to Japan's Osaka Gas. (Platts Commodity News)

9 Jan 2010 Buru Energy to build a 630km pipeline to connect proposed gas fields in the Kimberley to the domestic gas network in the Pilbara. (West Australian)

13 Jan 2010 Taiwan-China Petroleum signals renegotiation of Woodside Browse gas contract (Platts Commodity News)

22 Jan 2010 Green MP Robin Chapple alleges State secretly changed JPP site land tenure documents (ABC News)

Goolarabooloo group to the LNG precinct in mid-2010, it was obvious that the KLC would have to change tack. The KLC threatened legal action against NITV.¹³¹ At this stage Premier Barnett went back on the warpath, threatening ‘compulsory acquisition’ if the traditional owners did not approve the ILUA. The controversial 1998 amendments to the Native Title Act by the Howard government allowed for ‘compulsory acquisition’ of lands for public and private infrastructure.¹³²

Despite the fact that compulsory acquisition by the State had never been really tested, many were concerned at its effects. Graeme Campbell, President of Broome Shire, was one of those who were convinced of the seriousness of Barnett’s threat: “Well, you’ve got to look at compulsory acquisitions and what they do then is value the land that they’re acquiring at dollar values and that. And the real risk is there if you just did it on that basis — not future benefit and not future earning capacity — the pay-out to the owners could be significantly less and that worries me.”¹³³ The truth is that it is likely that any ‘compulsory acquisition’ would have to occur on ‘just terms’, that the whole process could be challengeable under the Racial Discrimination Act and that, having gone down that path, the government would have lost the co-operation of all of the Indigenous claimants and a lengthy and united legal challenge would ensue.

But the compulsory acquisition express was at full speed. The KLC produced a guide to the compulsory acquisition on its website, which repeated a common mantra that also appeared in the Strategic Assessment Report for the LNG precinct: “The State Government has been negotiating with the Kimberley Land Council (**KLC**), which represents the registered native title claimant group, since January 2008 to secure the areas required for the BLNG Precinct. It is the State Government’s preference to secure the land required via an Indigenous Land Use Agreement (**ILUA**) under the NTA, which would ultimately register the consent of the claimant to the establishment and operation of the BLNG Precinct. However, given continued questions on the authority of parties to negotiate such an Agreement and the timing issues that this presents, in September 2010, the State announced that it would commence a formal land acquisition process under the *Native Title Act 1993*. This process involves negotiating in good faith with registered native title claimants for a six-month period. If agreement cannot be reached, the State will refer the matter to the National Native Title Tribunal (**NNTT**) for arbitration for up to a further six months, after which the Tribunal determines if the development may be done, and if so, under what conditions.”¹³⁴

The view that began to be circulated was that the traditional owners had to accept the ILUA and allow the LNG precinct to



1 Feb 2010 Metocean study for JPP by Woodside (Pipeline & Gas Journal)

3 Feb 2010 Murray Wilcox says Aboriginal deal farcical and voices opposition to JPP calls on government to develop Karratha option (SMH)
9 Feb 2010 Joint venture partners reported to agree on site at JPP (Dow Jones)

10 Feb 2010 Woodside awards \$1.25 billion design phase contracts; Murray Wilcox launches case against the gas plant (WA Business News)
“Although it’s been claimed that the local traditional owners wished to, or support it, when you analyse what really happened, they have not so decided. But the second thing is, I say even if there is some money - and no-one has any agreement about money or how much it’ll be - why should the Aboriginal people have to give up their heritage to get things like proper education, proper health services, housing and so on?” Former Federal Court Justice Murray Wilcox, (SBS News)
“Well, there is people there, still looking after the country, in a very strong way and there is still people using it today for sustenance collecting, hunting, camping, all that stuff. Burial sites still being looked after today and what we’re going to do? We’re going to kill it with a gas plant. No, I don’t think so mate. Joseph Roe, (ABC News)”

¹³¹ ABC News, 17 June 2010

¹³² NTA 1993 s24AMD (6B).

¹³³ Northern Territory News, 15 June 2010

¹³⁴ SAR, Part 1, p. ES-13

go ahead or else risk losing the land and all of the benefits negotiated with the State government and Woodside. It is interesting to note that the legislation to allow ‘compulsory acquisition’ has been enacted but never passed by the WA parliament, notably: “the provisions to invest the power of hearing objections in the State Native Title Commission, which has never been established”.¹³⁵

One of the principal effects of Barnett’s persistent threat of compulsory acquisition was to demoralise the opposition to the LNG precinct and to make those who were negotiating believe they had no alternative but to go along with the project. The “sky would fall in on Indigenous peoples of the Kimberley” if the deal was not done. At the end of 2009, 150 people with native title interests in the Walmadany (James Price Point) area signed a petition against the LNG precinct.

The crunch came on May 6, 2011, at a meeting of ‘native title claimants’ for the area. The vote was 164 for the Walmadany (James Price Point) precinct to 104 against. This indicated that over the course of 2010-11, Premier Barnett’s threat of compulsory acquisition had an effect on the views of the native title holders. Many were under the impression that it was an all or nothing situation and the circumstances in which the vote was taken were also controversial.¹³⁶

But who were the voters and the native title aspirants in the critical vote on May 6, 2011? Unlike in a normal native title case, there had been no focus on the proof of origins and culture of the native title constituents. In the famous Yorta Yorta native title case in Victoria, the whole fabric of the claim fell down because of the controversial view that European settlement had severed all connections with traditional Aboriginal society, such that native title and customary law had been extinguished. Olney J found that, amongst other things, a failure to conduct initiations and other ceremonial activities indicated that the Aboriginal inhabitants had lost their native title rights¹³⁷. This ‘onerous burden of proof’ has been much criticised for the terrible impact it had on the native title claimants. So it is not suggested that such a principle be applied in the case of the Jabbir Jabbir or Goolarabooloo peoples. However, from the perspective of the native title claimants there needed to be some basis of proof of relationship to the land and culture before participants gained the right to vote on such an important matter as the construction of a \$40 billion on Aboriginal land!

There was no independent assessment of the decision-making process on May 6, 2011. Not only that, it seems that the funding to facilitate the consultation process had evaporated. The most critical decision that the Kimberley Indigenous landowners would make occurred in as harried, informal and turbulent



11 Feb 2010 Browse gas not top priority for BHP (West Australian)

11 Feb 2010 Domestic gas users lobby for JPP gas reserves (West Australian)

18 Feb 2010 "JPP greenies are something like a human version of the golden staph bacterium that does nobody any good, but can be found in a bit over a third of the population." (Kalgoorlie Miner)

20 Feb 2010 Study of effects on Broome fisheries rings alarm bells (West Australian)

25 Feb 2010 Gas from shale rock could lower price of gas and cast new perspective on NW Shelf and Browse Gas costs (WA Business News)
26 Feb 2010 Barnett: "WA government’s priority was to ensure that the gas was processed onshore so that WA and the Kimberley “benefits from the investment, business and employment opportunities this creates”. (WA Business News)

¹³⁵ Bartlett, 2004, p440

¹³⁶ Wayne Barker, “Aboriginal Negotiator: We are no “Pro Gas”, op cit 2011

¹³⁷ Bartlett, pp. 74-91

environment as the decision to authorise the ILUA on the 14-15 February 2009.

As we have seen in the Miriuwung Gajerrong Native Title case, over three years were spent by the courts establishing who the rightful claimants to the lands were. Walmadany (James Price Point) took the situation from one extreme of an onerous burden of proof to another, where merely on the say-so of the KLC a person gained entry as a native title aspirant to vote on the future of the Kimberley coast at Walmadany (James Price Point). Hearsay suggests that even some young people well below the legal voting age were allowed to vote. Furthermore, it is alleged that many people who had blood relations with native title claimants were not allowed to participate in the meetings or to vote on whether the LNG precinct should go ahead. It is also claimed that some people were assisted with travel and others were not. These claims and accusations continue to be taken up with the KLC.

This situation of votes and committees and meetings on matters reflecting traditional customary law is on any measure bizarre and arbitrary. The whole process tends to favour those who are more attuned to mainstream institutions and legal processes. That is why so many traditional owners all over Australia are insisting that important matters must always be discussed on country and that on matters of great importance the concept of 'a simple majority rules' cannot stand. Decisions can only be taken when the senior law men and women feel that a decision can be taken and when it accords with the hearts and minds of their people. This is a very different process from voting at a meeting and is in accordance with the principle of Indigenous Free Prior Informed Consent.¹³⁸

Instead of coming from the perspective of what, ironically, Wayne Bergmann had told the 2009 native title conference were the ingredients of successful negotiations over native title, namely, 'full knowledge and the strength of their convictions', many seemed to be under serious misapprehensions about their rights and capacities. According to the co-chair of the TONC, Wayne Barker: "The native title act gives you the right to negotiate but you cannot say 'no'".¹³⁹ What Barker was describing was a situation where the TONC viewed themselves to be mere pawns in the game: consulted but with no power to alter the outcome.

This is contrary to what Wayne Bergmann had previously declared to be the baseline principles of successful KLC native title negotiations in the Kimberley: "For example, in the Kimberley we have established baseline conditions like: • 'No means no' and Equity, • Financial compensation for past mining impacts, • ongoing TO involvement in projects including



26 Feb 2010 Huge scale of Browse Gas offshore plant includes 900 kilometers of inter field pipes and 350 kilometer export pipe (Upstream)

17 March 2010 "Aboriginal people negotiating over the Kimberley gas hub are to hold a vote on whether to abandon their 16 year old native title claim and submit a new claim. The Kimberley Land Council has proposed the group withdraw their current claim and re-submit it in a process that may result in some current claimants being excluded. The KLC's Nolan Hunter says the stakes are high and the correct traditional owners need to be established beyond doubt. 'This will create other opportunities and should mean there is a better native title outcome.'" (ABC News).

25 March 2010 KLC offices vandalized; Greens should not force poverty on Indigenous population: Bergman speech (ABC News)



¹³⁸ Walker, 2010

¹³⁹ Martin Pritchard, "Aboriginal Negotiator: We are not 'Pro-Gas'", 14 June 2011

rehabilitation and post-mine phases, obtaining assets. Companies don't necessarily accept these baseline conditions: there can be ongoing battles to assert them."¹⁴⁰

Bergmann was suggesting that you should not compromise your principles and that certain things were not negotiable. After all, 'no meant no' for traditional owners for several other regions and sites where it was proposed to build the LNG precinct. Why was it different when it came to Walmadany (James Price Point)? The troubling aspect here is that the KLC had already accepted payment to 'persuade traditional owners to go along with the LNG precinct'.¹⁴¹ Did this mean that the wrong legal and corporate advice had been made available to members of the TONC, namely that they could in fact say no and that they had every right to do so?

Even more troubling are Barker's comments: "We don't want this project." "We have had to jump into bed with the devil. "We are not pro-gas and we are not pro-project."¹⁴² Barker's view was that if they did not sit down and negotiate the project it would have gone ahead without any Aboriginal people having any input at all. Barker argued, "This is not Self-determination. This is not our gas plant! Barnett knows that – this is his gas plant!"¹⁴³ What this indicates is that even the co-chairman of the TONC did not want the LNG precinct to go ahead but felt as if there was no choice. Again this suggests that the Aboriginal negotiators had not been provided with enough information and support to enter any negotiations with any strength or capacity. Certainly there was no semblance of Indigenous Full Prior Informed Consent.

This also flies in the face of what the KLC regarded as the basis for successful negotiations. Bergmann said it was necessary to build a knowledge base which included establishing "the history of the key players: the native title group, the company, the project. Establish TO principles in relation to outcomes and process. Build understanding of company side and of any other key players. TO training and capacity building. Ongoing review process".¹⁴⁴ Were the negotiators aware, for example, that several of Woodside partners were sceptical of the project and wanted to see a pipeline built to Karratha bypassing the Dampier Peninsula? Were they aware that other floating technology was available to process the gas? How well aware were the negotiators of these alternatives if they did not want the Walmadany (James Price Point) project to go ahead?

¹⁴⁰ Bergmann, 2009, p21

¹⁴¹ Barnett government pays \$9.15 million "to meet the costs associated with obtaining consent from registered native title claimants" Reply from the Hon. Norman Moore to Question Without Notice No. 149 asked in the Legislative Council by Hon Robin Chapple 21 April 2009

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Bergmann, 2009, p16

Even more disturbing was the way in which an economic development agenda was plainly the main concern of the negotiators. Some negotiators clearly thought they had no chance of saying no to the development. This is disturbing because other native title holders for the area who wanted to fight the development through the negotiation process and the native title process on solid grounds were marginalised.

Those who thought the Walmadany (James Price Point) gas precinct was inevitable, then started to negotiate on the basis that they could develop a better series of long-term economic benefits for their community than had happened in, for example, the Pilbara. But what had happened in this process is that the first step that any responsible native title body should take was omitted. This was of course to establish with the company the full native title rights of the Goolarabooloo and Jabirr Jabirr people. Then, even if the native title group had accepted the LNG plant as inevitable, it should have reached a better outcome in its negotiations. This was unsatisfactory because it excluded the traditional owners from equity in the project. In other words Woodside and the WA Government would have equity in the project and make their money, then hand over the site to the traditional owners. The \$1.7 billion offered to the native title parties was inadequate against the profits and royalties that would come with equity. Similarly, the power of the native title parties to determine who received contracts on the site and other commercial dealing that could be of use to native title parties was also much stronger if they had equity in the project. If the KLC and the TONC were doing their best for their constituents then, as the rightful owners of the land, equity should have been their primary goal. Yet Wayne Barker could say, “We can put our hands over our hearts and say we done the best we possibly can for everybody, black and white, traditional and non-traditional owners in this country.”¹⁴⁵

Similarly disturbing was Barker’s comments that to think about the long term social impacts of the project was “crystal ball gazing”.¹⁴⁶ All that the TONC seemed able to guarantee was to minimise the impact of the incoming project workforce: “The fly-in, fly-out workforce – we have to lock them down. We don’t want them out there fishing in our creeks, shooting our bullocks, running around our country. Try catching a fish in the Pilbara. But we could only do that if we were at the table.” (14 June 2011)

Contrast this level of thinking with the quality of Paddy Roe’s stewardship of the lands. Roe was concerned about the effects of unsupervised but low-density tourism on the Kimberley coast! Barker seems not to be able to comprehend the effects of building the gas liquefaction plant at James Prices Point and the

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

effect of laying a pipeline and dredging the sea bed, or the reality of dealing with thousands of contractors and workers coming through Broome and onto the pristine Kimberley coast. Barker seemed to also accept that Woodside and the State Government had the right to break the songlines forever. This represented a real failure, given the fact that so many of the traditional claimants could see in clear detail the effect of the LNG precinct on the traditional lands.

