# A Tale of Two Agreements: Negotiating Aboriginal Land Access Agreements in Australia's Natural Gas Industry

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# Abstract

This PhD thesis develops practical, theoretically sound, broadly applicable and multi-disciplinary explanations for how Aboriginal traditional owners can maximise benefits from agreement making with resource companies. It focuses on negotiations conducted pursuant to the 'future act' regime of the Australian *Native Title Act 1993* (Cth). This regime stipulates that resource companies seeking to access land subject to claimed or determined native title rights and interests must negotiate for at least six months with that land's traditional owners with a view to reaching an agreement about the terms of that access. It does not allow traditional owners to veto access.

Using a qualitative case study research design, this thesis examines two land access agreement negotiations for liquefied natural gas (LNG) processing facilities that resulted in very different outcomes for traditional owners. These agreements were described by research participants as being "like chalk and cheese": the benchmark Browse LNG agreements in the Kimberley, Western Australia, and the inadequate Curtis Island LNG agreements of central Queensland. This PhD thesis joins only a handful of research projects to study real life negotiations from the perspective of all negotiation parties.

The thesis argues that Browse LNG and Curtis Island negotiation outcomes were determined by a complex combination of factors. These primarily relate to the strength of Aboriginal political organisations and the structural context that each negotiation takes place in, including the history of the location of the proposed development, the land's level of native title rights and the attitude of respective state governments. The thesis finds that the 'right to negotiate' is an important procedural tool for traditional owners, despite significant shortcomings.

In central Queensland, an extremely violent colonial period has resulted in poor prospects for recognition of native title rights, and the displacement of people from similar cultural and language groups from their land and from each other. This displacement makes forming strong political organisations more difficult because not only are people less geographically proximate, they are also likely to find it harder to maintain solidarity and less likely to practise traditional law and custom. The State of Queensland was almost totally absent from the Curtis Island LNG negotiations, and its stance towards the development favoured LNG company interests over those of traditional owners.

In comparison, Aboriginal people in the Kimberley experienced a different colonial impact (resulting in stronger native title rights), continue to practise Aboriginal law and custom, think of

themselves as a single political and cultural domain, and are represented by several important Aboriginal organisations. The State of Western Australia's stance in the negotiations aided traditional owner leverage because it was not only the proponent of the Browse LNG development, it also explicitly and publically linked the proposed development with a discourse of combating Aboriginal disadvantage in the Kimberley.

# Declaration

This is to certify that:

1. The thesis comprises only my original work toward the PhD;
2. Due acknowledgment has been made in the text to all other material used;
3. The thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

Lily Maire O'Neill

# Dedication

This thesis is dedicated to my parents, Cas and Chris O'Neill, and to the memory of my siblings Tom and Zoe O'Neill, and my grandfather Fred Everill.

# Preface

Parts of Chapters 4 and 6 appear in a chapter co-authored with Lee Godden 'Agreements with Indigenous Communities: The Native Title Act in Australia', in *Sharing the Costs and Benefits of Energy and Resource Activity* (Oxford University Press, 2016).

Parts of Chapters 5, 7, 8 and 9 appear in a journal article 'The Role of State Governments in Native Title Negotiations: A Tale of Two Cities' (2015) 18(2) *Australian Indigenous Law Review*.

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# Abbreviations

EIA — Environmental Impact Assessment

EPBC Act — *Environment Protection Biodiversity Conservation Act 1999* (Cth)

FPIC — Free, Prior and Informed Consent

GJJ — Goolarabooloo/Jabirr Jabirr registered native title group

HEAG — Human Ethics Advisory Group

ILUA — Indigenous Land Use Agreement

KLC — Kimberley Land Council

LNG — Liquefied Natural Gas

NDT — Northern Development Taskforce (a Western Australian government initiative)

OCG — Officer of the Coordinator General (Qld)

PCCC — Port Curtis Coral Coast registered native title group

SDA — State Development Area (Qld)

TO — Traditional Owner

TONC — Traditional Owner Negotiation Committee (for the Browse LNG negotiations)

QSNTS — Queensland South Native Title Services

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# Chapter One
# Introduction

## I. THE THESIS PROBLEM

Australia has recently experienced one of the largest resource booms in its history. [1] Large amounts of resource wealth are extracted from, or next to, land on which Australian Aboriginal communities live.[2] Yet the traditional owners of that land — like Indigenous people world-wide — are on average less educated, live shorter lives and pass on less wealth to their children than their non-Aboriginal counterparts.[3] This 'gap' in life chances is in spite of more than 30 per cent of the Australian landmass being subject to some form of native title rights and interests[4] while Aboriginal Australians comprise just over 2 per cent of the Australian population. [5] That resource wealth has largely not helped to improve the lives of Aboriginal traditional owners has been dubbed the paradox of 'poverty in the midst of plenty'.[6]

Agreement making between traditional owners and resource extraction companies over access to land is arguably one of the best ways for traditional owners to combat this paradox and improve their life chances.[7] Yet the literature is not completely clear on how traditional owners can best negotiate beneficial agreement outcomes.[8] What the literature largely concludes is that traditional owners are negotiating with resource

[1] Peter Sheehan and Robert G Gregory, 'The Resources Boom and Economic Policy in the Long Run' (2013) 46 *Australian Economic Review* 121.
[2] 'Australian Indigenous people' comprises both Aboriginal and Torres Strait Islander communities. However, as most resource projects are located on the Australian mainland and predominately impact Aboriginal communities, this thesis uses the term 'Aboriginal' while acknowledging that Indigenous Australians comprise both groups.
[3] The Minerals Council of Australia estimates that 60% of minerals in Australia are is extracted from, or next to, Aboriginal communities. See Minerals Council of Australia, *Minerals Industry: Indigenous Economic Development Strategy* (2011) 4. For Indigenous disadvantage, see Australian Government, *Closing the Gap Prime Minister's Report* (2014).
[4] Jon Altman and Francis Markham, 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (The Federation Press, 2015) 126.
[5] Australian Bureau of Statistics, '2011 Census'.
[6] Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31.
[7] Marcia Langton et al (eds), *Settling with Indigenous People* (Federation Press, 2006). Ciaran O'Faircheallaigh, 'Negotiations Between Mining Companies and Aboriginal Communities: Process and Structure' (Working Paper 86/1995, Centre for Aboriginal Economic Policy Research, 1995).
[8] What is meant by a 'beneficial' agreement outcome is discussed in Chapter 2, 'Agreement Making Between Traditional Owners and Resource Companies'.

companies who are often at a political advantage, and almost always at a legal and financial advantage.[9]

This thesis examines the 'right to negotiate' provisions of the *Native Title Act 1993* (Cth) ('the *Native Title Act*') which give Australian traditional owners procedural negotiation rights with resource companies seeking access to their land. The thesis asks how traditional owners can maximise outcomes when negotiating agreements with resource companies pursuant to this legal framework. It provides an original analysis of this question, through a qualitative case study of two 'right to negotiate' negotiations for liquefied natural gas (LNG) land access agreements over land the subject of registered native title claims. These are in the Kimberley, Western Australia (Browse LNG), and in central Queensland (Curtis Island LNG). While much has been written on agreement making and its potential benefits for improving the health, education, training and employment opportunities of Aboriginal traditional owners, there have been few academic empirical studies of agreement making that closely examine how traditional owners can maximise agreement outcomes, and none from the view point of all negotiation parties.

The primary aim of this research is to develop theoretically sound, practical, multi-disciplinary and broadly applicable explanations for how traditional owners can maximise agreement outcomes under the *Native Title Act*. A secondary aim is to provide a rich description of the Browse LNG and Curtis Island LNG land access negotiations. This will show how and why the agreements came into being in the form that they did in order to detail factors that shape beneficial agreement making.

In order to fulfil these aims, the thesis asks the following questions:

1. What factors are most important in shaping the power dynamics of negotiations between traditional owners and resource companies, and how do these dynamics shape agreement outcomes?
2. What role does law play in shaping agreement outcomes?
3. How can traditional owners maximise benefits available to them from these negotiations?

These questions have been formulated so as to be interesting, relevant, feasible, ethical, concise and answerable.[10] They are in direct response to an appeal for 'detailed case-

[9] Refer to Chapter 2, 'Agreement Making Between Traditional Owners and Resource Companies'.

study research to establish the reasons for positive and negative outcomes, which in turn can provide a basis for achieving more positive outcomes in the future.'[11] Many key commentators have remarked that there is a paucity of information that describes what occurs in the agreement-making process. This is not helped by the fact that almost all agreements are confidential. David Ritter, for example, writes that the lack of empirical information has left:

> A vacuum which has been filled by the myths of agreement-making … these stories bear little resemblance to what actually happens negotiating the deal, but they generally go unchallenged.[12]

This research seeks to fill that vacuum.

'Agreement outcomes' can mean many things, from the decisions a community reaches during the negotiation process and the conversations they have about the negotiation; to the actual agreement reached; the implementation of that agreement; to the impact that a negotiated agreement has on its relevant community into the future. [13] The last is particularly important because agreement making can only be said to be successful if it results in the creation of substantive beneficial outcomes for Aboriginal peoples. [14] However the scope and time frame of this research does not allow for the long-term impact of agreements to be studied. Nor does this thesis focus on implementation of agreements, although clearly the conclusion of a written agreement does not automatically lead to the outcomes envisaged by it, nor do the terms of the agreement necessarily determine the scope of what can be implemented. [15] Rather, the term 'agreement outcomes' in this thesis refers to the written agreement signed by the resource company and traditional owners at the end of the negotiating period.

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[10] What Gilbert says are essential for social research: Nigel Gilbert, *Researching Social Life* (Sage Publications, 1993), 47. See also Robert Yin, who suggests choosing 'significant questions' in 'significant areas' Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 1984) 20–21.

[11] Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2 *Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies* 1.

[12] David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) 42. See also Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (Issues Paper No. 25 (Volume 2), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, February 2004) 2. Ciaran O'Faircheallaigh, *Negotiating Major Project Agreements: The 'Cape York Model'* (Australian Institute for Aboriginal and Torres Strait Islander Studies, 2000) 4 <http://www.aiatsis.gov.au/research/docs/dp/DP11.pdf>.

[13] Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 307.

[14] Ibid 306.

[15] Ciaran O'Faircheallaigh, 'Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada' [2003] *Aboriginal Politics and Public Sector Management Research Paper* 6.

## II. LIKE CHALK AND CHEESE

In June 2011, the Goolarabooloo/Jabirr Jabirr registered native title group claiming ownership of James Price Point in the Kimberley, northern Western Australia, voted in favour of accepting an offer from Woodside Energy and the Western Australian government to process offshore Browse Basin LNG on their land. The Browse LNG development, had it gone ahead, [16] would have been the first significant industrial development on the Kimberley coast. These agreements were signed amidst a very high profile environmental campaign against the development.[17] The gas that this precinct would have processed was to have been piped from the deposits of Torosa, Brecknock and Calliance in the Browse Basin. They are located off the coast of northern Western Australia, 425 km north of Broome and estimated to have reserves of 34.6 trillion cubic feet of gas and 600 million barrels of condensate.[18]

The Browse LNG land use agreements struck between Aboriginal traditional owners, the State and Woodside Energy Ltd were estimated to be worth at least $1.5 billion.[19] They also contained substantial commitments by the Western Australian government and Woodside to improve the health, employment, education and social prospects of Kimberley Aboriginal people.

On the other side of the country, around the same time, land access agreements were reached for the building of four LNG processing plants on Curtis Island, near Gladstone, central Queensland.[20] These plants are designed to process coal seam gas piped from onshore gas wells in central and southern Queensland. The Curtis Island LNG agreements are equivalent to "crumbs off the master's table", say traditional owners, and

[16] In April 2013 Woodside announced that the gas resources of the Browse Basin would instead be processed offshore, resulting in significant questions about the validity of these agreements – see Chapter 3 for further discussion. The contents of these agreements are discussed in detail in Chapter 5.
[17] See, for example, Adam Morton, 'Hanging by a Thread: How the River Was Won' *The Sydney Morning Herald*, 5 March 2013. The controversy surrounding this proposed developed will be explored further in chapter 5.
[18] Western Australian government, Department of State Development, *Browse LNG - Native Title and Heritage* <http://www.dsd.wa.gov.au/state-development-projects/lng-precincts/browse-kimberley/native-title-heritage>.
[19] The figure of $1.5 billion was made by the State of Western Australia although this figure was an estimate based on future production projections, and if further proponents other than Woodside, also used the site. See Chapter 5, 'Browse LNG Agreements'.
[20] Note that one of the four projects, Arrow LNG, negotiated a land access agreement with traditional owners but has since been cancelled - Angela Macdonald-Smith, 'Shell Shelves Arrow LNG Project in Queensland' *The Sydney Morning Herald*, 30 January 2015. For more detail on the projects, refer to Chapter 5, 'Curtis Island LNG Negotiations' 'Curtis Island LNG Agreements'.

probably worth less than $10 million in total.[21] Both sets of agreements were negotiated pursuant to the 'right to negotiate' regime of the *Native Title Act*.

The two projects are similar in the type of resource being processed and timeline. The biggest difference is that of size: it is estimated that the Curtis Island facilities will process approximately twice as much LNG as the Browse LNG Precinct would have, and cost approximately twice as much to build.[22]

These "chalk and cheese" agreements are the focus of this thesis.[23] That traditional owners achieve widely different results under the same legislative scheme begs the question: what produces this difference? [24] How did Kimberley traditional owners negotiate such a substantial package? Why did Curtis Island traditional owners receive so little? It is these questions that this thesis seeks to explore.

## III. BRIEF HISTORICAL OVERVIEW

The Browse LNG and Curtis Island LNG agreements have their origins in the founding of modern Australia. In 1788, Captain Arthur Phillip claimed the colony of New South Wales for the British Crown. Until 1992, it was held that the British Crown could so easily assume ownership of Australia because Aboriginal people were 'without laws, without a sovereign and primitive in their social organization.'[25]

Prior to 1788, the Aboriginal population is estimated to have been between 750,000 to 1.5 million people. By the 1880s a violent expansion of settlement by the British resulted in a 'good half' of Aboriginal tribes in Australia being 'obliterated'. [26] Across the continent, British colonisation resulted in the decimation of Aboriginal populations through murder, disease and starvation.[27] On the frontier the level of violence against

[21] Refer to discussion in Chapter 5 'Browse LNG Agreements' and 'Curtis Island LNG Agreements' for the worth of the agreements.
[22] Former CEO of Woodside Don Voelte estimated that Gladstone LNG would be capable of producing approximately twice the amount of LNG per year than Browse LNG: interview with Don Voelte (Sydney, 5 June 2014). For more detail on the costs and projected production associated with these projects, refer to Chapter 5, 'Browse LNG Agreements' and 'Curtis Island LNG Agreements'.
[23] The phrase "like chalk and cheese" was used to describe the Browse LNG and Curtis Island LNG agreements by two Curtis Island traditional owners. See Chapter 5, 'Curtis Island LNG Agreements' for further discussion.
[24] See O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples', above n 11, 2.
[25] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 36, ('*Mabo*').
[26] WEH Stanner, *After the Dreaming* (ABC Enterprises, 1968) 34. Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 11.
[27] PG McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford University Press, 2011) 1.

Aboriginal people was often extreme. The resistance by Aboriginal people to this invasion was extensive and sustained, although knowledge of this resistance has been, until recently, largely absent from Australian history.[28]

From the early twentieth century until the 1970s, children of mixed Aboriginal and European descent were systematically removed from their families, resulting in the so-called 'Stolen Generations'. [29] Throughout the nineteenth and twentieth centuries, Aboriginal workers were used as indentured labour, and paid far less than their non-Aboriginal counterparts — indeed, often paid only in rations and accommodation. Many Aboriginal workers had their wages compulsorily diverted into government 'trusts', most of which was used for general government expenditure.[30] Nationally, Aboriginal and Torres Strait Islander people were treated as akin to children under the 'protection' of missionaries or the government, and did not receive universal suffrage in some places until the 1970s.[31] In the 1960s and 1970s, overturning of bans on alcohol in many communities caused further social upheaval.[32] The last few decades have seen Aboriginal peoples' political rights reach parity with other Australians', yet 'the gap' between Aboriginal and non-Aboriginal Australians' health, wealth and social conditions remains wide.[33]

Interactions between Aboriginal Australians and the resource extraction industry have similarly been fraught. Many key moments in the fight for Aboriginal land rights have their origins in disputes about mining undertaken on land without regard for its Aboriginal owners. Until the landmark Australian High Court decision of *Mabo v Queensland (No 2)*[34] efforts by most Australian Aboriginal people to exert control over

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[28] See Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800-2000* (Fremantle Arts Centre Press, 2000); Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1996); Rosalind Kidd, *Black Lives, Government Lies* (UNSW Press, 2000).

[29] See generally Australian Human Rights Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families' (Commonwealth of Australia, 1997).

[30] Kidd, above n 28.

[31] Mick Dodson, 'Towards the Exercise of Indigenous Rights: Policy, Power and Self-Determination' (1994) 35 *Race and Class* 4, 65-66.

[32] Marcia Langton, 'Rum, Seduction and Death: "Aboriginality" and Alcohol' (1993) 63 *Oceania* 195.

[33] In Australia, the campaign to close the health and educational disparities between Aboriginal and non-Aboriginal Australians is known as 'closing the gap'. See 'Closing the Gap - The Prime Minister's Report 2015' (Australian Government Department of the Prime Minister and Cabinet, 11 February 2015) <http://www.dpmc.gov.au/pmc-indigenous-affairs/publication/closing-gap-prime-ministers-report-2015>.

[34] *Mabo v Queensland (No.2)* (1992) 175 CLR 1 (*Mabo*). This case is discussed in some detail in Chapter 4, 'The Recognition of Native Title' and Section III below.

what occurred on their traditional lands were defeated by lack of legal title to land, and indifference or outright hostility from resource companies and governments.[35]

The Yolngu people, for example, brought the Gove land rights case after bauxite leases were granted over their traditional country in Arnhem Land, Northern Territory, in the 1960s.[36] While the case itself was unsuccessful, it brought the issue of Aboriginal land rights to prominence nationally and prompted the Commonwealth to legislate for land rights in the Northern Territory. [37] Similarly, the Noonkanbah dispute resulted from petroleum exploration licences granted over the country of the Yungngora people in Western Australia without their consent.[38]

## IV. NATIVE TITLE

In 1992 the landmark *Mabo* case was handed down by the Australian High Court.[39] It was a case brought by several Torres Strait Islanders who successfully argued that the common law could recognise and protect their traditional rights and interests in land on Mer (Murray Island) pursuant to their traditional law and custom. As discussed further in Chapter 4, the High Court held that Aboriginal and Torres Strait Islander property rights survived the acquisition of sovereignty by the British Crown, and, in certain circumstances, could be recognised by the Australian common law.[40] It termed these property rights 'native title', defining them as the communal, group or individual rights and interests in land of Aboriginal or Torres Strait Islander people, who hold those rights according to their traditional laws and customs.[41] The judgment recognised what was already known by Aboriginal people, that Australia 'is and always was Aboriginal land.'[42]

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[35] See, for example, Ciaran O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or "Business as Usual"?' (2006) 41 *Australian Journal of Political Science*.
[36] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, ('*Milirrpum v Nabalco Pty Ltd*').
[37] See discussion in Chapter 4, 'Continuity of Aboriginal Law'.
[38] See discussion in Chapter 5, 'The Emergence of the Kimberley Land Council'.
[39] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
[40] See discussion in Chapter 4, 'The Recognition of Native Title'.
[41] *Native Title Act* s 223; *Mabo* 59–60. It is worth noting that many scholars convincingly argue that the rights recognised by the court in *Mabo* have been progressively weakened by a series of court decisions and legislative changes that have read down native title rights. See Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost: Reflections on common law native title and ten years of the Native Title Act' (2003) 27 *Melbourne University Law Review* 523; Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009).
[42] Barney Barnes and Paul Marshall (eds), *Raparapa: Stories from the Fitzroy River Drover* (Magabala Books, New ed, 2011) 13.

The *Native Title Act* was passed in 1993 following the *Mabo* decision. At the time, there was concern from the resource industry that native title would adversely affect their operations. [43] However the legislation did not allow traditional owners to prevent resource extraction on their land. Instead, the *Native Title Act* instituted the 'right to negotiate' regime, one of the several compromises that ensured its passage by the Federal parliament and approval by the Aboriginal Australian negotiating team.[44] This regime mandated that companies must negotiate with traditional owners with a view to reaching an agreement over access to land.[45] If no agreement has been reached after six months, either party may seek arbitration.[46]

## V. CHAPTER SUMMARY

The thesis is structured as follows. Chapter 2 surveys the literature on the research's key questions, the most persuasive of which emphasises the role of power in understanding agreement outcomes, and particularly the key role that Aboriginal organisations play in consolidating and exercising traditional owner power. It also examines and critically assesses theoretical explanations — on themes of power, negotiation theory, and discourse analysis — for their utility for answering the key questions of this research.

Chapter 3 details the qualitative multi-site explanatory case study research design used in this research; the justifications for, and limitations of, this approach; and how this research method was applied and adapted over the course of the research. It discusses how case study sites were chosen and details the empirical evidence on which the thesis rests: how it was collected, verified and analysed, and the extent to which the research findings can be applied more generally.

Chapter 4 outlines the Aboriginal and settler legal framework of the two negotiations, particularly the 'right to negotiate' regime of the *Native Title Act.* It examines several legal theories, particularly legal pluralism and property law theory, in order to better understand the impact of law on the negotiations. It discusses the possibility that these

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[43] Hugh Morgan, of Western Mining Corporation, for example, said that the decision would not only threaten resource extraction but would also put peoples' backyards at threat: *The Australian*, 13 October 1992, 3.
[44] Tim Rowse, 'How We Got a Native Title Act' [1993] *Australian Quarterly.*
[45] *Native Title Act*, s 25.
[46] *Native Title Act* s35. For a detailed history of this regime, including the significant amendments made in 1998, see Marcia Langton and Alistair Webster, 'The 'Right to Negotiate', the Resources Industry, Agreements and the Native Title Act' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012). See Chapter 4 for a detailed discussion on the 'right to negotiate'.

negotiations are governed concurrently by Australian settler law and Aboriginal law, and explores the possible impact of legal pluralism on negotiation outcomes.

Chapter 5 provides a chronology of events for both negotiations, describes the agreements reached, and situates each negotiation in its historical, political, demographic and geographic context. The picture that emerges from this background is that while both developments are similar in resource, size and timeline, the areas in which they are located are politically, historically and geographically distinct.

Chapter 6 begins the examination of the empirical evidence. It explores the role that law — particularly Aboriginal law and the *Native Title Act* — played in both negotiations, and the impact it had on agreement outcomes. It finds that in the Kimberley, Aboriginal and Australian settler law both played a role in the negotiations. It argues that the recognition and partial adherence to Aboriginal law by non-Aboriginal negotiators is an explanation for agreement outcomes. It also discusses law in action in place: the extent to which the context of each negotiation affected how the *Native Title Act* was interpreted and applied.

Chapter 7 explores the link between agreement outcomes and the conduct of negotiations, particularly the parties and individuals who negotiated them, their length and tone, and traditional owners' strategies, tactics and resources. It finds that the way that the negotiations were conducted is evidence of the underlying power of the parties, rather than an explanation of outcomes by itself.

Chapter 8 discusses the impact of location and history on each negotiation and its outcome. It details the markedly different approach to negotiations taken by the state governments of Queensland and Western Australia. It provides evidence of the political power of each traditional owner group and the impact that power had on the negotiations, drawing on the theory discussed in Chapter 2. In particular, it discusses the basis of that political power, and the way it appeared to be best exercised through a strong Aboriginal organisation. It argues that Kimberley traditional owners were able to position themselves as partners in the development, resulting in agreement benefits not being tied to the commercial value of land. In contrast, Curtis Island traditional owners were paid a 'going rate' for their supposedly weak native title rights.

Chapter 9 concludes the thesis. It analyses the empirical findings, finding that they fall into three analytical levels: explanations relating to the internal dynamic of the

negotiation itself; organisational explanations, primarily related to traditional owners' ability to organise; and structural explanations, particularly the history of each case study site and the stance of state governments. It discusses the empirical findings set out in Chapters 6, 7 and 8 in light of this analysis and draws some conclusions about which aspects of the findings could be applicable more generally, and which require further research in order to better understand their impact on improving negotiation outcomes. It argues that Aboriginal agency — particularly exercised through a strong Aboriginal organisation that has broad community support and adheres to Aboriginal law — is key to improving agreement outcomes.

# Chapter Two
# The Explanatory Framework

## I. INTRODUCTION

The *Native Title Act* gives traditional owners procedural rights to negotiate with companies extracting resources from their land. As such, it is just a 'seat at the table'.[1] This chapter reviews the existing literature in order to find possible explanations for how traditional owners can best leverage that seat at the table. It also aims to locate this thesis within the literature on explaining agreement making and its outcomes. It finds that key explanations for agreement outcomes are the relative distribution of political power, the strength of Aboriginal organisations, the prevailing legislative regime and the financial prospects of the development. It focuses in particular on several important empirical studies.

The role of power is sometimes, but not always, explicit in this literature. This chapter explores the sources and use of traditional owner, company and government power in agreement making, focusing on a theoretical understanding of what power is, how it can be identified, and the ways in which it can be increased and mobilised.

Wider theoretical explanations for negotiation outcomes are also explored. In particular, the broader context in which agreements are made is examined, chiefly the entrenched views and accepted practices surrounding negotiations. The chapter asks what impact, conscious or otherwise, these have on negotiation participants, processes and outcomes. The chapter draws on Michel Foucault's concept of 'discourse' in order to better understand the power dynamics underlying negotiations.[2] Chapter Four, which examines Aboriginal and settler law as it applies to the negotiations, continues this theoretical exploration for agreement outcomes by examining the shaping role that law has on behaviour and context.

## II. AGREEMENT MAKING BETWEEN TRADITIONAL OWNERS AND RESOURCE COMPANIES

Resource companies have changed their public rhetoric since they campaigned against the recognition of native title. Companies now pay at least lip service to their need for a good relationship with Aboriginal landowners, and some do far more than that. The turning point in

[1] Ciaran O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table But No Guarantee of Success' (2007) 6 *Indigenous Law Bulletin*.
[2] Michel Foucault, *Archaeology of Knowledge and the Discourse on Language* (Pantheon Books, 1972).

the Australian industry's attitude is often said to be a speech by Leon Davis, then chief executive officer of Rio Tinto, in which he said that his company would actively embrace engagement with the Aboriginal landowners of its projects.[3] Rio Tinto had just come out of a bruising experience with its copper mine in Bougainville, in which negative community responses to a project imposed on them escalated into a civil war. Rio Tinto could thus see the benefits of positive community relations.[4]

In the international area, the *United Nations Declaration on the Rights of Indigenous Peoples* declares that States should obtain Indigenous peoples':

> [F]ree and informed consent prior to the approval of any project affecting their lands or territories ... particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[5]

The World Bank states that there is a growing expectation that resource companies should contribute positively to the long-term development of impacted communities, regions and nations, known as obtaining a 'social licence to operate'.[6] The Minerals Council of Australia similarly writes that the success of resource extraction operations is 'inextricably linked to building and enhancing strong relationships with communities'.[7]

Agreement making over resource extraction on Aboriginal land can bring significant benefits for some Aboriginal groups and arguably represents one of native title's best chances of providing economic benefits to its holders. [8] Agreements often contain financial remuneration, employment and training provisions and cultural heritage protection, among other things. Given both the confidential nature of most Aboriginal land access agreements, and that any evaluation of them depends heavily on the context of the agreement (for example, whether the resource project is financially sound), assessing the strength of agreements inevitably involves value

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[3] Kim Doohan, *'Making Things Come Good': Aborigines and Miners at Argyle* (PhD, Macquarie University, 2006) 50.
[4] See, e.g., Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Lisa Palmer Marcia Langton, Maureen Tehan and Kathryn Shain (ed), *Honour Among Nations* (Melbourne University Press, 2004)
[5] Art 32(2), *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (13 September 2007).
[6] John Owen and David Brereton, 'World Bank Extractive Industries Source Book: Good Practice Notes on Community Development Agreements' (Centre for Social Responsibility in Mining, Sustainable Minerals Institute, The University of Queensland, 26 September 2011) 1. On 'social licence to operate' see below B. 'Resource Companies'.
[7] Minerals Council of Australia 'Minerals Industry: Indigenous Economic Development Strategy', 2011, available at http://www.minerals.org.au/file_upload/files/publications/Minerals-Industry-Indigenous-Economic-Development-Strategy-17-10-11-Final-laser%28b%29.pdf
[8] See generally Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004); Marcia Langton et al (eds), *Settling with Indigenous People* (Federation Press, 2006); Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2(25) *Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies* 1, 2.

judgments. Nevertheless an assessment framework has been developed by Ciaran O'Faircheallaigh to provide baseline criteria against which traditional owners can gauge negotiation offers.[9] The Browse LNG agreements have been assessed according to these criteria as highly beneficial to traditional owners (see Appendix 4).

Traditional owners can also experience significant pitfalls when negotiating agreements with resource companies. This includes potentially receiving fewer entitlements through negotiated outcomes than they could have received through alternative means including political action and other legislative avenues. [10] In addition, the extent to which agreement benefits have been effective at improving Aboriginal disadvantage is not yet clear.[11]

The *Badimia people's declaration of principles for engagement with resource developers*, developed by traditional owners in mid-west Western Australia, puts this position bluntly:

> Badimia country is highly prospective and has produced a number of mines and significant mineral wealth. Historically, we have not benefited from resource development on our traditional country. Rather, we have suffered economically, socially and culturally and our country has been ravaged as a result of the activities of the resource industry … Some companies treated us with great respect, while others continue to demonstrate an attitude of flagrant and arrogant disregard for our rights, interests and culture.[12]

Wayne Bergmann, former chief executive officer of the Kimberley Land Council (KLC), writes that:

> [I]n native title, when it comes to determine what is fair and equitable, Aboriginal people don't have the right to say 'no'. There is a process in place, but the pendulum has swung too far to industry's side. The balance needs to be put back into recognising the rights and interests that Aboriginal people have through the native title system in relation to agreements.[13]

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[9] Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 309.

[10] See, eg, Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Lisa Palmer Marcia Langton, Maureen Tehan and Kathryn Shain (ed), *Honour Among Nations* (Melbourne University Press, 2004) ; Ciaran O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or 'Business as Usual'?' (2006) 41(1) *Australian Journal of Political Science* ; Ciaran O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table But No Guarantee of Success' (2007) 6(26) *Indigenous Law Bulletin*

[11] Danielle Campbell and Janet Eileen Hunt, 'Achieving Broader Benefits from Indigenous Land Use Agreements: Community Development in Central Australia' (2013) 48 *Community Development Journal* 197.

[12] *Badimia people's declaration of principles for engagement with resource developers*, appendixed to David Ritter, 'Hypothesising Native Title' in Lisa Strelein (ed), *Dialogue About Land Justice - Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) , 125.

[13] Wayne Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 186

Indeed, Marcia Langton et al describe the negotiating process as often amounting to 'duress'.[14]

The following section surveys the available literature on how traditional owners can maximise agreement making outcomes. It considers the role of each negotiation party in turn.

### *A. Traditional Owners*

O'Faircheallaigh argues that power is central to understanding resource agreement outcomes, both the bargaining power already available to traditional owners and their ability to mobilise and increase that power.[15] In a broad-ranging empirical study, he identifies four main reasons for differences in agreement outcomes. These are the company itself, and how politically and socially evolved it is; the prevailing legislative regime and whether it favours Aboriginal interests; the economics of the project being proposed; and the capacity of traditional owners to insist that companies meet their obligations.[16]

O'Faircheallaigh describes three negotiations conducted between different traditional owner groups and the same company, finding that the agreement most beneficial for traditional owners was the one in which the Aboriginal group was most unified and politically influential. [17] O'Faircheallaigh argues that much of the literature on mobilising traditional owner power focuses on negotiation tactics rather than on the potentially more valuable structural factors that shape Aboriginal groups' potential power in negotiations.[18] He finds that the key way in which groups may alter a negative power imbalance is by 'adoption … of effective political strategies operating on a number of scales'.[19] These political strategies can be local (often associated with a strong native title representative body and a unified Aboriginal group); regional, involving the sharing of information and common strategies; and national, including through alliances with other stakeholders. On this latter point, however, he highlights potential difficulties stemming from competing agendas:

> In the past there have been major national initiatives in response to resource development on Aboriginal land, often in combination with Church, environmental and worker organisations, but these have generally been based on a desire to stop mineral development … [M]any Aboriginal

[14] Marcia Langton et al (eds), *Honour Among Nations?* (Melbourne University Press, 2004) 13
[15] Ciaran O'Faircheallaigh, 'Negotiations Between Mining Companies and Aboriginal Communities: Process and Structure' (Working Paper 86/1995, Centre for Aboriginal Economic Policy Research, 1995) <http://caepr.anu.edu.au/sites/default/files/Publications/DP/1995_DP86.pdf>. O'Faircheallaigh's discussion relates to agreement making in both Australia and Canada.
[16] Ciaran O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or "Business as Usual"?' (2006) 41 *Australian Journal of Political Science* 1.
[17] Ibid 7.
[18] Ibid 2.
[19] O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 16.

> people do not wish to halt development but rather to ensure that it occurs with their consent and on terms they find acceptable.[20]

Traditional owner power is negatively impacted by the time constraints placed on Aboriginal parties by resource companies and legislation, and by the threat of arbitrated outcomes often decided in favour of the resource company.[21]

Mobilising power requires the community to first establish its goals for the negotiation, a process that necessitates knowing the likely impacts of the project.[22] It also requires that the community have access to resources, including independent commercial, legal, environmental and industry experts — an area in which Aboriginal communities are usually at a disadvantage.[23] Institutional capacity is key to this, O'Faircheallaigh says, and where present, is often found in Land Councils.[24] Bergmann also emphasises the value of experience when negotiating agreements.[25] Determined native title rights are also very important: Bergmann says that where native title claims have been determined 'companies wanting to develop in that area deal with you differently. They deal with you in a respectful way compared to when there is no native title determination.'[26]

O'Faircheallaigh and Ginger Gibson say that Canadian First Nations' power can derive from the location and legal status of the proposed site, its likely impact, and the probable power and actions of the company and State. They identify several ways in which groups may increase their power, including by maintaining group unity; establishing strategic alliances with other Aboriginal groups or non-government organisations; using the media, through direct action; and having focussed goal setting. [27] The central importance of Aboriginal agency in agreement outcomes is also stressed.[28]

Katherine Trebeck's empirical research into traditional owner power focuses on company acquiescence to Aboriginal demands in two case study sites: Century Mine in Queensland, and

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[20] Ibid 19.
[21] Ciaran O'Faircheallaigh and Tony Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14 *Environmental Politics* 629, 635–6.
[22] Ciaran O'Faircheallaigh, above n 15, 3.
[23] Ibid 10.
[24] Ibid 13.
[25] Wayne Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 187.
[26] Ibid 186. For a discussion of 'registered' and 'determined' native title rights, refer to Chapter 4, 'Native Title Act and Associated Case Law'.
[27] Ginger Gibson and Ciaran O'Faircheallaigh, 'IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements.' (Walter & Duncan Gordon Foundation, 2010) 99–102.
[28] Catherine Howlett, *Indigenous Peoples and Mining Negotiations: The Role of the State* (PhD, Griffith University, 2008) 203.

Jabiluka in the Northern Territory. She finds that, with little political or financial clout, Aboriginal communities are 'relatively powerless' in comparison to mining companies. Groups can nevertheless exert leverage over these companies where they can impact on profit, she argues, through threatening damage to a company's reputation.[29] The power to harm corporate reputation comes from an increasing awareness of Aboriginal rights by the Australian public, as well as increased monitoring of corporate activities by national and international civil society, she says.[30] It can occur by direct action (including shareholder activism), mobilisation of supporters, alliances, delay tactics, and through legislation.[31] She observes that the Mirarr people of Kakadu used these tactics to prevent uranium mining occurring at Jabiluka in the Northern Territory without traditional owner consent.[32] For example, in a two-year period of effective shareholder activism in relation to Jabiluka, share price of the company involved fell from over $6 to less than $2.[33] Trebeck therefore endorses O'Faircheallaigh's finding that the political capacity of groups and organisations is key to understanding why companies pay differently.[34]

Kim Doohan's examination of the renegotiation of the Good Neighbour Agreement at Argyle Diamond Mines in the Kimberley found that it took place despite not being legally required because of demographic factors and changing attitudes. [35] The mine's sizeable neighbouring Aboriginal community was demanding better relationships with the mine, as well as a greater share of the mine's wealth. In addition, the mine was operated by a subsidiary of Rio Tinto, which was leading a shift in corporate attitudes to the communities in which their mines were situated, and whose upper management were sympathetic to community demands.[36] Underlying these reasons is an implicit acknowledgment that the power dynamic between the mine and traditional owners had shifted due to changing societal expectations of company behaviour.

Jon Altman, looking at the power of traditional owners in opposition to resource projects, compares the campaign against the Ranger Uranium Mine with that of proposed uranium mining in Jabiluka, both in the Kakadu World Heritage National Park.[37] The first never stood a chance, he said, because traditional owners had little power. Ranger occurred before the enactment of

[29] Katherine Anne Trebeck, 'Tools for the Disempowered? Indigenous Leverage Over Mining Companies' (2007) 42 *Australian Journal of Political Science* 541, 544.
[30] Ibid 546, 555.
[31] Ibid 545.
[32] Ibid 554.
[33] Ibid 546, 555.
[34] Ibid 577.
[35] Kim Doohan, *Making Things Come Good: Relations Between Aborigines and Miners at Argyle* (Backroom Press, 2008).
[36] Kim Doohan, above n 3, 50. Discussed further below in 'Resource Companies'.
[37] Jon Altman, 'Indigenous Rights, Mining Corporations, and the Australian State' in Suzana Sawyer and Edmund Terence Gomez (eds), *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State* (Palgrave McMillan, 2012) 46.

the land rights legislation meaning traditional ownership was unrecognised by Australian law. The mine also had strong Commonwealth government support.[38] He compares this with the later, successful, campaign by traditional owners against the Jabiluka mine, in which the Mirarr people had legal title to the land, were allied with international NGOs, and were able to successfully lobby UNESCO World Heritage Committees and company shareholders.[39]

The literature also contains specific examples of how traditional owner power can be mobilised during negotiations. This appears to show a link between traditional owner power and the use of tactics that highlight that power. For example, Krysti Guest argues that a key determinant in the success of the Ord Final Agreement was the appointment of nationally prominent Pat Dodson as lead negotiator. His leadership ensured that there was engagement with issues of traditional law and custom, that traditional owners had trust in the process, and that the negotiations were given a political dimension.[40] Lobbying senior politicians proved productive, as did having a traditional owner steering committee that could pressure government on non-legal issues.[41]

In the New Zealand context, Sir Tipene O'Regan also identifies the importance of political pressure, advising the strategic use of litigation to create political leverage.[42]

The literature on native title agreement making contains reference to the continuation of Aboriginal law and its impact on negotiations.[43] For example, Wayne Bergmann writes that:

> Today, despite what the law says, we are determined to make our own decisions, such as the principle 'no means no'. That means to us that a company won't destroy a cultural site unless we agree to it Argyle [the mining company with which the Land Council was negotiating at that time] agreed to this.[44]

Richie Howitt et al similarly describe the types of interactions that occurred in South Australian native title negotiations:

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[38] Ibid 57.
[39] Ibid 60.
[40] Krysti Guest, 'The Promise of Comprehensive Native Title Settlements: The Burrup, MG-Ord and Wimmera Agreements' (Australian Institute of Aboriginal and Torres Strait Islander Studies, October 2009) 29.
[41] Ibid 30.
[42] Sir Tipene O'Regan, Lisa Palmer and Marcia Langton, 'Keeping the Fire Burning: Grievance and Aspiration in the Ngai Tahu Settlement Process' in Odette Mazel, Lisa Palmer, Maureen Tehan and Kathryn Shain Marcia Langton (ed), *Settling With Indigenous People* (The Federation Press, 2006) 44, 73.
[43] The law in the case study negotiations is detailed in Chapter 4.
[44] Bergmann, above n 25, 189.

> We have acted as if it is self-evident that Aboriginal peoples are self-authorizing. We have, in this sense, acted as if sovereignty on matters of governance and authority resided with the native title interests as principals rather than dealing with them as 'clients', 'victims' or 'claimants at law'.[45]

Two studies have been conducted that broadly relate to the Browse LNG and Curtis Island LNG negotiations. In an empirical study looking at coal seam gas agreements in Queensland (but not specifically at the Curtis Island LNG agreements), traditional owners are quoted as attributing poor outcomes to a lack of agency and its consequences for negotiation leverage.[46] This lack of agency is brought about by numerous factors, including perceived racism, dispersed families, historical disputes among family groups, lack of access to legal and financial information and the use of compulsory acquisition by the State.[47] In particular, the authors identify that traditional owner agency was hindered by lack of unity brought on by infighting and the turmoil associated with changing named applicants in native title claims. [48] They also find that the economics of a project is an important factor in agreement outcomes, and point out that Aboriginal parties may not fully appreciate the volatile nature of a development's economic viability.[49]

In contrast, in relation to Browse LNG, O'Faircheallaigh's study found that agreement outcomes were better than would have been predicted given the apparent power differential between the parties: clearly, he says, the power differential between the parties may have been misjudged. In explaining the Browse LNG agreement outcomes he particularly emphasises the importance of the KLC's political influence within the Aboriginal community and the broader community in the Kimberley. He also emphasises the State government's prioritisation of Aboriginal consent for the development — albeit short-lived[50] — together with broader changes globally, including the *United Nations' Declaration of the Rights of Indigenous Peoples*.[51]

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[45] Richie Howitt, 'Scales of Coexistence: Tackling the Tension between Legal and Cultural Landscapes in Post-Mabo Australia' (2006) 6 *Macquarie Law Journal* 61.
[46] David Trigger et al, 'Aboriginal Engagement and Agreement-Making with a Rapidly Developing Resource Industry: Coal Seam Gas Development in Australia' (2014) 1 *The Extractive Industries and Society* 176.
[47] Ibid 7.
[48] Ibid 8.
[49] Ibid 2–3. Note that this finding does not accord with findings of this research.
[50] See Chapter 5, 'The Browse Negotiation' for an explanation of the State government's position on Aboriginal consent for the Browse LNG development.
[51] Ciaran O'Faircheallaigh, 'Extractive Industries and Indigenous Peoples: A Changing Dynamic?' (2013) 30 *Journal of Rural Studies* 20, 20–30. United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007).

### *B. Resource Companies*

Resource companies almost always enter into the agreement making process from a position of strength. This derives from a stronger legal position pursuant to the *Native Title Act*.[52] It also comes from their access to significant financial resources, and significant informational and institutional capacity.[53] Companies generally occupy what Charles Lindblom calls 'the privileged position of business', where company executives enjoy an advantageous position in capitalist societies, with unmatched access to, and influence on, government. [54] This occurs because companies are often the sole decision-makers in areas vital to the functioning of our society: including the type of goods produced, the location of the labour force, the direction of innovations, the use of technology, and the quality of goods and services. [55] Companies, therefore, 'are taller and richer than the rest of us and have rights that we do not have' and have a political impact far greater than individuals and other interest groups.[56] As discussed in the Introduction, this has led to a history in which the interests of resource extraction corporations have almost always trumped those of Aboriginal communities.

Yet, some argue that the power of companies has been tempered over the last fifty years by the increasing pressure on resource companies to address social and environmental concerns and regulations. [57] Bergmann talks of a greater willingness by resource companies to want to accommodate the local Aboriginal community, although it is a shift he partly attributes to companies wanting to access land quickly and a local workforce easily.[58] Some commentators have even argued that companies sometimes do more to alleviate Aboriginal disadvantage than governments. [59] However there is still debate about whether this attitude has pervaded the industry as a whole.

Increased corporate attention to community concerns is often referred to as 'corporate social responsibility' or the more specific 'social licence to operate'.[60] 'Social licence to operate' is a contested concept. It is commonly said to encompass agreement by the community to

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[52] Refer to discussion in Chapter 4, 'The 'Future Act' Regime'.
[53] O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 16, 8. KJ Caine and N Krogman, 'Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North' (2010) 23 *Organization & Environment* 76, 85.
[54] Charles Lindblom, *Politics and Markets: The World's Political-Economic Systems* (Basic Books, 1977) 170–188.
[55] Ibid 171.
[56] Ibid 5.
[57] James Otto and John Cordes, *The Regulation of Mineral Enterprises: A Global Perspective* (Rocky Mountain Mineral Law Foundation, 2002).
[58] Bergmann, above n 25, 184.
[59] Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26 *Journal of Energy and Natural Resources Law* 31, 34.
[60] Richard Parsons, Justine Lacey and Kieren Moffat, 'Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its "Social Licence to Operate"' (2014) 41 *Resources Policy* 83.

development taking place, including setting out the conditions for the use and access of community land. [61] O'Faircheallaigh describes it as a pragmatic response from companies wanting cooperative relationships with local communities, and because of political pressure brought both by local communities and more broadly by civil society and international instruments including the *Declaration on the Rights of Indigenous Peoples*.[62]

It is often said to be a combination of opportunities and threats that leads companies to value an agreement with Aboriginal landowners.[63] Opportunities include being known as a good partner to Aboriginal communities and securing employment agreements for local labour.[64] Companies who can convincingly claim that they have community support can gain legitimacy that may protect them from other interest groups.[65] Threats include community unrest close to mine sites which can hinder access to resources.[66] Harvey and Brereton argue that a community agreement is particularly important in nations where governments are weak, or there is a significant level of political or social instability.[67] However, communities in developed countries may be better at getting their agenda met than those in less developed countries because of greater resources, better organisation and more ability to garner political representation.[68] The cynical view is that resource companies only go beyond what is required of them by law when they believe it is necessary to avoid future trouble.[69]

The 'social licence to operate' suggests that 'stakeholders may threaten a company's legitimacy and ability to operate through boycotts, picketing, or legal challenges', yet the stakeholders from whom this 'licence' is sought clearly do not have the same ability as regulators to withhold permission for development or to hold companies to their commitments.[70] The literature clearly

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[61] See, for example Langton and Mazel, above n 59, 43.
[62] Ciaran O'Faircheallaigh, *Negotiating Major Project Agreements: The 'Cape York Model'* (Australian Institute for Aboriginal and Torres Strait Islander Studies, 2000) 4 <http://www.aiatsis.gov.au/research/docs/dp/DP11.pdf>.; Ciaran O'Faircheallaigh, 'Extractive Industries, Environmental Performance and Corporate Social Responsibility' (2007) 52 *Greener Management International: The Journal of Corporate Environmental Strategy and Practice* 5. 'United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 61st Sess, 107th Pen Mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007)', above n 51.
[63] Richie Howitt, 'The Other Side of the Table: Corporate Culture and Negotiating with Resource Companies' (No. 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 1997).
[64] Richie Howitt, 'The Other Side of the Table: Corporate Culture and Negotiating with Resource Companies' (No. 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 1997).
[65] Paul Kapelus, 'Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' (2002) 39 *Journal of Business Ethics* 280.
[66] Richie Howitt, above n 64, 5. Harvey and Brereton echo the characterisation of community power with companies in terms of threats and benefits, adding that a good reputation enhances the company's standing to both its employees and the broader community, and can mean access to finance on more favourable terms, Bruce Harvey and David Brereton, 'Emerging Models of Community Engagement in the Australian Minerals Industry' (2005).
[67] Harvey and Brereton, above n 66.
[68] Kapelus, above n 65, 277.
[69] David Ritter, *The Native Title Market* (University of Western Australia Press, 2009) 30–31.
[70] Parsons, Lacey and Moffat, above n 60, 83.

highlights that purely voluntary commitments by companies may be dismissed where they clash with commercial requirements.[71]

It is also arguable that a 'social licence to operate' is used by companies to marginalise dissent, minimise regulations, legitimise operations and limit issues to the local.[72] It is one method by which a company can become a 'legitimate organisation', giving it 'largely unquestioned freedom' in its operations.[73] Similarly, it is argued that the term often appears inextricably linked with the resource industry's 'survival instincts'. [74] There is also scepticism about the gap between a company's rhetoric and actions.[75] Nevertheless, 'social licence to operate' is not without its potential community benefits. It can be the method by which companies adapt to the 'prevailing social norms' of a local community, or act as a *de facto* prerequisite for the granting of a legal licence by government.[76]

Trebeck argues the more influence a community can wield over company operations the more responsive a company will be to their demands. This responsiveness will depend on company culture and market pressure, as well as general expectations of company conduct. [77] Her conception of social licence explicitly rejects the idea that it emanates from a sense of moral responsibility.[78] Yet others have convincingly argued that this distinction is irrelevant, that as the concept becomes more 'socially and politically embedded', it will become normative and removed from the realm of managerial or company discretion.[79]

### *C. Governments*

The role of Australian State and Commonwealth governments in agreement making is often downplayed in the literature, largely because agreements are usually between the community and company. A few notable exceptions emphasise the key regulatory role played by governments, and the impact that it can have on the agreement making process. Catherine Howlett's examination of government practice in the Century Mine negotiations finds that the:

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[71] Trigger et al, above n 46, 4.
[72] Parsons, Lacey and Moffat, above n 60, 83–4.
[73] Ibid 84.
[74] John R Owen and Deanna Kemp, 'Social Licence and Mining: A Critical Perspective' (2013) 38 *Resources Policy* 29, 29.
[75] Mandy White, 'Cowboys Ogres and Donors – A Decade of CSR in Practice – NZ, Australia, Timor-Leste and Indonesia' (La'o Hamutuk, May 2011) <http://www.laohamutuk.org/Oil/Sunrise/2011/WhyteCSRMay2011.pdf>.
[76] Bruce Harvey and Sara Bice, 'Social Impact Assessment, Social Development Programmes and Social Licence to Operate: Tensions and Contradictions in Intent and Practice in the Extractive Sector' (2014) 32 *Impact Assessment and Project Appraisal* 327.
[77] Trebeck, above n 15.
[78] Ibid 544.
[79] Anthea Wesley and Diana MacCallum, 'The Political Economy of Corporate Social Responsibility in the Resource Sector in Western Australia. A Case Study of the Proposed James Price Point LNG Precinct' in Martin Brueckner et al (eds), *Resource Curse or Cure ?* (Springer Berlin Heidelberg, 2014) 59, 62.

> The Australian state is … a key player in mineral development, and its behaviour has enormous significance for determining the negotiating environment in which mineral development takes place … The [Queensland] state was definitely not a neutral arbiter in this negotiation. It determined the development would proceed and did everything in its power to ensure that it did. Much evidence was found of the state, as a whole, acting to promote development of the mine, and deny the interests of Indigenous people.[80]

Noel Pearson similarly argued in 1997 that Australian governments have an 'institutional antipathy to Aboriginal people and their rights and interests, resulting in negative impacts to traditional owners in negotiations. [81] Australian governments' influence is bolstered because, unlike similar common law countries, it owns nearly all subsurface minerals. [82] Trebeck emphasises governments' regulatory power as a key force in agreement making. She argues that given their role as provider of citizenship services, governments should play a larger role in ensuring greater power equity in agreement making.[83] Like Howlett, she finds governments were keen to facilitate mining and 'undermine' Aboriginal land rights in both the Century Mine negotiations and during the Jabiluka campaign.[84]

O'Faircheallaigh argues more broadly that the approach of state governments to native title has weakened the beneficial intent of the *Native Title Act* for many traditional owners. In particular, he contends that the adversarial attitude to native title recognition by governments often sends a message to companies that native title is not an important tenure. He observes that governments often accuse Aboriginal communities of holding up resource developments but do not fund them properly to negotiate. [85] Santiago Dondo and Joe Fardin point out that the interests of resource companies and governments are 'relatively aligned', asking 'to whom do indigenous groups turn for a comparable level of backing?' [86] They advocate for 'active

[80] Catherine Howlett, above n 28, 201.
[81] Noel Pearson, 'Governments Should Keep out of Major Developments' *Courier-Mail*, 23 August 1997. Cited in Catherine Howlett, above n 28, 3.
[82] Catherine Howlett, above n 28, 79. Most minerals are reserved in the Crown in Australian jurisdictions: the common law presumption of mineral ownership was that it followed the ownership of the land. However this has been 'virtually abolished' by Australian statutes, initially through a requirement that all land grants reserve minerals in the Crown and then through express legislative provisions: see Michael Hunt, *Halsbury's Laws of Australia: Minerals and Petroleum Law* (Butterworths, 1997) 8–20.
[83] Trebeck, above n 29.
[84] Ibid 558.
[85] Ciaran O'Faircheallaigh, above n 15, 10.
[86] Santiago Dondo and Joe Fardin, 'Parties to Mining Agreements with Indigenous Groups: A Proposal for Argentina, Drawing on the Experience in Australia, Peru and Canada' (2013) 32 *Australian Resources and Energy Law Journal* 241, 244.

government participation' to 'guarantee a minimum standard of practice when engaging with indigenous groups.'[87]

Other scholars discuss the issue of 'substitution', in which governments fail to provide essential services in areas of resource extraction with the expectation that companies will fill the gap. Langton and Mazel, among others, call this behaviour government 'rent-seeking'.[88]

There is also a small amount of literature on the way that the states of Western Australia and Queensland have traditionally approached development.

*(a) Western Australia*

Elizabeth Harman and Brian Head argue that Western Australian governments have long taken an active role in promoting development. They characterise this as a 'developmentalist' approach.[89] Brian Head argues that the Western Australian State was wanting to 'catch-up' to the other states from its inception in 1890. This was because of several factors, including the failure by private enterprise to build railways and the sudden influx of revenue from the discovery of gold.[90] He argues that when Western Australia became self-governing it 'acted as a kind of collective capitalist on behalf of the private sector as a whole ... [T]he state was seen as the only practicable mechanism for "getting things done."' [91] Western Australia is a geographically isolated state that was late to develop, resulting in:

> A relatively under-developed community with a fear of remaining undeveloped for all time … [I]t was constantly tempting to seek outside capital from any quarter and to offer generous initial terms so that investors might be tempted to stay … Because of the absence of strong indigenous capital growth the State has taken the main role in initiating investment and industrial enterprise. The State has intervened ... rather more actively than was expected in most other Australian communities…[92]

[87] Ibid 241.
[88] Langton and Mazel, above n 59. Trebeck, above n 29.
[89] Elizabeth J Harman and Brian W Head (eds), *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982) 14. This contrasts with a 'rentier' approach 'where the state collects royalties but does little else to facilitate mineral development, see B.W. Head, 'The State as Entrepreneur: Myth and Reality' in *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982) 51.
[90] B.W. Head, 'The State as Entrepreneur: Myth and Reality', *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982) 45.
[91] Ibid 46.
[92] G.C. Bolton, 'From Cinderella to Charles Court: The Making of a State of Excitement' in Elizabeth J Harman and Brian W Head (eds), *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982) 27–28.

This approach has continued in various guises, including in the form of a 'growth model' of the 1950s and 1960s characterised by 'a commitment to resource development by large-scale private capital undertaking large scale projects with assistance at all stages by State planning'.[93] The State showed a willingness to actively support mineral development, including by building infrastructure and occasionally sharing or underwriting project risk. [94] This approach saw Western Australia engage in 'State Agreements' — legislative instruments designed to streamline legislative approvals over major resource developments.[95] By the early 1980s, this approach shifted slightly — as a result of social changes including calls for Aboriginal land rights, and increasing actions by environmentalists and trade unionists — to a more 'interventionist' approach in which the State sought to take greater control and receive a greater share of resource development, including by increasing royalties.[96] Nevertheless, the 'WA development model' remains largely intact, characterised by a 'frontier ethos' and 'a belief in the urgent need for development'.[97]

*(b) Queensland*

There has been less scholarly attention on the Queensland State's approach to development. An important exception is Brian Galligan's study of the way in which the Queensland government extracted de facto resource rents from the coal industry using its monopoly over Queensland Rail from the 1960s.[98] Galligan charts how the Queensland government mandated all export coal to travel by rail freight, and then charged companies 'super rail freights' in a 'novel entrepreneurial manner to capture economic rent from a booming export coal sector'.[99] These super rail freights underwrote the state monopoly Queensland Rail, turning a declining state-run service into a profit-making venture. [100] This differed from an earlier approach that saw governments encourage development and be 'non-entrepreneurial and generous in the terms and rates it granted to coal developers.'[101] The new 'entrepreneurial' approach[102] was evident from

[93] L. Layman, 'Changing Resource Development Policy in Western Australia, 1930s-1960s' in Elizabeth J Harman and Brian W Head (eds), *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press) 163.
[94] B.W. Head, above n 89.
[95] John Phillimore, 'The Politics of Resource Development in Western Australia' in Martin Brueckner et al (eds), *Resource Curse or Cure ?* (Springer Berlin Heidelberg, 2014) 25, 26.
[96] Ibid 28.
[97] Ibid 26.-31.
[98] Brian Galligan, 'Queensland Railways and Export Coal' (1987) 46 *Australian Journal of Public Administration* 77.
[99] Ibid 77.
[100] For example, a $2.10 loss per train kilometre in 1977/78 was turned into a $3.36 profit per train kilometre by 1985/86, Brian Galligan, 'Queensland Railways and Export Coal' (1987) 46 *Australian Journal of Public Administration* 77, 100.
[101] Ibid 86.
[102] Galligan defines an 'entrepreneurial' approach is where a government seeks to maximise their share of an agreement with a view to making a profit, Ibid.

the mid 1960s and ensured that Queensland governments were receiving far greater shares of resource extraction profit than previously.[103]

Queensland has other characteristics that may help explain the case study negotiation outcomes. It was, and continues to be, a highly regionalised state. When first colonised, it had few roads or rivers with which to navigate the interior, with large pastoral leases taken up and controlled by southern pastoral families, bypassing control of the capital, Brisbane. This resulted in 'the Queensland phenomenon … [in that] unlike other Australian colonies economic life did not revolve around the capital.' When infrastructure, like railways, was built, it was because of local agitation and not a 'grand master plan'. [104] This regionalism was further emphasised by the increasing importance of ports to the burgeoning pastoral and mining industries — resulting in towns like Rockhampton and Townsville developing into major towns to rival Brisbane, of which they remained relatively independent.[105] As a result Brisbane failed to develop a strong industrial base that meant that, even as it acquired more political importance in the twentieth century, it did not greatly impact 'Queensland's essentially decentralized character'.[106]

## III. POWER

The way that power is exercised is a central question for this research. In their seminal piece on community power, political scientists Peter Bacharach and Morton Baratz argue that power has 'two sides', the visible and the invisible. An invisible exercise of power may be occurring when institutional changes are made to ensure that certain issues are not discussed, when agendas are continually limited to 'safe' issues, or when certain social or political values are strengthened or constructed.[107] Stephen Lukes expands on the notion of the two sides of power by adding a third dimension — what he terms the 'radical view' of power — which supposes that people's wants may themselves be a product of a system that works against their interests, and that the exercise of power can be unconscious. [108] This 'radical view' is a similar idea to Foucault's discourse, discussed below, which says that what we believe to be possible is in fact our relationship to power, that each person's view of their future is profoundly influenced by the contexts in which they operate. Lukes criticises those who primarily see power in successful decision-making, thereby conflating power with its exercise.[109] He exhorts researchers of power

[103] Ibid 89.
[104] Ross Fitzgerald, *A History of Queensland: From the Dreaming to 1915* (University of Queensland Press, 1986) 266.
[105] Ibid 286–7.
[106] Ibid 295.
[107] Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1964) 56 *The American Political Science Review* 948.
[108] Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2nd ed, 2005) 38, 47.
[109] Ibid 38.

to undertake empirical research into the third dimension of power, acknowledging that this can be difficult given power is at its most effective when hidden.[110]

One study that undertakes such a task is Matthew Crenson's examination of two towns in the United States with air quality problems, one of which implemented clean air legislation 13 years earlier than the other. The reason behind the delay was a local steel industry that, while never overtly lobbying against legislation, ensured that this 'seemingly important topic' never became an issue.[111] Inaction on important issues can be genuinely random or can be because action is being deliberately stifled: for example, by environmental activists keen to avoid retaliation by a powerful industry group.[112]

John Gaventa undertook a similar study of impoverished mining communities in the Appalachian Valley in the United States, to find out why some dominated communities rebel when others are quiescent. He finds long-established relationships of inequality, supported by entrenched and 'self-sustaining' patterns of power and powerlessness.[113] Gaventa points out that once patterns of power are in place, power is wielded more easily: both through existing structures and over the decision-making agenda. The powerless anticipate that they will be defeated not because of an inherent fatalism but through experience: continued defeat leads to the postponement of any action, feelings of powerlessness and the sense of a lack of viable options — what Gaventa terms the 'indirect mechanisms' of power's third face.[114]

In their study of power, Joanne Sharp et al argue for recognising that there is always space for resistance against the powerful, including in situations in which power imbalances are entrenched.[115] They emphasise the creativity that some communities employ in creating and utilising power, often ignored in more traditional studies of power.[116] Resistance, they argue, can take many forms, including the 'peasant resistance' ploy of feet-dragging. In particular, Sharp et al emphasise that communities may be exercising power even when they appear, at first blush, to be completely dominated.[117] Gaventa also discusses the manner in which people can start to break cycles of powerlessness, including by exploring grievances openly; seeing themselves as

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[110] Ibid 64.
[111] Matthew A Crenson, *The Un-Politics of Air Pollution: A Study of Non-Decisionmaking in the Cities* (The John Hopkins Press, 1971) 4.
[112] Ibid 24.
[113] John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press, 1982) 256.
[114] Ibid 252.
[115] Joanne P Sharp et al, *Entanglements of Power: Geographies of Domination/Resistance* (Routledge, 2000) 7.
[116] Nigel Thrift, 'Entanglements of Power: Shadows?' in Joanne P Sharp et al (eds), *Entanglements of Power: Geographies of Domination/Resistance* (Routledge, 2000) 269, 271.
[117] Ibid 10–11.

participants with relevant interests; mobilising and developing their own resources; and identifying and overcoming barriers that would normally prevent them from acting.[118]

## IV. NEGOTIATION THEORY

The explanations and advice that negotiation literature gives for improving outcomes can broadly be divided into two categories. Firstly, those that see negotiation processes (including tactics, strategy and the role of individuals in the negotiation room) as being determinative of outcomes. Secondly, those that look at a wider range of negotiation determinants, both inside and outside the negotiation itself. The latter are in the minority but are ultimately more believable explanatory tools.