In the interests of due process and fair play the TONC should have been made up, at least in part, of those who did understand the full effects of the LNG precinct being built at Walmadany (James Prices Point) and who did not want to settle with Woodside or the WA government. Even if the project were to have gone ahead, these representatives would have taken a stronger line on many issues and it is arguable that a better result would have been achieved in the negotiations.

There seems no doubt from Wayne Barker's remarks that the TONC itself was of the view that it had no other option but to proceed with the LNG precinct. However, as it stood there was a confluence of economic advocacy and native title representation. On this basis it can be argued that native title rights and customary law were not properly represented. Moreover, even though the agreement was a step ahead of some of the negotiations that took place in the Pilbara and elsewhere, in that it was not just a cash royalty deal, it was still suboptimal. Customary law and culture and stewardship of lands was never properly expressed or represented. Rather it was excluded from the table. Wayne Barker's view that "you had to have a seat at the table to have a voice" was a very sad testimony to all that the Mabo decision in Australia seems to have been reduced to in the Kimberley.

Despite Bergmann's view that the biggest protests against the LNC precinct are from outsiders, at the same time a very powerful voice within the Kimberley was also expressing its concern. The traditional families of Broome are very conservative about the issues they take on. Yet on the day that Bergmann was penning his article Broome's families were also meeting to voice their protest at the LNG precinct. On the 9 June 2011, 500 members of prominent Broome families voiced their disapproval of the LNG development.¹⁴⁷ Moreover, in an unprecedented action several family members joined the blockade against the development and on 10 June packed into St Mary's College to publicly sign a petition against the LNG precinct.¹⁴⁸ The families were about as far away as you could get from being Kimberley outsiders. They were the pioneers of the local Broome economy, living there in the time before tourism, building the pearl industry and the famous multi-



21 June 2010 JOSEPH ROE: "And Wayne Bergmann got up. He looked at me and he said well I'll ring up Barnett and tell him to take the threat away. DEBBIE WHITMONT: Roe says Bergmann went outside for only a few minutes. JOSEPH ROE: With his telephone. Then he came back inside all smiling and said na, if you take the deal Barnett's not going to come and take it. So to me he just went down the phone, talked to who I don't know, got the gun off Barnett and pointed it at us now. That's the way I read it." PATRICK DODSON: There's no no. There never has been a no. There's never been a no in indigenous land rights in this country. WAYNE BERGMANN: I think KLC have acted with the utmost integrity through the whole time, and I think what's happening is that this whole process has, um, created a huge lot of pressures, and people are pulling at straws to try and argue anything. (4 Corners, ABC)

30 June 2010 State Premier Colin Barnett said he was disappointed that the Kimberley Land Council (KLC) had been unable to sign the indigenous land use agreement by the Wednesday deadline because of infighting among aboriginal groups. "There has been substantial progress made but until the signature's there, it all means nothing," he said. (International Oil Daily, Reuters)

¹⁴⁷ The **West Australian**, 9 June 2011)

¹⁴⁸ . The **West Australian** 10 June 2011

cultural values that the town is famous for. Many families have close relationships with the traditional Yawuru owners of Broome and other Aboriginal native title holders, including the Goolarabooloo and Jabirr Jabirr custodians of Walmadany (James Price Point). In their letter of protest they argued that the bureaucratic process that had allowed the LNG precinct to go ahead left them weakened and that they were not consulted at all in the deliberations. Not only was this sentiment aimed at the WA Government it was also aimed at the KLC itself.

Bergmann article did not mention that his own independent Indigenous Social Impact report had found that the principle of Indigenous Free Prior Informed Consent was absent from “the thorough process of negotiations” and asked, if the KLC had consulted fully with traditional owners about Walmadany (James Price Point), why were 30 Aboriginal women involved in a blockade of the site just days after his article appeared? Jabirr Jabirr woman Mitch Torres said: “I’m sitting with the aunties and my children and my cousins and we’ve all got the same feeling. We’ve been coming to this country since we were babies and we don’t want to see the destruction of this because its so important to all of us.”¹⁴⁹ The next day, on 14 June 2011, the KLC said that the “environmental groups” participating in the blockade were betraying the traditional owners who had voted to approve the gas hub.¹⁵⁰ Bergmann harked back to the 2007 agreement between the KLC and environmental groups “to respect decisions made by traditional owners”. But it was traditional owners who were involved in the blockade. The KLC continued to believe or were trying to give the impression that only outside environmentalists were against the LNG hub. when the divisions were deep amongst the traditional owners themselves.

Aboriginal people of the Kimberley badly need an economic base but it cannot be won at the price of trading away their fundamental native title rights. It is concerning that in his article Wayne Bergmann argues that “it is legally difficult” for Aboriginal people to say no to a development and that it was impossible to say no to Colin Barnett. “It was his gas plant.” One wonders if the traditional owners really did understand that the ‘legally difficult’ path of saying no was open to them and that, following that course, there was always the possibility of doing what the founders of the KLC had done a generation before at Noonkanbah.

Wayne Bergmann’s article also seemed to trade the Goolarabooloo and Jabirr Jabirr ancient practices and country off for economic reasons. The suggestion was that the LNG precinct is compatible with the ancient culture of the region and that having traditional owners involved with the management of



2 July 2010 "Pat Dodson has joined other law men and hundreds of native title claimants in court action against the Kimberley Land Council over Woodside's proposed liquefied natural gas precinct near Broome." (The Australian)

26 July 2010 Sealed road to JPP approved (ABC News)

28 July 2010 Shell to reconsider Woodside stake; may team up with Woodside rival Chevron; Broome Shire says no workers in town (Dow Jones International)

30 July 2010 Contractors vie for Browse FEED (Upstream)

2 August 2010 The Federal Court has thrown out legal action being taken by Kimberley gas hub opponent, Joseph Roe. Mr. Roe was trying to stop a meeting of traditional owners which will bring together the pro and anti-gas hub factions to find a way to re-start negotiations with Woodside. He argued the Kimberley Land Council should never have started negotiating with Woodside because the project did not have the support of the more than 1,000 people listed on the native title claim for James Price Point. Judge John Gilmour dismissed Mr. Roe's case, saying he doesn't have the right to take action on behalf of the claimant group. He described Mr. Roe's behaviour during the litigation as "most unsatisfactory". (ABC News)



¹⁴⁹ ABC, 13 June 2011

¹⁵⁰ ABC, 14 June 2011

the plant will somehow preserve culture and heritage. This clearly contradicts the view of Paddy Roe and his extended family, who took the initiative to care for their country in the times when there was no suggestion of any kind of economic compensation. Their view was the LNG precinct will have dire consequences for not only their own people but the Aboriginal people of the West and East Kimberley.

Tick the Box

“Safety is not proprietary.”

US National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Chapter 8, 11 Jan, 2011

The problems of the consultation process went far beyond the question of who was judged to be the traditional owners of the Walmadany (James Price Point) area and the way in which the negotiations over the ILUA had proceeded. Once Colin Barnett came into power in Western Australia the question of appropriate development on the Kimberley coast, one of the world’s pristine ecological locations, became secondary to ticking off the necessary environmental, social and economic regulations to ensure that the LNG precinct could go ahead.¹⁵¹

Speed was of the essence. To quote again from the KLC’s own independent assessment review:

“Traditional owners and the KLC were required to negotiate with severe time constraints, and as a result insufficient time was available to negotiate certain issues fully with the State and Woodside and for Traditional Owners to fully understand the ramifications of certain components of the Heads of Agreement; Traditional Owners and the KLC faced the threat of loss of State funding to support any further participation in relevant processes if an agreement was not concluded; Traditional Owners lacked adequate information about important aspects of the proposed Precinct, including its design, the location of associated facilities, and its likely environmental impacts”¹⁵²

As the combined environmental groups also demonstrated in their submission to the Strategic Assessment in April 2011, the entire analysis of the LNG plant shifted from being an analysis of the best site for processing the Browse Basin gas to being simply an assessment of Walmadany (James Price Point) as the only possible site for processing the gas.¹⁵³

¹⁵¹ See on this S. Halpern, et. al, **A Global Map of Human Impact on Marine Ecosystems**, Science 319, 948, 2008

¹⁵² O’Faircheallaigh, op cit, p. 9)

¹⁵³ The strategic assessment process agreed to between the Commonwealth and WA governments in February 2008, and endorsed by a range of community groups, was supposed to determine the optimum location for processing gas from the Browse gas field having regard to environmental, social and economic factors. Unfortunately, due to political interference, this process has never been conducted and therefore no meaningful comparative assessment of processing options is available to WA or Commonwealth Ministers. i. The strategic assessment process was effectively unilaterally discontinued after the August 2008 change of government in WA. ii. Incoming Premier Barnett imposed himself above the process — first stating Browse gas processing must be in the Kimberley, then announcing North Head as his preferred location, then opting for James Price Point when certain environmental constraints at this location were pointed out to him. All this



5 August 2010 Barnett: "I don't see anything particularly onerous about compulsory acquisition. It's nothing unusual for any sort of public works whether it is a road or pipeline, power station or industrial site as this is for the state to acquire the land. James Price Point is not an area that has native title established on it. It is vacant Crown land, it belongs to the state." (Asia Pulse)

25 August 2010 Mr Bergmann said negotiating under the umbrella of compulsory acquisition was unfair because it put pressure only on Aboriginal people, not the company and not the state. The gas hub would bring in 6000 workers and have a huge impact on Aboriginal communities, he said. "How can Aboriginal people be part of this project when the educational requirements are Year 12 or better and up the Dampier Peninsula there are next to no kids finishing Year 12? I think there's a mandate for this project to go ahead, but not at any cost." (AAP)

A\$40 billion project on sacred land with a mass of environmental, economic and social consequences had to be reviewed and accepted in a matter of months. There were numerous questions. What effect would the LNG precinct have on the Kimberley economy, society and environment? Local and regional people whether Aboriginal or non-Aboriginal had fundamental rights as citizen; not only the traditional owners but the wider community of Broome and the Kimberley needed an extensive analysis of many questions and issues including:

- what would the LNG precinct look like in real terms?
- that the project was the best solution to access the Browse Basin Gas in the national interest
- that there was no vested interest in promoting the project between the State and Federal governments and the foundation proponent of the project, Woodside and its partners
- that the project was safe
- that it was environmentally responsible and would not degrade their world-renowned pristine region
- that the project would be positive for the local economy, society and culture
- that it protected and advanced the local Indigenous culture and opportunities
- that it would lead to a better future for the Broome region and for the Kimberley in general

took place outside of due process. iii. As a result of this political interference together with the role of Woodside Petroleum Ltd and Federal Resources Minister Martin Ferguson (see section 4.1 below), strategic comparative assessment of processing options outside the Kimberley was never properly carried out or presented. iv. Following the August 2008 state election, the EPA colluded in ignoring feasible options outside the Kimberley by preparing a report on siting options that deliberately sidestepped non-Kimberley options — despite the EPA referral document specifically referring to the assessment of locations outside the Kimberley. v. A series of consultants' reports (Worley Parsons; Gaffney Cline; GHD) either effectively ignored gas processing options outside the Kimberley, or dismissed them on spurious grounds or grounds that apply equally or more so to James Price Point. vi. The SAR dismisses Port Hedland, for example, as 'not feasible' on grounds that are either irrelevant, inaccurate or apply equally or more so to James Price Point, e.g. port difficulties, height above sea level, Native Title and Indigenous heritage concerns and EPBC-listed species constraints. vii. The SAR even goes to the extent of misleadingly and selectively summarising the finding of the Commonwealth-commissioned GHD study of feasible alternative locations as "*Any green fields site greater than 500km from the gas field was determined to be prohibitively expensive*", without explaining that locations such as Port Hedland, while >500km from the gas field, is a fully-developed 'brown fields' industrial site [SAR, p4-6]. viii. As a result, there has been no establishment of the 'non-feasibility' of processing options outside the Kimberley. Indeed, several of the Browse joint venture partners have repeatedly stated their preference for options outside the Kimberley. ix. The Minister has stated that this is not acceptable, but has not so far acted upon this failure of process." Submission to the Strategic Assessment Report Browse LNG Precinct, 2011, p.8



31 August 2010 Michael Hughes, of Curtin University's Sustainable Tourism Centre, says tourism accounts for more than a third of the Kimberley's economy and the proposed gas plant north of Broome will threaten that. (AAP); Barnett rejects report (ABC PM)

1 Sept 2010 "What I say to the Premier is be very careful about setting presents like this, they can do more damage that you can ever imagine. I think compulsorily acquisition is, in a sense, another act of colonialism, it's another theft of our land, it's another invasion. It should never ever be contemplated at a political level" Professor Mick Dodson (ABC PM)

24 Sept 2010 KLC Cape York leaders unite to fight Barnett & Bligh (The Australian)
Malcolm Douglas dies (West Australian)

- and that all of these issues were being adjudicated impartially and fairly on their behalf.

In terms of what Joseph Roe called “breaking the snake in half”¹⁵⁴ there is no doubt that the LNG precinct would do that. It would forever destroy the traditional Lurujarri trail and the pathway of the ancestral snake. But the deep meaning of what Joseph Roe means by this starts to become registered when we consider the ecological, social and economic impacts of the development. It would create a pipeline bedded in a dredged channel two metres deep in an ocean floor that was very sensitive to excavations or disturbance and this trench would stretch 390 kilometres to the north in the ocean¹⁵⁵. It would create a major port for at least six LNG super tanker carriers. The port facilities would extend three kilometres and include a dredge channel for ships coming into port as well as a deepwater turning circle for ships in port. The operation would create a 52 square kilometre¹⁵⁶ dead marine zone in a marine area that is judged to be one of the most pristine coastal environments in the world. The onshore processing facilities would occupy about three square kilometres. Beneath the precinct, water would be sourced from aquifers hundreds of metres deep. A 180 metre flare tower would light up the sky 24 hours a day. In the ocean, on the land, in the earth and in the sky, the blockage would be permanent and irreversible.