In the first category is the seminal text *Getting to Yes*, which sees negotiation strategy and tactics as being determinative of negotiation outcomes.[119] It advises that:

> If the other side has big guns, you do not want to turn a negotiation into a gunfight. The stronger they appear in terms of physical or economic power, the more you benefit by negotiating on the merits. To the extent that they have muscle and you have principle, the larger a role you can establish for principle the better off you are.[120]

Another negotiation textbook equates negotiation power with the ability to persuade opponents to adopt your view in the negotiation room using little more than rhetoric.[121] This strand of negotiation theory acknowledges power, and particularly parties' comparative power resources, as a determining factor in negotiations. [122] However it suggests that power is situated in an opponent's subjective beliefs and that these beliefs can be altered by choice of tactics or strategies:

> If you think you've got it, then you've got it. If you think you don't have it, even if you have it, then you don't.[123]

Another text says that inquiring into the rationale behind a fixed position can 'embarrass the advocate of the extreme position, because the chances are that he or she cannot justify the

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[118] Gaventa, above n 113, 257.
[119] Roger Fisher and William Ury, *Getting to Yes - Negotiating Agreement Without Giving In* (Hutchinson, 1982).
[120] Ibid 110.
[121] Nadja Spegel, Bernadette Rogers and Ross P Buckley, *Negotiation: Theory and Techniques* (Butterworths, 1998) 181.
[122] The examples given are often commercial transactions or international relations negotiations. An oft-cited example is that of the 1979 Israeli-Egypt peace negotiations, presided over by former US President Jimmy Carter – see for example Jeffrey Rubin, Dean Pruitt and Sung Hee Kim, *Social Conflict, Escalation, Stalemate and Settlement* (McGraw-Hill, 1994) 4. See also Peter H Kim, Robin L Pinkley and Alison R Fragale, 'Power Dynamics in Negotiation' (2005) 30 *Academy of Management Review* 799.
[123] Spegel, Rogers and Buckley, above n 121, 172.

position'.[124] It suggests that making such an inquiry 'therefore … assists in neutralising any power imbalance present in the negotiation'.[125] Others have used empirical studies — often drawn from simulations involving graduate business students — to argue that a party in a business-to-business negotiation is able to increase its relative power by increasing its number of people in the room.[126]

Negotiation behaviour undoubtedly plays some role in a negotiation's progression, and may have some impact on its eventual outcome. However, the literature described above fails to provide a full explanation for negotiation outcomes. It assumes that power imbalances can be overcome by clever strategies, and presumes a negotiation opponent who can be persuaded to ignore their own power. In particular, it fails to adequately address why a more powerful party would be embarrassed or otherwise persuaded by the rhetoric of a less powerful party. This focus on behaviour means that the context in which the negotiation is taking place is often sidelined, as is the effect that this context has on the power balance in the negotiating room.[127]

Peter Lawler, among others, argues that most literature on bargaining does not deal adequately with power.[128] Similarly Jeswald Salacuse criticises those theorists who assume an 'enlightened process will overcome power differentials'. [129] He argues that research showing that a good negotiator can lessen a power differential has likely misunderstood the power dynamics of the negotiation.[130] Ritter makes a similar point about mediations between traditional owners and resource companies conducted by the National Native Title Tribunal (NNTT). [131] These mediations employ an interest-based approach to problem solving, as popularised by *Getting to Yes*. He argues that this approach ignores the power differentials that exist between the parties, and can mean that agreements are falsely equated with the parties having achieved mutually

[124] David Spencer, *Principles of Dispute Resolution* (Thomson Reuters, 2011) 42.
[125] Ibid 42.
[126] Frank Jacob et al, 'Power Asymmetry in Intercultural Business Negotiations and Its Impact on Negotiation Strategies' (2012).
[127] A criticism made by Kalypso Nicolaidis, 'Power and Negotiation: When Should Lambs Negotiate with Lions?' in Deborah M Kolb (ed), *Negotiation Eclectics: Essays in Memory of Jeffrey Z Rubin* (PON Books Harvard Law School, 1999) 100.
[128] Edward J Lawler, 'Power Processes in Bargaining' (1992) 33 *Sociological Quarterly* 17, 20.
[129] Jeswald W Salacuse, 'How Should the Lamb Negotiate with the Lion? Power in International Negotiations' in Deborah M Kolb (ed), *Negotiation Eclectics: Essays in Memory of Jeffrey Z Rubin* (PON Books Harvard Law School, 1999) 87.
[130] Ritter, above n 69, 89.
[131] Refer to discussion in Chapter 4, 'Right to Negotiate'.

beneficial outcomes.[132] This power imbalance may result in the limited legal rights traditional owners have being 'overwhelmed' by the power of other parties involved in the negotiations.[133]

The more persuasive strand of negotiation literature focuses on the underlying power dynamics between parties, how this translates into tactics, and what this means for improving agreement outcomes. Bacharach and Lawler argue that negotiation tactics are a symptom of underlying power dynamics, rather than a cause of outcomes by themselves. They say that each negotiation begins with an evaluation of the power relationship between the parties, and that parties will assess whether power will actually be used in the negotiation, based on these perceptions of power. Decisions about which tactics to use are based on these perceptions of power.[134] They argue that the bargaining power of negotiation parties depends on the other party's dependence on them: the obvious implication of this, they say, is that to increase power a party need to make the other party more dependent on them.[135] Bacharach and Lawler say that there are two ways to do this: provide something that the other party needs or stop them getting what they need elsewhere.[136]

In a rare empirical study of real world negotiations, Stephen Weiss compared attempts by Toyota Corporation to enter into joint ventures with General Motors Corporation (which succeeded) and the Ford Motor Company (which failed) in order to determine why these outcomes occurred. He rejects any single theoretical explanation — for example, goal gain theory which holds that outcomes are reached when one party meets the other's resistance point — as too simplistic given the complexity of the organisations and negotiations being observed. [137] Negotiation procedures are not predictive of outcomes by themselves, he argues. However, they can provide insight into the impact of factors outside the negotiating room.[138] He emphasises understanding the context and background of the negotiations, as well as the detail of what is being negotiated and the influencing factors specific to each party.[139] He also advocates for a multiple-cause

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[132] Ritter, above n 69, 46.
[133] David Ritter and Frances Flanagan, 'Lawyers and Rats: Critical Legal Theory and Native Title' in Sandy Toussaint (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, 2004) 128, 130.
[134] Samuel B Bacharach and Edward J Lawler, 'Power and Tactics in Bargaining' (1981) 34 *Industrial & Labor Relations Review* 219, 219.
[135] Edward J. Lawler and Samuel B. Bacharach, 'Power Dependence in Collective Bargaining' (1986) 3 *Advances in Industrial and Labor Relations* 191, 169. See also Lawler, above n 128, 29.
[136] Edward J. Lawler and Samuel B. Bacharach, above n 135, 169. EJ Lawler and SB Bacharach, 'Comparison of Dependence and Punitive Forms of Power' (1987) 66 *Social forces* 446, 449.
[137] Stephen E. Weiss, 'Creating the GM Toyota Joint Venture; a Case in Complex Negotiation' (New York University, Graduate School of Business Administration, the Center for Japan-US Business and Economic Studies, 1987) 253.
[138] Ibid 257.
[139] Ibid 295.

model that incorporates diverse perspectives, but suggests that even then, outcomes in the real world can never be entirely predictable. [140] His model for understanding these negotiation outcomes does not include an explicit focus on power, although this is perhaps to be expected where there was no obvious power disparity between the car manufacturing companies.

## V. DISCOURSE ANALYSIS

Michel Foucault understands power as coercive and facilitative, pleasant and vile: it circulates through society, he argues, and members of society are 'vehicles' rather than 'holders' of power who 'circulate between its threads'.[141] Foucault says that power can be productive or repressive and:

> [I]s never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth.[142]

The way that he conceptualises power is based on the way in which 'truth' is created:

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[143]

Foucault's discourse analysis is concerned with the way utterances and texts are regulated and shaped by power dynamics, and the shaping effect that they in turn have on their participants.[144] Foucauldian discourse analysis invites the examination of statements for what they do, rather than what they say; the impact of framing things in different ways; and the way in which certain ways of explaining phenomena come to be authoritative.[145] Discourse analysis asks that the

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[140] Ibid 311.
[141] Colin Gordon (ed), *Michel Foucault: Power/Knowledge Selected Interviews and Other Writings 1972-1977* (The Harvester Press Limited, 1980) 98.
[142] Ibid. Clare O'Farrell, *Michel Foucault* (SAGE, 2005) 100–101.
[143] Michel Foucault, 'On Power' in LD Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture - interviews and other writings, 1977-1984* (Routledge, 1988) 131. This concept differs from a concept of power as a catch-all term for coercion, force and the threat of violence, see David Luckenbill, 'Power: A Conceptual Framework' (1979) 2 *Symbolic Interaction* 97, 106. See also Nicolaidis, above n 127, 104. See also Joseph S Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004) who argues that a nation can have 'soft power', attracting people through its culture, history and political ideals.
[144] Sara Mills, *Discourse* (Routledge, 1997) 7–10. Unlike Critical Discourse Analysis, it focuses on the impact of texts and utterances, rather than on their structural or grammatical features: see Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Taylor and Francis, 2nd ed, 2013).
[145] Linda J Graham, 'The Product of Text and "Other" Statements: Discourse Analysis and the Critical Use of Foucault' (2011) 43 *Educational Philosophy and Theory* 663, 663–7. Dorothy E Smith, ''K Is Mentally Ill' the Anatomy of a Factual Account' (1978) 12 *Sociology* 23.

connection between words and things be made explicit in order to see the constitutive and productive effect that this communication has, including the process by which individuals come to know and accept their place in the social hierarchy.[146] Discourses are created, Foucault says 'not in order to arrive at the truth, but to win'.[147]

Discourse analysis potentially provides a tool with which to uncover the relationships of power in the Browse LNG and Curtis Island LNG negotiations, and the way in which that power is employed.[148] In particular, it can connect the power dynamics of negotiations to both their context and outcomes. The following is an example of a discourse in relation to Aboriginal people from W.E.H. Stanner, speaking of Australia in the late nineteenth century:

> Over this long period the depreciation of the aborigines — or to put the matter the other, and possibly the more correct way — the justification of what was being done to them — was more violent and moralistic than before or since. The correlation, I would say, was high and positive. This was the time of the greatest talk about the law of progress and the survival of the fittest … They were made to appear a people just across, or still crossing, that momentous border which separates nature from culture, and trailing wisps of an animalian past in their human period.[149]

Ritter argues that the *Yorta Yorta* decision that Aboriginal law and culture in northern Victoria had been swept away by the 'tide of history'[150] had strong echoes of the above view of Aboriginal people, rather than echoing *Mabo*'s message of recognition.[151] Similarly, Michael Dodson writes that outsider conceptions of Aboriginality continue to have a powerful impact in contemporary society. First, he says, Aboriginal people were the noble savage, an 'innately obsolete peoples'; then, after a fall from grace, inebriated and lazy; and more recently, 'spiritual' and artistic.[152] Stanner, too, writes of 'the extraordinary intellectual struggle which we have had to live through before seeing the Aborigines in a perspective that is at one and the same time well-informed, humane and respectful'.[153]

Stanner argues that early writings on Aboriginal people in the Australian colony show a good

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[146] Graham, above n 139, 672.
[147] Michel Foucault 'La Verite et les Formed Juridiques' in O'Farrell, above n 142, 66.
[148] Mills, above n 144, 18–19.
[149] W.E.H. Stanner *After the Dreaming* (ABC Enterprises, 1968) 34, 37. See also Henry Reynolds, who writes that while frontier violence was a widely acknowledged fact in the nineteenth century, by the early twentieth century Australian society believed that 'Aborigines were never able to contest the control of the continent', and were 'pitied rather than respected': Henry Reynolds, *The Forgotten War* (New South Publishing, 2013) 17–18.
[150] *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422. Refer to Chapter 4, 'The Native Title Act and Associated Case Law' for an explanation.
[151] Ritter, above n 69, 119.
[152] Mick Dodson, 'The End in the Beginning: Re(de)fining Aboriginality' (1994) 1 *Australian Aboriginal Studies*.
[153] Stanner, above n 149, 31.

level of understanding of Aboriginal ways of life, countering the argument that mishandling of race relations was due to ignorance of Aboriginal culture. From at least the 1830s 'sufficient good information was at hand to have made a difference if the compulsive structure of Australian interests had been open to it.' However, negative folklore managed to replace this 'good information'. Stanner argues that the motivations behind these changing understandings were racially and culturally motivated, and 'seldom generous.'[154] He further argues that:

> [W]hat may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practiced on a national scale.[155]

This 'cult of forgetfulness' had significant implications for the way in which Aboriginal people were viewed. Geoff Gallop, former Premier of Western Australia, put the position bluntly when he said:

> The reason, however, for our not wanting to come to terms with Australia's Aboriginal past and culture was not so much the intellectual difficulty of coming to grips with the Aboriginal world-view as it was the power and politics of the situation. For most of the first settlers Aboriginal Australians had no claim on the land or title to it ... Australia was *terra nullius*. Why bother about Aboriginal views of the landscape if they themselves had no right to it?[156]

Discourses are at their most powerful and least visible when they are widely accepted: it is when discourses are in the process of changing that they become far more obvious.[157] As Stanner correctly foretold, the 'great Australian silence' on Aboriginal ownership of land needed only 'a suitable set of conditions to come to the surface, and be very consequential indeed.'[158] This suitable set of conditions came together with the handing down of the *Mabo* decision. It represented a huge legal, intellectual and moral break with the past but also, as the majority judgment acknowledged, was itself made possible by changing community standards. Brennan J noted that the idea that 'inhabited land may be classified as *terra nullius* no longer commands general support', therefore 'it is imperative in today's world that the common law should [not]… be frozen in an age of racial discrimination.'[159] Times had changed so much by 1992 that Toohey J would state that: 'it is inconceivable that indigenous inhabitants in occupation of land

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[154] Ibid 32.
[155] Ibid 24–25.
[156] Geoff Gallop, *A State of Reform* (Helm Wood Publishers, 1998) 37. For a discussion on *terra nulliu* see Chapter 5, 'The Recognition of Native Title'.
[157] Mills, above n 144, 102.
[158] Stanner, above n 149, 27.
[159] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 41–42, ('*Mabo*').

did not have a system by which land was utilized in a way determined by that society.'[160]

Therefore the language used to describe the case study negotiations is potentially an important marker of their power dynamics. However, the link is not straightforward. Using war-like language, for example, could indicate a robust negotiation without a significant power differential, or it could indicate the opposite: that resorting to such language indicates a large power imbalance, as suggested by the discussion above. Sir Tipene O'Regan et al write of the Ngai Tahu Settlement process in New Zealand in war-like terms: 'The great problem at the end of the day is human capital … We need to be invaded every generation otherwise we forget how to defend ourselves.'[161] This war-like language has been a common way of speaking of processes related to native title in Australia. Noel Pearson, for example:

> We are in a political guerrilla war, in a colonial circumstance which is powerful and against which we infrequently prevail. People in situations like ours must make do with the tools which are on hand.[162]

Mick Dodson spoke in similar terms:

> My argument is that we are getting slaughtered by the colonial imperative to steal our land, to strip our culture, and to demoralise us as peoples and nations. It's about self-defence — we must defend our identity and our inheritance to the land and sea.[163]

Scholars note that the deployment of different discourses by a community or individuals can be a strategic choice. For example, the way in which communities can become 'empowered' is examined by social geographers Katrina Brown et al in relation to a grassroots environmental movement of rubber tappers in South America.[164] One key strategy was that community's use of their image as 'defenders of the forest' as a way to gain publicity.[165] Similarly, in developing countries, community protests have been couched in terms designed to appeal to a Western audience — like human rights or environmentalism — but could potentially also be characterised in different ways, including as a question of sovereignty.[166]

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[160] Ibid 187.
[161] O'Regan, Palmer and Langton, above n 42, 62.
[162] Noel Pearson, 'Aboriginal Law and Colonial Law Since Mabo' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994) 157.
[163] Mick Dodson, 'Asserting Our Sovereignty' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 15.
[164] Katrina Brown and Sergio Rosendo, 'Environmentalists, Rubber Tappers and Empowerment: The Politics and Economics of Extractive' (2000) 31 *Development & Change* 201, 203.
[165] Ibid 213.
[166] Chris Ballard and Glenn Banks, 'Resource Wars: The Anthropology of Mining' (2003) 32 *Annual Review of Anthropology* 287, 299.

The following represent a discussion of possible discourses relevant to the case study negotiations.

### *A. Native Title Discourses*

Given the jubilation and hostility that greeted *Mabo* and the passing of the *Native Title Act*,[167] as well as the symbolism with which both have been infused, it is probable that native title discourses have an impact on negotiations and outcomes. In her study of the Century Mine negotiations in Queensland, Howlett identified an anti-native title discourse operating strongly in both the negotiations, and more generally in Australian society. This discourse saw *Mabo* as a threat to Australian prosperity.[168] Together with a pro-mining discourse, it:

> [H]ad a significant effect on the final outcomes of the negotiations, for they unambiguously favoured the interests of the state and the mining company, and the historically established rules of the mineral development policy community.[169]

The counterpoint to native title as a threat to Australian progress is a discourse that infuses it with positive symbolism. The language of independence and self-determination is found throughout the literature on the importance of land rights and land ownership to Aboriginal people. Bergmann, for example, says that:

> I remember ... hearing that the High Court of Australia had recognised our inherent right to land ... I remember our cultural leaders gathering in disbelief that we could now start to control our own future.[170]

For some commentators, the real strength of *Mabo* was that it changed the way that Aboriginal people were viewed.[171] Strelein writes that native title has great symbolic value as a 'fundamental recognition of the distinct identity and special place of the first peoples', despite courts' downgrading of those rights.[172] Joe Williams believes that the symbolic value of native title is also extremely valuable for the State — that the post-colonial question of 'moral and political legitimacy of the current legal order remains a stone in the shoe of the state' and that native title

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[167] Refer to discussion in Chapter 4, 'The Recognition of Native Title'.
[168] Catherine Howlett, above n 28, 186–7.
[169] Ibid 189.
[170] Wayne Bergmann, 'Mabo 20 Years On - Have Land Rights Delivered?' (National Press Club Address, Canberra, 27 June 2012)
[171] Guest, above n 40, 48.
[172] Lisa Strelein, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 128. For a discussion of how courts have 'downgraded' native title rights, see Chapter 4, 'The Native Title Act and Associated Case Law'.

is one way the State may gain that legitimacy.[173] He tells his Indigenous audience that 'the gift of legitimacy to the state is a powerful moral and political card ... The gift of legitimacy must not be given lightly.'[174]

### *B. Mining as Progress*

Another key discourse is one that emphasises the importance of mining to the economy, 'mining as progress'. Howlett, for example, traces how this discourse appeared in the language of Aboriginal people, senior politicians, and mining company employees in the Century Mine negotiations. She identified it as being the dominant discourse in the negotiations. It 'presented development in general, and mining in particular, as a positive thing, and thus deserving of support and approval.' [175]

A pertinent illustration of this is common understanding of the importance of the mining industry to the Australian economy. For example, a survey in 2012 found that while the number of people employed by the mining industry accounted for 2 per cent of the Australian workforce, the public perception was that it accounted for 16 per cent. This 'perception gap' is the result, it is argued, of a public relations offensive by the mining industry to portray themselves as vital to jobs and the economy. [176] The following excerpts from a presentation by Federal Treasury Secretary Martin Parkinson to a Senate Estimates hearing are illuminative on this point and indicate some of the key players involved in shoring up this view:

> **Dr Parkinson:** I find this whole discussion about the importance of mining quite bizarre—
>
> **Senator Pratt:** I think there are three Western Australians at the table.
>
> **Dr Parkinson:** Sorry. The reason I say that I find it is a bit bizarre—
>
> **Senator Pratt:** I do not disagree.
>
> **Dr Parkinson:** is because we are talking about eight per cent of GDP. It is a very important eight per cent of GDP, but there is a very important 92 per cent of GDP which is out there.
>
> **Senator Ludlum:** You should tell that to the Minerals Council—
>
> **Dr Parkinson:** For some reason we have stopped talking about it.[177]

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[173] Joe Williams, 'Confessions of a Native Title Judge' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 26.
[174] Williams, above n 173.
[175] Catherine Howlett, above n 28, 188.
[176] See Richard Deniss, 'When the Powerful Buy into the Media, Can the Media Still Scrutinise the Powerful?' <http://theconversation.com/when-the-powerful-buy-into-the-media-can-the-media-still-scrutinise-the-powerful-5317>. See also Carmen Lawrence, 'The Limits of Dominion' [2015] 47 *Griffith Review*.
[177] Australian Senate Economic Legislative Committee, 'Hansard' (2011) 55 <http://www.aph.gov.au/hansard/senate/commttee/s88.pdf>.

The above is also illustrative of Foucault's musings on the nature of truth — that it is not something transcendental, to be 'found', but something that societies work to produce.[178] If the vital nature of mining to the economy has reached the status of national 'truth', what impact does this have on resource negotiations over native title land? O'Faircheallaigh speculates that Aboriginal communities could harness the power in dominant political ideas, including the need to move from 'welfare dependency' towards self-sufficiency, as part of their agreement making leverage in native title negotiations.[179]

This discourse is also part of a global trend in which the mining town is seen 'as a symbol and promise of modernity'.[180] And yet, according to Judith Brett, mining was not always so dominant in Australian discourse as it is now. In the 1980s and 1990s, she writes, the National Party (representing country Australia) formed a temporary alliance with mining to defeat native title: the Nationals were useful to the miners because they had ties to the community, while the miners were 'associated with the top end of town and had neither a social base to mobilise nor the capacity to pull city heart-strings.'[181]

## VI. CONCLUSION

Negotiations are complex events, and their outcomes can never be entirely predictable. This chapter has canvassed various possible explanations for why the negotiations for Browse LNG and Curtis Island LNG resulted in such different outcomes. The literature on agreement making emphasises the central role of traditional owner power in explaining negotiation outcomes, with much of the empirical work emphasising the importance of legal and political power, the latter mobilised through strong organisations and group unity. It points to a large financial, legal, political and historical power imbalance between traditional owners, companies and governments. It also points to the importance of mobilising the power potentially available from adherence to traditional law and custom; building alliances; ensuring proper negotiation preparation (including ensuring adequate funding); and understanding the social, cultural and economic impact of the proposed project. The power in broader community expectations of how resource companies should behave is also clearly important. Governments' role in agreement making is under-researched but clearly significant. There are strong arguments that governments have a responsibility to lessen the power differential in negotiations, but little evidence that they do so.

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[178] Quoted in Mills, above n 144, 18. See also Michel Foucault, *Archaeology of Knowledge and the Discourse on Language* (Pantheon Books, 1972)
[179] O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 16, 19.
[180] Ballard and Banks, above n 166, 292.
[181] Judith Brett, 'Fair Share: Country and City in Australia' (2011) 42 *Quarterly Essay* 46.

Company attitudes towards traditional owners depend on the ability of that community to hold them to account.

The most convincing theoretical explanations for understanding negotiation outcomes point to recognising the multitude of ways in which power is used, including how the negotiation agenda is decided, and the expectations that negotiation participants have of themselves and their opponents. Therefore careful attention will be paid to the ways in which people speak about all aspects of the negotiations in the Kimberley and central Queensland. It is possible that certain discourses are being expertly or unconsciously harnessed as a way of lessening or entrenching the power differential between traditional owners, resource companies and governments.

Importantly, discourses need to be accepted by their listeners to have currency, which means that the context in which discourses occur is important to understand. Negotiation participants are all products of their environment, and their wants, needs and behaviours are conditioned by what they believe is possible. Australians have long-held conceptions about the nature of Aboriginal people and Aboriginal society, and these ideas continue to have enormous power. The language of the negotiations should therefore be analysed carefully for what it says about the accepted practices and underlying power dynamics of each negotiation. The contention that the use of observable power may in fact signal a particularly powerful party will be considered during the analysis of the negotiations. These explanations will be further assessed in Chapter 9, where they will be integrated with the empirical findings.

The next chapter sets out the research design for this thesis, including how the case study negotiations were chosen, and the empirical data gathered and analysed.

# Chapter Three
# Research Design

## I. INTRODUCTION

The chosen case study negotiations are two LNG land access negotiations conducted at a similar time but with significantly different outcomes. [1] These negotiations were both conducted pursuant to the *Native Title Act*. [2] The empirical data on which the thesis rests includes documentary data and interviews with key participants from all parties of both negotiations. In total, 53 interviews were conducted, including 41 interviews with 33 people on an on-the-record basis, eight of whom were interviewed twice, and 12 interviews conducted on an off-the-record basis (see Appendix 2 for a list of interviewees). The other empirical data collected and analysed includes the Browse LNG agreements, legislation, cases, company reports, media reports and analysis (including print, television and radio), government publications, academic research, non-academic writing, statistical data and internet materials, including websites.

This chapter details and justifies the chosen research approach, including how the case study negotiations were chosen and 'cased', and how the empirical data was analysed. It also discusses the extent to which the research findings can be applied more generally.

## II. THE CHOSEN APPROACH

The aims of this research are to develop theoretically sound, practical and broadly applicable explanations for how traditional owners can maximise benefits from agreement making under the *Native Title Act*, and to provide a rich description of the Browse LNG and Curtis Island LNG land access agreement negotiations. Specifically, it aims to answer following questions:

1. What factors are most important in shaping the power dynamics of negotiations between traditional owners and resource companies, and how do these dynamics shape agreement outcomes?
2. What role does law play in shaping agreement outcomes?
3. How can traditional owners maximise benefits available to them from these negotiations?

[1] Refer to the discussion in Chapter 5, 'Browse LNG Agreements' and 'Curtis Island LNG Agreements'.
[2] Nevertheless, a surprising outcome of this research, discussed in Chapters 6 and 9, is that the application of this common legal regime differed significantly between negotiations.

The research questions seek to identify causal explanations for agreement outcomes. Therefore, the most suitable research design is one that is able to establish causation: why and how a negotiation led to a particular outcome. This is a two-stage process. The first involves the selection of land access agreements that resulted in different outcomes for Aboriginal parties. The second involves analysing the negotiations to find out why those different outcomes occurred.

### *A. Qualitative Case Study Research*

Chapter 2 found that the strongest explanations for agreement outcomes are the power dynamics found in the structural context in which negotiations occur. Power can be exercised invisibly and unconsciously, making it hard to detect. Nevertheless, the previous chapter made several observations about where power may be situated in the negotiations: in the legal regime, the financial prospects of the development, and the political power of the parties. It also provided potential ways that power may be identified. These include how the agenda is set, the negotiation's dominant discourses and values, and in the outcomes participants believe to be possible. Therefore, in order to identify power and its use, the context in which each negotiation occurs will be closely examined.

The combination of these factors led to the choice of a qualitative multi-site explanatory case study research design. A case study approach was chosen because it is particularly useful for explaining causation. Unlike an approach that merely establishes correlation, for example that strong political organisations are associated with good agreement outcomes, a qualitative explanatory case study can highlight *why* these organisations help achieve good agreement outcomes. This is done by employing explanatory strategies which can include exploring rival explanations for the data.[3] These strategies help to establish causal explanations because they weigh empirically observed explanations with theoretical explanations using analytical logic.

Qualitative inquiries are focussed on understanding real life events in context, in order to produce findings that retain the 'holistic and meaningful characteristics' of the phenomena being studied.[4] This focus on context contrasts with other research designs, for example experiments,

[3] Robert K Yin, *Applications of Case Study Research* (Thousand Oaks, 2nd ed, 2003) 18. John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Publications, Second, 2007) 12.
[4] Norman K Denzin and Yvonna S Lincoln (eds), *The Landscape of Qualitative Research: Theories and Issues* (SAGE Publications, 1998) 3. See also James Mahoney and Gary Goertz, 'A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research' (2006) 14 *Political Analysis* 227, 230.

which deliberately divorce things being studied from their context, or surveys in which variables are deliberately limited.[5]

The choice follows Ciaran O'Faircheallaigh's call for 'detailed case study research to establish the reasons for positive and negative outcomes, providing a basis for more positive outcomes in the future,' without which traditional owners are often left to 'trial and error without being able to draw on the experience of other Indigenous groups'.[6] It is an approach that bears out Michel Foucault's plea that:

> What is needed is a study of power in its external visage, at the point where it is in direct and immediate relationship with that which we can provisionally call its object, its target, its field of application, there – that is to say – where it installs itself and produces its real effects.[7]

Debate exists in the literature about how a case study should be approached. Some have argued that case study research can be fluid in design.[8] Others, particularly the widely cited Kathleen Eisenhardt, argue that case study research should closely follow a quantitative approach, using large numbers of case studies and creating theoretical propositions that can be tested quantitatively. [9] Robert Yin, on the other hand, argues for a comprehensive and stringent research design, but does not preference a high number of case studies or advocate the need for quantitative testing of findings. Yin's approach has been chosen for this research given its widespread acceptance, its ability to accommodate both high and low numbers of case studies, and its emphasis on 'analytical generalisability'.[10]

In the preliminary research phase, the possibility of using quantitative approaches was also explored. In contrast to a qualitative approach, quantitative methods are best suited to enumerate the frequency or incidence of a particular problem — for example how many negotiations occur each year — or to establish correlation: for example, did legal recognition of

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[5] Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 1984) 13.

[6] Ciaran O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (Issues Paper No. 25 (Volume 2), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, February 2004) 2. Ciaran O'Faircheallaigh, *Negotiating Major Project Agreements: The 'Cape York Model'* (Australian Institute for Aboriginal and Torres Strait Islander Studies, 2000) 4 <http://www.aiatsis.gov.au/research/docs/dp/DP11.pdf>.

[7] Colin Gordon (ed), *Michel Foucault: Power/Knowledge Selected Interviews and Other Writings 1972-1977* (The Harvester Press Limited, 1980) 97.

[8] For example Robert Stake says a 'case study is not a methodological choice but a choice of what is to be studied ... By whatever methods we choose to study the case': Robert E Stake, *The Art of Case Study Research* (SAGE Publications, 1995) 443.

[9] Kathleen M Eisenhardt, 'Building Theories from Case Study Research' (1989) 14 *Academy of Management Review* 532.

[10] Yin, *Case Study Research: Design and Methods*, above n 5; Yin, *Applications of Case Study Research*, above n 3. See below, 'Generalisability'.

native title result in increased agreement-making?[11] Given these characteristics, it was ultimately deemed unsuitable for the explanatory nature of this research.

### *B. Generalisability*

A key attraction of Yin's approach is the ability to generalise research findings which, given the 'paradox of poverty amidst plenty' introduced in Chapter 1, is an important consideration. There is an ethical aspect to attempting generalisability. Where research findings are valid and could help others in a similar situation, a claim to generalisability should be made to promote their relevance and applicability as broadly as possible. Yet this claim of generalisability is not without controversy. Indeed there are those that argue that qualitative research can never be generalisable. They do so from different perspectives. The first, from a quantitative research focus, says that qualitative case study research lacks academic vigour and objectivity and is the 'weak sibling' of social science research. This criticism is made because case studies are said to be inherently subjective and therefore lack the empirical precision of quantitative research or other forms of qualitative research, for example, surveys.[12]

The second comes from a constructivist view on qualitative research, which says that any research is so time and context bound that generalisability is unlikely.[13] Striking a middle path and downplaying the importance of generalisability is Robert Stake, who says that the key question the researcher should be asking is: what is important about the case in its own world? He says that this is not necessarily generalisable.[14] Yin makes a strong argument that case study findings, while not statistically generalisable to populations or universes, are nonetheless expandable to general theories, what he terms 'analytical generalisation'. [15] Analytical generalisation occurs where case study findings support the theoretical framework. Where findings are not supported by existing theory, they are not analytically generalisable, yet may nevertheless have policy implications and form the basis for further research that may make claims to generalisability.[16] Chapter 9 discusses which of the research findings of this thesis are analytically generalisable to theoretical propositions.

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[11] Yin, *Case Study Research: Design and Methods*, above n 5, 6.
[12] Ibid 10.
[13] Carol Grbich, *Qualitative Data Analysis: An Introduction* (Sage Publications, 2013) 5.
[14] Stake, above n 10, 99.
[15] Yin, *Case Study Research: Design and Methods*, above n 5, 10, 21.
[16] Robert K Yin, *Case Study Research: Design and Methods* (SAGE, 4th ed, 2009) 39.

The selection of case study sites to show contrasting situations, as is done in this research, is a first step towards establishing external validity. Claims to external validity are strengthened if those contrasting cases support existing empirical research and theory.[17]

## III. ETHICAL CONSIDERATIONS

Ethical considerations were an important preliminary component of the research design, as well as being a significant ongoing consideration. Ethics approval was obtained from the University of Melbourne's Human Ethics Advisory Group (HEAG) in June 2011, and amended slightly in April 2012 to take into account increased interview numbers as a result of a shift from MPhil to PhD candidature. These applications stressed that while the danger to research participants was minimal, several risks remained. These related to the potential disclosure of legally privileged or commercial-in-confidence information. In order to reduce these risks, participants were told that no legally privileged information was being sought, and that they could later redact from the transcript any inadvertently disclosed information. When potentially confidential information was disclosed, informants were explicitly asked whether this information could be used in the research.

All participants were sent a plain language Explanation of Research before agreeing to an interview, and were again given a copy of this immediately prior to signing the consent form and undertaking the interview (see Appendix 3). The ethics clearance stipulated that participants could be sent a transcript of their interview, an invitation that was accepted by all but two interviewees. These transcripts were checked for accuracy by participants and could be altered. Participants were informed that they could be named or anonymised in resulting publications. If choosing to be anonymised, participants were warned that given the nature of the research and the small pool of potential participants, it was possible that they would remain identifiable in some way. Four research participants chose to be anonymised, understanding these limitations.

The HEAG stipulates further requirements that must be followed when undertaking research with Aboriginal people. These are similar in nature to the extra care that research ethics requires for research with children, the disabled, the mentally unwell and those with whom the researcher may have a dependent relationship, among others. The reasons behind Aboriginal peoples' inclusion in this list are well intentioned, and reflect the vulnerable social and economic position that some Aboriginal people may be in. However, it can also lead to unhelpful assumptions and

[17] Ibid 54.

double standards in which a rebuttable presumption exists that Aboriginal people do not possess the same ability to consent to being research participants as other people.[18]

## IV. APPLICATION OF APPROACH

The research was designed following Yin's elements for case study design. These are:

1. Deciding on research questions and purpose;
2. Using theory to develop research direction and preliminary propositions;
3. Deciding on the 'unit of analysis', that is, the aspect of the case to be studied;
4. Case selection, including why the cases were chosen, and how their scope was limited;
5. Deciding on methods for data collection and analysis.[19]

Yin sets out further requirements to ensure that explanatory case study research has a solid research design. These are:

1. Construct validity, to avoid the view that research findings are merely subjective impressions. This requires multiple sources of evidence and solid reasons for the issue which is being researched.

2. Internal validity, that is, do the findings describe the correct state of affairs of the case? Have all rival possibilities been canvassed? Are the explanations credible? The use of multiple viewpoints — as will be done in this research, particularly in relation to interview data — increases the internal validity of specific findings.

3. External validity, that is can the case study findings be analytically generalised to theoretical propositions?[20]

### *A. Case Study Selection*

An initial choice in case study research is how many cases are to be studied. Unless there are overwhelming reasons to study a single site, Yin prefers a multi-site case study because it better allows for the possibility of analytical generalisability. Given the time and resource constraints of a single researcher project, a decision was made to limit to two the number of case study negotiations. Case study negotiations were therefore selected so as to be similar in many respects but have significantly different agreement outcomes. This approach is known as

[18] This thinking brings to mind Peter Sutton's invective on 'white post-imperialist guilt politics', and the cloudy thinking on issues relating to Aboriginal people that it sometimes occasions, Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2009) 13.
[19] Yin, *Case Study Research: Design and Methods*, above n 5, 21.
[20] As described above, B. 'Generalisability'.

'purposive sampling', in which case study sites are chosen for their ability to shed most light on the research questions. The nature of this approach means that case study selection is neither random nor representative, and so cannot be said to be statistically generalisable. The 'unit of analysis' chosen was the *Native Title Act* 'right to negotiate' negotiation that had occurred between traditional owners, resource companies and government (where relevant), and their resulting agreements in each case. 'Negotiation' is understood in its broadest sense.[21]

The case study negotiations were then identified. Browse LNG was mooted as a potential site from the commencement of the inquiry: the native title aspects of the development had a high profile and traditional owners appeared to have significant influence over whether it would go ahead.[22] Shortly into the project, the Browse LNG agreements were made public, and their content confirmed initial impressions that these agreements would be very beneficial to traditional owners. In addition, their public availability was highly unusual — these types of agreements are almost always confidential — and provided further justification for studying them.[23] The project as envisaged in the agreements is no longer being pursued by Woodside, who announced in April 2013 that the land-based option was no longer commercially viable and the company would instead be seeking to process the gas offshore using floating LNG technology.[24]

Curtis Island LNG was selected nine months into the project in order to provide a contrast to the outcome achieved by traditional owners in the Browse LNG agreements. The 'Curtis Island LNG' agreements refer to land access agreements made in relation to the building of four LNG processing plants on Curtis Island, off Gladstone, Queensland.[25] They are confidential and have not been sighted for this research. They are part of a broader Gladstone LNG project involving the extraction of coal seam gas from onshore deposits in the Bowen and Surat Basins, which is then piped to Curtis Island and processed. Unlike Browse LNG where the offshore gas is not the subject of any native title claims, the broader Gladstone LNG project involved a large number of land access agreements, both with traditional owners and other landowners. This

[21] See below, 'B. Casing'.
[22] Refer to Chapter 5, 'The Browse LNG Negotiations'.
[23] Robert Stake advises that when choosing cases to study, 'opportunity to learn is of primary importance.' Stake, above n 10, 102.
[24] This is discussed in Chapter 5, 'Browse Negotiations' which conclude that the Browse agreements did not contribute to the demise of the project and therefore should not exclude Browse LNG agreements from this investigation.
[25] Note that one of the joint venturers who signed a land access agreement with traditional owners, Arrow LNG, has since cancelled the project: Angela Macdonald-Smith, 'Shell Shelves Arrow LNG Project in Queensland' *The Sydney Morning Herald*, 30 January 2015.

research will only be examining what is known about the content of the agreements made for Curtis Island in order to provide the best comparison to Browse LNG.

Information on Curtis Island LNG's unfavourable agreement outcomes was gleaned from personal contacts and one media report.[26] In addition, the project is similar in timing and scale to Browse LNG, and both sets of agreements were negotiated pursuant to the *Native Title Act*. The biggest difference is that of size: it is estimated that the Curtis Island facilities will produce approximately twice as much LNG as the Browse LNG precinct would have, and cost approximately twice as much to build.[27]

A clear shortcoming of this research is that the full Curtis Island agreements were not available to be analysed. However enough information was gathered to be able to assert that they were inferior to the Browse LNG agreements.[28]

### *B. Casing*

'Casing' is the process of identifying and refining the subject to be studied. It is what turns real life events into a case study.[29] The 'casing' of the case studies evolved throughout the early empirical phase of this research. Initially, it was expected that data would be collected solely in relation to the formal process of negotiating, whether in a negotiation 'room' — whatever space the negotiations were conducted in — or via email, telephone, letter or other written communication.[30] As the project progressed however, it became clear that the opposition to the Browse LNG Precinct should also be investigated as a significant aspect of the context in which the negotiation was taking place.[31] The early refinement of the parameters of the Browse LNG case study negotiation was therefore in direct response to initial data. The same parameters were applied to Curtis Island LNG, revealing a lack of broader community opposition.[32]

The case studies were also given temporal boundaries. The Browse LNG negotiation is considered to have commenced in late 2006 when then Premier Alan Carpenter announced the

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[26] Petrina Berry, 'Indigenous Groups Slam Gas Deal' *Brisbane Times*, 27 March 2010. In addition, former CEO of the KLC Wayne Bergmann had a role in advising Curtis Island traditional owners on their negotiations, and said that he had been shocked at the low financial compensation figures being discussed, interview with Wayne Bergmann (Broome, 20 June 2012).

[27] For more detail on the costs and projected production associated with these projects, refer to Chapter 5, 'Browse LNG Agreements' and 'Curtis Island LNG Agreements'.

[28] Refer to discussion below in 'Limitations of this Approach' and Chapter 5, 'Curtis Island LNG Agreements'.

[29] Charles C Ragin, '"Casing" and the Process of Social Inquiry' in Charles C Ragin and Howard S Becker (ed), *What is a Case? Exploring the Foundations of Social Inquiry* (Cambridge University Press, 1992) 220.

[30] This definition evolved out of this researcher's professional experience of what a negotiation is and in what forms it occurs.

[31] Refer to discussion in Chapter 5, 'The 'No Gas' Campaign'.

[32] This difference between the two case studies is discussed particularly in Chapter 8 where it is argued that the lack of environmental opposition is reflective of several credible explanation for the difference in agreement outcomes.

State was looking for a place to process Browse Basin natural gas, and ended in June 2011 with the signing of the three Browse agreements.[33] The start and finish times of the Curtis Island negotiations are harder to pinpoint given the lack of specific data and the multiple projects involved but were concentrated between 2010 and 2013.[34]

### *C. Empirical Data*

A case study protocol was developed. It identified the data to be gathered, the people to be interviewed and the questions to be asked. The empirical data to be gathered was to come from any interview or documentary source that could shed light on the research questions, based on its source and authority. Clearly, not all interview or documentary evidence is of equal weight. For example, sources including judicial decisions, legislation or government reports are usually subject to more scrutiny prior to publication than internet blogs. Therefore, all empirical evidence was carefully analysed, and where found to be less credible, only used when corroborated by other sources.

The documentary sources that have been analysed as part of the empirical evidence are: the Browse LNG agreements, relevant judicial decisions, National Native Title Tribunal data on agreements, newspaper articles, government reports, KLC reports and other documentation including newsletters, television and radio broadcasts and transcripts, newspaper and magazine reports and photos, Hansard and website copy. The documentary data was sourced via desktop searches, including of legal databases, via a Google alert of key words, through word of mouth and from research participants. The research protocol identified the following broad groups with a significant stake or influence on the negotiations and their outcomes: Aboriginal traditional owners; representatives of relevant Aboriginal organisations; resource company representatives; State public servants; senior State politicians; Commonwealth representatives; and those opposed to the developments. These multiple sources of data means that research findings are corroborated with a variety of sources, what Yin calls 'triangulation'.[35]

All on-the-record interviews except for one were recorded and transcribed — the exception asked that her interview not be recorded and notes of the interview were taken instead. Transcripts of interviews were edited slightly for clarity or to avoid repetition. All but two

[33] 'Western Australian, Parliamentary Debates, Legislative Assembly, 21 November 2006, 8443c-8443c (Alan Carpentar, Premier)' (2006) <http://www.parliament.wa.gov.au/Hansard%5Chansard.nsf/0/17abc1a733076925c82575700032596a/$FILE/A37%20S1%2020061121%20p8443c-8443c.pdf>.
[34] National Native Title Tribunal, *Future Act Applications* <http://www.nntt.gov.au/Future-Acts/Search-FA-Determinations/Pages/search.aspx>.
[35] Yin, above n 5, 115–116.

participants (who specifically declined this option) were sent transcripts of their interview. Of the 31 people sent transcripts, 28 made alterations or redactions to them.

Research interviews were conducted face to face, with the exception of two conducted over the phone. The benefits of face to face interviewing include establishing rapport, being able to respond to body language and meeting people in their usual context. They far outweigh the extensive travel required. The informed consent material sent to participants said they could withdraw their consent at any time up to the publication of their comments. The interview style that developed was friendly and non-threatening and, given the data gathered in interviews, deemed a success. Indeed, Yin says that case study interviews can often be a double game, in which questions may not necessarily betray the information being sought, and a verbal line of inquiry may be very different to the mental line of inquiry.[36]

Questions were directed towards the role of power in the negotiations given the emphasis of the literature and theories discussed in the previous chapter.[37] Participants were asked broad and open-ended questions from a prepared list of discussion points, with follow up questions should any answers suggest the need for them.[38] It was intended that the questions be broad enough to encapsulate as much of people's views as possible and they were successful in this regard. The interview questions were designed to explore the power dynamics of the negotiations, in particular how the negotiation agenda was set, the negotiation's dominant discourses and values, and in what outcomes participants believed to be possible from the process. Nevertheless interviews often traversed a wide range of topics. The richness and diversity of interview responses added many unexpected observations.

Interviews usually lasted a little over one hour, with some variation: 30 minutes to almost three hours. The specific information sought from interviewees inevitably changed as the research progressed, and so while the core questions remained unchanged, follow up questions were tailored to address areas where not enough information existed or where there was conflict or a lack of clarity about an issue.

Initial interviews were conducted in Broome in June 2012 with traditional owners and Kimberley Land Council (KLC) staff. These resulted in the research scope and aims being further defined. Similar interviews were not conducted for Curtis Island LNG because the research scope had already been defined by that stage of the project.

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[36] Ibid 75.
[37] See Appendix 3 for a list of interview questions.
[38] The interview approach advocated by Yin, *Case Study Research: Design and Methods*, above n 5, 57.

The interviews were conducted over two years for Browse LNG, and five months for Curtis Island LNG. Despite these time gaps, they were cross-sectional rather than longitudinal in nature, because they did not follow the progression of negotiations but rather probed people's memory of them.[39] The timing of interviews therefore likely had some impact on what was said. For example, initial interviews on Browse LNG were conducted in Broome at the implementation stage of the agreements. Agreement implementation was not progressing as well as had been hoped, perhaps leading to a greater amount of reflection on whether the negotiations had resulted in a good environment for implementation.

Some information provided by interviewees was given on an off-the-record basis. None of this has been cited in this thesis, however in some cases it has provided valuable context for the analysis of the on-the-record data.

### *D. Sourcing Research Participants*

During the conduct of the research it became clear why so few negotiations are studied in this manner: finding out who was involved in negotiations, gaining their contact details, and persuading them to talk on-the-record was laborious, time-consuming and delicate work. A decision was made early in the empirical data collection phase to interview any willing negotiation participant which, given the small pool of people involved in these negotiations, would necessarily be limited. The high profile nature of the LNG developments worked both for and against attempts at sourcing participants. Where it was advantageous was where people wanted to be heard on a controversial or important topic, and expected interest from researchers. It was disadvantageous where potential participants were wary of further attention, or of being misconstrued. No people were interviewed from the Commonwealth government, despite requests being made of relevant former Ministers. Additionally, only Browse LNG saw an Aboriginal representative organisation actively participating in the research: while Queensland South Native Title Services was formally involved in the authorisation of the Curtis Island Indigenous Land Use Agreements, it did not represent traditional owners in the negotiations and accordingly declined to be involved in this research.[40]

As time progressed and the project gained in credibility, sourcing research participants became easier. For example, Woodside initially refused permission for its employees to be interviewed in 2012. They reversed this position by 2014 following a presentation on the research at their Perth headquarters.

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[39] See Nigel Gilbert, *Researching Social Life* (Sage Publications, 1993) 37.
[40] Refer to Chapter 5, 'Central Queensland – Political Representation'.

The goal in the empirical phase of case study research is to reach 'saturation', the point at which the researcher is uncovering no further information relating to the theories being tested or constructed. In approximately the final third of interviews conducted — with the exception of those conducted with staff from Woodside Energy who offered some new information — it was noted that while some new perspectives were being offered, no new or surprising information was emerging. This provided reassurance that saturation point had been reached. In addition, when at least one key participant from all major groups had been interviewed (with those exceptions noted above), it was deemed that all major negotiation viewpoints had been represented.

### *E. Reflexivity*

The research was conducted bearing in mind Yin's advice that bias can be present in all types of research, and research should be conducted in as fair a manner as possible. [41] It was also conducted with an understanding that people can never observe reality through a completely objective lens: 'we are all in some sense prisoners of personal experience'.[42]

Early in the empirical phase, these issues came up when it was noted that a particular tendency of this researcher was to view interviewees on the basis of whether they were 'likable'.[43] This was combatted by paying strict attention to the interview transcript when analysing interview data rather than relying on remembering what had been said.

In addition, research participants likely viewed this researcher based on how they had been introduced. For example, time spent in the KLC office may have led several KLC staff and traditional owners to view this research as associated with the KLC. Similarly, several research participants were sourced through personal contacts. The literature on 'insider and outsider' research acknowledges that this position might make research participants more likely to talk, or to say certain things, or might affect the impartiality or judgment of the researcher.[44] These possibilities were resisted in two ways. First, the researcher's position as a PhD researcher with the University of Melbourne was explicitly stated at the start of the interview, and in the plain

[41] Yin, *Case Study Research: Design and Methods*, above n 5, 10.
[42] WEH Stanner, *After the Dreaming* (ABC Enterprises, 1968) 54.
[43] The recommendation of Dwyer and Buckle to bring a 'close awareness' of personal biases and perspectives in order to combat the lens that such a bias might bring was followed: Sonya Corbin Dwyer and Jennifer L Buckle, 'The Space Between: On Being an Insider-Outsider in Qualitative Research' (2009) 8 *International Journal of Qualitative Methods* 54, 60.
[44] Dwyer and Buckle, above n 274.

language 'Explanation of Research' given to all interviewees.[45] Second, the researcher actively considered the possibility of impartiality throughout the conduct of the research.

Finally, a relatively young, female, non-Aboriginal lawyer conducted the research. This undoubtedly had some impact on the way in which the data was gathered. For example, it may have had an impact on the information given in interviews given the restrictions that Aboriginal law places on which genders may have access to what information.[46] Triangulation of multiple sources of data however allowed gaps in interview data to be filled by other sources.

## V. ANALYSIS

### *A. Analysing the Agreements*

First, the agreement outcomes were analysed so as to confirm that the Browse LNG and Curtis Island LNG agreements resulted in very different outcomes for Aboriginal parties.[47] This was confirmed by triangulating the following data:

1. The objectives that the community, company and government had for the negotiated outcome, whether these objectives were met and whether participants believe a beneficial agreement was reached; and

2. Generic indicia of good agreements and whether these are present in the agreements analysed.

The first was assessed through the recollections and opinions of interviewees and through publically available statements of traditional owners and other negotiation participants (for example, media items and press releases from relevant land councils). The second was assessed according to criteria on outcomes contained in the literature on agreement making.[48]

### *B. Analysing the Negotiations*

Next, the empirical data gathered for each negotiation was analysed to identify why they resulted in their respective agreements. First, the data was coded. This was a two-stage process that initially involved a content analysis of all empirical evidence, with the software package Nvivo, a program that allows for electronic coding of themes within documents. This content analysis

[45] See Appendix 3.
[46] Refer to Chapter 5, 'Browse LNG' – 'Authority of Aboriginal Law' for a discussion of the impact of Aboriginal law on negotiations.
[47] Refer to Chapter 5, 'Browse LNG Agreements' and 'Curtis Island LNG Agreements'.
[48] For an extensive list of these criteria, see Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 309. Note that this was only done in relation to Browse LNG given that Curtis Island LNG agreements were not available.

was conducted separately for each case study. All explanatory information contained in the data was coded and grouped into specific categories, for example '*Native Title Act'* or 'political strength of traditional owners'.

The second stage of data analysis involved analysing and interpreting the data and corresponding codes. This allowed for the recognition of recurring patterns and for logical chains of evidence to emerge from the data. Separate Browse LNG and Curtis Island LNG explanatory narratives were then created out of the broad theoretical themes.[49] This ensured that while the data was analysed across consistent broad themes, the differences between the case study negotiations were also kept in focus. These explanatory narratives actively considered all rival explanations for the negotiation outcomes, which were also weighed against the other available data. All major findings draw on a range of data and have been subjected to rigorous and logical analysis.[50] The analysis therefore resulted in conclusions about each case, including their commonalities and differences.[51] It also resulted in the making of some general conclusions about these types of negotiations.[52]

Construct validity requires that key research informants provide feedback on aspects of the research as it is being conducted. This is in order to ensure that their words are not misconstrued or taken out of context. This was done in several ways. It was primarily done through participants checking over the transcript of their interview: most people made at least minor amendments to their records of interview. In addition, presentations on preliminary research findings were conducted throughout the latter stages of the inquiry. These included conference presentations to a general audience, as well as presentations to audiences including people related to the negotiations. The discussions, many in-depth, that followed these presentations, did not contradict any preliminary findings. Two non-academic articles on the research were sent to several Curtis Island traditional owners and received very positive feedback.[53]

The research data was triangulated. The process of triangulation, what lawyers might see as gathering a brief of evidence, is the process by which different and diverse sources of evidence

[49] Yin calls this 'pattern matching' or 'explanation building', Yin, above n 5, 141.
[50] Ibid 116.
[51] Ibid.
[52] In order to ensure that research findings are analytically generalisable, the goal of analysis is to do a 'generalising' and not a 'particularising' analysis. Ibid 11.
[53] Lily O'Neill, 'Gasploitation in Queensland' [2014] *Eureka Street* <www.eurekastreet.com.au/article.aspx?aeid=38787#.UugyBLQ7bIU>; Lily O'Neill, 'Marcia Langton's "quiet Revolution" and What You Don't Hear about James Price Point' *The Conversation*, 12 December 2012 <http://theconversation.com/marcia-langtons-quiet-revolution-and-what-you-dont-hear-about-james-price-point-11256>.

are weighed up so that research conclusions are drawn from a variety of data.[54] When this is done, research findings are based on a range of oral and documentary sources and therefore more likely to be credible and valid.[55] Of course, in the 'disorderly world of empirical research', sources are often inconsistent or conflicting.[56] It is the researcher's job to not only gather data from a variety of sources but also to analyse their consistencies and inconsistencies.

## VI. LIMITATIONS OF THIS APPROACH

The limitations of the approach taken in this research include those inherent to all research, as well as limitations specific to this particular design. The information gaps around Curtis Island LNG are a clear example of the latter. Given that the content of the Curtis Island LNG agreements was not available, all discussion of agreement benefits is based on secondary sources. Indeed, Curtis Island traditional owner Kezia Smith herself complained that she was never shown the full text of the agreements, despite repeatedly asking.[57] Relying on interview data to establish what these agreements contained has obvious limitations — peoples' memories of what the agreements contained could be faulty or distorted by subsequent information, they might not have understood the agreements, or they could have been actively deceptive. However, given the similarity of information gathered about the Curtis Island LNG agreements from multiple sources across different negotiation parties, the data is likely to be reliable, if incomplete.

Another limitation of the approach taken is that it relies on interviewees' memories of what occurred, memories which may be imperfect or partial. This is often said to be a short-coming of qualitative research, and particularly of retrospective qualitative research, which relies so heavily on human memory.[58] However, this problem is likely to have been ameliorated given the relatively short time lapse between the negotiations and the research interviews, as well as the likelihood that the issues would be remembered given the dominance that negotiations had in people's lives. Similarly, there is a question as to whether people give socially desirable or self-serving answers,[59] or are entirely frank and forthcoming.[60] It is a limitation that is likely to be

[54] Creswell, above n 3, 199–200.
[55] Ibid 202.
[56] Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (Sage Publications, 1998) 199.
[57] Interview with Kezia Smith (Gladstone, 11 September 2013).
[58] Michael Chesterman, Janet Chan and Shelley Hampton, 'Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales' (University of New South Wales and the Law and Justice Foundation's Justice Research Centre, February 2001).
[59] Ibid 60.
[60] Stephen E. Weiss, 'Creating the GM Toyota Joint Venture; a Case in Complex Negotiation' (New York University, Graduate School of Business Administration, the Center for Japan-US Business and Economic Studies, 1987) 259–260.

true of all research involving people, and is overcome because of the wide range of people interviewed and the way that research findings have been triangulated.