There have been no real visual displays of what the Walmadany (James Price Point) gas precinct will look like in its entirety to scale. It is necessary to put together several images. In most of the documents developed so far for public viewing, the proposed port facilities are never put together with the land facilities and neither is shown connected to the feedstock pipeline route. Below is the best schematic view of the 390 kilometre pipeline feedstock route for the gas to flow to the precinct. The pipelines beyond three nautical miles from Walmadany (James Price Point) are not subject to the overall Precinct approval process but requires separate approval. Here a significant problem is the dredging of a two-metre trench for eight hydrocarbon-feed gas pipelines, four export pipelines conveying mono-ethylene glycol and other chemicals needed for offshore processing. These 12 pipes would be located in fourteen trenches two metres deep in the ocean floor within a 500 metre corridor stretching out 390 kilometres.¹⁵⁷



30 Sept 2010 French energy giant Total comes on the scene; (The Australian) John Butler concert Broome; (ABC News) BHP Shell rumblings continue: Yeager says "We're doing the work in order to meet the Aust govt's requirements...as we develop our basis of design and get ready to have a concept selection. This is a huge project which will be north of \$US25Bn and possibly much higher than that." Another reluctant partner, Shell, has said the project could cost as much as the \$43bn Gorgon project. There are concerns about overcoming issues around the size and length of the pipeline to the coast, a high amount of carbon dioxide in the gas, and a soft ocean floor. BHP Petroleum Boss Michael Yaeger (Trans-Tasman Political Letter)

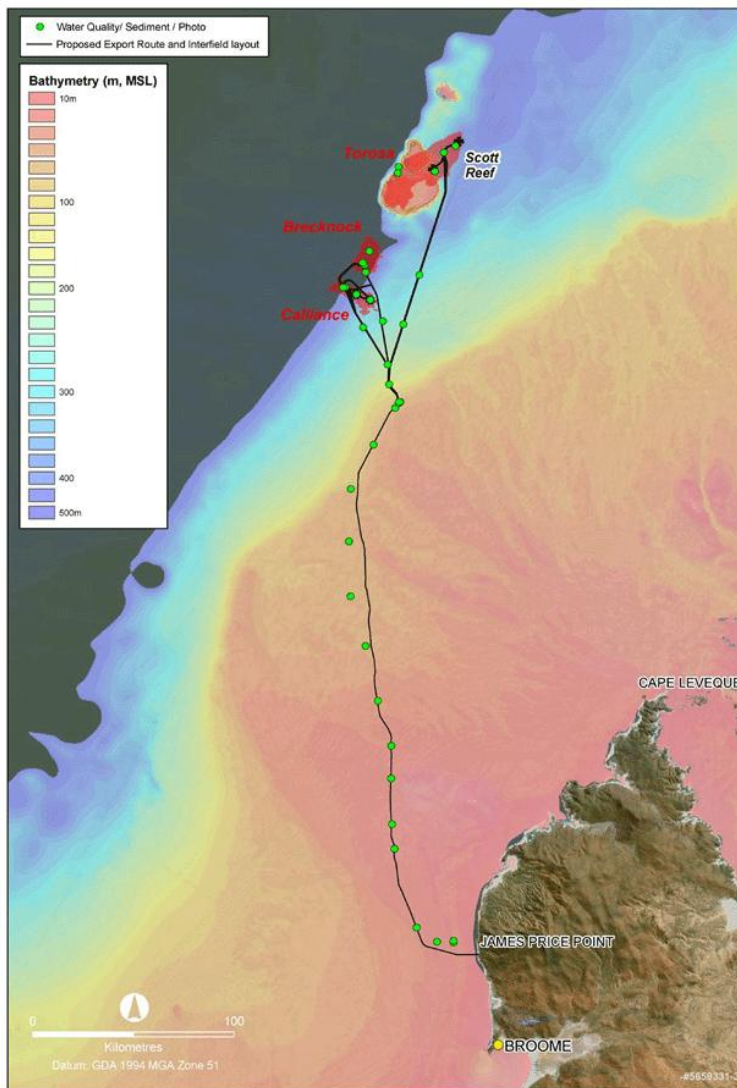
1 Oct 2010 An anti-gas poster on a wall in town reads, "Who's looking after country?" Beneath it, someone has scrawled, "Not you, you black cunts." (The Monthly) Shire allows clearing at gas hub site

¹⁵⁴ ABC, 4 Corners, 21 June 2010

¹⁵⁵ SAR, Vol 3, pp. 2-5

¹⁵⁶ See on this point the combined environmental groups "Submission to the Strategic Assessment Report", op. cit., p.17

¹⁵⁷ SAR, Vol 3, pp. 2-33. Also see SKM, *Benthic Habitat Calculations*, 2011, SAR, Appendix g-2, p. 25



SAR Vol 3, 1-22

The pipeline will connect to the onshore industrial facilities at Walmadany (James Price Point), where the gas would undergo liquefaction and in turn be transferred to supertankers.

At maximum capacity the Port would take 500-860 LNG shipping movements, 155-220 condensate shipping movements and between 170-240 LPG related shipping movements. In total there would be between 825 and 1320 shipping movements per annum. This alone would have a “severe and unmanageable”¹⁵⁸ impact on the marine environment. In addition, according to the SAR, the key components of the port facility are a proposed shipping channel of minimum 300 metres, turning basin and offshore anchorage area, export jetty facilities with loading berths for six vessels, breakwaters, seawalls, a marine facility for handling and transferring materials, fuel, chemicals and water, including a roll-on roll-off loading facility, small all-



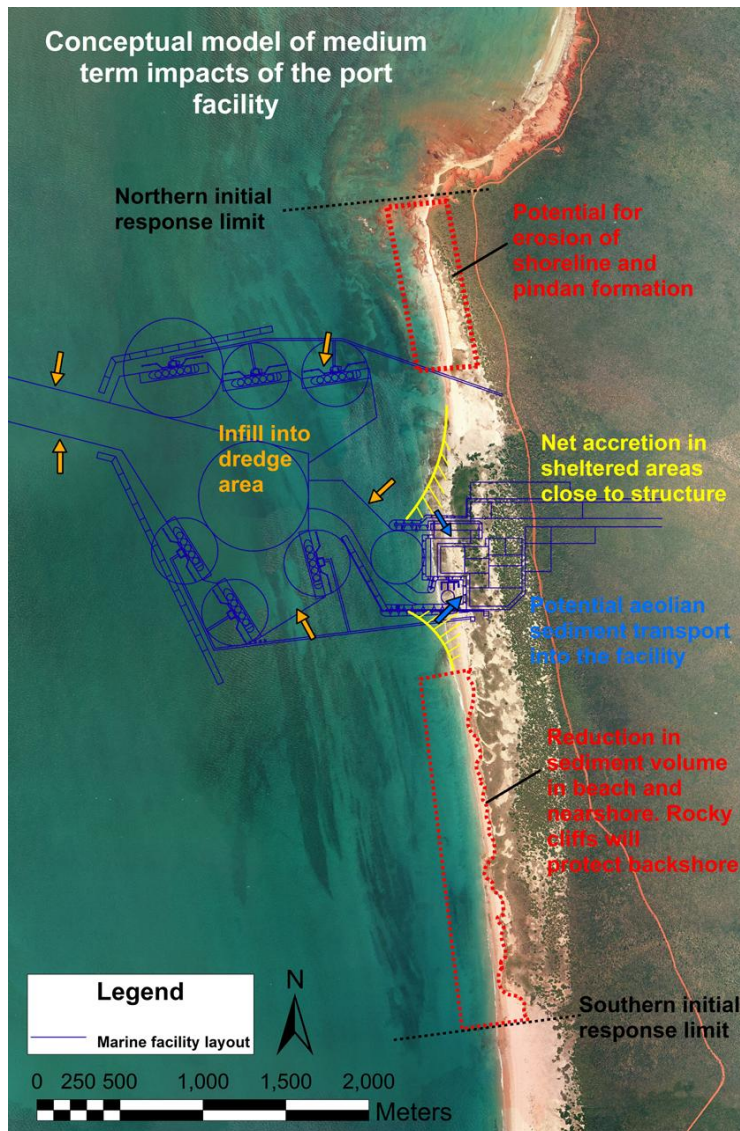
2 Oct 2010 "There are two factors that have to be weighed up here, one is the economic development and its worth to Western Australia and the benefits that will be derived, but more importantly is the benefits that will be derived for Kimberley people. "There is still a six month opportunity for the three parties to come together and negotiate a common agreement and I would certainly advocate the three parties do find a common outcome which is mutually beneficial to all three." Ken Wyatt (ABC News)

5 Oct 2010 The approval for Woodside to clear land for the development of its LNG project underscores the support the company has received from the local and state governments in Western Australia (BMI Industry Insights)

6 Oct 2010 In a comprehensive report on the Australian LNG sector, Citi, led by the analyst Mark Greenwood, says it is now "more realistic" that Origin and ConocoPhillips's Gladstone APLNG project will produce only half its initial expected output, and it has downgraded Woodside to a "sell" based on its big LNG portfolio and the rising cost of its projects. (SMH)

¹⁵⁸ See combined environmental groups “Submission to the Strategic Assessment Report”, pp. 50-59

weather harbouring facilities, an access causeway and a rock loading wharf for the rocks needed for the offshore pipeline.¹⁵⁹



Layout of the Proposed Port Facility, SAR, Vol 7, p. 57

The onshore facilities would comprise 500-metre access points for the 14 ocean pipelines, either to the north or south of the facility, two industrial blocks for hydrocarbon processing, storage and related infrastructure, a common user area for proponents of the project to use shared facilities and ancillary infrastructure, service pipeline and road corridors, a light industrial area for third party contractors, a 200 hectare workers' accommodation area, industrial land use buffers. The LNG facilities would separate gas and liquids, removing the water, mercury and carbon dioxide, stabilising liquids and condensate, recovering mono-ethylene glycol, separating out elements such as butane and propane, chilling the gas to minus 161 degrees centigrade, removing inert gas and storing the finished liquefied gas in up to seven LNG storage tanks of 200,000 cubic metres



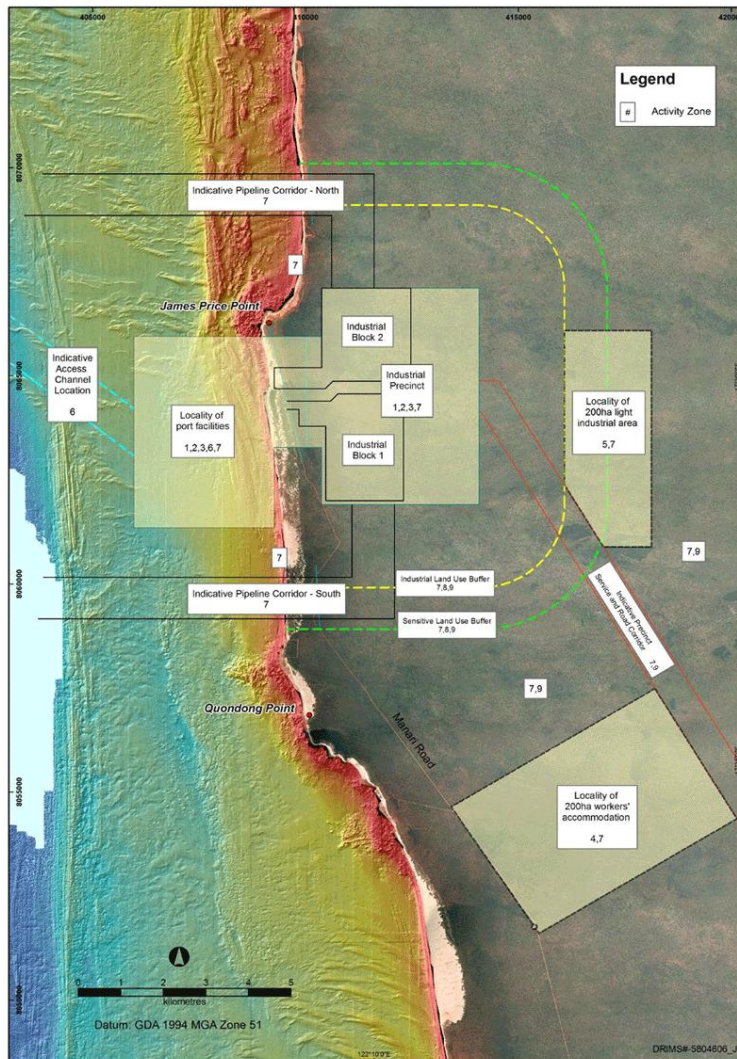
7 Oct 2010 Property and land developers earmark WA mining towns; (The Australian) "Speaking during a break in his meetings with industry over the mining tax, Mr Ferguson said he was not defending WA premier Colin Barnett's use of compulsory acquisition to resolve the ongoing dispute over the site of the proposed Kimberley gas hub. But he wondered how the state Labor party could attack the move given it had also proposed to use compulsory acquisition powers when in government." (WA Business News)

8 Oct 2010 Federal Resources Minister Martin Ferguson says he is confident an Indigenous land use agreement will be struck in the Kimberley, allowing for the construction of a multi-billion dollar gas hub. (ABC News)

10 Oct 2010 Traditional landowners in the Kimberley have been dealt another blow, with the State Government taking almost three times the area of land originally proposed for the controversial Woodside gas hub. Despite a signed Heads of Agreement between Aboriginal landowners, gas giant Woodside and the Government stating the gas precinct would be 3500ha in size, the Government is now compulsorily acquiring more than 10,000ha. (Sunday Times)

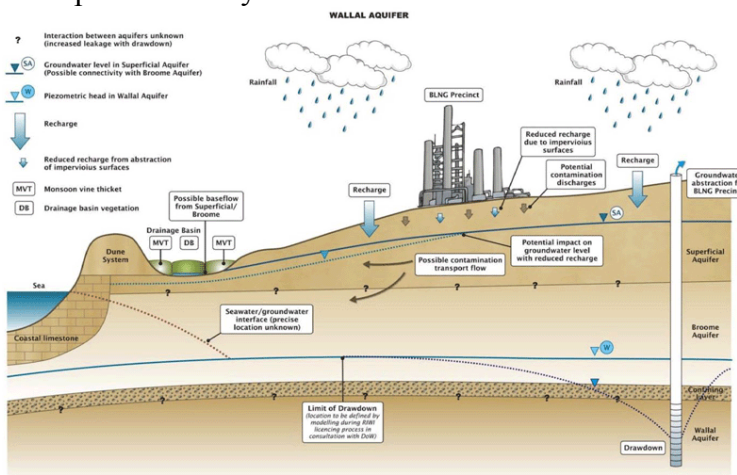
¹⁵⁹ See for an overview, SAR, Vol 1, p. 1-126.

per tank, ready to be loaded onto the gas carriers. In addition, a flare systems would be required for marine operations, smaller storage facilities and an emergency high pressure flare system mounted on a stack up to 180 metres from the ground.



Layout of the Proposed Onshore Liquefaction Plant

Underground, the plant would require access to reliable water supplies as set out below. It would store runoff from the plant in three ponds directly behind the sand-dune line on the shore.