## VII. CONCLUSION

This chapter has set out the research design on which this thesis rests. It is one that relies on a wide range of empirical data including the full text of the Browse LNG agreements and interviews with all negotiation parties. This means that the conclusions drawn in this work will be internally valid as rich descriptions of the Browse LNG and Curtis Island LNG negotiations. The soundness of the research design also means that some research findings are analytically generalisable to other negotiations between traditional owners, resource companies and governments. The discussion in Chapter 2 highlighted the importance of studying real life negotiations to better understand negotiations and their outcomes. Too often 'empirical' negotiation research involves role-playing, something Samuel Bacharach and Peter Lawler call 'artificial and removed from the 'real world'.'[61] This research design means that the thesis may help to fill that gap.

The next chapter details the Aboriginal and Australian legal framework for the negotiations.

[61] Samuel B Bacharach and Edward J Lawler, 'Power and Tactics in Bargaining' (1981) 34 *Industrial & Labor Relations Review* 219, 232. Note that given their research is based on role-playing: their criticism acknowledges the weaknesses involved in their approach.

# Chapter Four

# The Legal Framework

## I. INTRODUCTION

One of the central questions posed by this thesis is the role that law plays in shaping the agreement outcomes of negotiations pursuant to the 'future act' provisions of the *Native Title Act*. This chapter begins that task.

First, the chapter describes the relevant law of the Browse LNG and Curtis Island LNG negotiations. It outlines a brief history of the law of land ownership in Australia: from Aboriginal law, to British colonial law, to native title law and the possible co-existence of these laws. It sets out the applicable Australian legislative framework that applied to each negotiation, focusing on the potential leverage it offers traditional owners.

Second, the chapter examines three legal theories that may help explain the impact of law on the negotiations. 'Law and society' scholarship emphasises the symbolic power of law and the impact that the recognition of the doctrine of native title has on Australian society. Legal pluralism is used to discuss the possibility, authority and impact of a continuing Aboriginal jurisdiction in the negotiations. Property law theory is examined to understand the significance accorded land by the English common law that may explain the lens through which non-Aboriginal people view Aboriginal rights and interests in land.

## II. A BRIEF LEGAL HISTORY

### *A. Aboriginal Law*

Prior to 1788, Aboriginal law and custom governed the Australian continent. Aboriginal law is both a system of governance and a set of rules for daily living and behaviour, for the interaction of people with each other and with their natural environment. It contains spiritual, religious and juridical characteristics.[1] It is a system of laws that is both intensely local (with details varying from group to group) as well as having a 'commonality' across the continent.[2]

[1] Ronald Berndt, 'Law and Order in Aboriginal Australia' in Ronald Berndt and Catherine Berndt (eds), *Aboriginal Man in Australia* (Angus & Robertson Publishers, 1965).
[2] B. Sansom, 'The Aboriginal Commonality' in Ronald M. Berndt (ed), *Aboriginal Sites, Rights and Resource Development* (University of Western Australia Press) 117. Marcia Langton, 'The Edge of the Sacred, the Edge of Death: Sensual footnote hanging Inscriptions' in Meredith Wilson and Bruno David (eds), *Inscribed Landscapes: Marking and Making Place* (University of Hawaii Press, 2002) 255.

Aboriginal law is said to have its origins in an idea often referred to in English as 'The Dreaming', commonly understood to connote a period in the past in which many spiritual occurrences happened, but more correctly:

> [T]he Dreaming is many things in one. Among them a kind of narrative of things that once happened; a kind of charter of things that still happen; and a kind of logos or principle of order.[3]

Fred Myers, writing of the Pintupi of the Western Desert, explains The Dreaming ('tjukurrpa' in Pintupi) as ontology: 'an endowment of being and potential that defines for Pintupi the framework of human action'.[4] It sets out social norms, including complex rules for marriage, inheritance and social interaction.[5] The tjukurrpa is a timeless foundation for all that is visible in the present day.[6] It emphasises continuity and permanence, 'the relatedness of the cosmos, rather than the opposition of spirit and matter, natural and supernatural, or good and evil'.[7] The interdependence of people, society and the natural world is also emphasised.[8]

The Dreaming sets out the basis for people's rights and interests in land. Aboriginal peoples' relationship with 'country'[9] is a legal, spiritual, emotional and social one.[10] Anthropologist W.E.H. Stanner said:

> When we took what we call "land" we took what to them meant hearth, home, the source and locus of life, and everlastingness of spirit … No English words are good enough to give a sense of the links between an aboriginal group and its homeland. Our word "home", warm and suggestive though it be, does not match the aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre".[11]

Marcia Langton, writing about the traditions of the eastern Cape York in northern Queensland, says that 'country' is deeply embedded with supernatural sentient beings, both 'Story' beings — supernatural non-human entities who are able to impact the physical world — and also Old

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[3] W.E.H. Stanner, 'In Traditional Aboriginal Society: A Reader' in W. H. Edwards (ed), *The Dreaming* (MacMillan Co, 1987) 225.
[4] Fred Myers, *Pintupi Country, Pintupi Self: Sentiment, Place and Politics among Western Desert Aborigines* (Smithsonian Institution Press and Australian Institute of Aboriginal Studies, 1986) 47.
[5] MJ Meggitt, *Desert People: A Study of the Walbiri Aborigines of Central Australia* (Angus & Robertson Publishers, 1962) 252. Meggitt points out that, amongst the Walbiri, the sun, rain and kangaroos are also subject to these social rules emanating from The Dreamtime.
[6] For example, Myers writes that people and the landscape are thought to be 'from The Dreaming – tjukurrtjanu', and that therefore the existence of a hill associated with an important tjukurrpa story is evidence of the truth of that story, Myers, above n 4, 49.
[7] Ibid 52.
[8] Meggitt, above n 5, 251.
[9] The term 'country' is widely used to describe Aboriginal land and encompasses a physical, metaphysical, legal, social and spiritual landscape.
[10] Marcia Langton, above n 2, 259, 266. Myers, above n 4, 59.
[11] WEH Stanner, *After the Dreaming* (ABC Enterprises, 1968) 44.

People, deceased ancestors of the community.[12] These beings have senses and emotions, are deeply embedded both in certain places and in the 'everywhen'.[13] The landscape is therefore simultaneously a 'representation of the past, the present and the future'.[14] This conception of landscapes:

> [I]s rather like the way that someone with a reasonable astronomical knowledge in Western culture perceives the night sky resplendent with twinkling stars ... there is the simultaneous sense of perceiving something that is present, the view itself sensed visually at that time, and of perceiving things that are past, the stars whose deaths many thousands of light years ago are perceived as the twinkling radiances ... What I see in the sky are ancient traces of light emanating across vast distances from giant bodies of fire. Bama [people] similarly perceived the spiritual presence of Elders in the landscape ...[15]

Amongst the Bama, people's property rights are found in their ancestry, stories and practices, and are often related to physical attributes of land.[16] People's connection to and rights and interests in land continues even if they have spent many years away from it: property rights do not depend on occupation. Elders hold both the authority of law, as well as being the people charged with keeping and passing on the law. Rights in land derive from:

> [A] body of knowledge about the relationship among particular beings, human and non-human, and the places for which they bear particular responsibilities and in which they have particular rights. This knowledge is held in trust by knowledgeable Elders and transmitted to the junior members of society as their right by birth into the group. It is through this knowledge that people write themselves on the land and the land in themselves.[17]

Different locations are inscribed with different spiritual affiliations which direct human behaviour. For example, a central tenet of Aboriginal law is that permission must be sought when entering another person's country. This is the 'primary law that Elders recite in asserting their authority over places'.[18] Mervyn Meggitt asserts that, among the Walbiri of the central Australia, this means other communities' territorial boundaries are respected, and that 'territory

[12] Marcia Langton, above n 2, 256–259.
[13] Ibid 265. The 'everywhen' is a term used by Stanner to describe the time in which the 'Dreamtime' occurred, i.e. in the past, present and future – see Stanner, above n 11.
[14] Marcia Langton, above n 2, 265.
[15] Ibid 265–6. Myers similarly describes The Dreaming as representing 'all that exists as deriving from a single, unchanging, timeless source ... time as continuity': Myers, above n 4, 52.
[16] Myers, above n 4, 49.
[17] Marcia Langton, above n 2, 255.
[18] Ibid 258.

seized in a battle was virtually an embarrassment to the victors, whose spiritual ties were with other localities'.[19]

There are also specific requirements of behaviour in certain places, including which gender is allowed to enter certain areas, and what people must wear in order that they are treated well by the spiritual presences within.[20] Breaches of law are punished both by people and by spiritual beings.[21] Meggitt writes that, prior to the coming of the colonising Europeans, the Walbiris':

> Socio-cultural and physical environment was then comparatively stable, and the range of events that men were likely to encounter was relatively limited. We do not know how the law developed to meet this reality; but, once it was formulated, the people had little reason to change it, especially as the putative basis of the stability of the cosmos, the dreamtime, was thought to be ever-present.[22]

### *B. The Arrival of Colonial Settler Law*

#### *1. Acquisition of Sovereignty*

There are competing views on the legal basis for the British Crown's acquisition of sovereignty over Australia. At the time of colonisation, the position at both international law and common law (although it was the common law that applied to the Australian colonies) was that colonies could be acquired by settlement, conquest or cession. The official Australian law account is that Britain acquired sovereignty over Australia by settlement. By the end of the 18th century, the doctrine of settlement, which said that sovereignty could be acquired over land that had no other owner, that was 'desert and uncultivated' (the common law conception) or was terra nullius (the international law doctrine) had evolved. It initially referred to an uninhabited land, but was later expanded to include lands whose occupants were considered 'uncivilized' or incapable of united political action.[23] The definition adopted by the Privy Council in the 1889 case of *Cooper v Stuart* which held that at the time of British settlement the colony of New South Wales had:

> [C]onsisted of a tract of territory practically unoccupied, without settled inhabitants or settled law,

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[19] Meggitt, above n 5, 246.
[20] Marcia Langton, above n 2, 261–2.
[21] Ibid 261.
[22] Meggitt, above n 5, 253. He adds that it was not that law did not change, but that if changes were made they could easily be fitted into the existing framework, and the 'fiction of the immutability of the law could be maintained ... Certainly, the people have no tradition that law can be changed.'
[23] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 39–42, ('*Mabo*'). Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-Mabo: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore' (2004) 38 *University of New South Wales Law Journal* 703.

> at the time when it was peacefully annexed to the British dominions.[24]

It is a view that has been subject to criticism. Justice Murphy of the High Court said of the decision that:

> Although the Privy Council referred in *Cooper v Stuart* to peaceful annexation, the aborigines did not give up their lands peacefully: they were killed or removed forcibly from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement by the Privy Council may be regarded either as having been made in ignorance or as a convenient falsehood to justify the taking of aborigines' land.[25]

In the words of Justice Brennan in *Mabo*, this meant that:

> The indigenous people of a settled colony were thus taken to be without laws, without a sovereign and primitive in their social organization.[26]

However, the High Court in *Mabo* accepted th**a**t Britain had acquired sovereignty over Australia by settlement, subject to an alteration of the doctrine.[27]

The alternate view is that Aboriginal sovereignty and self-government continues to operate in Australia in spite of Australian settler law holding otherwise.[28] This view is discussed further below in 'legal pluralism'.

*2. The Continuity of Aboriginal Law?*

The arrival of colonialism also meant the introduction of the common law, although not in its entirety.[29] The English common law was first found to apply to intra-Aboriginal disputes in 1836 by *R v Jack Congo Murrell*, a case concerning the murder of one Aboriginal person by another.[30] It is clear, however, that Aboriginal law continued to be practised. Nancy William's influential study of the dispute resolution processes of the Yolngu people of Arnhem Land (in

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[24] *Cooper v Stuart* (1889) 14 App Cas 286, 291 ('*Cooper v Stuart*').
[25] Justice Murphy in *Coe v Commonwealth* (1979) 24 ALR 118.
[26] *Mabo* (1992) 175 CLR 1, 36.
[27] Mabo (1992) 175 CLR 1, 37–8, 57 (Brennan J, with whom Mason CJ and McHugh J concurred), 79–80 (Deane and Gaudron JJ), 182 (Toohey J), 13 8–9 (Dawson J). The legal justification for the acquisition of sovereignty is mired in scholarly criticism that is beyond the scope of this thesis, refer to the discussion below 'The Recognition of Native Title'.
[28] Marcia Langton, 'Indigenous Self-Government and Self-Determination: Overlapping Jurisdictions at Cape York' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994); Noel Pearson, 'Aboriginal Law and Colonial Law Since Mabo' in Christine Fletcher (ed), *Aboriginal Self-Determination in Australia* (Aboriginal Studies Press, 1994).
[29] *Mabo* (1992) 175 CLR 1, 80 per Deane and Gaudron JJ.
[30] *R v Jack Congo Murrell* (1836) 1 Legge 72. Prior to this case, Aboriginal people had been charged under the common law in relation to crimes committed against non-Aboriginal people.

the Northern Territory) carried out in the 1960s found that Yolngu law continued alongside settler law. She argues that:

> The Yolngu community viewed Australian law as based on values contradictory to their own … the existential propositions that gave validity to their law — beliefs about the nature of man, the relationships of men and women to each other, and to the environment — had few if any points of correspondence with white Australian values and Yolngu were unwilling to compromise … their beliefs.[31]

In 1986 the Australian Law Reform Commission commented that 'there are many indications that Aboriginal customary laws and traditions continue as a real controlling force in the lives of many Aborigines'.[32] Elizabeth Eggleston has remarked that this conflict between the legal and factual accounts of British colonisation resulted in a '"conflict of laws" problem, whether or not this was officially acknowledged'.[33]

The first case to assert Aboriginal rights and interests in land was instigated by the Yolngu people in 1971. *Milirrpum v Nabalco Pty Ltd* was brought in response to a bauxite mining lease being granted, without consultation, over Yolngu country. The claim was ultimately unsuccessful for reasons including that the judge felt bound by *Cooper v Stuart*.[34] However, Justice Blackburn said of the Yolngu:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.[35]

The Commonwealth government responded to this case by establishing the Woodward Royal Commission to look into ways in which Aboriginal land rights could be recognised. In 1974, the Commission recommended the establishment of an Aboriginal land rights regime. [36] The Commonwealth government responded by passing the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*ALRA*).[37] It was the first Australian legal recognition of Aboriginal rights to

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[31] Nancy Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Australian Institute of Aboriginal Studies, 1987) 149.
[32] Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (31, 1986) 38.
[33] Elizabeth Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (Australian National University Press, 1976) 277.
[34] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 268, ('*Milirrpum v Nabalco Pty Ltd*').
[35] *Ibid* 267.
[36] A.E. Woodward, 'Aboriginal Land Rights Commission' (Commonwealth of Australia, 1974).
[37] The legislation was passed for the Northern Territory because it is a territory over which the Commonwealth has far greater control and is also a region with a high Aboriginal population.

land held according to traditional law and custom. The *ALRA* initially gave traditional owners a veto over the granting of exploration licences and mining interests, subject to a 'national interest' override that has not yet been applied. Since amendments in 1987, however, the ability to veto is only in relation to exploration licences.[38]

### *C. Contemporary Practise of Aboriginal Law in the Kimberley and Central Queensland*

#### *1. In the Kimberley*

There is significant publicly available evidence of the contemporary practise of Aboriginal law and custom in the Kimberley. Successful native title claims have been made over 70 per cent of the Kimberley comprising large areas of exclusive possession native title.[39] These determinations are indicative of traditional laws and customs having continuing 'substantially uninterrupted' since British sovereignty.[40] Kimberley Aboriginal leader Peter Yu asserts that there is a 'strong sense of political unity' across the Kimberley which is based in Aboriginal law.[41] Underlying this unity is an understanding of the Kimberley as a single cultural domain, as expressed through the 'wunan', a continuing relationship bond and trade network expressed geographically that details the rights, responsibilities and obligations of Kimberley Aboriginal people.[42]

The wunan is:

> An egalitarian principle that forces the spread of wealth to be shared by all adults in the system still prevails. Things are to be given away. Wealth is for all. Nothing is meant to remain in any one bank account, pocket, suitcase or to any individual's advantage for any length of time. Goods and services circulate around the community.[43]

It forms an:

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[38] *Aboriginal Land Rights (Northern Territory) 1976* (Cth) s 40.

[39] See discussion in Chapter 5, 'The Kimberley'. See also the maps in Appendix 1, particularly Map 2 which shows large areas of exclusive possession native title.

[40] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, at 456 per Gleeson CJ, Gummow and Hayne JJ.

[41] Peter Yu, 'The Kimberley: From Welfare Colonialism to Self-Determination' (1994) 35 *Race & Class* 21, 32.

[42] Kim Doohan, *'Making Things Come Good': Aborigines and Miners at Argyle* (PhD, Macquarie University, 2006) 213. Doohan notes that the wunan extends into north-west parts of the Northern Territory, and has similarities with other regional systems, 219. Note that this concept is also spelt 'wirnan' (see next quote), 'winan' and 'unan' by several sources. This thesis uses the most common spelling 'wunan' except when quoting directly from a source that spells it otherwise.

[43] Hilton Deakin, *The Unan Cycle: A Study of Social Change in an Aboriginal Community* (PhD, Monash University, 1978) 159–161.

> Integral element of Aboriginal peoples' secular and ritual lives, and how there have been severe sanctions for those who have not met the expectations of a wirnan exchange or have been dishonest in their wirnan dealings.[44]

Senior Kimberley law boss John Watson says:

> We had a little bit of difficulty amongst ourselves in certain cultural areas, but we have very strong beliefs that we have a [Kimberley] culture, even if we have differences.[45]

Watson argues that:

> We got to ... stand up for ourselves, not just our own mob … a lot of kartiya [non-Aboriginal] don't understand that. They reckon they can cut people out and make secret deals.[46]

Wayne Bergmann similarly emphasises this point:

> We've got a common cultural background; we've got a common belief of Kimberley Aboriginal people sticking together. We've got common values about concerns for the environment [47]

In an extensive study Kim Doohan describes the practise of Aboriginal law in the renegotiation of the Argyle Diamond Mine Good Neighbour Agreement. She places this practise in the context of the 'wunan'.[48] Punishment for people who 'break the rules' of the wunan can be severe, writes Doohan:

> "[Y]ou can get kicked out for good if you make a mistake, if you didn't do the right things, there is no second chance" … [says] Janet Oobagooma … In the past this could have meant that the offender was killed.[49]

In the Argyle Diamond mine negotiations decisions were always arrived at by consensus and in consultation with particular elders and spiritual beings. This was in order:

> [T]o ensure that the decision will not generate tensions and disruption within the Aboriginal

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[44] Kim Doohan, above n 42, 214.
[45] John Darraga Watson, Malcolm Allbrook and Liz Thompson, *Never Stand Still: Stories of Land, Life and Politics in the Kimberley* (Jarlmadangah Burru Aboriginal Corporation, 2012) 162.
[46] Ibid 163.
[47] Quoted in Australian Broadcasting Corporation, 'Interview with Wayne Bergmann', *Four Corners*, 22 September 2008.
[48] Kim Doohan, above n 42, 213. Doohan notes that the wunan extends into north-west parts of the Northern Territory, and has similarities with other regional systems, 219.
[49] Ibid 216.

> community or the metaphysical world. For example when Aboriginal people were deciding whether or not to take [a particular performance] on tour it was considered necessary to seek the permission not only all the performers but also the "Rainbow" [spirit] who resided in the country.[50]

Strict rules of who could 'speak' for country were enforced in the negotiations, based on gender, seniority and descent-based connections.[51] The site of the Argyle Diamond Mine, for example, is known as a women's site and thus women played a large role in the negotiations.[52] Certain cultural practices also informed the timing of meetings. Observes Doohan:

> [T]he darkness of the night-time is a traditional time when Aboriginal people air grievances and assert their authority, their opinions and their positions without fear of open challenge or of transgressing established positions within the community.[53]

*2. In Central Queensland*

There is far less publicly available evidence of the contemporary practise of Aboriginal law and custom in central Queensland. An exception relates to the Ghungalu/Kangoulu people of central Queensland who have shown evidence of continuing law and tradition in relation to rights and interest in land, as well a strong commitment to the protection of cultural places, the passing down of important stories and the continuing use of a range of culturally significant trees and plants.[54] In addition registered native title rights clearly show a continuing adherence to Aboriginal law and custom.[55]

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[50] Ibid 206.
[51] Ibid 204.
[52] Ibid 203.
[53] Ibid 204.
[54] James Weiner, Luke Godwin and Scott L'Oste-Brown, 'Australian Aboriginal Heritage and Native Title: An Example of Contemporary Indigenous Connection to Country in Central Queensland' (Occasional Paper Series 1, National Native Title Tribunal, 2002), 10-14.
[55] Refer to Map 1 Appendix 1 showing registered native title claims. Refer also to the registration test discussion below for why this means that Aboriginal law and custom continues in these. Note that Map 2 shows that there are very few determined native title rights and interests in central Queensland.

## III. COMMONWEALTH LAW

### *A. The Recognition of Native Title*

The *Mabo* decision was handed down by the High Court in 1992.[56] The court held that *terra nullius* had always been a 'fiction'.[57] *Mabo* did not, however, overturn the finding that British sovereignty had been acquired by settlement.[58] Rather, it altered the common law conception of settlement, stating it could validly occur even when the acquired land had owners with valid systems of laws.[59] This meant that sovereignty and all 'radical title' — the sovereign power to deal with land — vested in the British Crown.[60] Deane and Gaudron JJ found that the common law of England was first introduced into the Australian colonies in 1788 as domestic law, although not in entirety: only 'in so far as such laws were applicable to the conditions of the new Colony'.[61] English land law was one of those laws said to be directly applicable to the new colony. [62] However the court found a distinction between the Crown's radical title and the Crown's ownership of land ('beneficial title'). This conception left room for the recognition of Aboriginal property rights and interests because:

> [T]he mere fact that the radical title to all the lands of the Colony was vested in the British Crown did not preclude the preservation and protection, by the domestic law of the new Colony, of any traditional native interests in land which had existed under native law or custom at the time the Colony was established. Whether, and to what extent, such pre-existing native claims to land survived annexation and were translated into or recognized as estates, rights or other interests must be determined by reference to that domestic law.[63]

The majority held that the Meriam people held possessory title to their traditional land, which it termed 'native title'. Justice Brennan defined native title in the following terms:

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[56] *Mabo* (1992) 175 CLR 1. Finding for the Meriam's peoples native title in Mer were Brennan (with whom Mason CJ and McHugh concurred on all points), Deane and Gaudron JJ (in a joint judgement) and Toohey J. Dawson J dissented. See Richard Bartlett, *Native Title in Australia (3rd Edition)* (Lexis Nexis Butterworths Australia, 2015) 27 for a discussion on the matters agreed between the judgments.

[57] *Mabo* (1992) 175 CLR 1, 45, 58 per Brennan J, and 108-9 per Deane and Gaudron JJ. The use of the term 'terra nullius' in the judgement is controversial given it was not used in submissions to the court and, as the court found, had never been the legal position in Australia given the common law definition had been formerly used. See, for example, David Ritter, 'The Rejection of Terra Nullius in Mabo: A Critical Analysis' (1996) 18 *Sydney Law Review* 5, 214. See also Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' 19 *Melbourne University Law Review* 195, Bartlett, above n 56, 28.

[58] *Mabo* (1992) 175 CLR 1, 58 per Brennan J, 79 per Deane and Gaudron JJ, 182 per Toohey J.

[59] *Mabo* (1992) 175 CLR 1, 37–39 per Brennan J.

[60] *Mabo* (1992) 175 CLR 1, 53 per Brennan J, 81 per Deane and Gaudron JJ

[61] *Mabo* (1992) 175 CLR 1, 80 per Deane and Gaudron JJ, although note that the exact date of 1788 is disputed.

[62] Ibid.

[63] *Mabo* (1992) 175 CLR 1, 45, 81 per Deane and Gaudron JJ.

> The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.[64]

Native title was found to be consistent with common law doctrines, therefore, the common law was capable of recognising it. According to Justice Brennan, recognition could not 'fracture the skeleton of principle which gives the body of our law its shape and internal consistency' and this conception did not do so.[65] *Mabo* said that traditional laws and customs that have changed and evolved are still capable of recognition by the common law, that is they are not 'frozen as at the moment of establishment of a Colony'.[66]

The *Mabo* decision has been the subject of scholarly criticism for several reasons, two of which are discussed here. First, the High Court specifically said that it could not interrogate the successful method by which the British Crown had achieved sovereignty over Australia because, as an institution of the Australian State, it did not have jurisdiction to adjudicate this issue.[67] This finding left the legal justification for Australian sovereignty open to justifiable criticism.[68]

Second, 'native title' is not Aboriginal law but merely the common law's ability to recognise some aspect of it. [69] Many have argued that, rather than being the radical decision of popular imagination, *Mabo* was instead a conservative decision.[70] Others have pointed to the pragmatic compromise at the heart of the decision.[71]

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[64] *Mabo* (1992) 175 CLR 1, 57 per Brennan J. This definition was largely adopted by the *Native Title Act* s 223; *Mabo* (1992) 175 CLR 1 59–60. It is worth noting that many scholars convincingly argue that the rights recognised by the court in *Mabo* have been progressively weakened by a series of court decisions and legislative changes that have weakened native title rights. See Maureen Tehan, 'Hope Disillusioned, an Opportunity Lost - Reflections on Common Law Native Title and Ten Years of the Native Title Act, A' (2003) 27 *Melbourne University Law Review* 523.; Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2009).

[65] *Mabo* (1992) 175 CLR 1, 29 per Brennan J.

[66] *Mabo* (1992) 175 CLR 1, 110 per Deane and Gaudron JJ.

[67] *Mabo* (1992) 175 CLR 1, 69 per Brennan J, 78-79 per Deane and Gaudron JJ.

[68] Gerry Simpson has said that 'Australian judicial pronouncements on acquisition [of sovereignty are a] series of elisions and slippages [which] provide the tools for a series of artificial and purely formal reconciliations of law, politics and history', see Simpson, above n 57, 200. See also Strelein, above n 64., and Michael Mansell, 'The Court Gives an Inch But Takes Another Mile' (1992) 2 *Aboriginal Law Bulletin* 4.

[69] Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life* (University of Queensland Press, 1997) 150.

[70] Marcia Langton, 'Dominion and Dishonour: A Treaty Between Our Nations?' (2001) 4 *Postcolonial Studies* 13, 13.; Pearson, above n 69, 150.; Richie Howitt, 'Scales of Coexistence: Tackling the Tension between Legal and Cultural Landscapes in Post-Mabo Australia' (2006) 6 *Macquarie Law Journal*.

[71] Richard Bartlett, 'Mabo: Another Triumph for the Common Law' (1993) 15 *Sydney Law Review* 178. See also Simpson, above n 57, 206.

### *B. The Native Title Act and Subsequent Case Law*

The *Native Title Act* was passed in response to *Mabo*.[72] It is national legislation, and therefore binds all states and territories within the Australian federal system.[73] Other legislative powers related to native title rights and interests sit largely with the states and territories — for example in relation to resources permits, environmental protection, cultural heritage and the ability to compulsory acquire land — although the Commonwealth retains power to legislate for certain matters, particularly in relation to environmental protection.[74]

Among other things, the Act validated all land grants and resource legislation made prior to its enactment, in order to address the concern that land titles might no longer be lawful given the belated recognition of native title. The Act also created a regime, known as the 'future act' regime, to govern activities on land the subject of native title claims or determinations.[75] What follows is a brief description of native title processes and case law.[76]

An application for native title can be made via a 'registration test'. [77] This test requires that claimants satisfy certain requirements, including establishing a *prima facie* case that at least one member of the group and their predecessors has an association with the area being claimed, and that there is a continuing body of traditional laws and customs, acknowledged and observed by that group, that give rise to the native rights being claimed.[78] A registered applicant or applicants make the native title claim: it is these people who make decisions on the part of the group.[79] After a claim is determined, native title rights and interests are communally held by the native title group, who nominate an organisation known as a 'Registered Native Title Body Corporate' to manage these rights and interests, and represent the group in relation to them.[80]

There is a complex legal test for claiming native title. Claimants must demonstrate the claimed rights and interests in land or waters are possessed under acknowledged traditional laws and

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[72] Tim Rowse, 'How We Got a Native Title Act' [1993] *Australian Quarterly*.
[73] Richard Bartlett, *Native Title In Australia* (Butterworths, 2000) 88.
[74] See generally Chapter 3, Bartlett, above n 55 on 'complementary' and 'incompatible' state legislation. For an example on the interaction between state laws and the *Native Title Act* see *Parker v State of Western Australia [2008]* FCAFC 23 which said that the expedited procedure of the *Native Title Act* could apply because state heritage legislation would protect significant sites.
[75] The Honourable Paul Keating, 'Second Reading Speech of the Native Title Bill 1993' <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F1993-11-16%2F0040%22>.
[76] These matters are described only briefly here as they are outside the scope of this thesis.
[77] *Native Title Act* ss24-44. Claims for native title can proceed without registration but don't have access to the future act regime.
[78] *Native Title Act* s190B.
[79] *Native Title Act* s190B.
[80] *Native Title Act* s55-57. These organisations are also known as 'Prescribed Body Corporates', and can be either a trustee or an agent of the group, see Angus Frith, *Getting It Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations* (PhD, University of Melbourne, 2013) 118–119.

observed traditional customs since prior to the assertion of British sovereignty.[81] The elements needed to show this are that:

> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.[82]

Each element needs to be satisfied separately. This includes particularising and proving each and every element of traditional law and custom.[83] Traditional laws and customs must originate from before the assertion of British sovereignty and must have continued 'substantially uninterrupted' since then.[84] Native title rights and interests can only be held by an identifiable community or society that has continued to acknowledge the same body of traditional law and custom since before the acquisition of British sovereignty.[85] There is no requirement for a continuing physical connection.[86]

*Mabo* said that native title could only be extinguished by the Crown through 'clear and plain legislation or by an executive act authorised by such legislation'.[87] However this test has been acknowledged but 'ignored' in subsequent case law.[88] In *Western Australia v Ward* the majority of judges found that the test was instead that of 'inconsistency of rights'.[89] Where a native title right is found to be inconsistent with a right granted to a third party, the native title right is extinguished to the extent of the consistency.[90] The test in *Ward* is considered a much weaker protection against extinguishment of native title than was contained in *Mabo*.[91] More recently the High Court has found that native title can be 'suspended' during the operation of an inconsistent mining lease.[92]

Native title litigation subsequent to *Mabo* has defined native title as consisting of a 'bundle of

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[81] See *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Native Title Act*, ss 223, 225.
[82] *Native Title Act* s223
[83] *Western Australia v Ward* (2002) ('*Ward*') 213 CLR 1, at 94 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[84] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, at 456 per Gleeson CJ, Gummow and Hayne JJ.
[85] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[86] *Western Australia v Ward* (2002) 213 CLR 1, 85 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[87] *Mabo* (1992) 175 CLR 1, 92.
[88] Bartlett, above n 56, 82.
[89] *Western Australia v Ward* (2002) 213 CLR 1, at 78.
[90] *Ward*, at 78, 82.
[91] Bartlett, above n 56, 84.
[92] *Western Australia v Brown* (2014) 253 CLR 507. This case is generally considered to have strengthened the ability of native title to survive extinguishment, see Ibid 112–113.

rights ... the individual components of which may be extinguished separately'.[93] These rights exist along a continuum, from weaker rights like the right to conduct ceremonies and to hunt and fish, to the strongest native title right being that of exclusive possession of land.[94] The right to 'exclusive possession' native title, for example, is only possible in areas where no inconsistent third party interests have been granted. This means that native title determinations can vary considerably in strength. For example, the Dambinmangari people of the Wanjina Wunggurr bloc in the north Kimberley have a native title determination that covers 27,932 square kilometres, most of which is exclusive possession native title.[95] In contrast, in north east Victoria the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples native title determination found that native title is extinguished in large parts of the claim while non-exclusive native title rights (including the right to hunt, fish, gather and camp) continue to exist only in smaller areas.[96] Ritter and Flanagan refer to the rights and interests in such determinations as 'empty' native title rights that are akin to public rights of access.[97]

*1. The 'Future Act' Regime*

'Future acts' are proposed uses for land with claimed or determined native title rights and interests that will 'affect' those native title rights and interests, for example the grant of a mining tenement.[98] The Act sets out procedural requirements for how future acts can validly be done, including how land access agreements can be negotiated when the proposed impact on native title rights and interests will be significant.[99] This regime does not give traditional owners a veto.