14 Oct 2010 "My starting position is that this area — James Price Point and the Kimberley — is an international wonderland; globally, a big natural and indigenous heritage area." "Having been to James Price Point with the traditional owners, and having put my hand in the sand, I am committed, until the last day I draw breath, to have it stay as it is," Bob Brown (ABC)

20 Oct 2010 400-strong Woodside team led by Michael Hession pursue LNG precinct (West Australian)

21 Oct 2010 Joseph Roe takes action to prevent land clearing (AAP)

22 Oct 2010 State govt announces plans for Australia's second largest marine park in the Kimberley (ABC News)

27 Oct 2010 "The proposed James Price Point hub alone would emit 32 million tonnes a year of greenhouse gases — equivalent to five per cent of Australia's current total greenhouse gas emissions, or New Zealand's entire annual greenhouse gas emissions." Greens Senator Scott Ludlam (AAP)

29 Oct 2010 Barnett warns BHP not to develop Scarborough gas field — too many stand-alone LNG plants (The Australian)

5 Nov 2010 Woodside soil density test (ABC News)

The question of the impact of these facilities on the environment and Kimberley coast is unambiguously severe. However according to the Strategic Assessment Report produced by the State Government, any problems created by the plant, the port and the pipeline including its impact on the Lurujarri trail could be completely neutralised. However the quality of the analysis in the SAR leaves a lot to be desired. The first evidence of this came the day after Wayne Bergmann's "David v Goliath" article appeared in the **Canberra Times**. The Australian Heritage Council (AHC) found that dinosaur footprints along the Dampier Peninsula had outstanding heritage value and should be protected. The AHC found that the tracks were the best and most extensive evidence of dinosaurs in WA and were noted for their diversity and size. This finding landed on the Federal Minister for the Environment's desktop very close to the time when he had to decide whether the Lurujarri Trail should be protected under a heritage listing and whether the LNG precinct met the appropriate environmental standards.

Significantly, the WA State Government analysis of the LNG precinct had found that the footprints were dispensable and "not of museum-grade quality".¹⁶⁰ This was not a great advertisement for the quality of the Strategic Assessment Report produced by the WA government for public comment in the short timeframe of December 2010 to March 8 2011, which repeated these findings.

The Strategic Assessment Report (SAR) should have allayed the fundamental questions that any citizen had the right to ask and find answers for. Instead, it had a much narrower purpose. It simply had to meet the assessment requirements of the Commonwealth and State environmental agencies in order for the LNG precinct at Walmadany (James Price Point) to be viewed as viable. Its purpose was to tick all the assessment boxes so that the Federal Minister for Environment could give the project the joint government environmental green light. The Report would then be the basis for the strategic plan for the gas plant. The Federal Minister for the Environment's decision on the question of the precincts affect on the Kimberley has been delayed twice and is now due in the second half of 2012.

Whatever the Minister's decision, from a citizen's point of view the whole process was flawed. The public's ability to hear about the LNG precinct or to respond to any findings was limited by the nature and whole orientation of the process. At a time when citizens demand more accountability from their governments it is just not good enough.¹⁶¹

¹⁶⁰ **West Australian**, 7 June 2011

¹⁶¹ This is what may have finally tipped Wayne Bergmann to oppose the whole project.



5 Nov 2010 Woodside soil density test (ABC News)

8 Nov 2010 Tony Burke delays environment and heritage decision until June 30 2011 (AAP)

9 Nov 2010 Shell offloads \$3b in Woodside shares (AFR)

12 Nov 2010 Shell floating facility acceptable under national environmental law (AAP)

16 Nov 2010 BHP Billiton Ltd may not proceed with James Price Point if the mining giant, a minor participant in the venture, feels its values are being compromised. (Asia Pulse)

22 Nov 2010 "...location of a Kimberley gas hub at James Price Point was decided before environmental studies. Greens' leader Bob Brown raised the issue in Parliament yesterday, telling the Senate, Mr Ferguson effectively directed Woodside to build the LNG precinct at James Price Point as a condition on the company's retention lease. He will ask Woodside boss Don Voelte about the provision when they meet on Friday. "I will ask him whether Woodside wanted this provision put in at the outset or whether it came from Federal Minister Ferguson in cahoots with the state Minister for Resources — it's a fair question for the public to know. There should have been no such condition." (ABC News)

The SAR is voluminous and has as many pages as most double-volume, major city telephone books. It cost in the vicinity of \$15 million to produce and was completed in a relatively short time frame. Volume 1 is an Executive Summary with an Appendix indicating the terms of reference of the SAR (114 pages). Volume 2 outlines the Strategic Assessment Process, Site Selection, Facilities, Description and Consultation Process (102 pages plus 50 pages of annexures and appendices), Volume 3 Environmental Assessment – Marine Impacts (302 pages plus appendices), Volume 4 Environmental Assessment – Terrestrial Impacts (300 pages plus appendices), Volume 5 Social Assessment (342 pages plus appendices and attached to this Volume as addendums are three further volumes produced by the WA Department of State Development and six volumes produced by the KLC on Indigenous impacts including the all important report on traditional owner consent and community consultation, an Aboriginal social impact report, a heritage assessment report, an Aboriginal archaeological report and ethno-biology studies. These further addendums fill hundreds of additional pages. SAR's Volume 6 contains an assessment of predominantly Commonwealth matters, including the precinct plan and matters of national environment (60 pages). Finally, Volume 7 contains some very significant information on wastewater discharges, hydrocarbon spills, benthic (lowest level of body of water) primary producer habitats i.e. for oysters, clams, sea cucumbers etc, and coastal processes (67 pages)

The public had just over three and a half months to make submissions on what amounts to over 7900 pages of information. Furthermore, most of it is hardly organised to be anything more than an information dump of publicly available material in one series of reports. After the report was published the public was given the opportunity to comment on its findings on the 29-30 January 2010 at the Boulevard Shopping Centre, and Indigenous consultations ceased. Apparently, the WA Government saw the actual compilation of the Strategic Assessment Report as the public consultation process! For a concerned individual, community or Indigenous organisation the prospect of diving into such a muddy lake of information and making a written submission was daunting and the government offered no public presentations of the information or even a summary of what it had found. The only scrutiny that the mass of information will receive will be from the Commonwealth Minister. In his wisdom how could he possibly represent the views of dynamic remote and regional areas like Broome or the Kimberley? We have to assume that the process was deliberately designed to exclude public scrutiny and critical analysis. Furthermore, how could the peak Indigenous native title representative body be seen as the only voice that mattered on such an important development when we consider the diversity of Aboriginal people and communities in the vicinity of the proposed development? The KLC's own volumes were buried



24 Nov 2010 12,000 postcards protesting JPP delivered to Canberra (ABC News)

29 Nov 2010 In April, the claimant group for James Price Point held a vote on whether to remove anti-gas hub campaigner Joseph Roe as a legally-recognised applicant for the group. Mr Roe refused to accept the decision ... Mr Roe's lawyers have told the court as many as 58 of the 149 people who voted at the meeting were not authentic traditional owners. (ABC News)

30 Nov 2010 Flare stack foul-up Karratha. \$900m mistake, 6 month delay. Voelte: "We love Browse and there are no obstacles, on track for final engineering and design phase in 2011"; BHP fuels rumours and problems with Woodside process (AAP, The Australian)

2 Dec 2010 Broome Chamber of Commerce row; Fluor wins design phase contract (West Australian, Upstream)

4 Dec 2010 Paul Kelly (The Australian) profile of Colin Barnett: The state has the natural resources Asia needs. Some four billion people, or 60 per cent of the world's population, live to our north and in the same time zone. The state's industry, mining and petroleum, is worth \$70 billion and there's \$170 billion of projects I expect to get under way within the next five years. We don't look over the Nullarbor; we look over the horizon to Asia." (The Australian)

as appendices of the Social Impact Assessment, few copies were published and have to be downloaded from the WA Department of State Development website.

At least one group, namely the old families of Broome, have rightly complained bitterly about the way in which both the WA and Federal Governments have gone about presenting the project, the SAR's findings and the way it has sought public participation. The foundation families of Broome have invited the Commonwealth Minister for the Environment to "...come to Broome to talk with us about the imminent impact of large-scale development such as the LNG Hub proposed for Walmadany (James Price Point) on the Dampier Peninsular. There has been a great deal of political posturing and behind-the-scenes wheeling and dealing between governments and multinational corporations. It is now time for governments to hear the concerns of local families; as it is our air, water, and holist lifestyle that is going to be forever degraded." ¹⁶²

Another problem of the report is the fact that ostensibly the same group that stands to gain financially from the precinct, as opposed to other less capital intensive developments, namely the Commonwealth and State Governments, are producing the report in cooperation with the foundation proponent of the project Woodside, and are, at the same time, responsible for approving its findings. Similarly, the Federal Government approves or does not approve the development as environmentally and socially desirable and yet they rely on much of the material provided by Woodside. Within the ranks of the Labor government is Gary Grey, former Woodside public relations manager, close confidant of Minister Martin Ferguson and factional ally of Environment Minister Tony Burke.

With regard to the consideration of other options for processing the Browse Basin gas, the SAR verges on the propagandistic and misleading. It argues that multiple LNG precincts could emerge if Walmadany (James Price Point) does not go ahead, it argues that if gas reserves were processed at a distance from the gas fields it would drive up costs, when in fact it would be far less costly to process the gas at Karratha than build the \$20-50 billion LNG plant at Walmadany (James Price Point), and it ignores the floating liquefaction process; it argues that processing the gas outside the region would be a great drawback, when this is highly debateable, especially given the region's position as a Mecca for tourism. The final fallacious argument is that if the Walmadany (James Price Point) precinct did not go ahead the gas might not be processed at all. The SAR then maintains that Browse Basin partners have a legal



9 Dec 2010 "The State Government's final social impact assessmentsays the project would deliver "significant benefits" to the West Kimberley but concedes even a small population increase could have a disproportionate impact on its "already overburdened social services system". (West Australian)

11 Dec 2010 "...there is no doubt that non-Aboriginal interests have contributed to and exploited the divisions between Aborigines. It is not just anti-development interests that drive wedges between Aborigines but indeed development interests (not the least governments) were the pioneers of these tactics". Noel Pearson (The Australian); KLC release a six-volume Aboriginal Social Impact Assessment of the LNG project. The impact study states "the LNG precinct can either make a significant contribution to Aboriginal social and economic development, or can actually leave Aboriginal people much worse off". (AAP)

¹⁶² Public Statement and Petition, Old Broome Families, 21 June, 2011

obligation (thanks to Minister Ferguson) to rush headlong into the LNG precinct.¹⁶³

For this reason no-one can have any confidence in the strategic assessment report. The proper way to conduct an analysis of this kind would have been to have appointed an independent commissioner who could receive submissions from a wide variety of groups including the proponents of the project, and then to make an assessment of whether the project would comply with Federal and State regulations and was in the interests of the nation and the local community.

Many of the SAR findings simply acknowledge problems and then suggest that the problems will be solved without any independent analysis of whether this can or will be the case. There is a series of serious and misleading statements.

One of the first unchallenged fallacies of the SAR is the view that “ The establishment of the BLNG Precinct would reduce the duplication of infrastructure such as ports, accommodation and roads, which would be required should individual companies build ‘stand alone’ facilities. A single, common-user LNG precinct would offer economic efficiencies to proponents, while reducing the development footprint compared to multiple, stand-alone LNG processing facilities – thus limiting the potential disturbance to environmental, cultural and heritage values.”¹⁶⁴ In fact, as we have already pointed out, several of the leaseholders of the Browse Point Gas had proposed to use the facilities that existed in the Pilbara. So in effect the building of the BLNG precinct at Walmadany (James Price Point) was precisely the duplication of resources that the report suggests the BLNG precinct would prevent. What is more, the LNG facilities in Darwin and the Pilbara were, or are, to be connected to the domestic gas pipe network. It should be noted here that the analyses of the alternatives that are contained in Part 2, Appendix B Site Selection Supporting Documents vary greatly in their detail and quality. Appendix B-6, which purports to show the advantages of the BLNG precinct over the Darwin and Pilbara alternatives, is simply an exercise in school-boy geography. It also fails to address the major consideration of the BLNG joint venture partners that a pipeline to Karratha or to Darwin would cost between one tenth and one twentieth the cost of the BLNG precinct proposed for Walmadany (James Price Point) . It would also of course completely save the Dampier Peninsula from any environmental, social, heritage and problematical Indigenous impacts or future problems. As this suggests, the report is completely one-sided in its appraisal of the merits of the project.

¹⁶³ SAR, Vol 1 p. ES-20

¹⁶⁴ SAR, Vol 1, p.ES 3



13 Dec 2010 State EPA gives LNG precinct go-ahead; Environment groups critical of decision; JPP going to be far bigger than Burrup; Public Submissions (AAP, ABC News)

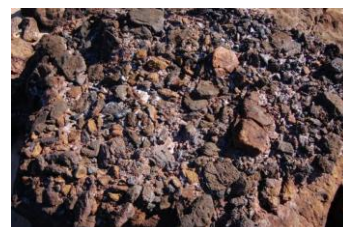
15 Dec 2010 Derby house blocks come on market; Ferguson attacks Green obstructionism; Dinosaur footprints now worth preserving; 25 international conservation groups work against LNG precinct (ABC)

16 Dec 2010 KLC elect co-chairs Tom Birch and Frank Davey

21 Dec 2010 Australian Heritage Council recommend JPP site be included in a national heritage listing for the west Kimberley. (West Australian); Gubinge industry threatened; State development says gubinge industry will be helped by LNG plant (ABC)

22 Dec 2010 Bergmann attacks Brown; (The Australian) Barnett land take in jeopardy because of flawed notices of intent (West Australian)

23 Dec 2010... Woodside CEO Don Voelte sent Greens leader Bob Brown a card reading: “Bob, May everything go your way in 2011 (except Browse???) . Oh well, almost everything. Regards, Don Voelte.” As Bob revealed on his Facebook page, he fired back with: “Don, Merry Christmas and a ‘priceless’ New Year. Regards, Bob.” (West Australian)



A second concern of the project that is under review in the SAR is that it is a “nominal project”. The proposal is for a facility capable of processing 50 mpta of LNG but it could be less and it could be more. Furthermore other potential activities such as gas processing into products, petrochemical production and the processing of minerals might also emerge “in response to global demand for LNG”.¹⁶⁵ The community would not be wrong in thinking that the LNG is a precinct in the true meaning of the word, so other potential developments should be borne in mind.

The LNG precinct will be managed by a Precinct Control Group with three main functions: social management, precinct operations and coordination and the management of the precinct environment. Each of these areas will be overseen by committees with representation from the commercial proponents, government agencies, native title holders where necessary, the Port authority, contractors and a range of other entities. The management structure does not look efficient because of the wide range of representative bodies. It looks more like a discussion forum than an efficient management structure. While the public interest may be served at least in a symbolic way, the question is how effective would these committees be in the event of a crisis, from an operational standpoint or from the point of view of share holder value for the commercial entities involved?