Then Prime Minister Paul Keating described the rationale for the regime:

> It delivers justice and certainty for Aboriginal and Torres Strait Islander people, industry, and the whole community … a mining grant can generally be made over your or my freehold. It will be exactly the same for native title … This emphasis on Aboriginal people having a right to be asked

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[93] *Western Australia v Ward* (2002) 213 CLR 1, 76, 95 per Gleeson CJ, Gaudron, Gummow, Hayne JJ, with Kirby J concurring. Lisa Strelein has been vocal in her view that courts are too ready to downgrade native title rights, even where the factual circumstances should not warrant such a finding - Lisa Strelein, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 129.

[94] Refer generally to Chapter 15 'Content of Native Title' in Bartlett, above n 56.

[95] *Barunga v State of Western Australia* [2011] FCA 518. Exclusive possession native title gives holders the right to exclude the world.

[96] *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795

[97] David Ritter and Frances Flanagan, 'Lawyers and Rats: Critical Legal Theory and Native Title' in Sandy Toussaint (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, 2004) 128.

[98] *Native Title Act*, s 233. An act 'affects' native title if it extinguishes native title rights and interests or is wholly or partially inconsistent with their continued existence, enjoyment or exercise, s 227.

[99] This aspect of the future act regime is known as the 'right to negotiate' and is detailed below.

> about actions affecting their land accords with their deeply felt attachment to land. But it is also squarely in line with any principle of fair play. It is not a veto.[100]

The purpose of the 'future act' regime is to enable development: negotiations must be undertaken 'with a view to reaching an agreement about the act (activity).'[101] The Act stipulates that certain 'future acts' may only be undertaken on land with native title rights and interests if they could also be validly done on freehold land (known as the 'freehold test').[102] Valid future acts generally do not extinguish native title.[103] The Act allows native title rights and interests to be compulsorily acquired.[104]

There are different minimum procedural rights in relation to 'future acts', depending on what kind of 'future act' is proposed and the level of impact it will have on native title rights and interests. These include the opportunity to comment, the right to be consulted, the right to object and the right to negotiate. Where the proposed 'future act' will have little or no impact on native title rights and interests, native title holders and claimants are accorded lower (just the right to be consulted, for example) or no procedural rights.[105] The regime does not apply to land where it is clear that native title has been completely extinguished.[106]

The future act process is instigated by the relevant Minister giving notice to native title parties (and the public) that various licences are to be issued (known as notification).[107]

*(a) Right to Negotiate*

The 'right to negotiate' is the Act's strongest procedural right in relation to 'future acts' and applies to the taking of land by compulsory acquisition for third party benefit, certain acts done by governments, and the exploration (except 'low impact' exploration), exploitation and extraction of minerals, oil or gas (which are all considered to have a significant impact on native title rights and interests).[108] It is an important procedural right for traditional owners, which has given groups an

[100] The Honourable Paul Keating, 'Second Reading Speech of the Native Title Bill 1993'.
[101] *Native Title Act*, s 25.
[102] *Native Title Act*, s24MD.
[103] *Native Title Act*, 24AA(6)
[104] Native Title Act, ss24M, 26, 51(2).
[105] These procedural rights are contained in Subdivisions G, H, I, JA, J, K, M, N of the *Native Title Act* but are outside the scope of this thesis.
[106] *Anaconda Nickel Ltd v Western Australia (2000)* 165 FLR 116, [29] & [191].
[107] *Native Title Act*, s 29.
[108] *Native Title Act*, s 26. Note that it is possible for proponents of future acts to fast track their application and avoid the right to negotiate under the 'expedited procedure' of the Act if the proposed act is unlikely to interfere directly, or cause major disturbance to, native title holders, their rights and interests: see s 237.

opportunity to have some say over what occurs on their traditional land.[109] When the 'right to negotiate' applies, the Act provides parties with a choice of either negotiating an 'Indigenous Land Use Agreement' (ILUA), following the 'right to negotiate' process and negotiating an agreement commonly referred to as a 's31 agreement', or following both processes concurrently.[110]

ILUAs are voluntary and legally binding contracts with traditional owners over land access that can also be used even where the 'right to negotiate' does not apply. [111] They are generally considered appropriate for more complex matters. The Act's ILUA provisions do not require negotiations to be conducted in good faith, [112] but do set out extensive authorisation and registration requirements. These requirements include that 'all reasonable efforts' have been made to identify all native title holders to which the ILUA applies, that these native title holders have authorised the making of that ILUA (according to traditional law and custom or otherwise), and that the ILUA be registered with the NNTT.[113] ILUAs act as a contract between the parties,[114] and bind all native title holders (including those who are not a party to the ILUA).[115] Both ILUAs and s31 agreements can contain a wide variety of matters, including financial compensation, environmental protection and employment and training, but do not have to.[116] The *Native Title Act* is silent on how the quantum of agreement benefits (if any) should be calculated and how negotiations should be conducted, other than that they should be in 'good faith'. In relation to compensation for the extinguishment of native title outside agreement making,[117] the Act contains a cap that limits compensation for extinguishment to 'the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters'.[118] However this cap is described as 'confusing' given it is subject to the Australian Constitution's requirement that the acquisition of property be on 'just terms'.[119] Where compensation is payable for the grant of a

[109] Marcia Langton and Alistair Webster, 'Right to Negotiate', the Resources Industry, Agreements and the Native Title Act' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012).
[110] The negotiations of the Browse LNG agreements followed both processes concurrently, and it is likely that the Curtis Island LNG negotiations did likewise. See discussion in Chapter 5, 'The Browse LNG Agreements', 'The Curtis Island LNG Agreements'.
[111] ILUAs can take three different forms, known as 'body corporate agreements', 'area agreements' and alternative procedure agreements'. The difference between these types of ILUAs is not relevant for this thesis.
[112] Unlike 's31 agreements, see below 'Good Faith'.
[113] *Native Title Act*, s 24AA-24EC.
[114] *Native Title Act*, s 24EA(1)(a))
[115] *Native Title Act*, s 24EA(1)(b) & (2).
[116] Native Title Act, s 24BB, CB, DB. To see the range of subject matter in the Browse LNG agreements, for example, refer to Appendix 4.
[117] Compensation is only payable for the extinguishment of native title in limited circumstances, see generally Chapter 28, Bartlett, above n 56.
[118] *Native Title Act*, s51A(1).
[119] Bartlett says that this cap is confusing because of the 'just terms' condition and because 'native title and freehold are not, of course, the same. Native title may comprise a panoply of rights. Native title may have a greater

mining interest, the NNTT has rejected the idea that native title rights and interests 'are artificially converted to freehold rights and that the peculiar features of native title law are to be ignored'.[120]

The minimum period for a 'right to negotiate' negotiation is a period of six months from notification.[121] The parties can vary this time limit if no agreement has been reached within this time.[122] If they choose not to do this, any party may choose to go to arbitration and apply to the NNTT for a determination.[123] The NNTT must determine whether or not the act can be done, and whether any condition should be imposed on the doing of that 'future act'.[124]

The NNTT has rarely refused to allow 'future acts': as of 8 January 2016, the NNTT has refused to allow just three 'future act' applications, while allowing 51 'future acts' without any attached conditions, and a further 39 future acts with certain conditions, often minimal, imposed.[125]

*(b) Good Faith*

Section 31 agreements must be negotiated 'in good faith with a view to obtaining the agreement of each of the native title parties'.[126] The scope of the duty to negotiate in good faith is only in relation to the doing of the future act.[127]

Good faith requires parties to act with subjective honesty of intention and sincerity, and also to act in accordance with certain objective indicia, including reasonableness. Parties whose conduct is so unreasonable that it could not be said that they had any sincere or genuine desire to reach an agreement are not negotiating in good faith. In addition, a lack of good faith can be assessed against indicia including unreasonable delays in communication; failing to make proposals, stalling or unnecessarily delaying negotiations; refusing to compromise on trivial matters; adopting a rigid or non-negotiable position; failing to make counter offers; and taking unilateral and unreasonable steps.[128] The development of large-scale projects may impose a more proactive role on

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significance, especially in the circumstances of a forced taking' Bartlett, above n 56, 794. There has not yet been litigation clarifying this point.

[120] *Western Australia v Thomas* (1996) 133 FLR 124 at 192.

[121] *Native Title Act* s35.

[122] *Native Title Act* s35.

[123] *Native Title Act* s35. Although in practice it is usually the non native title party who does so given the NNTT's reputation for rarely refusing the grant of 'future acts', see Bartlett, *Native Title In Australia*, above n 73, 476.

[124] *Native Title Act* 38.

[125] National Native Title Tribunal, Search Future Act Applications and Determinations, available at <http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>

[126] *Native Title Act* s31.

[127] *Risk v Williamson* (1998) 155 ALR 393, at 412.

[128] *Western Australia v Taylor* (1996) 134 FLR 211, *FMG Pilbara P/L v Cox* (2009) 175 FCR 141; 255 ALR 229.

government, including harmonising native title negotiations with other aspects of project negotiations.[129]

However, negotiating in good faith does not require parties to deviate from their commercial interest, and can encompass 'hard line' negotiations.[130] It also does not impose a requirement to negotiate beyond the six-month period even where the doing of the future act has not yet been discussed in substance.[131]

### *C. Environment Protection and Biodiversity Conservation Act*

The other significant Commonwealth legislation relevant to the negotiations is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act'*), which regulates the protection of matters of national environmental significance, and — though far more peripherally — the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth)[132] which regulates petroleum and gas resources in Commonwealth waters.

The *EPBC Act* was applicable to both Browse and Curtis Island negotiations because of its jurisdiction over matters of 'national environmental significance', over Commonwealth waters (in which a large portion of the Browse Basin is located) and over National Heritage listings.[133] Both projects were deemed to be 'controlled action' developments for which an *EPBC* environmental impact assessment ('EIA') was required.[134]

The *EPBC Act* provides that its EIA process can be devolved to a relevant state authority, as was done for both Browse LNG and Curtis Island LNG. It requires environmental factors to be balanced with economic and social factors.[135] However, the final authority rests with the federal Minister. There are no specific requirements in the Act stipulating that traditional owners or Aboriginal people more broadly are consulted in relation to a proposed EIA: when an EIA is open to public comment, they have the same right to be heard as the rest of the community. The *EPBC Act* also grants discretionary power to the Minister to order a 'strategic assessment' — generally considered to be a more holistic and extensive assessment than an EIA — to be carried out where

[129] *Western Australia v Taylor* (1996) 134 FLR 211, at 2.3 and 4.2.
[130] Deputy President Sumner in *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at 93-94.
[131] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49. An application for Special Leave to the High Court was refused.
[132] Discussed below in relation to the retention leases, 'Western Australian Law'.
[133] See Chapter 2, Part 3, Division 1, Subdivisions A (World Heritage), AA (National Heritage), F (Marine environment), FA (Great Barrier Reef Marine Park) *EPBC Act*. Both Curtis Island and Gladstone Harbour come under the EPBC Act because they are part of the World Heritage listed Great Barrier Reef Marine Park below their low water marks. In addition, both Curtis Island and the Kimberley are part of National Heritage Listings: the West Kimberley listing includes dinosaur footprints at James Price Point and Aboriginal heritage more generally, and the Great Barrier Reef Marine Park listing includes Gladstone Harbour and Curtis Island below the low water mark.
[134] *EPBC Act* s67, 67A
[135] *EPBC Act* s46-47 and s136

a planned policy, program or plan is complex, covers a whole region or has multiple stakeholders.[136]

A strategic assessment in relation to Browse LNG was agreed by the Commonwealth and Western Australia, and carried out jointly.[137] Among other things, the Browse LNG Strategic Assessment required an appraisal of the cultural, heritage and socio-economic impacts that Browse LNG would have on Aboriginal people, and their potential role in the development.[138] In December 2010, the Browse LNG Commonwealth Strategic Assessment was released, incorporating a KLC contribution of six volumes of material on social, cultural, environmental, heritage, archaeological and ethno-biological impacts for Kimberley Aboriginal people, comprising 958 pages. [139] The Indigenous Advisory Council of the *EPBC Act* noted positively that this level of Aboriginal involvement went beyond what was required by the legislation.[140]

No strategic assessment was ordered in relation to Curtis Island LNG. The reasons for this are not known, although the implications of this are discussed further in Chapter 6.[141]

## IV. STATE LAW

### *A. Western Australian Law*

Western Australian legislation had its most significant impact on the Browse LNG negotiations in relation to compulsory acquisition powers,[142] and the environmental approvals required under Part IV of the *Environmental Protection Act* 1986 (WA) ('*EP Act*'). The *EP Act* does not set out any specific role for traditional owners, or landowners more generally. These state approvals were the subject of litigation on several occasions.[143]

The *Aboriginal Heritage Act 1972* (WA) applies to any sites of Aboriginal cultural heritage within the precinct site. This legislation is notably weaker in its protections of sites of significance than

[136] *EPBC Act* s146.
[137] Australian Government-Western Australian Government, 'Relating to the Assessment of the Impacts of Actions under the Plan for the Browse Basin Common User Liquefied Natural Gas Hub Precinct and Associated Activities' (6 February 2008) to pursuant to s146 EPBC Act and s38(3) of the Environmental Protection Act 1986 (WA).
[138] Ibid, c7-8.
[139] Kimberley Land Council, 'Kimberley LNG Precinct Strategic Assessment: Indigenous Impacts Report Volume 1-6 '(6' (September 2010), available at http://www.dsd.wa.gov.au/8249.aspx#8260.
[140] Commonwealth Department of the Environment, 'Indigenous Advisory Council Annual Report' (2011), 17.36
[141] However a strategic assessment for the Great Barrier Reef, including an Independent Review of Gladstone Harbour, was ordered after the Curtis Island LNG native title negotiations had been completed (see Australian Government, Department of the Environment, 'Strategic Assessments', http://www.environment.gov.au/protection/assessments/strategic.
[142] *Lands Acquisition Act 1997* (WA), s241.
[143] Refer to Chapter 6, 'Environmental and Heritage Law'.

elsewhere in Australia.[144] It provides for the identification and recording of sites of Aboriginal cultural significance (which are ultimately determined by the relevant Minister) in a central register.[145] The Western Australian legislation does not impose significant penalties for damaging cultural heritage sites.[146]

The Browse Basin is located in both Commonwealth and Western Australian waters, and is governed by both state and federal legislation.[147] The Commonwealth retention leases are issued pursuant to the *Offshore Petroleum and Greenhouse Gas Storage Act* 2006 (Cth) and the state retention leases are issued pursuant to the *Petroleum (Submerged Lands) Act* 1982 (WA) and the *Petroleum and Geothermal Energy Resources Act* 1967 (WA).[148] At the time of negotiations, these retention leases required that the processing of Browse Basin gas be undertaken onshore to meet the political objective of economically developing the region.[149]

### *B. Queensland Law*

The most significant state legislation affecting the Curtis Island LNG negotiations was the *State Development and Public Works Organisation Act 1971* (Qld) ('*SDPWO* Act') the governing legislation for the Office of the Coordinator-General (OCG). The OCG was established by the state government to oversee all government approvals on large infrastructure projects, including all environmental and social impact assessments, [150] and has the power to compulsorily acquire land.[151] The OCG is generally understood to be pro-development.[152] All Curtis Island LNG projects came under the remit of the OCG after being declared 'coordinated projects'.[153]

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[144] *Aboriginal Heritage Act 2006* (Vic), Part IV. For example, Victoria is generally considered to have strong cultural heritage legislation because Aboriginal people are the decision makers on cultural heritage management plans (CHMPs). See also Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 316–7.
[145] Ben Boer and Graham Wiffen, *Heritage Law in Australia* (Oxford University Press, 2006) 301–303.
[146] *Aboriginal Heritage Act 1972* (WA), s16. For example, the regulations stipulate a $50 fine for unauthorised activities including digging in an area of a significant site: *Aboriginal Heritage Regulations 1974 (WA)* r.10.
[147] It was thought that approximately 5-8% of the Browse Basin was in state waters, however a redrawing of the boundary occurred in May 2014 that saw this percentage markedly increased to almost half: Angela Macdonald-Smith, 'Call to Investigate Browse Gas Decision' *Sydney Morning Herald*, 15 May 2014.
[148] The State's two retention leases are administered under different Acts due to the history of regulation in this area, see Western Australian government, Department of Mines and Petroleum, 'Western Australia's Petroleum and Geothermal Explorer's Guide' (2014) 31.
[149] The Commonwealth removed this requirement in August 2013, and Western Australia followed suit in mid 2015. Refer to discussion in Chapter 5, 'Demise of the Land Based Project'. Woodside Energy, 'ASX Announcement: Variation to Commonwealth Browse Retention Leases Approved' (2 August 2013).
[150] For example, an EIS prepared under the SDPWO Act is considered to be sufficient for the requirements of the parallel state regulations, *Environmental Protection Act 1994 (Qld)*, s50.
[151] *SDPWO Act*, Part 6, Division 1,
[152]Aynsley Kellow and Simon Niemeyer, 'The Development of Environmental Administration in Queensland and Western Australia: Why Are They Different?' (1999) 34 *Australian Journal of Political Science* 205, 217.
[153] *SDPWO Act*, Division 2, Subdivision 1

The *SDPWO Act* and the *Environmental Protection Act 1994* (Qld) ('EP Act') both have trigger clauses for the conduct of an EIS, which, if their terms of reference stipulate, may include a social impact statement.[154] This was done for all Curtis Island LNG projects. Where an EIS is required, the *Aboriginal Cultural Heritage Act 2003* (Qld) (*ACH Act*) requires that a Cultural Heritage Management Plan (CHMP) is also undertaken. [155] The *ACH Act* uses a risk management/protection model of Aboriginal cultural heritage management, focusing particularly on the protection of cultural heritage.[156] Where activities are undertaken in areas where cultural heritage sites exist, a risk management assessment is undertaken. This results in a CHMP which is developed in consultation with the local Aboriginal group.[157]

The OCG has the power to declare certain areas 'State Development Areas' (SDAs), essentially a way of fast-tracking approvals in areas where large-scale developments are planned. SDAs give the Coordinator General powers to compulsorily acquire land even where a specific development has not yet been approved.[158] However the declaration of a SDA does not change the land tenure in that area. If land is compulsorily acquired within a SDA, the right holder is entitled to compensation pursuant to the *Acquisition of Land Act 1967* (Qld). [159] There are currently nine SDAs in Queensland, including one around Gladstone which was declared in 1993 and amended in 2008 to include the parts of Curtis Island to be used for LNG processing.[160] The Gladstone SDA identifies Curtis Island as 'High Impact Industry Precinct',[161] although it does not purport to extinguish native title.

## V. THE ROLE OF LAW IN NEGOTIATIONS — THEORY

Legal theory may help explain the role that law plays in shaping *Native Title Act* negotiations. Several strands are considered here. They are law and society scholarship, including literature on legal pluralism, and property theory.

### *A. Law and Society*

'Law and Society' scholarship aims to differentiate between 'law on the books' and 'law in practise'; situate and explain legal phenomena by reference to their context; and emphasise the

[154] *SDPWO Act,* Part 4.
[155] *ACH Act,* Part 7.
[156] Boer and Wiffen, above n 145, 291.
[157] *ACH Act,* Part 7.
[158] *SDPWO Act,* Part 6, Division 1,
[159] *SDPWO Act,* Part 6, Division 1,
[160] The Co-ordinator-General (Queensland), 'Gladstone State Development Area: Development Scheme' (September 2012) <http://www.dsdip.qld.gov.au/resources/plan/cg/gladstone/gsda-development-scheme.pdf>.
[161] Ibid 15.

culturally relative and culturally embedded nature of legal systems.[162] Scholars point to the porous nature of law and discuss the effect that society has on its development and interpretation, and its ability to influence behaviour.[163] Law both acts on, and is acted on by, society, and is thus both its subject and its object.[164] This scholarship criticises claims that law is pre-eminent or self-sufficient.[165] Law should be studied empirically, Lawrence Friedman argues, because it is found in the 'grubby facts of day to day life'.[166] It is potentially a helpful way of understanding the Browse LNG and Curtis Island LNG negotiations because it may explain why two negotiations pursuant to the same legal regime resulted in different outcomes.

One of Law and Society's key arguments is that law can create reality by 'inventing many of the concepts and categories' in which we think.[167] The idea that law can have symbolic as well as juridical power can be seen in the discussion of native title discourses in Chapter 2. *Mabo* not only recognised the place of native title in the common law, but also ignited a national conversation about the nature of Aboriginal rights to land. Pearson said at the time of the decision that:

> *Mabo* represents an opportunity for the achievement of a greater national resolution of the question of Aboriginal land rights, and an improvement in relations between the new and old of this land, a first step in a new direction which might yield the changes necessary for indigenous people to be genuinely re-possessed of their inheritance.[168]

### *B. Legal Pluralism*

Legal pluralism challenges a view that law is self-contained and coherent. It argues that this conception of law is so dominant that it can 'masquerade as fact'.[169] Advocates of legal pluralism argue for recognising competing or parallel systems of law, derived from sources other than the state.[170] These parallel legal systems vary in strength. 'Strong' legal pluralism is where other

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[162] Lawrence M Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law Review* 763. One of the dangers of law and society scholarship is that, because it encompasses so many disciplines and perspectives it may end up as an intellectually incoherent 'scholarly goulash': Patricia Ewick, 'Embracing Eclecticism' in 41 *Special Issue Law and Society Reconsidered* (Emerald Group Publishing Limited, 2007), 1.
[163] Kitty Calavita, *Invitation to Law & Society: An Introduction to the Study of Real Law* (The University of Chicago Press, 2010) 94.
[164] Roger Cotterrell, *Law, Culture and Society* (Ashgate Publishing, 2006) 66.
[165] Ibid 4.
[166] Friedman, above n 162, 775.
[167] Calavita, above n 163, 4.
[168] Noel Pearson, 'Mabo: Towards Respecting Equality and Difference (The Boyer Lectures)' (Australian Broadcasting Corporation, 1993).
[169] John Griffiths, 'What Is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 4.
[170] Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87, 88.

systems operate 'independent of and uncontrolled by, dominant law'. 'Weaker' forms of legal pluralism are where one legal system is clearly subordinate to another.[171]

In Australia questions of legal pluralism were brought to the fore by the partial recognition of Aboriginal law in *Mabo*. This recognition resulted in a 'perceptible shift' in the 'constitutional foundation' of the nation.[172] 'Native title', as understood by Australian law, is said to be a form of weak pluralism because its recognition is explicitly subject to Australian law. [173] Where Aboriginal law clashes with Australian law, it is the latter that prevails.

Nevertheless claims of a continuing system of Aboriginal law continue to be made along a spectrum, from claims of continuing Aboriginal sovereignty — firmly rejected by Australian law but still made by many people[174]— to claims of Aboriginal self-government and a continuing jurisdiction over certain issues including land and crime.[175]

Dianne Otto argues that sovereignty is an inherently powerful claim.[176] She advocates using the language of 'internal' Aboriginal sovereignty [177] to help shift the power relationship between Aboriginal and non-Aboriginal Australians. Otto points out that claims to sovereignty are always a 'contingent truth', employed to great effect by nation states 'who have the power to shape reality'.[178]

In contrast to Otto, Sundhya Pahuja deliberately uses the language of jurisdiction rather than sovereignty because, she says, it allows the question of where authority sits to be left unresolved. An encounter between Indian villagers and a mining company is recast as 'ongoing encounters between rival jurisdictions' rather than a dispute between a marginalised people and large corporation.[179] This practice of 'critical redescription' is one that international law is constantly engaged with. It can be bolstered by jurisdictional practices and behaviour that have the impact of asserting both jurisdiction and sovereignty: Pahuja cites the British building of elaborate

[171] Ibid 95.
[172] Gummow J in *Wik Peoples v The State of Queensland & Ors (1996) 187 CLR 1* 230.
[173] Davies, above n 170, 95.
[174] Langton, above n 70.
[175] See for example Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012).
[176] Dianne Otto, 'A Question of Law or Politics - Indigenous Claims to Sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law and Commerce* 65, 68.
[177] Defined as Aboriginal peoples' authority over themselves.
[178] Otto, above n 176, 94. Note that Otto clearly delineates between external self-determination, which would involve some sort of international legal standing, and internal self-determination which is associated with property rights and self-government.
[179] Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 *London Review of International Law* 63, 65.

English-style gardens in colonial Assam as an example of such practices.[180] Claims of jurisdiction are powerful, she argues, because jurisdictional language, particularly when it is in relation to land, is the act of a sovereign.[181]

### *C. Property as Power*

The centrality of land to Aboriginal law and culture is so often spoken about that what is sometimes missed is the importance that the English common law attaches to land. In the English common law property is closely associated with power — the term 'property', the High Court found, means 'a degree of power that is recognised in law as power permissibly exercised over the thing.'[182] It denotes the amount of power that society allows to be exercised over those resources it values. Its opposite is 'disempowerment, disorientation and alienation'. [183] As discussed in Chapter 2, native title rights are part of traditional owner leverage: Wayne Bergmann observed that companies 'deal with you in a respectful way compared to when there is no native title determination.'[184]

The power in property is a power over people to the extent to which they are engaging with that property: ownership of property has consequences for others. Indeed, English theorist Kevin Gray argues that 'property' is not about *enjoyment of access* but rather *control over access* and is thus a state-sanctioned power relationship that enables a property's owners to exclude strangers from benefiting from particular resources.[185]

The common law of property places great store in the way that people behave towards, or communicate about, property. For example, Kevin Gray and Susan Francis Gray canvass real property case law and find that when courts are asked to determine the nature of rights to land, the critical factor is how the claimant behaves towards the land.[186] The reality on the ground can prevail over a written document: the courts can overrule any 'superficial label' that is found to inaccurately describe the legal relationship at play.[187] In a similar vein, US property theorist Carol Rose finds that possession, the first indicia of property ownership at common law, requires a 'clear act', tantamount to a statement to the world. The act of possession must be 'suitable' —

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[180] Ibid.
[181] Ibid 69.
[182] *Yanner v Eaton (1999)* 201 CLR 351, 17.
[183] Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 4.
[184] Wayne Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 186.
[185] Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 294.
[186] Gray and Gray, above n 183, 7.
[187] Ibid 15.

that is the world must recognise it as a possessory act.[188] Possession, therefore, is an act of communication that puts all on notice that you own the land. Failure to communicate adequately can result in losing land through adverse possession to another person 'who speaks loudly and clearly, though erroneously'. [189] This observation about failing to communicate adequately bears striking resemblance to the fiction of *terra nullius*, and the inability to recognise Australian Aboriginal rights and interests in land prior to the *Mabo* decision.

Rose explicitly acknowledges that this communication, like all 'texts', can be misunderstood. She illustrates this point inadvertently herself while discussing the US case *Johnson v Mc'Intosh*,[190] stating that:

> As the Indian tribes moved from place to place, they left few traces to indicate that they claimed the land ... it is doubtful whether the claims of any nomadic population could even meet the common law requirements for establishing property in land.[191]

In Australia, this raises the question as to whether belated legal acknowledgement of Aboriginal rights to land has resulted in the broader community being able to hear Aboriginal claims to land more clearly and accept them more readily.