The SAR with all its limitations recognises that site disturbance and excavation for the port development will have a high detrimental impact on the site. It maintains that further detailed work is needed on dredging and dredge-spoil disposal. It also notes that site disturbance and excavation will have a major and detrimental effect on *benthos* – the community of organisms that live on or near the seabed and in particular seagrass, algae and filter feeders. A third potentially major impact on the marine environment is the potential impact of marine discharges. A major hydrocarbon (oil) spillage would have a disastrous effect on the Kimberley coast from the Eighty Mile Beach south of Broome to the Adele Islands north. It should be noted that the condensate that is separated from the gas at Walmadany (James Price Point) is a light crude oil and that several other forms of liquid hydrocarbons will be stored at the facility. The SAR report contains an analysis of oil spillage in the last volume as supplementary material. It rates the probability for such an event affecting areas such as Broome and Cable Beach to be 1 in every 10,000 years.



15 Feb 2011 Federal Court ruling to replace Joseph Roe as native title applicant; Barnett indicates deal can now be done with Aboriginal applicants; KLC demand end to compulsory acquisition (AAP)

23 Feb 2011 Joseph Roe lodges appeal against Federal Court decision (AAP)

4 March 2011 Bergmann quits KLC CEO position to head new KRED organisation (CQ FD Disclosure)

10 March 2011 Mitsui and Mitsubishi consider investments in JPP LNG Precinct reduces Woodside risk (AFR)

14 March 2011 WA govt gives Rio/Alcoa more time to come up with a development plan for Mitchell Plateau bauxite (West Australian)

15 March 2011 Joseph Roe loses land clearing case (ABC)

31 March 2011 To survive in the 21st century Aboriginal communities need to be prepared to walk in both worlds, the world of the modern economy and of our cultural heritage. Wayne Bergmann, (West Australian)

11 April 2011 BHP move on Woodside; Barnett tells foreign companies to keep hands off Woodside: BHP "patient predator"? (AAP)

¹⁶⁵ SAR, Part 1, p. ES-6



However, perhaps it is necessary to recall the words of the US National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling report which found that offshore oil and gas ventures are “...an inherently risky business given the enormous pressures and geologic uncertainties present in the formations where oil and gas are found—thousands of feet below the ocean floor.”¹⁶⁶ One wonders what similar modelling might have been done on the Florida coastline prior to the catastrophe in the Gulf of Mexico last year and even closer to home the Montara oil spill off the Kimberley coast in 2009. As the US National Commission found, such modelling cannot take into account the propensity of human beings to unwittingly increase risk through cost cutting and complacency. Greed and other human frailties cannot be modelled, so it is worth reproducing above what the SAR regards as the map of the area that would be affected by a 1 in 500-100,000 year hydrocarbon spillage in the Walmadany (James Price Point) region. It would inundate Broome, Cable Beach, the environmental protectorate to the North and the Aboriginal communities of Beagle Bay and One Arm Point.

¹⁶⁶the US National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Jan 1, 2011, <http://www.oilspillcommission.gov/final-report>



12 April 2011 Ferguson talks up ILUA "exceptionally good progress" of LNG project (West Australian)

14 April 2011 Wood Group Kenny wins contract for sub-sea pipeline design and engineering (Platts Commodity News)

15 April 2011 Barnett spends \$12m on consultants; \$3 million for AECOM "strategic assessment" of LNG Precinct (ABC News)

18 April 2011 Graeme Campbell bans mining clothes on flights to Broome, quarantines workers from town (ABC News)

18 April 2011 Japanese earthquake and nuclear catastrophe fuel LNG demand (Intellasia)

19 April 2011 Geoff Cousins describes Tony Burke as facing narrow decision over environmental approval of JPP (ABC)

20 April 2011 LNG Market robust for 20 years; Don Voelte last press conference emotional, expresses disappointment about East Timor disapproval of Sunrise project (ABC)

21 April 2011 Barnett clashes with landowners, suggests he won't compulsorily acquire land until meeting to make final decision; traditional owners storm out of meeting in Broome (AAP)

In terms of the terrestrial impacts of the Walmadany (James Price Point) LNG precinct, even the SAR notes the danger of a massive erosion on the coast due to the clearing of monsoon vine thickets. Monsoon vine thicket is a State-listed Threatened Ecological Community. These are precious plants. They grow with very little moisture and are found only in the Kimberley, the Northern Territory coast, Arnhem Land and Cape York. These small thickets literally hold the coastline together and enable a large number of other animals and plants to survive in an otherwise hostile environment. “23 per cent of the species known to occur on the Dampier Peninsula occur within the monsoon vine thicket patches.”¹⁶⁷ South-Eastern Australian residents will recognise the tremendous damage that can be done to dune systems when the natural vegetation is cleared. There is no way that the clearing of the Walmadany (James Price Point) precinct will not remove many hundreds of square hectares of Pindan shrubland and woodland vegetation, including monsoon vine thickets.

Groundwater recharge was also recognised even by the SAR to be a significant problem. The creation of large roofs, concrete areas, roads, covered walkways and even gravel areas will vastly increase the propensity for runoffs and the concentration of monsoonal rains in flood-prone areas. Even when we pretend that the impact of the built environment and the port facility is minimal in terms of its visual and environmental impact, the concentration, redirection and capture of groundwater will cause a major change in the environment at Walmadany (James Price Point). In addition the contamination of surface water from spills and routine discharges is a very real ongoing possibility.¹⁶⁸

It is easy to visualise the damage to the Kimberley coast from site levelling, cut and fill excavation, drains and sediment barriers, wire fences, dredge spoil areas, road dust and heavy machinery operations that would be the norm for the site if the LNG precinct was built. In effect the site would replicate the existing brownfield site on the Burrup Peninsula.

The SAR notes that the LNG generated from Walmadany (James Price Point) will play a role in reducing national greenhouse emissions by replacing fuels like coal for electricity generation. No-one can argue that, if the LNG were produced sustainably and efficiently and transported effectively that this would represent a major step forward. However, as has been argued previously, the best way to do this would be to pipe the gas to the existing LNG facilities that have already been built in Karratha at much less cost than building the LNG plant at Walmadany (James Price Point). The SAR pays little heed to



29 April 2011 The Federal Court has dismissed an application by Kimberley gas hub opponent Joseph Roe to appeal a court ruling appointing replacements for him as a native title claim applicant... (AAP)

29 April 2011 Woodside refuses Indigenous owners' guarantees about any future disaster at JPP; then a day later changes mind. (West Australian)

2 May 2011 The traditional owners of James Price Point have gathered in Broome to be briefed on details of the benefits package being offered in connection to the \$30 billion Kimberley gas hub (ABC News)

5 May 2011 On the eve of a vote on the future of the Kimberley gas hub, a Supreme Court challenge has been launched that could derail the plans. Neil McKenzie and Phillip Roe are among the traditional owners of James Price Point, approximately 60 km north of Broome, which has been earmarked for the \$30 billion LNG precinct. They have started a legal action that late yesterday saw Lands Minister Brendan Grylls served with Supreme Court writs. The men are alleging the State Government's threat to compulsorily acquire the land is illegal, because the documents they have lodged to start the process fail to specify the exact parcels of land." (ABC News)



¹⁶⁷ Combined environmental groups, “Submission to the Strategic Assessment Report”, op. cit., p. 74

¹⁶⁸ Ibid., pp. 76-78

the fact that by its own estimation the greenhouse gas emissions from the LNG precinct would be up to 39Mt C₂-e per year¹⁶⁹. If the gas were piped to Karratha this amount per year would be reduced and any emissions would be spread out over a long timeframe.

The social assessment of the effects of the LNG precinct at Walmadany (James Price Point) is mostly an exercise in simply profiling the current makeup of the region and towns nearby.¹⁷⁰ These analyses are singularly ineffective. The object of the surveys is to suggest that in the net effect of the LNG plant will be minimal. Even if this contentious argument could be sustained, the problem is that most of the information presented is quantitative rather than qualitative. Little consultation occurred with the communities and even the quite conservative old families of Broome have raised the point that there has been no dialogue with them on the likely impact of the LNG Precinct. In ignoring these dialogues the SAR has not picked out any qualitative issues about the effect of the LNG precinct on the way of life of Broome or Kimberley residents. There is no doubt that this way of life would change forever if the LNG precinct were to go ahead. The region would over time turn from a tourism Mecca renowned for its environment, natural wonders and lifestyle to a mining industry area where trucks and heavy equipment would be the norm on the local roads. In fact, the only contribution that the SAR makes on these issues is to raise questions that cannot be answered. The SAR social assessment does not meet either national or international standards.¹⁷¹ The Shire of Broome repeatedly asked Woodside and the State government for guidance on these matters, to no avail. President Graeme Campbell noted, "With industry workers coming to town, you're looking at a 40% increase in population over a one- or two-year period. We don't want what happened in the Pilbara to occur here. Rents in the Pilbara can be as much as \$1500 or \$2000 per week or, in Karratha, \$3000 per week. If you own a café, how are you going to employ someone to serve a cup of coffee, because they can't afford to live in the town?" Tourism in Pilbara towns has virtually died, he says, because fly-in, fly-out workers occupy all the beds: "There's nowhere to stay."¹⁷²

Much of this discussion paper has been devoted to the impact the LNG would have on Aboriginal people and the way in which



6 May 2011 "Traditional owners have voted in favour of an agreement to build a gas hub at James Price Point, just north of Broome. The deal will provide the Jabirr-Jabirr Goolarabooloo people with over \$1.5 billion in benefits over the life of the project. According to ABC Radio reports, 164 voted in favour of the agreement, while 108 were against it at a meeting in Broome today." (WA Business News)

7 May 2011 Geoffrey Cousins outlines opposition to JPP; Wayne Bergmann: this deal is for our grandchildren; Macklin and Ferguson welcome decision (The Australian)

8 May 2011 DAVID WEBER: The vote was 164 in favour and 108 against. Negotiator and Kimberley Land Council director, Wayne Bergmann says he's pleased with the outcome but would've preferred it if more people voted in favour. WAYNE BERGMANN: I think look, let's be real, we live in a Western democratic system. The Prime Minister did not make majority government, nor did the current Premier, Colin Barnett. I think we need to treat Aboriginal people with the same level of respect we treat our own political legal system. (ABC News)

¹⁶⁹ Ibid., pp. 90-93

¹⁷⁰ SAR, Vol 5.

¹⁷¹ See on this O'Faircheallaigh, C, "Effectiveness in Social Impact Assessment: Aboriginal Peoples and Resource Development in Australia", *Impact Assessment and Project Appraisal*, 27, 2, pp. 95-110 and International Principles for Social Impact Assessment, Special Publication Series, No. 2, May 2002. The analysis of the problems of the social impact analysis in the combined environmental groups' submission to the Strategic Assessment is also useful. See pp. 98-100

¹⁷² 1 Oct 2010

consultations have steered away from discussions with the traditional custodians of the area. The SAR in this respect is a major cop out. It cannot hide the fact that the LNG precinct will have a major impact on Aboriginal sites and on the Lurujarri trail. It cannot hide the fact that the economic advantages of the LNG precinct will not go to Aboriginal people. What it proposes to do to rationalise the damage and destruction is to create a kind of virtual world in which it can pretend these things are not really happening. It is worth reproducing in full the text of the SAR on these issues:

The mitigation and management strategies developed for the Precinct Plan will address the heritage values and sites potentially affected by the Precinct Plan. They will also take into account the regional aspects of the heritage values associated with the HIA area. These are set out in the Strategic Assessment Report and include the following key initiatives:

- Commitments under the Heads of Agreement, for the State and Woodside to “work with the Native Title Party and the KLC to design, construct, operate, decommission and rehabilitate the LNG Precinct in a manner that where possible avoids impacts on Aboriginal sites, including (without limitation) song lines, or minimises any impact on Aboriginal sites in accordance with the Studies Agreement (dated 7 May 2008), the proposed Heritage Protection Agreement and any future cultural heritage management plans”.
- Procedures set out in the Heritage Protection Agreement regarding Traditional Owners’ rights, how the parties to the agreement will manage heritage studies, what will be done in the event of the discovery of a site, how applications to the Aboriginal Cultural Material Committee established under the Western Australian *Aboriginal Heritage Act 1972* (**AH Act**) will be managed and how other activities will be conducted.
- The development of a Cultural Heritage Management Plan that will document how any vulnerable sites will be monitored, managed and protected during the construction and operational phases of the Precinct. Each proponent seeking to establish a project within the precinct will be required to develop a CHMP.
- The BLNG Precinct Management Structure, as delineated in **Part 6, Section 3**, will provide another important mechanism to monitor, manage and report on any potential cultural heritage impacts, specifically through the Precinct Management Committee.
- Social impact management strategies including a Managed Access Construction Camp access camp, organised recreational activities and cultural awareness training.
- Existing plans by the DIA and the Department of Environment and Conservation to develop a Dampier Peninsula Land Use and Infrastructure Plan and associated conservation reserve in collaboration with the KLC and Traditional Owners to help address existing and ongoing impacts of various land uses on the Dampier Peninsula.
- The development of a BLNG Precinct ILUA or similar land agreement. The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* applies in conjunction with the AH Act of WA and was introduced to enable the Commonwealth to protect significant Aboriginal areas and sites when State or Territory law does not provide effective protection. The Minister can only take action when he or she receives an application by or on behalf of Aboriginals or Torres Strait Islander people to protect a specified area from injury or desecration. These management strategies are designed to provide multiple triggers for Traditional Owners to be involved in the management of potential impacts on cultural heritage. Detailed archaeology and anthropology surveys, including further engagement with the Traditional Owners, are proposed for the Precinct to ensure that there is a comprehensive approach to understanding the tangible, intangible and cultural heritage of the area. These will be conducted in accordance with the Heritage Protection Agreement between the State, the KLC on behalf of the Traditional Owners and Woodside. The parties have agreed to work together to minimise impacts on Aboriginal heritage sites where possible, including working with the Traditional Owners on the layout of the Precinct. Sites of significant importance will be protected not only by the provisions of the AH Act but through the



9 May 2011 Rachiel Siewert says traditional owners forced into signing agreement; Woodside welcome agreement; Final details of benefits agreement by June 30 (ENP Newswire)

10 May 2011 A machinery convoy transporting a drill rig to the proposed gas hub at James Price Point in the Kimberley has been met by protesters. WA Senator Alan Eggleston says a multi-billion-dollar gas hub north of Broome in the Kimberley region will transform the lives of Indigenous people. (ABC)

11 May 2011 Wayne Bergmann’s dedication to the land and the Aboriginal people of regional WA has seen him named a finalist in this year’s Citizen of the Year awards. (West Australian) Peter Coleman former VP Exxon Mobil exec named as Woodside head. He is a St Kilda supporter, he was an Esso production manager at the Longford gas processing plant when it blew up in 1999 and subsequently spent much of a good four years in regular and routine dispute with Indonesia’s government over what oil and gas territories ExxonMobil did and did not own. Evidently Woodside’s next boss, Peter Coleman, is well practised in the elusive arts of crisis management. (Platts Commodity News)

development of a Cultural Heritage Management Plan being negotiated between the State, the Foundation Proponent and the KLC.¹⁷³

In a nutshell, the LNG Precinct group will destroy the songlines and then, after the plant has been de-commissioned, it will somehow put them back together again. In all of this the traditional peoples will not be in control of the social impact strategies but will merely be consultants.¹⁷⁴ The logic is that the State government, Woodside and their partners will borrow the land for the lifetime of the project, do their business, make their profits and then return it to the traditional owners at the end of the day. It will pay them a nominal sum with a range of benefits for the use of the land, but won't bring them in as equity partners. That would be going too far. But it will involve Aboriginal people in ensuring that the machines, processing equipment, ships and personnel do not disturb sacred sites. Moreover, Aboriginal people will be employed to ensure that no unnecessary damage occurs to the land!