This brief discussion highlights two important aspects about the way in which common law thinks about property. The first is that property is equated with power. The second is that how people communicate about property is one indicia of ownership. These characteristics may have resonance for non-Aboriginal Australians, who are, consciously or otherwise, steeped in the common law's love and prioritisation of property.[192] It may help to explain the reaction of some non-Aboriginal people to Aboriginal claims to land in the Browse LNG and Curtis Island LNG negotiations.

## VI. CONCLUSION

This chapter explained the relevant law governing the negotiations. The *Native Title Act*'s 'right to negotiate' provisions stipulate a framework for resource negotiations that provide traditional

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[188] Carol Rose, 'Possession as the Origin of Property' (1985) 52 *The University of Chicago Law Review* 73, 76.
[189] Ibid 80.
[190] *Johnson v M'Intosh 21 US 543* (1823) was a case of the United States Supreme Court that held that Aboriginal title could not be purchased by private individuals.
[191] Rose, above n 188, 86–7. Note that Toohey J in *Mabo* (1992) 175 CLR 1, at 181 said 'the view that a nomadic lifestyle is inconsistent with occupation of land is at odds with reality. It pays no regard to the reason why people move from one area of land to another. Often people move, not because they lack any association with the land over which they travel but to follow the availability of water and food in a harsh climate.'
[192] Kitty Calavita says that law can have unconscious impacts on people, Calavita, above n 163, 4.

owners with an important procedural right. However, the 'right to negotiate' and NNTT case law favours proponents of 'future acts' over traditional owners.

There is very little difference between the regulatory frameworks of the two negotiations. Indeed, the main differences in legislation were in terms of impacts that were political in origin. These include the decision by the Commonwealth to order a strategic assessment under the *EPBC Act* for Browse LNG and not for Curtis Island LNG.

The chapter has also examined three strands of legal theory with potential to explain negotiation processes and outcomes. A law and society approach focuses our attention on the symbolic power of law and the impact that the doctrine of native title had on Australian society. This could potentially help to explain outcomes that might otherwise appear to be at odds with substantive legal rights of Aboriginal people and resource companies.

The scholarship on legal pluralism highlights the possibility of a continuing Aboriginal jurisdiction in the Kimberley and central Queensland, as well as the potential authority that this provides to traditional owners. Property law theory helps situate property rights in their common law context, potentially helping to explain the lens through which non-Aboriginal negotiation participants view Aboriginal property rights and interests.

The next chapter details the geographic, historical, political and demographic context of the Browse LNG and Curtis Island LNG negotiations, sets out a chronology for negotiations and assesses the respective agreements.

# Chapter Five
# Setting the Scene: The Case Studies

## I. INTRODUCTION

A key theme that has emerged out of the discussion in the previous four chapters is that power is likely to be central to understanding the agreement outcomes of Browse LNG and Curtis Island LNG. This discussion emphasised that the power dynamics of each negotiation will likely arise from ingrained and self-sustaining patterns of power and powerlessness, may be exercised invisibly, subconsciously or creatively, and will likely only be discernible when the context, conduct, funding and agenda of each negotiation is examined in detail.[1] The purpose of this chapter is to provide that detail, and in particular, to set out the political and geographic context of each case study area, a chronology for negotiations, and to discuss the content of the Browse LNG and Curtis Island LNG Agreements. Michel Foucault argued that the 'long baking process of history' turns specific historical events into universally accepted norms.[2] This chapter therefore also conducts a historical analysis to highlight similarities and differences between each negotiation location.

Chapters 6, 7 and 8 will analyse the impact of these factors on agreement outcomes.

## II. THE CASE STUDY LOCATIONS — KEY DIFFERENCES

Resource extraction forms a large percentage of both Western Australia and Queensland's economic activity, and both identify as resource extraction states.[3] The Kimberley, however, is the least developed region in Western Australia, while Curtis Island is in central Queensland, a heavily industrialised regional area. Native title rights are generally much stronger and more widespread in the Kimberley than in the Gladstone region.[4] This is due to two reasons. First, there is far more 'unallocated Crown land' in Western Australia than Queensland (particularly central Queensland).[5] Second, the Kimberley received far less British settlers than central

[1] Refer to discussion in Chapter 2, 'Power'.
[2] From 'Nietzsche, Genealogy, History', in Michel Foucault et al, *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984* (New Press, 2003), 354.
[3] Ibid.
[4] Refer to the maps in Appendix 1, particularly Map 2 which shows areas of exclusive possession native title.
[5] As described in Chapter 4, 'The Native Title Act and Subsequent Case Law', the strongest native right is the right to exclusively possess land while weaker native title rights, for example the right to hunt and fish, can co-exist with third party titles. The description of land as 'unallocated Crown land' means that it does not have third party property interests and is therefore far more likely to be found to be subject to exclusive possession native title rights.

Queensland, and those that did come arrived later. This resulted in traditional owners in the Kimberley being less displaced than those in central Queensland and so more likely to be able to show continuity of connection to their traditional country.[6]

## III. THE KIMBERLEY

The Kimberley occupies the north west corner of the Australian continent, and was first settled by Aboriginal people approximately 40,000 years ago.[7] It has a population of approximately 35,000 people, of whom 43.5 per cent are Aboriginal Australians, and around 70 per cent of its land mass is determined native title land.[8] While there are large pastoral leases in the Kimberley, there are also vast areas of exclusive possession native title land, and 'unallocated Crown land' that may also be found to be native title.[9] The Kimberley is an area of high environmental and cultural value: large areas of the West Kimberley received National Heritage Listing in 2011 for environmental, historical and cultural factors, including dinosaur footprints in the intertidal zone at James Price Point.[10] The main industries of the Kimberley are tourism, mining, agriculture and pearling.

Broome is the closest town to the proposed development, and has a population of 12,766 — which can more than triple during the tourist season — of whom 22.5 per cent identify as Aboriginal or Torres Strait Islander.[11] The Browse LNG development, had it gone ahead, would have been the first large-scale industrial development on the Kimberley coast.

### *A. Historical Survey*

The Kimberley was not considered suitable for British settlement until John Forrest (later the Premier of Western Australia) explored the area in 1879.[12] It was 'the last fertile region of Australia to be colonised'.[13] From the 1880s, the colonial government promoted pastoral

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Note that ss 47, 47A and 47 B of the *Native Title Act* allows prior extinguishment to be disregarded in relation to certain third party grants.

[6] Refer to discussion on continuity of connection in Chapter 4, 'The Native Title Act and Subsequent Case Law'.

[7] Commonwealth Government, 'Inclusion of a Place in the National Heritage List: The West Kimberley' (31 August 2011) <http://www.environment.gov.au/system/files/pages/ed0b4e39-41eb-4cee-84f6-049a932c5d46/files/10606305.pdf>.

[8] Australian Bureau of Statistics, '2011 Census' <http://www.abs.gov.au/websitedbs/censushome.nsf/home/census?opendocument&navpos=10>.

[9] Refer to Map 2, Appendix 1.

[10] Australian government, Department of the Environment, 'Strategic Assessment of the Browse Basin Liquefied Natural Gas Precinct', http://www.environment.gov.au/node/18603

[11] Australian Bureau of Statistics, above n 8.

[12] Bruce Shaw, *When the Dust Come In Between: Aboriginal Viewpoints in the East Kimberley Prior to 1982* (Aboriginal Studies Press, 1992) 13.

[13] Peter Yu, 'The Kimberley: From Welfare Colonialism to Self-Determination' (1994) 35 *Race & Class* 21, 23.

expansion in the Kimberley, resulting in a rush of business interests from the eastern states, mainly companies and larger holdings, taking vast areas of the Kimberley for grazing.[14] The advent of very large pastoral stations followed, including those of the Durack family, Alexander Forrest and Isadore Emanuel, on the lands of Aboriginal groups including the Miriuwung, Doolboong, Gajirrawoong, Kija and Jaru.[15] None of these ventures were particularly successful until about 1893, when an improved port at Wyndham allowed live cattle to be exported, and the large population increase in Western Australia that followed the Kalgoorlie gold rush provided a closer market for agricultural products.[16] On the Ord River station in the eastern Kimberley, for example, cattle numbers increased from 4000 in 1885 to 30,000 in 1896.[17]

As elsewhere in Australia, this colonial expansion into the Kimberley heralded a brutal time for Aboriginal peoples, who fiercely resisted incursions into country. It is known in the east Kimberley as 'the killing time'.[18] An 1894 article in the Roeburne paper *The North West Times* advised that Western Australia could 'shut its eyes for three short months' and let the settlers deal with 'the niggers' in order to combat Aboriginal resistance.[19] It would soon, the paper said, 'easily be forgotten'.[20] They were not alone in this view. Violence against Aboriginal people by police, for example, was often excused as 'giving them a lesson'.[21] One policeman was referred to as 'one of the best shots in the country' who 'missed very few blacks if after them'. [22] Whipping Aboriginal offenders, made illegal in 1883, was legal again by 1892.[23]

The murder of Aboriginal people appeared to be carried out frequently in the early days of colonial Kimberley, with little punishment. A 'conspiracy of silence' and tacit government approval ensured that crimes against Aboriginal people went unreported.[24]

The most celebrated resistance to the colonisation of the Kimberley was from the Bunuba in the east Kimberley, led at times by the legendary Jandamarra, a former stock-worker with expertise

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[14] Shaw, above n 12, 14. See also Kim Doohan, *Making Things Come Good: Relations Between Aborigines and Miners at Argyle* (Backroom Press, 2008). Chris Owen, '"The Police Appear to Be a Useless Lot Up There": Law and Order in the East Kimberley 1884-1905' (2003) 27 *Aboriginal History* 106.

[15] Owen, above n 14, 108.

[16] Ibid.

[17] Ibid.

[18] Doohan, above n 14.

[19] Howard Pederson and Banjo Woorunmurra, *Jandamarra and the Bunuba Resistance* (Magabala Books, 1995) 110. Henry Reynolds, *Frontier* (Allen & Unwin, 1987) 58.

[20] Pederson and Woorunmurra, above n 19, 110. Reynolds, above n 19, 58.

[21] Owen, above n 14, 109.

[22] Ibid 114–115.

[23] Ibid 111.

[24] Ibid 127. See also Shaw, above n 12, 17.

in firearms.[25] This resistance raged from the early 1880s to the late 1890s, with Bunuba country described in 1894 by the WA Police Commissioner as being in a state of "open hostility".[26] The resistance was very successful for a period, before the full force of colonial power crushed it in 1897. One police action that followed the killing of two gold prospectors in 1892 killed six people according to police figures, however Bunuba versions speak of a much higher death toll and of violence in which "small children and babies were grabbed by their legs and had their heads smashed against the trunks of trees."[27] Killings of Aboriginal people continued to occur well into the twentieth century, including a large-scale massacre in 1926 at the Forrest River Mission, for which nobody was convicted.[28]

In some quarters these massacres were met with revulsion. The head of the Colonial Secretary's Office described these moves as a 'war of extermination'. [29] The *Catholic Record* called the atrocities 'horrors in the name of justice and good government' against people repelling incursions 'they must have considered an unjust invasion'. [30] Yet, the expansion of colonial settlement into the Kimberley in the 1890s coincides with the period in which Stanner identified an increasing use of discourses like the 'law of progress' and 'survival of the fittest'.[31] In 1893 the first MP for the East Kimberley Francis O'Connor advocated for a more aggressive approach toward Aboriginal people asking in Parliament whether 'the life of one European is not worth a thousand natives, as far as settlement of this country is concerned.'[32] Premier John Forrest tempered this rhetoric by replying that the Parliament could not sanction the 'indiscriminate slaughter of blackfellows'. [33]

By the 1890s, as a result of colonial expansions into their lands and the accompanying violence, many Aboriginal people in the Kimberley were 'coming in', and began living around station homesteads whose economic survival depended on cheap Aboriginal workers.[34] They could be indentured to these stations under the provisions of the *Aboriginal Protection Act* 1886, although

[25] Pederson and Woorunmurra, above n 19, 87. See also Shaw, above n 12, 16.

[26] Pederson and Woorunmurra, above n 19, 132.

[27] Ibid 75.

[28] Ian Crawford, *We Won the Victory: Aborigines and Outsiders on the North-West Coast of the Kimberley* (Fremantle Arts Centre Press, 2001) 199.

[29] Pederson and Woorunmurra, above n 19, 140.

[30] Ibid 139–140.

[31] WEH Stanner, *After the Dreaming* (ABC Enterprises, 1968) 34.

[32] Owen, above n 14, 111.

[33] Ibid 111.

[34] Pederson and Woorunmurra, above n 19, 44. The phrase 'coming in' was used to indicate a partial abandonment of traditional ways of living by moving onto pastoral or cattle stations.

some settlers simply charged Aboriginal people with crimes such as sheep stealing as a de facto method to stop people leaving the stations.[35]

Broome from the nineteenth century had a multicultural mixture of Aboriginal people, Malays, Filipinos, Chinese, Japanese and Europeans.[36] This demographic mix was largely due to the pearling industry, which employed Asian and Aboriginal divers to do highly dangerous work.[37] While this mix of cultures and people is often described in romantic terms, others highlight the sexual abuse of Aboriginal women by the crews of the pearling industry.[38]

The advent of the missions saw children given a rudimentary formal education and trained to become servants and labourers for colonial masters.[39] The *Aborigines Act* 1905 (WA) stipulated that the Chief Protector was the legal guardian of all Aboriginal children, with the Aborigines Department to 'provide for the custody, maintenance, and education of the children of aborigines'.[40] As elsewhere in Australia many Aboriginal children, particularly children with a European or part European parent, were removed from their families 'for their own good'.[41]

Dramatic changes to Aboriginal/non-Aboriginal relations occurred in the 1960s and 1970s, following major social policy changes at the Federal and state levels including the right to vote, equal pay, ability to receive social security and the 1967 constitutional referendum. Some of these policy changes had unintended consequences. [42] Equal wages were introduced in the Kimberley in the wet season of 1968-1969 and immediately resulted in mass evictions and unemployment after Aboriginal workers were 'kicked off the stations'.[43] It was a 'particularly destructive' time because these stations were often located on Aboriginal workers' traditional

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[35] Ibid 68. Erich Kolig, *The Noonkanbah Story* (University of Otago Press, 1987) 41.

[36] Christine Choo, 'The Role of the Catholic Missionaries at Beagle Bay in the Removal of Aboriginal Children from Their Families in the Kimberley Region from the 1890s' (1997) 21 *Aboriginal History*.

[37] John Bailey, *White Divers of Broome: The True Story of a Fatal Experiment* (Pan Macmillan Australia, 2002).

[38] Choo, above n 36, 16. Numerous fictional books have been written on this era – see, for example, Di Morrissey, *Tears of the Moon* (Pan Macmillan Australia, 2009).

[39] Choo, above n 36, 15.

[40] s6(3), 8 *Aborigines Act 1905 (WA)*.

[41] Choo, above n 36, 15. Australian Human Rights Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families' (Commonwealth of Australia, 1997).

[42] Fiona Skyring argues that the advent of social security of Aboriginal people in 1960 was another boon for station owners because they could commandeer a large proportion of their Aboriginal residents' pensions. She cites the Director of Social Service in Western Australia stating that some station owners "regard the pension as a form of station subsidy": Australian Human Rights Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families' (Commonwealth of Australia, 1997).

[43] Ibid 153. See also Shaw, above n 12, 22.

lands, meaning that expulsion resulted in a loss of connection to country.[44] The lifting of the ban on purchasing alcohol brought on the commencement of alcohol-fuelled social destruction.[45] Peter Yu says that this combination of factors had a 'shattering' effect on the Kimberley, resulting in many displaced people occupying refugee camps outside towns.[46] Old ways in which settlers interacted with Aboriginal people continued. For example, Wayne Bergmann, writing of the damming of the Ord River and the creation of Lake Argyle in the 1960s, says that there was no consultation with traditional owners, who were sometimes 'thrown on the back of trucks to escape rising water levels' as their traditional country was flooded.[47]

*1. Emergence of the Kimberley Land Council*

The political mobilisation of Kimberley Aboriginal people started in the latter half of the twentieth century, with strikes and station walk offs occurring in 1951 from Thangoo, south of Broome, and several times throughout the 1960s from the Mount Hart Station. [48] The Noonkanbah dispute of 1978-80 was the event that the KLC credits as cementing the need for its formation. Noonkanbah was a pastoral station in the west Kimberley that had been returned to its traditional owners in 1976, courtesy of an Aboriginal Land Fund Commission buy-back.[49] Before the hand back, the Yungngora community had endured terrible conditions at the hands of station management, resulting in the station's entire Aboriginal population walking off the station.[50] Soon after the return of the station, the State issued several exploration permits to oil company AMAX.[51] The inaugural meeting of the KLC was held at Noonkanbah, and the subsequent campaign to prevent drilling became an issue of national prominence.[52]

The KLC became increasingly active throughout the 1980s. It participated in the Seaman inquiry into land rights which led to land rights legislation being introduced to, but not passing, the Western Australian parliament in 1985.[53] The KLC also convened the 'Crocodile Hole' meeting

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[44] Skyring, above n 42, 153.

[45] Ibid 157. The effects of these changes had an impact Australia wide.

[46] Yu, above n 13, 26.

[47] Wayne Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 188.

[48] Skyring, above n 42, 161.

[49] Steven Hawke and Michael Gallagher, *Noonkanbah: Whose Land, Whose Law* (Freemantle Arts Centre Press, 1989) 20.

[50] Kolig, above n 35, 49.

[51] Hawke and Gallagher, above n 49, 36.

[52] Ibid 31.

[53] Maureen Tehan, 'Hope Disillusioned, an Opportunity Lost - Reflections on Common Law Native Title and Ten Years of the Native Title Act, A' (2003) 27 *Melbourne University Law Review* 523, 531. Paul Seaman, 'The Aboriginal Land Inquiry: Report' (Western Australia, 1984). The Aboriginal Land Bill 1985 (WA) was defeated in the upper house of the Western Australian parliament. The Burke Labor government baulked at Aboriginal land rights in the

in 1984 that saw the establishment of the Kimberley Aboriginal Law and Culture Centre (KALACC) and outlined the manner in which they believed that Kimberley Aboriginal development should occur.[54]

Just before the passage of the *Native Title Act*, Western Australia passed legislation that sought to replace the Commonwealth's native title regime with 'rights of traditional usage'. These were inferior to those in the national legislation, passed one month later. This state law was ultimately struck down by the High Court as a breach of the federal *Racial Discrimination Act 1975* (Cth).[55] The election of the Gallop government in 2001 saw the state adopt a less adversarial approach in relation to Aboriginal affairs and native title. In the period from 2001 to 2008 there was a significant increase in agreement-making with resource companies undertaken by the KLC, including the renegotiation of the Argyle Diamond Mine agreement and the Koolan Island iron ore agreement.[56]

### *B. The Browse Negotiations*

Woodside first approached Kimberley traditional owners to canvass the processing of gas on the Kimberley coast in 2005. This initial approach was rebuffed, a decision that Woodside said it respected.[57] Following this, Aboriginal elders approached the KLC saying that given significant interest in industrialising the Kimberley they wanted a single process in which all companies had to come "through one door and tell us the same message."[58] In 2006, then Western Australian Premier Alan Carpenter announced that the State was looking for a single site on the Kimberley coast to process all Browse Basin natural gas. He said that this development would only go ahead with the support of Kimberley traditional owners and would be 'a dialogue, not an imposition or a demand'.[59] This was seen in some quarters as giving traditional owners a right to

face of strident conservative opposition and was instrumental in stalling a national land rights regime proposed by the Hawke Labor government: John Phillimore, 'The Politics of Resource Development in Western Australia' in Martin Brueckner et al (eds), *Resource Curse or Cure ?* (Springer Berlin Heidelberg, 2014) 25, 36.

[54] Kimberley Land Council, 'Newsletter No. 3' (October 2013) <http://www.klc.org.au/docs/default-source/Print-Newsletters/2013-print-newsletters/klc-newsletter-october-2013.pdf?sfvrsn=4>. The KLC, KALACC and the Kimberley Language Resource Centre are known as the three key Aboriginal organisations of the Kimberley, John Darraga Watson, Malcolm Allbrook and Liz Thompson, *Never Stand Still: Stories of Land, Life and Politics Inthe Kimberley* (Jarlmadangah Burru Aboriginal Corporation, 2012) 166.

[55] *Western Australia v Commonwealth* (1995) 183 CLR 373.

[56] For a list of these agreements, see ATNS - Agreements, Treaties and Negotiated Settlements project, *Kimberley Land Council* <http://www.atns.net.au/agreement.asp?EntityID=417>.

[57] Ciaran O'Faircheallaigh and Justine Twomey, 'Indigenous Impact Report Volume 2, Traditional Owner Consent and Indigenous Community Consultation: Final Report' (Kimberley Land Council, 3 September 2010) 23. See also Interview with Don Voelte (Sydney, 5 June 2014).

[58] Interview with Wayne Bergmann (Broome, 20 June 2012).

[59] 'Western Australian, Parliamentary Debates, Legislative Assembly, 21 November 2006, 8443c-8443c (Alan Carpentar, Premier)' (2006).

veto the development. However, former Deputy Premier Eric Ripper — one-time lead Minister on the project — explained that this stance was not akin to giving the Aboriginal community a veto, but rather was "a pragmatic response to the particular circumstances of the Kimberley where Indigenous people are half the population and native title land is two thirds of the area".[60] The Carpenter government set up the Northern Development Taskforce (NDT) in June 2007 to consult with traditional owners, gas companies, scientists, environmentalists and the community about this development.[61]

The KLC led the Aboriginal consultations for the Browse development process.[62] The first formal traditional owner meeting to consider the possibility of LNG processing was held in December 2007, in accordance with a directive from Kimberley elders. They mandated Kimberley-wide consultation because of the cultural obligations of the wunan and because the impact of the precinct would be felt Kimberley-wide for several generations.[63] This meeting decided that if Kimberley Aboriginal people agreed in principle to a development, all traditional owners' groups would support the specific traditional owner group on whose land it was placed.[64]

At the same time the KLC negotiated a Joint Position Statement on Kimberley Liquefied Natural Gas Development ('the Environmental Accord') with five prominent environmental organisations. The Environmental Accord acknowledged 'significant potential for beneficial outcomes for Kimberley traditional owners from LNG', subject to the development being in accordance with best practice, and detrimental impacts being limited. [65] Kimberley coast traditional owners elected representatives to a 'Traditional Owner Taskforce' that considered whether LNG processing was acceptable in principle and, if so, whether a site could be found that was approved by its traditional owners. Together with the state government and Woodside,

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[60] Interview with Eric Ripper (Perth, 21 June 2013).

[61] At the time, two joint ventures were planned led by gas companies Woodside and Inpex, however the latter soon pulled out of processing LNG in the Kimberley, a move widely seen as a factor in the demise of the State Labor government.

[62] The key role played by the KLC in these negotiations was by no means pre-ordained by the legislation. Many Kimberley coast traditional owners have native title determinations and thus could have been represented by their PBC rather than the KLC. This positioning of the KLC as the peak Kimberley body is discussed further in Chapter 8, 'Kimberley Land Council and Aboriginal Leadership'.

[63] O'Faircheallaigh and Twomey, above n 57, 26. Refer to discussion on the wunan in Chapter 4, 'The Contemporary Practice of Aboriginal Law in the Kimberley'.

[64] Interview with Mary Tarran (Broome, 27 June 2012).

[65] 'Joint Position Statement on Kimberley Liquefied Natural Gas Development, Kimberley Land Council, Australian Conservation Foundation, the Wilderness Society, Environs Kimberley, WWF Australia and the Conservation Council of WA' <http://www.wwf.org.au/crawl_publications.cfm?2072/Joint-Position-Statement-on-Kimberley-Liquefied-Natural-Gas-Development>.

this Taskforce reduced the number of possible sites from 13 to four for cultural, financial and engineering reasons, by September 2008.[66]

This site selection process came to a halt following the 2008 State elections in which the Carpenter Labor government was defeated. During the election campaign, then Opposition Leader Colin Barnett of the conservative Liberal Party had been scathing of the Carpenter government's role in gas company Inpex's decision to move their planned LNG project from the Kimberley to Darwin. Barnett accused the Carpenter government of similarly "dithering" on the Browse LNG site selection process.[67] Once elected, Barnett cut short the existing site selection processes, announcing James Price Point, 60km north of Broome, as the State and Woodside's preferred site in December 2008. [68] He said that if no agreement could be reached with traditional owners, the government would compulsorily acquire the land. He said of the Carpenter government's so-called veto:

> The traditional owners certainly have a legitimate and legal right to be involved in any discussions about the land and the site. They basically hold native title over much of that area. But they should not have a right of veto. No citizen should have a right of veto in that sense.[69]

Barnett was widely seen as staking his political legacy on delivering the Browse LNG project.[70]

A 'Traditional Owner Negotiation Committee' (TONC) was drawn from members of the Goolarabooloo/Jabirr Jabirr claimants in February 2009, and a Heads of Agreement for the negotiation signed by the KLC, the state government and Woodside in April 2009.[71] In addition, the KLC established the Environmental and Cultural Heritage Team in May 2009, comprising ten senior female and male traditional owners, and a Heritage Protection Agreement was signed in November 2009.[72]

Soon after the Heads of Agreement was signed, divisions within the Goolarabooloo/Jabirr Jabirr claim group came to the fore. Several named applicants who were opposed to the development at James Price Point were later removed from the native title claim (see discussion below in 'Split

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[66] O'Faircheallaigh and Twomey, above n 57, 31–33.
[67] Ibid 33. *WA Set to Lose $25 Billion Gas Plant: Barnett* (22 August 2008) ABC News <http://www.abc.net.au/news/2008-08-22/wa-set-to-lose-25-billion-gas-plant-barnett/2597034>.
[68] O'Faircheallaigh and Twomey, above n 57, 33. *WA Set to Lose $25 Billion Gas Plant: Barnett*, above n 67.
[69] Quoted in Australian Broadcasting Corporation, 'Bran Nue Deal', *Four Corners*, 22 September 2008.
[70] See, for example, Jade Macmillan and Irena Ceranic, *Premier Says He's 'Failed' WA on James Price Point Project* (21 August 2013) ABC News <http://www.abc.net.au/news/2013-08-20/premier-colin-barnett-admits-failing-wa-on-woodside27s-plans-f/4900964>.
[71] O'Faircheallaigh and Twomey, above n 57, 37–39.
[72] Ibid 48.

in the Claim Group'). Negotiations continued, albeit delayed during periods of Goolarabooloo litigation, on the basis of the Heads of Agreement, until September 2010. At this time, the State government again stated it would commence the long-threatened compulsory acquisition process to acquire the necessary land if an agreement was not forthcoming. [73] Following this, an agreement was reached in early 2011. In May 2011, the claim group voted 164 to 108 in favour of accepting the agreements, amidst claims that this result did not truly constitute Aboriginal consent given the State's threats of compulsory acquisition.[74] Subsequently signed in June 2011, the agreements were originally intended to be Indigenous Land Use Agreements (ILUA) but the split in the claim group meant that the ILUA authorisation and registration procedures were considered too hard to satisfy and the agreements were made as a 'future act' agreement under s31 of the *Act* instead.[75]

The cost of the four-year site selection process and subsequent negotiations is not entirely clear. A senior state government official told the Western Australia's Parliament that the cost of the process between 2009 and May 2012 alone was $40.4 million, of which Woodside contributed $16 million.[76] The KLC received funding of $15.6 million of this amount from the State and Woodside between January 2009 and September 2010.[77] This level of funding is highly unusual in a field in which native title representative bodies are usually not funded adequately to fulfil their statutory duties, let alone to do the work of negotiating with project developers.[78]

*1. Split in the Claim Group*

The selection of James Price Point precipitated an acrimonious split in the Goolarabooloo/Jabirr Jabirr claim group that had a profound impact on the negotiation, including prompting multiple rounds of litigation, forcing negotiations to cease for significant periods of time and giving great momentum to environmental opposition. The reasons behind this split are complex but can be largely attributed to two factors: first, objections to James Price Point as the chosen site, and second, significant questions raised by the Jabirr Jabirr people as to Goolarabooloo claims to be traditional owners of the land.

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[73] Ibid 54.

[74] Victoria Laurie, 'Dividing the Territory' [2010] *The Monthly*.

[75] Interview with SFGO (Perth, 7 June 2013). For the difference between ILUAs and s31 agreements refer to the discussion in Chapter 4, 'The Future Act Regime'.

[76] Ms G McGowan, Hansard of the Legislative Assembly Estimates "A", 29 May 2012.

[77] Ibid.

[78] Ciaran O'Faircheallaigh, 'Negotiations Between Mining Companies and Aboriginal Communities: Process and Structure' (Working Paper 86/1995, Centre for Aboriginal Economic Policy Research, 1995) 10.

Both groups agree that the Jabirr Jabirr were the original traditional owners of the land at James Price Point.[79] The term 'Goolarabooloo' is a recent creation, a conflation of several Yawuru words indicating a coastal people living in or near Yawuru land. [80] The Goolarabooloo are primarily composed of people descending from Paddy Roe, a Nygina man who came to the area in the 1930s and later asserted that Jabirr Jabirr elders assigned him traditional rights over their country. His daughter, Theresa Roe, would say during the 'No Gas' campaign that Jabirr Jabirr elders had "handed the land over to my father".[81] Paddy Roe came to national prominence in the late 1980s as an author and activist. By this time, he had successfully campaigned against a sand mine in the area and established the Lurujarri Heritage Trail, a prominent multi-day tour of land around James Price Point in which visitors are taught about Aboriginal culture. It attracts hundreds of people every year, and helped earn Paddy Roe an Order of Australia medal.[82]

Paddy's grandson Joseph Roe first made a native title claim to the area including James Price Point solely on behalf of the Goolarabooloo families in 1994. Soon after, Jabirr Jabirr people wrote to the NNTT that:

> [T]he Jabirr Jabirr people are traditional owners for part of the country that is included in this claim … We … are happy to work cooperatively with Goolarabooloo in this claim, but we do want our rights in the country recognised.[83]

The two groups went into mediation, following which the claim was amended and became a joint claim by the two groups.[84] The anthropological reports (which will be used to determine who are the correct traditional owners) for this native title claim are confidential.