Unfortunately for the Aboriginal custodians, who learned their law from the traditional people, land cannot be used in this way. They see in the rock formations and cycles of life in the plants, animals and sand dunes – environmental masterpieces that have taken thousands of years to form. For them an industrial plant is but a stupid contrivance that pales into insignificance against the beauty of the lines a snail makes on the sand. You cannot destroy the formations of thousands of years and then put them back together. Nor can you repair the damage that is done from dredging or drilling that is done in the land. Nor can you teach plant workers the ways of living that ensure that the ecological systems are not disturbed. It is an art to live off the land and allow it to breathe and sustain itself. These arts are very difficult to teach mainstream individuals, let alone a monster of industrial development.

In the end, despite the rhetoric of joint management committees and sharing roles in a new bureaucracy of the environment, the acquisition of the land at Walmadany (James Point Price) comes down to disregard for customary law – whether in direct or indirect terms. Again the text of the SAR is worth quoting in full. It reads:

¹⁷³ SAR, Vol 1, pp. ES-93

¹⁷⁴ Thus breaching the concept of adequate resources industry social impact mitigation and empowerment of marginalised Indigenous communities. O'Faircheallaigh, op cit.

Under the Terms of Reference for the Strategic Assessment, the question of “whether the Traditional Owners have given informed consent, in a culturally appropriate manner to the implementation of the Plan” needs to be addressed. The Strategic Assessment Report must also include any details of consultation, in addition to the statutory consultation, about the Plan. The State’s process to achieve informed consent and details of its consultation are described in **Part 5, Section 3.9** of this report. On 15 June 2007 the Cabinet of the Western Australian Government established the Northern Development Taskforce “to identify one or more suitable strategic industrial sites to minimize the environmental and heritage footprints of, and be practicable for, proposed Browse Basin gas-based projects”. At that time a key objective of government was to establish the basis for the meaningful participation of Kimberley Aboriginal communities in a site selection process to underpin “informed consent” for the development of the Browse Basin gas at a site on the Kimberley coast and ultimately for the BLNG Precinct Plan under the Strategic Assessment. Between December 2007 and September 2008, comprehensive engagement was undertaken with the West Kimberley Traditional Owners by the KLC, funded by the NDT. The process was to underpin the ultimate “informed consent” decision in anticipation of finding a suitable site that was technically viable, environmentally sustainable and acceptable to Aboriginal people, taking into account Aboriginal heritage, cultural significance and any related impacts on the Aboriginal community. That consultation informed the decision to reduce the number of suitable sites from the 43 assessed to four. The KLC have noted the site selection process conducted between December 2007 and September 2008 embodied the principle of Indigenous Free Prior Informed Consent (**IFPIC**) to a substantial degree. This is consistent with its view that the *IFPIC reflects the fundamental cultural values and political principles held by Kimberley Traditional Owners*, and is the appropriate standard for its report. The Strategic Assessment Report’s Terms of Reference negotiated between the State and the Commonwealth, which were made available for Public Comment in July 2008, did not imply that the IFPIC would apply. At the time, the Australian Government did not support the United Nations Declaration of Rights of Indigenous People (**UNDRIP**) and declined to become a signatory. The State’s objective has and continues to be, to achieve the highest possible level of Traditional Owner informed consent and to confer substantial benefits arising from the development of the Precinct to the region’s indigenous people. Since early 2009, the development timelines have been subject to the retention lease conditions required by Woodside and its JV Partners to make a final investment decision by mid-2012. The KLC and the Traditional Owners consider the commercial timeframes did not afford them enough time nor provide enough detailed information to meet IFPIC principles. Notwithstanding, the State, the KLC representing the Traditional Owners Negotiating Committee (**TONC**), and Woodside have continued to negotiate. A range of significant milestones have been achieved, including development of a comprehensive Traditional Owners Information Booklet, a Studies Agreement, a Heads of Agreement, a Heritage Protection Agreement and ongoing Funding Agreements. Negotiations in good faith are continuing within the land acquisition process provided for under the future act provisions of the Native Title Act.¹⁷⁵

Basically what this text is saying is that the government and Woodside have constructed their own means of talking to Indigenous people. It does not meet international standards and most importantly it does not meet the traditional owners of Walmadany (James Price Point) on their own terms. But the Strategic Assessment Report suggests that it should be good enough to allow the project at Walmadany (James Price Point) to go ahead. It suggests that it is not necessary to do any more than this, despite the fact that it would be against the clear and unequivocal opposition of not only the traditional owners but thousands of concerned Australian citizens.



13 May 2011 Woodside new CEO says he will not deviate from aggressive push for JPP (The Australian)

17 May 2011 Workers at James Point Price take down number plates (Media Monitors)

19 May 2011 Engineers vy for JPP contract; Supreme Court Challenge set June 1 (WA Business News)

20 May 2011 Shell has announced that the biggest floating structure ever put to sea will process gas from its Prelude field off Australia's north-west coast. The oil and gas company says it's made the final investment decision to use floating LNG processing technology. (ABC PM)

27 May 2011 Barnett's plan for Derby as a gas base plan in doubt as Broome and Darwin preferred (West Australian)

30 May 2011 John Butler, Jimmy Barnes, Pigram Bros join to protest against WA gas hub; Old Broome families begin to meet to discuss problems and divisions within their community (AAP)

June 1 2011 WA Govt wants access to land for Woodside by December, FID June 2012, Roe and Mc Kenzie have until June 22 to lodge evidence (Legal Transcripts)

¹⁷⁵ SAR, Vol 1, p. ES-25

Conclusion: The Lessons of Walmadany

If a LNG liquefaction precinct were proposed in the region of Cairns or Townsville, it would never be built. The analogy is apposite for Walmadany (James Price Point). The only difference is that the West Kimberley region is not as well studied or visited as the Great Barrier Reef. But as more studies are undertaken the wonder of the Kimberley coast, from dinosaur trails to biodiversity, is unfolding. The Australian Heritage Council has recently declared:

“The west Kimberley is one of Australia's very special places. It is a vast area of dramatic and relatively undisturbed landscapes that has great biological richness and provides important geological and fossil evidence of Australia's evolutionary history. With sheer escarpments and pristine rivers that cut through sandstone plateaux and ancient coral reefs to create spectacular waterfalls and deep gorges, the region's remoteness has created a haven that supports plant and animal species found nowhere else on the Australian continent. Against the backdrop of this extraordinary landscape is woven a remarkable account of Aboriginal occupation over the course of more than 40,000 years and the story of European exploration and settlement, from William Dampier's landing at Karrakatta Bay to the development of rich and vibrant pastoral and pearling industries that continue today. The west Kimberley was added to the National Heritage List on 31 August, 2011”¹⁷⁶

The above words are something that all mainstream European Australians can understand. This precious quality of the Kimberley coast is what Paddy Roe, his children and grandchildren have been trying to ensure is preserved for generations to come. They created the Lurujarri Trail to ensure that the magic 80 kilometre stretch from Broome's Roebuck Bay Caravan Park – (Gantheaume Pt/Entrance Pt through Daparapakun, Jurlarri, Lurujarri and Minarriny to north of Coulam Pt) – to Bindingankuny is preserved forever.

This report puts forward the following findings for all Australians to consider in support of the position Joseph Roe and his family have taken :

1. For overwhelming economic, social, cultural and environmental reasons the LNG precinct proposed for Walmadany (James Price Point) should not be built. The drivers to complete the LNG Precinct at Walmadany



June 2 2011 Rio signs \$2bn Aboriginal Native Title Deal (West Australian)

June 7 2011 Heritage Council recommends dinosaur footprints for heritage listing: Wayne Bergmann, Help Kimberley Aboriginal People Progress, Canberra Times; Protesters block road (West Australian)

June 8 2011 Fred Chaney praises Heads of Agreement (WA Business News)

June 9 2011 More than 500 people from 'old Broome families' have publicly voted "no deal" to the State Government's proposed \$30 billion gas hub at James Price Point, 60km north of the town. They packed into St Mary's College to sign a petition against the plan and a letter to Federal Environment Minister Tony Burke, inviting him to Broome to hear their concerns. (West Australian)'

June 12 2011 Premier Colin Barnett's top adviser conflict of interest claim; 70 protesters block road to JPP (Sunday Times)

June 16 2011 Wheatstone Onslow will be the last precinct to be approved in WA, Barnett (The Australian)

June 17 2011 Barnett releases Kimberley Science and Conservation Strategy (ABC)

¹⁷⁶ [Australian Heritage Council's final assessment of national heritage values of the West Kimberley](#) (1 August 2011)

(James Price Point) are narrow: (1) State revenues and an ongoing push to industrialise the Kimberley (2) Woodside Petroleum's potential for increased revenue (3) payments and benefits for the Indigenous community. These are not sufficient to (1) destroy the significant traditional cultural heritage of the area (2) to destroy a pristine and precious coastal environment (3) and to fundamentally undermine the people-centred tourist and cultural economy of the Broome region. Furthermore, the hasty processing of the Browse resources will result in diminished revenue and an over-expenditure on infrastructure. In sum, such a project is against the national interest.

2. The Lurujarri Trail - the magic 80 kilometre stretch from Broome's Roebuck Bay Caravan Park, (spanning Gantheaume Pt/Entrance Pt through Daparapakun, Jurlarri, Lurujarri and Minarriny to north of Coulam Pt), to Bindingankuny — should be preserved in a pristine state forever in accordance with the wishes of the traditional owners who know the law and spirit of the land.
3. The Browse Basin gas resources should be distributed by a pipeline to the Burrup Peninsula LNG plant or, if this involves too long a timeline for the gas leasees, then by floating gas liquefaction. The 'use or lose' it provisions engineered to fast track the Walmadany (James Price Point) development need to be the subject of a major parliamentary inquiry.
4. All Australian economic development on Aboriginal land needs to be in accordance with the principle of Informed Full Prior Indigenous Consent (IFPIC). The threat of compulsory acquisition of the Walmadany lands and the formal bureaucratic methods of the Native Title process that took place in relation to it need to be reviewed in the light of IFPIC. In short, Australia needs to bring its laws and processes into line with the principles of IFPIC.
5. Traditional Indigenous decision-making is best practice decision making. Decisions are made that are strong, binding and valued. Traditional processes do not occur by majority votes or participation in committees or through political representatives that can work within mainstream decision making or negotiating frameworks according to a time line. Decisions are made by 'men and women of high degree' who have a direct knowledge and expertise of the matters to be decided upon. The decisions of the leaders take time and are then endorsed by common consensus as reflected in the *liyarn* of the



June 18 2011 Pluto cost blow-out wipes 1bn off Woodside shares (The Age)

June 27 2011 Wayne Bergmann pleads with environmentalists to recognise the right of Aborigines to use their land for their own economic advancement. (The Australian)

June 29 2011 Icthy's final investment decision reached; (SMH) Woodside chairman Michael Chaney criticises opponents of the proposed \$30 billion gas processing plant at James Price Point, accusing them of lying to win public support. Speaking at the Vincent Fairfax Oration at the University of WA on Monday night, Mr Chaney attacked the activists' Save the Kimberley slogan, saying facts had become the first casualty of their campaign. "Elements of the green movement have mounted a campaign opposing development in the area and have enlisted the support of various entertainers and celebrities," he said. Mr Chaney's comments drew fire from former Optus Vision chief Geoffrey Cousins. He said he had delivered the same oration several years ago and would never have used it to advance his business agenda. "I certainly never would have used it as an opportunity to comment on my own business affairs — I think that's very inappropriate," he said. "To say the opponents of this project are telling untruths is, I think, also quite appalling." (West Australian)

customary group. Without these ingredients there can be no consent on matters as important as the status of lands and estates. Aboriginal people, or any other people from outside areas have no bearing or right to determine decisions in such a forum.

6. There will be some who view these findings as anti-progressive and anti-development in fact they are the basis for a more enlightened economic development process. Australia must recognise that destroying the environment is not progress and pursuing the fastest dollar possible is not sound economic development.
7. The hardship and plight of Kimberley Indigenous peoples are well understood. The need to celebrate and practise traditional law and culture as well as participate in the best of the mainstream world is the goal of all Indigenous people supported by all honourable Australians. The package of economic and social benefits negotiated by the KLC on behalf of the Jabirr Jabirr, Goolarabooloo peoples and other Kimberley Indigenous people was a step forward from the travesty of royalty payments in the Pilbara. There will be other opportunities to improve on these developments and to improve on the model developed by the KLC. The good work of the KLC, and those Goolarabooloo and Jabirr Jabirr individuals who supported them, will not be lost but will in turn be improved upon.
8. Broome and the Kimberley have resisted well the dictates of crass commercialism and development at all costs. Broome is the place where the white Australia policy had only minimal effects. It is a place where people know how to think ten different cultural ways. This unique quality does not need just to be celebrated in the famous festivals of Broome. It needs to be a foundation for economic, social and cultural development of the region. Miners, economic developers and politicians would do better if they worked together with the people who have made the region so special. If they do so they are sure to have success and to bring well being and prosperity to the region, Australia and the world.

These findings are the easy part of what must be done to protect the Kimberley coast and its peoples. It is appropriate to ask the question: where to from here? And what are the negative and positive lessons to emerge from the process that has driven the LNG development at Walamadany (James Price Point)?



June 30 2011 WA EPA chief says JPP is the most environmentally suitable place for LNG Precinct; Gas deal Indigenous milestone says Barnett; Fas deal with KLC signed (The Australian)

1 July 2011 A \$30 billion Kimberley gas hub deal is "the most significant act of self-determination by Aboriginal people in Australian history", West Australian Premier Colin Barnett says. (The Advertiser) 2 July 2011 Protesters given traffic tickets

4 July 2011 Alan Pigram leads protests delegation to Canberra (Canberra Times)

5 July 2011 12 Protesters arrested; Mitch Torres, Allan Pigram and Dr Anne Poelina hand Environment Minister Tony Burke a petition against LNG precinct signed by 3000 people, 20 per cent of Broome's population; Police break through protesters barricade (ABC News)

July 5 2011 WA Police begin removing protesters (Asia Pulse).

6 July 2011 Thai energy company PTTEP announces floating platform gas extraction ability; Woodside begin clearing JPP site (West Australian)

7 July 2011 Suspicious fires start at Walamadany (JPP); candlelight vigil outside Woodside Broome offices (ABC News)

Alternatives to the LNG precinct

In the first weeks of research the author invited discussions with a wide range of proponents of LNG liquefaction techniques as well as the corporate leasees of the Browse Basin gas to fully examine the alternatives to building the LNG liquefaction precinct at Walmadany (James Price Point). This process was accepted, has begun and is continuing. There are clearly better alternatives than the Walmadany (James Price Point) LNG precinct. These need to be brought into the open for the public to evaluate.

Outlaying the high costs of building the Walmadany (James Price Point) industrial precinct just do not make any economic sense, only a very narrow framework of interests propels the project forward. It is the author's view that many of the lessees understand that on top of this, the environmental and cultural damage that would occur is unsustainable. Therefore it may be necessary to work with enlightened corporate interests to stop the LNG precinct from being built and to fully develop alternatives; extraordinarily this may have to occur in defiance of Federal and State Governments. It is hoped that at some stage common sense will prevail. It is up to leading indigenous organisations in the Kimberley to encourage alternatives and more enlightened discussion where there is the capacity to do so.

A big plus of Walmadany (James Price Point) not going ahead could be the potential diversion of the liquefaction of the Browse Basin gas to the existing facilities at Karratha. This would create upwards of 20 billion in savings for the business community and for the general good. The precious Browse Basin gas could be hooked up to a domestic Australian pipeline and it would ensure that the damage done to the environment and to Aboriginal cultural heritage would be minimised. The process would take longer and mean that the gas would go to market in a steady fashion over the next twenty years, not within the next five to ten years.

Lurujarri Heritage Trail

The other major positive to arise from the opposition to the LNG precinct is the awareness that it has brought of the extraordinary legacy of Paddy Roe and the continuing work of his family to protect and develop the Lurujarri trail.

South Africa and New Zealand are important models for Lurujarri.

South Africa's luxury camping in Kruger National Park provide a model for how high yield, low impact camping could occur along the Lurujarri trail that is in keeping with Paddy Roe's original vision of 'giving all Australians access to the top soil' in a sustainable way that is protected by the traditional custodians. This would provide another much needed alternative for



8 July 2011 Excessive force allegations made against police; police deny claims; Quality of 130 million year old dinosaur footprints at Walmadany blows away palaeontologist (ABC)

9 July 2011 Jabirr Jabir elder Anthony Mason speaks out against protesters; clearing stops after Aboriginal cultural site (ABC)

12 July 2011 Woodside say final investment decision on Walmadany (JPP) a year away. (West Australian)

14 July 2011 Buru energy's Streitberg talks up potential of Canning Basin as gas field; \$500m hoped for to connect gas up to domestic gas grid; ConocoPhillips looks to buy into Goldwyer shale gas project in the Canning Basin (WA Business News)

15 July 2011 Broome Chamber of Commerce criticised for being too uncritical of LNG, breakaway business group forms (ABC News)

17 July 2011 Spirit of Jandamarra invoked as basis for protest against JPP; Cable Beach concert to celebrate Broome families and values (STM Entertainment)

20 July 2011 Australia to dominate world floating gas rig market; (LNG World News, Rigzone) Elsta Foy says she will never stop fighting the LNG Precinct (SBS News)



Broome's strong international and domestic tourist market. Cable Beach is frequently voted the world's No. 1 beach. The camel rides at sunset are now famous. Extending tourism activities along the Lurujarri Trail incorporating the traditional owners' knowledge and guidance would provide another dimension to the unique experience of visiting Broome and the Kimberley. The South African strategy is to allow private commercial ventures within a regulatory framework designed to minimise adverse affects on biodiversity and to ensure a risk-free return to the conservation assets that are being used. Private operators are given a contract for 20 years to create low income camps with no automatic right of renewal. The strategy has generated \$US 35 million in new investment in low impact accommodation and facilities. The total income generated by South African National Parks amounts to an undiscounted sum of \$US 90 million over a 20 year period.¹⁷⁷

New Zealand's "Great Walks" are another inspirational model for what could occur with regard to the Lurujarri Trail.¹⁷⁸ New Zealand's Department of Conservation (DOC) does not impose fees for access to any publicly owned conservation areas. However DOC offers concessions to individuals and business to conduct commercial activities such as tourism, agriculture, horticulture, telecommunications and commercial filming on public conservation land. Concessionaires pay a market rate for access to the conservation areas. In addition, DOC charges fees for access to protected areas facilities as follows:

"At the top end of the market are the Routeburn and Milford tracks, with fees of \$35 person per night (ppn). Most other 'Great Walks' are charged at around \$15 ppn. An extensive network of huts in other locations charge fees of \$10 ppn or \$5 ppn, depending on the services provided. Some 300 basic and remote huts remain free of charge. Campsite charges similarly range from \$7 ppn for fully developed sites with showers, cooking facilities etc. down to \$3 ppn for basic camps. For 'Great Walk' tracks, in particular, fees are set at a level which ensures that the costs of providing hut facilities are fully recovered from users. In other words, no taxpayer subsidy is required to provide Great Walk huts".¹⁷⁹

The New Zealand public sector-based strategy raises around \$24 million per annum from concession fees, hut and campsite charges and other external sources of revenue. This represents about 15% of the total budget of the Department. Much of the income is used to maintain high quality facilities and provide other services to users of public conservation areas.

¹⁷⁷ Lucy Emerton, Joshua Bishop and Lee Thomas. **Sustainable Financing of Protected Areas A Global Review of Challenges and Options**, The World Conservation Union, 2006, p58

¹⁷⁸ Ibid p. 60

¹⁷⁹ Ibid., p. 60

The difference that could emerge in the Kimberley is that the native title holders and traditional could play the major role of managing and granting access to the conservation lands.

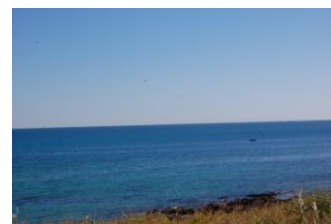
There are many other models¹⁸⁰ to consider for building the Lurujarri Heritage trail and these should be examined fully with the traditional custodians. Up until now the investment in cultural tourism in the Broome and Kimberley area has been led by particular outstanding Aboriginal individuals such as Sam Lovell and Vincent Angus. Kimberley TAFE has also run some successful models for communities and individuals to develop their own models of cultural tourism.¹⁸¹

But what is needed is the development of an overall strategy for Broome and the Kimberley which is backed by Federal, State and local government as well as the leading tourism companies of Broome. The Queensland government has recently allocated \$16.5 million over a ten year period to initiate a world class system of walking tracks including through five magnificent World Heritage areas¹⁸². Similarly, investing in the Lurujarri Heritage trail is the appropriate way to build the Broome and Kimberley economy.

¹⁸⁰ The work of Lucy Emerton is particularly interesting for Broome and West Kimberley-based economic development. Emerton, L. 1997. The Economics of Tourism, and Wildlife Conservation in Africa. Applied Conservation Economics Discussion Paper No. 4, African Wildlife Foundation: Nairobi; Emerton, L. 1998. Balancing the Opportunity Costs of Wildlife Conservation for the Communities Around Lake Mburo National Park, Uganda. Evaluating Eden Discussion Paper EE DP 05, International Institute for Environment and Development: London.; Emerton, L. 1999. Using Economics for Biodiversity Strategies and Action Plans in Eastern Africa. IUCN Eastern Africa Regional Office: Nairobi. Emerton, L. 2001a. What are Africa's Forests Worth? Ecoforum 24 (4): 7.; Emerton, L. 2001b. The nature of benefits and the benefits of nature: why wildlife conservation has not economically benefited communities in Africa. In: Hulme, D. and Murphree, M. (Eds.) African Wildlife and Livelihoods: The Promise and Performance of Community Conservation. James Currey: Oxford; Emerton, L. 2002. The Use of Economics in National Biodiversity Strategies and Action Plans: A Review of Experiences, Lessons Learned and Ways Forward. IUCN Regional Environmental Economics Programme for Asia: Karachi, Pakistan; Emerton, L. and Mfunda, I. 1999. Making Wildlife Economically Viable for Communities Living Around the Western Serengeti, Tanzania. IUCN Eastern Africa Regional Office: Nairobi; Emerton, L. and Tessema, Y. 2001. Economic Constraints to the Management of Marine Protected Areas: The Case of Kisite Marine National Park and Mpunguti Marine National Reserve, Kenya. IUCN Eastern Africa Programme Economics Programme and Marine & Coastal Programme: Nairobi.; Emerton, L., Rao, K., Nguyen, N. and Tu, H. 2002. Sustainable Financing Mechanisms for Yok Don National Park, Vietnam. PARC Project, Ministry of Agriculture and Rural Development Forest Protection Department, United Nations Office for Project Services, United Nations Development Programme and IUCN: Hanoi; Emerton, L., Rao, K., Nguyen, N., Tu, N. and Bao, T. 2003. Covering the costs of Vietnam's Protected Areas. IUCN and Government of Vietnam Forest Protection Division: Hanoi.

¹⁸¹ <http://www.isx.org.au/news/news/Yawuru.html>

¹⁸² http://www.derm.qld.gov.au/parks_and_forests/great_walks/



30 July 2011 Rob Hirst pens "Joseph Roe" to support Kimberley protest (Courier Mail)

2 August 2011 Conoco Phillip warns Australia's burgeoning liquefied natural gas sector faces a "struggle" in the near term because of rising cost pressures and the impact of strong \$A; begins drilling 4Q 2011 (Dow Jones, Reuters) three women arrested at hub blockade (Asia Pulse) Fed environment minister Burke visits LNG hub (ABC News)

3 August 2011 Fed Environment Minister Burke says his final decision on LNG Precinct will be a narrow one on environmental grounds "It's an environmental approval I'm giving," he said (ABC News)

4 August 2011 Protest Blockade reaches 6th week; "A fight to the death" Albert Wiggan (Northern Rivers Echo) Woodside shares underperforming because of credibility in delivering LNG precinct (WA Business News) Broome Catholic church holds service to bring families together divided over LNG gas dispute (ABC News) Small business owner and former Shire of Broome vice-President, Nik Wevers arrested in protest (ABC News)

The Political Situation

The overall political situation is not optimistic for those opposed to the Walmadany (James Price Point) industrial complex being built. Only the Greens within the Federal political environment have vowed to oppose it. If the Federal Minister for the Environment Tony Burke were to disallow the development on environmental grounds at some point, it would mean that the development would not go ahead. However the author does not expect this to occur. Despite the West Kimberley being declared a world heritage area, a similar situation to that which occurred on the Burrup Peninsula will arise – namely, that Woodside and its partners will gain an exemption to develop the industrial complex at Walmadany (James Price Point).

Added to the pessimism here, if Tony Abbott were elected within the next twelve months, which may occur, it is unlikely that this decision would be overturned. More than likely it would be reinforced.

At a state level the Labor Party still falls behind the Liberal/Nationals in the two party preferred vote. However the Walmadany (James Price Point) issue is certainly not a vote winner for Premier Barnett. This is particularly so when it is understood that there are better alternatives, which mean that the Kimberley coast can remain in pristine condition. When Western Australians understand that the gas is being developed in a market where there is likely to be a much lower price than if it were developed after the North-West Shelf gas also adds to their reservations about the fast-track development that Premier Barnett oversees. A Karratha gas pipeline from the Browse Basin would also ensure that the gas could be distributed through the domestic gas network.

Satyagraha

The likely pessimistic political situation means that the opposition to Walmadany (James Price Point) must take the form of passive resistance along the lines of Mahatma Ghandi's great principle of Satyagraha which combines the Hindu words for "truth" and "holding firmly".¹⁸³ Declare opposition to an unjust law/development, test the law/development (through passively resisting its development) and suffer the consequences (arrest, physical abuse, prison). Resisters calm, dignified, passive resistance would open the eyes of the unjust and weaken their resolve. The proponents would be obliged to see what was right and that would make them change their minds and actions.¹⁸⁴

There is evidence, for example, to suggest that the calm passive



5 August 2011 KLC says Kimberley should be heritage listed in trade off for LNG Hub go ahead (Morning Bulletin)
6 August 2011 Broome against Boom (The Australian); Tensions split town (West Australian) Rare bilbies found at gas hub site (West Australian)

9 August 2011 Gladstone looks on with alarm at Pilbara and Broome "When people on low incomes can no longer afford to pay rent, that's when economic impacts turn into social impacts," he said. "Our modelling suggests housing prices will rise by 60-80%. We haven't seen that peak yet." (The Observer Gladstone) Indigenous communities very different Gooreng Gooreng elder Cedric Williams (The Observer Gladstone) Woodside share price fluctuations viewed with alarm (the Age)

10 August 2011 Woodside vows to protect bilbies (SMH); Gas hub will aid the poor says Martin Ferguson (West Australian) Broome elder Anne Poelina says Fergusons out of touch and has no idea about what he is talking about (ABC News)

11 August 2011 LNG Plant thin edge of wedge of Kimberley development (West Australian). Woodside confident on LNG FID mid-2012 (The Australian, Dow Jones Business News) Broome won't become oil and gas town says Colin Barnett (Asia in Focus)

¹⁸³ See Peter Ackerman & Jack Duvall, **A Force More Powerful A Century of Nonviolent Conflict**, Palgrave, 2000, p.65

¹⁸⁴ Ibid., p. 65

opposition of the Old Broome families is already swaying the minds of many who had originally thought that there was no option but to support the development of the LNG precinct at Walmadany (James Price Point).

However, Ghandi's Satyagraha was not just about blind opposition or passive martyrdom, it was also about a strategy. There are a number of things that must be done in this context including: ensuring that all Australians are aware that a great majority of the traditional owners/custodians for the Walmadany (James Price Point) site are standing against the development and would welcome the support of those who have the time and capacity to join them in their opposition. It is also important to ensure that all Australians understand that the development at Walmadany (James Price Point) is a sub-optimal means of processing the Browse Basin gas. These messages are already reaching a large audience. But it should also be made clear through a series of communications from Indigenous organisations that the support and opposition of the Green and environmental movement is welcome to stop the development occurring. Communications from Indigenous organisations that are for the development of the industrial complex should be directly countered.

Consultations with Aboriginal Australians

There are some hard lessons for mainstream non-Indigenous organisations to learn from the Walmadany (James Price Point) experience. Above and beyond what is regarded as best practice in consultations, why couldn't the mainstream institutions of our society and the mainstream commercial mining community hear what the Roe family were saying about the Kimberley coast?

The answer goes to the way that the dominant Australian non-Aboriginal community engages with Aboriginal people. The dominant culture goes to a lot of trouble not to engage. In the case of the proposed Walmadany (James Price Point) LNG precinct many millions of dollars were poured into an artifice of communications that purportedly represented and engaged with Aboriginal Australia.

After the principle of ICFIC was abandoned in 2008 all of the funding put into the process by the Barnett government and Woodside was effectively a wasted and lost investment. A whole world of dialogue was invented which never touched the people who were the holders of the traditional knowledge of the area. Instead of speaking to a custodian the dominant culture created an artificial authority structure and circumscribed the place, time and way any discussion could take place.

Over the past twenty five years elaborate processes have been created to ensure that grassroots Aboriginal interests remain marginal, unseen, unacknowledged, unconsulted. Mainstream



13 August 2011 "The risks of adding more pressures to regional economies already stretched to their limits, as well as intensifying risks for water resources and the environment, seem to be ignored as state politicians see only the billions in upfront royalties they stand to gain.: Paul Cleary The Australian Shell pushed plan for pipeline over LNG Precinct with Martin Ferguson (The Australian) Governments' failure to regulate is costing mining industry, taxpayers and environment (Crikey)

16 August 2011 Baby bilbies found at LNG Precinct (LNG World News) Colin Barnett mounts furious attack on Wilderness society in WA Parliament (West Australian) Woodside wants conservationists to reveal where bilbies were filmed on LNG site (ABC news)

17 August 2011 Cyclists ride to Broome as protest against LNG precinct (Northcote Advocate)

26 August 2011 Burke ready to make heritage decision on West Kimberley (West Australian) Locals resign from community bodies because of Woodside money in Broome (ABC News) Two Australian women chained to a concreted 44 gallon drum are blocking a convoy of Australia's oil and gas company Woodside trucks from the site of a proposed gas hub near Broome in Western Australia, local media reported on Friday. (Xinhua News Agency)

institutions often see ‘men and women of high degree’ as trouble makers, not respectable, deviant, poor, ignorant, foolish. They try to invent another interface that means they do not have to talk directly to such people. But more often than not such individuals and groups are the last chance Australians have to talk to Aboriginal Australians on their own terms. They are the last chance Australians have to understand the wisdom that has been a part of this land for time immemorial.

As a result, Australian governments and business make monumental mistakes. Aboriginal people frequently do not engage in the mechanisms that are set up to represent their interests. They learn only too soon not to place too much faith in the organisations and people that have been set up to represent their interests. Often bitterness and resentment against those who stand for them in the mainstream community arises.

This problematic dialogue between Aboriginal and mainstream Australia is the reason why there are so many problems of dysfunction between the Aboriginal and non-Aboriginal world.

The Strength of Saying No & Taking on ‘Compulsory Acquisition’

*“Raised in big spirit country, Great Sandy Desert near the shore
Never questioning the seasons, letting nature take its course
Till your eyes begin their searching, new sensations lead you on
By the hand down thru dark alleys, a strange reality is born
And the faces are all so friendly, when you first walk through the door
But the faking’s done so sleazy, that you can’t take it anymore
And the wheeling and the dealing, sucks you in for one more try
Before you even know it, you see through someone else’s eyes
And your heart begins to harden as you lash out in reply
To those that want to make you, lay your head and cry
But there’s no way that you’ll bend me, my focus is still strong
I can feel the old man’s power, I’m going back where I belong
For my eyes they have been opened and the tears they start to swell,
And I am longing for the freedom, the innocence that I once had,
Yeah there’s no way that you’ll bend me, my focus is still strong
I can feel the country’s power, I’m going back where I belong”
S. Pigram, Where I B’long*

Saying no for the right reasons is a force more powerful than compromising for unjust reasons. All over Australia there are small pockets of Aboriginal people sitting on the country of their ancestors. While many of their extended family and even close relatives have left their lands, these custodians continue to live in accord with their traditional beliefs. One of these custodians said to me, “My backbone will be buried in this earth.” ‘If the mining companies want to drill into this earth they will have to kill me first. If my relatives want to sell this country for money they will have to kill me first.” Malcolm Douglas articulated a related theme just before his tragic death by saying: “The world is being changed so quickly it’s been industrialised



27 August 2011 “Dinosaur footprints abound near Broome. Should they stymie a \$35 billion gas project planned for the area? The footprints are all around me, as large as spa baths or as small and delicate as a modern paw print. It feels sacrilegious to tread on them, even though I know they are firmly embedded in Broome’s orange sandstone. I skip over the smaller three-toed impressions, and leap across bigger, bath-like imprints”.
(**The Australian Magazine**)

31 August 2011, “Swaths of the west Kimberley will be given national heritage listing today by the Federal Government. But in a blow to environmentalists, the listing will not impede the development of the James Price Point gas processing hub.”
(**The West Australian**)
Woodside Petroleum has accepted the Australian federal government’s heritage listing of parts of the west Kimberley but downplayed the heritage value of dinosaur footprints in the region (Asia Pulse) In June, Kimberley Land Council director Wayne Bergmann helped traditional owners of the site to negotiate a \$1.5 billion benefits package with Woodside and the State Government. But, today, in a surprise about-turn, Mr Bergmann said the plant at **James Price Point** should not be given the go-ahead. (**ABC News**)

so quickly, overpopulated so quickly we really must save these wilderness areas.”¹⁸⁵

One of the cruellest lessons to learn for those who accepted the rhetoric of Colin Barnett that they could not say no to the LNG precinct, is that saying no in such circumstances is the only thing to do. During the Noonkanbah protests — the origins of the KLC in the Kimberley — Aboriginal people had less right to say no than they have today. There was no Native Title act, there was little environmental or heritage law which protected Aboriginal country. Yet saying no at Noonkanbah created the whole framework of rights and negotiation that Aboriginal people enjoy today, not only in the Kimberley, but around the country. Today ‘the Noonkanbah no’ was important in building value and creating a strong culture among Kimberley native title groups.

To say “no”, as Joseph Roe knew, would take a fight. It meant defying all of the institutions and forces of the mainstream, non-Indigenous world. It meant saying no to a lot of money. It meant defying the wishes of those countrymen who wanted to sell the land. This is not easy. But saying no is important because it is necessary to take on the fundamental injustice of ‘compulsory acquisition’. In 1998 the State and Territories gained the right to extinguish or impair native title in their jurisdictions. In particular States gained the right to compulsorily acquire native title land for public infrastructure (NTA 1993 s24AMD(6B)). This was the brainchild of the Howard government and, as Paul Keating has recently argued, it set back native title rights a decade.

The 1998 amendments contravene the United Nations Declaration on Indigenous Rights and need to be challenged accordingly. In many ways both the Walmadany issue in WA and the Wild Rivers Laws in Queensland are the line in the sand where Aboriginal leaders must defend their rights to say no and to have the benefit of informed consent. ‘Compulsory acquisition’ needs to be challenged fully and comprehensively by Indigenous legal and representative organisations over the next decade. In addition Federal Government needs to be continually made aware of the desire by all Indigenous people to overturn the 1998 amendments and to ensure that Indigenous people have the full benefit of Indigenous Free Prior Informed Consent.

Winning these rights for Indigenous people may also well set a precedent for other land holders to have the right of full informed consent before any mining or industrial development can occur on their lands. The 21st century should be a period when the rights of the informed individual with tradition and



1 Sept 2011 The scale of Western Australia's resources boom is set to go up a notch with the giant Wheatstone gas project, tipped to cost \$25 billion, close to getting final approval. **(WA Business News)** “Somehow Environment Minister Tony Burke managed to announce a national heritage listing for the western Kimberley yesterday but left off the site for Woodside Petroleum’s proposed gas plant at James Price Point ... That’s hardly surprising considering the national heritage listing given to the Burrup Peninsula in 2007 left one per cent unprotected that just happened to coincide with the site for another Woodside gas plant, Pluto.” **(West Australian)** University of Qld palaeontologist Dr Salisbury rejected the notion that Woodside’s gas hub could coexist with the tracks. **(West Australian)** An area of wilderness bigger than England will be classified as a National Heritage site to help guard its rare attractions including 130 million-year-old dinosaur footprints. But in a sign of rising tensions over the use of natural resources here, neither environmentalists nor miners are happy with the move. **(Wall St Journal)**

¹⁸⁵ Malcolm Douglas, 27 August 2010

knowledge on their side should win out over the might of states and corporations. Non-indigenous people should not see the rights of Aboriginal people as something which detracts from their own rights but rather enhances the rights of all.

Aboriginal people carry with them much more than just the love and knowledge of their lands. They possess wisdom about how best to use and preserve our natural assets. It will be a great day for Australia when the wisdom of Aboriginal customary law is recognised and acknowledged. Aboriginal Australians will have a right to say no or yes about developments on their own lands knowing they have the full support of their fellow non-Aboriginal countrymen. Australians will learn to distinguish the diversity and variety of the many language groups and Aboriginal nations within our own nation. Aboriginal people will no longer have a 24/7 debate in their own minds about whether or not to participate in Australian society. Money will be a secondary consideration in bridging the prosperity gap between Aboriginal and non-Aboriginal Australians but the resources including cooperation, trust, goodwill and capacity that are truly needed will never be in short supply.

Aboriginal Compensation, Reparations, Royalties and Investments in the Future

The KLC and Wayne Bergmann did a good job on many fronts in negotiating the Heads of Agreement with Woodside and the State government in onerous circumstances. The package of investments they developed learned much from the Pilbara disaster for Aboriginal people. Cash royalty payments are as much a curse as welfare payments and it is still as much a fight as it ever was for Aboriginal people to gain opportunities of employment from mining and processing operations.

Companies and governments seeking agreements with Aboriginal communities gloss over the problems. As Dr. Andrew Jerimenjenko, the former Woodside Chief Health Officer at Karratha said: "The companies come in, they say, 'We're going to make you millions of dollars, billions of dollars if you allow us to develop this resource,' but unfortunately it never flows through to the people who really need it."¹⁸⁶

If we look at those places in Australia where large royalties have been paid out from mining and other economic activities the profile of Aboriginal problems is the same, and in some cases, worse.¹⁸⁷



2 Sept 2011 BHP Billiton and Chevron had attacked the more stringent use it or lose it measures imposed by the Federal Government on retention leases for offshore gas fields in Western Australia. The companies claimed the rules increased investment risk and would force them to use infrastructure operated by Woodside Petroleum and Woodside's preferred **James Price Point** site, according to Wikileaks cables. (AFR) Oil and gas giant Woodside has expressed surprise at the heritage listing of dinosaur footprints through its proposed James Price Point LNG site but believes the two can co-exist (The Australian). "A 20-million hectare national heritage listing of the West Kimberley has given the federal government a big say in the future development of one of Australia's last frontiers. That said there is little indication of what that means. .. a national heritage listing does not automatically stop development. There are plenty of examples where exploration, mining and other industrial ventures have been approved in heritage-listed areas, such as the recent decision to allow gas exploration near the world heritage-listed Ningaloo Reef off the West Australian coast." Graham Lloyd (**The Australian**)

14 Sept 2011 First tent embassy outside of Canberra established at site of gas precinct by Teresa, Phillip and Joseph

¹⁸⁶ Andrew Jerimenjenko, 29 October 2010)

¹⁸⁷ John Taylor, Benedict Scambary, **Indigenous people and the Pilbara mining boom: A baseline for regional participation**, CAEPR, Research Monograph 25 / 2005

There are several areas that need to be investigated and studied further arising out of the Walmadany (James Price Point) HOA, including:

- a bottom line principle that, if access to Aboriginal land is essential to an enterprise's success, there should be a minimum level of equity issued in that enterprise on behalf of Indigenous people;
- the question of whether public responsibilities of the State and Commonwealth can or should be part of agreements over private sector developments;
- the need for a multi-level approach to breaking down barriers to Indigenous employment in the mining industry and related areas as part of economic development opportunities; this is still not part of compensation settlements.¹⁸⁸
- the question of whether there should be a mining tax whose public income should be devoted to Aboriginal enhancement needs to be examined within the context of Aboriginal negotiations over land use. As much as possible this should take the form of a bureaucracy-free investment fund that goes directly into Aboriginal enterprises and contractors that provide high level training and employment for Aboriginal employees in the real economy. Another option that needs to be considered is allowing 50 per cent tax deductibility for investments in Aboriginal corporations that have commercial contracts in the non-welfare economy. The cost of this could be subsidised by a surcharge on the mining industry and other resources enterprises operating on Aboriginal lands.¹⁸⁹

A model paradigm of best practice agreements for mining developments needs to become the basis for any negotiations over large projects in the future.

Native Title.

In most circumstances native title is a long and torturous process in which State and Federal governments can often obstruct and impede the process. In the case of Walmadany (James Price Point), *so long as traditional owners were prepared to negotiate an ILUA allowing industrial development on their land, then native title would be automatically approved.* If potential native

¹⁸⁸ See Ngarda Civil & Mining, *Strength through Enterprise, Work and Training*, 18 December 2007

¹⁸⁹ See on this Peter Botsman "Aboriginal Economic Development and the Mining Tax" Peter Botsman 15 June 2010 [After Emancipation The Pilbara Australian Aboriginal Economic Development and the Mining Tax](#)

Peter Botsman, "The Henry Whalebone Tax Review" Peter Botsman 6 May 2010 "New Thinking from the ISX on Remote Area Transport Plant for Indigenous Contractors, Offices Space for Homelands Enterprises", 27 October 2009 <http://www.workingpapers.com.au/publishedpapers/2805.html>



15 Sept 2011 Palaeontologists will be flown in from Canada and the United States to conduct a fresh review of dinosaur footprints near the proposed Kimberley gas hub. The dinosaur footprints are embedded in rock close to where the State and Federal Governments want to build a \$35 billion LNG precinct north of Broome. (ABC News, Advertiser, West Australian, AAP)

16 Sept 2011 Protests against Woodside Petroleum's Browse liquefied natural gas project have continued for a third month, with daily blockades on the road leading to James Price Point, where the Kimberley gas hub will receive the LNG. Another three arrests were made last week after a Woodside convoy was delayed for more than 36 hours on the road leading to the onshore gas hub, according to The Wilderness Society, which is opposed to the onshore facility on environmental and ecological grounds. (Upstream)



title holders were not prepared to go along with industrialisation, those same rights would be withdrawn.

The native title system should not be seen as a way of delivering necessary approvals for major development proposals. Yet this is the way that the process for approving the LNG precinct in the Kimberley proceeded. The whole basis on which the Walmadany (James Price Point) negotiations were conducted needs to be thoroughly reviewed.



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