Joseph Roe was one of the named applicants of the native title claim at the time it was nominated as the preferred site by Woodside and the State. Roe had supported the Browse LNG development up to that point, but objected strenuously to the specific area chosen at

[79] *Roe v State of Western Australia (No 2)* [2011] FCA 102.

[80] *Rubibi Community v State of Western Australia (No 6) (Corrigenda dated 15 February 2006 and 10 May 2006)* [2006] FCA 82 (13 February 2006) 97–105. The Yawuru are traditional owners of the area just south of James Price Point, including Broome.

[81] Theresa Roe, quoted in Eugénie Dumont, *Heritage Fight* (2012).

[82] Australian Broadcasting Corporation, 'Rush to Riches', *Four Corners*, 21 June 2010. See also *Goolarabooloo - Lurujarri Heritage Trail* <http://www.goolarabooloo.org.au/lurujarri.html>.

[83] *Roe v State of Western Australia (No 2) [2011]* FCA 102, 122–124.

[84] *Goolarabooloo/Jabirr Jabirr Peoples' Federal Court No WAD 6002/1998; NNTT No WC99/36.*

James Price Point, saying it would disrupt important songlines and burial sites.[85] He would go on to become one of the development's most powerful opponents.[86]

After the Browse LNG agreements were signed, the claim group split and registered competing native title claims.[87] The Federal Court is yet to decide which group holds native title to the area. However it was clear by the end of the 'No Gas' campaign in 2013 that the Goolarabooloo were widely viewed by non-Aboriginal people and the media as being the traditional owners of James Price Point.[88] The Goolarabooloo were often spoken about as the 'true' traditional owners because they acted in a way that non-Aboriginal people think traditional owners should act: they were often seen camping at James Price Point, had long welcomed national and international visitors to talk about traditional law and custom, and were very vocal in the media that they were the traditional owners of the area. This theme is discussed further in Chapters 6, 8 and 9 because it raises important questions of the way in which non-Aboriginal people perceive Aboriginal rights and interests in land, and the power of those perceptions.[89]

*2. The 'No Gas' Campaign*

By the time Woodside announced it was pulling out of processing Browse LNG on the Kimberley coast, the 'No Gas' campaign had drawn significant national and international attention. The 'No Gas' campaign emphasised potential damage to Aboriginal culture, and particularly songlines through James Price Point; dinosaur footprints; a whale calving area; bilbies; and Broome more generally. The Browse LNG proposal was the subject of national campaigns by the Wilderness Society and Greenpeace, which sent its flagship, the Sea Shepherd, to protest against potential impacts on whale calving. At its height in 2011, the 'No Gas' campaign was an extremely visible presence in Broome. The campaign identified heavily with the Goolarabooloo

[85] Joseph Roe, 'An Open Letter from Traditional Custodian Joe Roe to Browse JV Partners Shell, Chevron, BHP and BP Regarding Proposed Gas Plant at James Price Point' <http://www.savethekimberley.com/an-open-letter-from-traditional-custodian-joe-roe-to-browse-jv-partners-shell-chevron-bhp-and-bp-regarding-proposed-gas-plant-at-james-price-point/>.

[86] The litigation brought by the Goolarabooloo is discussed in detail in Chapter 6, 'Authorisation Provisions'.

[87] In November 2013, the Jabirr Jabirr registered Federal Court No. WAD357/2013, NNTT No. WC2013/007 and in December 2013, the Goolarabooloo People registered Federal Court No. WAD374/2013, NNTT No. WC2013/008.

[88] Refer to discussion in Chapter 8, 'Aboriginality and Wilderness'.

[89] Chapter 6, 'In the Outside World', Chapter 8, 'Relationship Between Power and Place', and in particular Chapter 9, 'Aboriginality as Wilderness'.

family, who were painted as being the custodians of culture and country, in contrast with avaricious or bullied traditional owners who supported the development.[90]

Yet, the campaign had only gathered broad support quite late in the process. As ABC TV's *Four Corners* program observed in September 2008, the Browse LNG development had no significant environmental campaign against it. Environmentalist Pat Lowe was quoted on why this was so:

> Up here I think there's some anxiety about crossing swords with ... Indigenous organisations' point of view because obviously the environment movement and the Indigenous people have been working together pretty well, especially up here.[91]

As discussed above, the consensus between the KLC and environmental groups had been formalised in the Environmental Accord of December 2007. However, the election of the Barnett government caused a significant shift in the position of many environmental groups, primarily because of the new Premier's decision to cut short the existing site selection process. Barnett's decision meant that environmental groups that had been unwilling to campaign against a development with traditional owner support could legitimately say that this consent was no longer freely given. The consequences of this are discussed further in Chapters 6 and 8.[92]

*3. Demise of the Land-Based Project*

The proposal to process Browse LNG gas on the Kimberley coast was abandoned in April 2013, with Woodside citing cost blowouts, and the 'No Gas' campaign claiming victory in preventing the development.[93] Woodside CEO Peter Coleman said that "public policy" issues — code for the 'No Gas' campaign — did not cause this.[94] Woodside and Western Australia were in dispute for some time following this announcement: the state government has said that Woodside's new proposal to process the gas at sea would not result in the same levels of employment or development of the region, and refused to make the requisite regulatory changes to allow it.[95] It

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[90] See, for example, Andrew Darby, 'Aboriginal Activist Named Environmentalist of the Year' *Sydney Morning Herald*, 1 September 2013 <http://www.smh.com.au/environment/aboriginal-activist-named-environmentalist-of-the-year-20140901-10aym0.html>.

[91] Quoted in Australian Broadcasting Corporation, 'Interview with Wayne Bergmann', *Four Corners*, 22 September 2008.

[92] Refer to Chapter 6, 'Compulsory Acquisition' and Chapter 8, 'Aboriginal Consent as a 'Shield' for Development?'.

[93] Woodside Petroleum Ltd, *Woodside to Review Alternative Browse Development Concepts (Australian Stock Exchange Announcement)* (12 April 2013) <http://www.woodside.com.au/Investors-Media/Announcements/Documents/12.04.2013%20Woodside%20to%20Review%20Alternative%20Browse%20Development%20Concepts.pdf>.

[94] Woodside Petroleum Ltd, *Company Insight - Explains Delaying Browse LNG Project (ASX Announcement)*

[95] Macmillan and Ceranic, above n 70.

is a contentious issue as to which aspects of the Browse LNG agreements remain enforceable following this announcement.

### *C. Browse LNG Agreements*

The Browse LNG Agreements were signed in June 2011 by the Goolarabooloo/Jabirr Jabirr registered native title applicants, the Kimberley Land Council, the State of Western Australia and Woodside Energy. At the time, it was estimated that the project would cost $40 billion in its construction phase and, when in operation, the LNG precinct would include three processing trains capable of processing 12 million tonnes of LNG per year.[96] When the Browse LNG Agreements were signed in 2012, LNG was priced at approximately $600 per tonne.[97]

The agreements are:

1. *Browse (Land) Agreement* (‘*BLA’*) (parties to which are the Goolarabooloo/Jabirr Jabirr peoples and the State of Western Australia), an agreement pursuant to s31 of the *Native Title Act*;

2. *Browse LNG Precinct Project Agreement* (‘*PPA’*) (parties to which are the Goolarabooloo/Jabirr Jabirr peoples, the State of Western Australia, Woodside Energy Limited, Broome Port Authority and LandCorp), an agreement pursuant to s28(1)(f) and s31 of the NTA, and parts 9 and 10 of the *Land Administration Act* (1997) (WA); and

3. *Browse LNG Precinct Regional Benefits Agreement* (‘*RBA*’) (parties to which are the State of Western Australia, Minister for Lands, Conservation Commission of Western Australia, Kimberley Land Council and Woodside Energy Limited).[98]

As discussed in Chapter 4, Western Australia has developed a practice of entering into State Agreements with companies over major resource developments, which are then passed into law as an Act of Parliament. One aspect of these agreements — which came at traditional owner insistence — was that the *Browse (Land) Agreement* would be a State Agreement. The *Browse (Land)*

[96] The precinct would have had the ability to expand so as to process 25 million tonnes of LNG per year: Woodside Petroleum Ltd, ‘Annual Report’ (2012) 31–32 <http://www.woodside.com.au/Investors-Media/Announcements/Documents/20.02.2013%20Annual%20Report%202012.pdf>.

[97] Australian Government and Department of Foreign Affairs, ‘Australia’s Liquefied Natural Gas (LNG) Exports, 2003-04 to 2013-14 and beyond’ 2 <https://dfat.gov.au/about-us/publications/Documents/australias-lng-exports-2003-04-to-2013-14.pdf>. The figures on the Browse LNG and Curtis Island LNG projects are intended to show an approximation of the sums involved rather than being precise estimates of future profits.

[98] These agreements are available on the Department of State Development’s website: Western Australian government, Department of State Development, *Browse LNG - Native Title and Heritage* <http://www.dsd.wa.gov.au/state-development-projects/lng-precincts/browse-kimberley/native-title-heritage>.

*Agreement Act* 2012 (WA) received bipartisan support when it came before parliament, and received assent on 11 December 2012.[99]

The LNG Precinct was to be controlled and managed by the State, while Woodside, which holds the retention leases to the Browse deposit, was to be the first of up to four potential users of the proposed site.[100] The State was a party to the agreements because the 'LNG Precinct is a unique and important project'.[101] The agreements secured 3414 hectares of land for the building of a multi-user LNG processing facility on the Kimberley coast, including a port, a second runway for the Broome airport and accommodation facilities. The Western Australian Valuer General valued the site at $30 million for the purposes of compulsory acquisition.[102]

The agreement beneficiaries are the Goolarabooloo/Jabirr Jabirr, who receive the highest level of agreement benefits, and then a sliding scale of benefits to firstly Dampier Peninsula native title groups and then Kimberley Indigenous people more broadly. The agreements contain significant monetary and land compensation packages (said to equate, in the first phase, up to $1.5 billion, including a minimum of $552.4 million of guaranteed financial payments from Woodside and the State),[103] extensive business opportunities for traditional owners, traditional owner control over significant cultural and environmental aspects of the project and the guarantee that offshore gas would not be processed anywhere else on the Kimberley coast.[104] The financial payments are tied to specific purposes, for example housing, education and reading recovery programs, land tenure reform and cultural heritage programs.[105] Many of Woodside's commitments were linked with future production. Appendix 4 contains a detailed summary of the Browse LNG agreements.

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[99] For the debates on the *Browse (Land) Agreement Act 2012 (WA)*. see Colin Barnett, 'Hansard of the Legislative Assembly of Western Australia' (10 August 2011). The significance of this Act is discussed in Chapter 6, 'In the Outside World'.

[100] Woodside's joint venture partners are Shell Developments Australia Pty Ltd, BP Developments Australia, Chevron Australia Pty Ltd and BHP Billiton Petroleum (North West Shelf) Pty Ltd.

[101] Recitals, *Browse (Land) Agreement Act 2012 (WA)*.

[102] John Addis, 'James Price Point Land Acquisition Likely' *WA Today*, 1 May 2013 <http://www.watoday.com.au/business/mining-and-resources/james-price-point-land-acquisition-likely-20130501-2isew.html>.

[103] The estimate of $1.5 billion for the total worth of the first phase of the benefits package was made by the State – see The Honourable Colin Barnett, *Media Statements - Historic Land Use Agreement Signed at State Parliament* (30 June 2011) <https://www.mediastatements.wa.gov.au/Pages/Barnett/2011/06/Historic-land-use-agreement-signed-at-State-Parliament.aspx>. The agreements would have been worth more if further proponents, other than Woodside, also used the precinct. In addition, the agreements contain a formula for further payments by Woodside if additional LNG trains had been built.

[104] See ATNS - Agreements, Treaties and Negotiated Settlements project, *Browse LNG Precinct Project Agreement* <http://www.atns.net.au/agreement.asp?EntityID=5484>. See also Appendix 3 - An Analysis of the Browse LNG agreements.

[105] Refer to Appendix 4 – 'Summary of the Browse LNG agreements'.

Most of the agreements' benefits were payable only if Woodside made a final investment decision on their participation in the project. Benefits payable before a final investment decision occurred included a land package; a $30 million payment from the State on the taking of land; and funding for Waardi Ltd and Aarnja Ltd, two bodies set up to manage the agreement benefits for the native title parties, and Kimberley Indigenous people more broadly.[106]

The evaluation of agreements is a difficult, and political, task, and one that inevitably involves value judgments.[107] Appendix 5 contains an assessment of the Browse LNG agreements as measured against Ciaran O'Faircheallaigh's criteria and scoring system for assessing agreement outcomes.[108] This finds that they rate highly across almost all criteria.[109] The Browse LNG agreements have also been described as 'much more positive' than those typically achieved in negotiations between extractive industries and Aboriginal peoples. [110] They have also been described as 'controversial', particularly given they were negotiated under the threat of compulsory acquisition.[111]

There was general consensus across interviewees from all parties that traditional owners had obtained a very beneficial outcome from the Browse LNG negotiations.[112] KLC lead negotiator Cameron Syme stated that prior to negotiations:

> Wayne came to me and said take a 100 year view of the project ... my personal diary says this deal must get billions of dollars for people, it must start with a 'B'.[113]

This aim was fulfilled, he said.[114] Wayne Bergmann welcomed it as a chance for Kimberley Aboriginal people to be properly resourced to take control of their lives.[115] Traditional owners were similarly positive about the agreement — all agreed, with some qualification, that they were

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[106] Ss 9 and 10, PPA.

[107] Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 303.

[108] O'Faircheallaigh, above n 107.

[109] The same exercise has not been undertaken in relation to Curtis Island LNG given insufficient information on the content of these agreements.

[110] Ciaran O'Faircheallaigh, 'Extractive Industries and Indigenous Peoples: A Changing Dynamic?' (2013) 30 *Journal of Rural Studies* 20, 28.

[111] John Phillimore, 'The Politics of Resource Development in Western Australia' in Martin Brueckner et al (eds), *Resource Curse or Cure?* (Springer Berlin Heidelberg, 2014) 25, 36.

[112] Refer to Chapter 3, 'Analysing the Agreements' for a discussion on how the agreements were assessed. Also see the discussion on the Browse State Agreement in Chapter 6, 'In the Outside World', and the discussion on the 'Traditional Owners' Rules for Major Resource Developments' in Chapter 6, 'Site Selection Process and Negotiation'.

[113] Interview with Cameron Syme (Perth, 12 June 2012).

[114] Interview with Cameron Syme (Perth, 12 June 2012).

[115] Kimberley Land Council, 'Traditional Owners Sign James Price Point Agreement' (Media Release, June 2011).

beneficial agreements. Mary Tarran, for example, said that "this agreement is dignified, it showed the people who are the first occupants of the Kimberley", but noted "they could have been better".[116]

Colin Barnett, echoing his predecessor Alan Carpenter, emphasised the positive impact that the agreement would have on the lives of Kimberley Aboriginal people. [117] Duncan Ord, chief negotiator for Western Australia before the 2008 election, described the agreement as a 'game-changer', including because:

> They [the TOs] had a desire ultimately to not be the takers of benefits but to be a part of the business ... They need to have as much stake in the success and failure of what we're doing as everybody else. There should be no kind of handout.[118]

Somewhat surprisingly, Woodside chief negotiator Betsy Donaghey described being unaware that the agreements they signed were beneficial to traditional owners:

> Did I know that it would be record-breaking, or set a benchmark? No, Cameron [Syme] and Wayne [Bergmann] did a lovely job of making us think it was poor.[119]

## IV. CENTRAL QUEENSLAND

Curtis Island is located just off Gladstone, Queensland. Before the LNG processing plants were built, the island consisted of a national park and a pastoral lease, while the Gladstone hinterland is dominated by pastoral, agricultural and mining industries. The census area around Gladstone, in central Queensland, has an Indigenous population that identifies as approximately 4.6 per cent of a total 148,122 people.[120]

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[116] Interview with Mary Tarran (Broome, 27 June 2012). Frank Parriman largely agreed with this: interview with Frank Parriman (Broome, 21 June 2012). Tarran also said of the agreements that they were "the biggest thing to hit the shores since those ships sailed in".

[117] Colin Barnett, Premier, "Consent Agreement Reached for Kimberley LNG Precinct" (Press Release, 6 May 2011).

[118] Interview with Duncan Ord (Perth, 4 December 2012). Ord also pointed out that the agreements had potential greater than the figures suggested: "They'd never actually factored in what owning a major port and 3500 hectares of freehold land attached to it in 100 years' time. But I said for my great-great-grandchild I would have taken that". Ord also pointed out that: "If you've put up $3 million for an education fund and overnight you've got a doubling of kids going to university ... Obviously if the program is worth $4.5 million you'd get another 20 or 30 kids, and [if] there were all these kids missing out do you think that that money won't be found? Of course it will. So I said don't get fixated on bits of money that have got 20, 30 year time horizons."

[119] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

[120] The House of Representatives seat of Flynn best represents the claim group area. It is classified as a rural electorate. In comparison, Cape York, in the state's north, has 49.6% Indigenous population, as per the 2011 census: Australian Bureau of Statistics, above n 8.

Both Curtis Island and Gladstone Harbour are part of the World Heritage listed Great Barrier Reef Marine Park below their low water marks.[121] Gladstone Harbour, however, is home to Australia's sixth largest port, and the largest bulk commodity port in Queensland, which services the coal, bauxite, agricultural and LNG industries. [122] The area is known as being highly industrialised, despite its proximity to the Great Barrier Reef.[123]

Gladstone Harbour has been the subject of various recent environmental controversies, which have called into question the impact of these industries on its environmental state and world heritage status.[124]

### *A. Historical Survey*

Much less historical material is available on the history of Aboriginal people in central Queensland in comparison to the Kimberley. The historical survey therefore focuses on Queensland more broadly, noting the exceptions that relate directly to the central Queensland Aboriginal experience.

When British settlers arrived in area that became Queensland, it was home to approximately 200 of the 600-700 Australian Aboriginal nations, who spoke at least 90 languages. [125] From the 1820s, New South Wales authorities had used Queensland as a penal colony. Authorities intended that Port Curtis, as Gladstone was then known, be used to house up to 3000 'useless and unemployed' convicts.[126] However, the first attempt in 1847 to establish this penal colony made little progress because of 'bloody battles' with local people.[127] The town of Gladstone was eventually established in 1853. A nineteenth century history of the Port Curtis colony notes that:

> Murders by the wild black were of almost daily occurrence; white men could not travel at all unless well mounted and well armed [until] a certain number of the blacks were civilised,

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[121] The United Nations Educational, Scientific and Cultural Organization, 'World Heritage Nomination - The Great Barrier Reef' (1981) <http://whc.unesco.org/archive/advisory_body_evaluation/154.pdf>. Great Barrier Reef Marine Park Authority, 'Capricorn Zoning Map' <http://www.gbrmpa.gov.au/___data/assets/pdf_file/0016/28123/MAP-17.pdf>.

[122] Anthea Tinney et al, 'Independent Review of the Port of Gladstone - Report on Findings' (Commonwealth of Australia, July 2013) <http://www.environment.gov.au/system/files/resources/ae7cbcf9-2963-47d7-9029-3aa1a065db51/files/gladstone-review-initial-report.pdf>

[123] Refer to the discussion in Chapter 8, 'Gladstone is Industrial'.

[124] Anthea Tinney et al, above n 122. Australian Broadcasting Corporation, 'Great Barrier Grief', *Four Corners*, 8 November 2011 <http://www.abc.net.au/4corners/stories/2011/11/03/3355047.htm>.

[125] Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 3.

[126] Ibid 2.

[127] Ibid 60.

> organised into companies of mounted native police ... and trained to run down, shoot, or capture their wild marauding brethren of the bush.[128]

In general, Raymond Evans et al describe the Queensland colonial expansion as being more violent and racist than elsewhere in Australia. They argue that this was due to a combination of factors: mining, pastoral and plantation frontiers were expanding simultaneously; Aboriginal people were fighting British settlers more violently than in southern colonies due to an increased knowledge of each others' battle tactics; particularly virulent racist theories were at their height; and the presence of a larger Aboriginal population, due to the bounty of the country and comparatively little European disease. [129] They also argue that British settlers arriving in Queensland were people who had failed elsewhere, were desperate for economic success and therefore prone to greater acts of violence against Aboriginal people. Queensland:

> [E]xperienced the most tumultuous frontier history, and, for Aboriginal people already traumatised by the rapid, hostile takeover, the most oppressive post-frontier one.[130]

In addition, Queensland saw the widespread use of Native Mounted Police — a force of armed Aboriginal men under the command of Europeans — who were known both for their ability to track Aboriginal people through thick bush, and for their slaughter and savagery. [131] They operated under the direct control of the colony's Executive Council, and were part of a trend across the British colonies that used and armed local people, other instances including the sepoys in India and the Irish constabulary.[132] Widespread guerrilla resistance ensured this force was active.[133] Their usual tactic was to track any groups associated with resistance, approach their camp at dawn, shoot the sleeping people and burn their bodies. [134] In some cases, they deliberately attacked elders who were known as the holders of traditional law and custom and who could therefore 'sing' the death of native police.[135] Their non-Aboriginal officers too were often remarked on for their brutality: "the Native Police offered a perfect niche for the sadist" noted a contemporary.[136] These officers were occasionally removed from the force for 'excessive

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[128] James Francis Hogan, *The Gladstone Colony: An Unwritten Chapter of Australian History* (T. Fisher Unwin, 1898) 77–78.

[129] Evans, above n 125, 56.. The conclusion that the Queensland frontier was more violent than elsewhere has also been reached by Timothy Bottoms, *Conspiracy of Silence: Queensland's Frontier Killing-Time* (Allen & Unwin, 2013).

[130] Evans, above n 125, 269.

[131] Ibid 60–61.

[132] Jonathan Richards, *The Secret War: A True History of Queensland's Native Police* (University of Queensland Press, 2008).

[133] Evans, above n 125, 34.

[134] Jonathan Richards, 'The Native Police of Queensland' (2008) 6 *History Compass* 1024, 1025.

[135] Ibid 1026.

[136] Quoted in Evans, above n 125, 58–59.

violence' against Aboriginal people, but there is no evidence that they were charged with offences.[137] Colonial officials appeared to ignore or conceal the worst of the force's excesses from the general public: this 'war of wholesale extermination' was essential for the colonial project, argued a contemporary.[138]

Aboriginal people working on pastoral stations fared only a little better than those still holding out against colonial authority. Sexual abuse of Aboriginal women on pastoral stations was widespread: they were 'usually at the mercy of anybody', considered as 'stud gins' who 'belonged' to the station.[139] Many other Aboriginal women lived in a state of sexual servitude, after having been kidnapped or sold.[140] Mustering expeditions, in which Aboriginal women were the prey, were both known about, and tolerated, by officialdom.[141] While sexual exploitation was tolerated, cohabitation and marriage between white men and black women was considered a 'degradation'.[142] Aboriginal Queenslanders were not the only non-white workers being exploited: an indentured labour system akin to slavery saw approximately 60,000 Pacific Islanders forcibly brought to work in Queensland and northern New South Wales in the latter half of the 19th century in a practice known as 'blackbirding'.[143]

Official colonial policies saw Aboriginal Queenslanders experience high levels of displacement from their traditional lands, as well as the break-up of groups and families: one in six children is estimated to have been removed from their families between 1897 and 1971. [144] Aboriginal 'trouble makers' were sent to reserves including Cherbourg and Palm Island, the latter effectively a prison housing Aboriginal people from all over Queensland.[145]

The conservative Liberal National Party government of Johannes Bjelke-Petersen, the premier of Queensland between 1968 and 1987, continued this legacy of state oppression over the lives of Aboriginal peoples in Queensland. [146] In 1978, an expert in race relations described the Aboriginal mission system as analogous to the Soviet gulag archipelago.[147] Unlike elsewhere in

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[137] Richards, above n 134, 1027.
[138] Ibid.
[139] Evans, above n 125, 103–4.
[140] Evans, above n 1, 105.
[141] Ibid 106–107.
[142] Ibid 108.
[143] Evans, above n 125.
[144] Ibid 232.
[145] Joanne Watson, *Becoming Bwgcolman: Exile and Survival on Palm Island Reserve, 1918 to the Present* (PhD, University of Queensland, 1994). See also Thom Blake, *A Dumping Ground: A History of the Cherbourg Settlement* (University of Queensland Press, 2011).
[146] Evans, above n 125, 232–4.
[147] Ibid 232.

Australia in the 1970s, Queensland did not seek to employ Aboriginal leaders in the public service, ensuring that 'polarisation and militancy were maximised'.[148] Aboriginal Queenslanders were not granted freedom of movement until 1971, and even then the legislation enabling this was found to contravene fifteen clauses of the *Universal Declaration of Human Rights*.[149] By the 1980s, Aboriginal Queenslanders had the lowest life expectancy in Australia.[150]

In 1992, the landmark *Mabo* decision was handed down in relation to Murray Island in the Torres Strait, Queensland. The Bjelke-Petersen government had earlier attempted to thwart this litigation by purporting to extinguish native title, an attempt that was ruled invalid as a contravention of the *Racial Discrimination Act 1975* (Cth) by the High Court in 1988.[151] In 1991, the Goss Labor government passed land rights legislation: the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld). This legislation was never implemented because of the subsequent *Mabo* decision. Its weak recognition of Aboriginal land rights reflected Premier Goss' personal opposition to the recognition of those rights, according to Langton.[152] Similarly, Howlett finds, based on her research, that Queensland had a:

> [H]istorical and institutional antipathy … towards recognition of Aboriginal land rights … The overriding of Aboriginal interests was ingrained in the practice of State government decision-making, with Queensland having a particularly harsh history of treatment of its Aboriginal people.[153]

*1. Political Representation*

The local Aboriginal group who are the registered applicants for Curtis Island are known as the Port Curtis Coral Coast (PCCC) people, an amalgam of four groups: the Gooreng Gooreng, Gurang, Bailai and Bunda peoples. There is little publicly available information on the PCCC group. The PCCC registered native title applicant group have undergone disruptive internal disputes, with the replacement of all the named applicants in February 2012 after the negotiation of all but the Arrow LNG ILUA.[154]

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[148] Ibid 236.

[149] Ibid 233.

[150] Ibid 234.

[151] *Mabo v Queensland (No 1)* [1988] CLR 186.

[152] Marcia Langton, 'Koowarta: A Warrior for Justice: A Brief History of Queensland's Racially Discriminatory Legislation and the Aboriginal Litigants Who Fought It' (2014) 23 *Griffith Law Review* 16.

[153] Catherine Howlett, *Indigenous Peoples and Mining Negotiations: The Role of the State* (PhD, Griffith University, 2008) 206.

[154] Interlocutory decision of *Kerry Blackman & Ors on behalf of the Port Curtis Coral Coast Claim and State of Queensland and others* [2012] QUD6026/2001.

The PCCC were represented by the Gurang Land Council until it was deregistered in 2008 following a federal government review. [155] They are now represented by Queensland South Native Title Services (QSNTS) in their native title claim.[156] They were represented in the Curtis Island LNG negotiations by several different law firms having chosen not to use QSNTS for LNG negotiations.[157] The PCCC do not have a political organisation to represent the claim group, although Gidarjil Aboriginal Corporation claims to politically represent parts of the group. This claim is contested.[158]

### *B. Curtis Island LNG Negotiations*

The LNG-related projects currently underway around Gladstone are three joint venture projects seeking to extract coal seam gas (CSG) from the Bowen and Surat Basins in central Queensland, and piping it to Curtis Island where it will be processed and exported. The agreements from a fourth joint venture project, that of Arrow LNG, are also considered, although at the time of writing it has been put on hold[159] and it is unclear whether the project will proceed. The Curtis Island LNG projects include the processing facilities, as well as dredging, marine loading facilities and accommodation facilities. While aspects of these projects have been controversial (see below), the four land access agreements signed with Curtis Island traditional owners received almost no public attention.

The broader Gladstone LNG projects[160] have resulted in 35 Indigenous Land Use Agreements (ILUAs), and an unknown number of s31 agreements. As detailed in Chapter 3, the scope of this research is limited to the agreements for the Curtis Island processing facilities, however the pipeline agreements are also briefly discussed here as part of the broader context of these projects. The aspect of the Gladstone LNG projects that has been most publicly controversial relates to putting coal seam gas wells on agricultural land. Given Australian law on resource

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[155] ATNS Project, *Gurang Land Council*, available at http://www.atns.net.au/agreement.asp?EntityID=1247.

[156] It is noteworthy that QSNTS is a native title service provider rather than a native title representative body (NTRB). The latter are considered to be more membership-driven (and therefore grassroots) organisations than the former. 'Native title service providers' are established by the Commonwealth government to provide services to native title claimants and holders in areas where no NTRB exists.

[157] Gadens Lawyers represented the groups in the first three ILUA negotiations, and Jeff Dillon acted in the Arrow LNG ILUA. This change of legal representation mirrored the change of PCCC named applicants. See National Native Title Tribunal, *Register of Indigenous Land Use Agreements Details* (2014).

[158] Interview with Kezia Smith (Gladstone, 11 September 2013) who states that this organisation does not represent the PCCC, while others say that it does: interview with Kerry Blackman (Gladstone, 10 September 2013).

[159] Angela Macdonald-Smith, 'Shell Shelves Arrow LNG Project in Queensland' *The Sydney Morning Herald*, 30 January 2015.

[160] These relate to the extraction and piping of LNG to Curtis Island, refer to Chapter 3, 'Case Study Selection'.

ownership[161] the owners of this land could not veto these wells. This aspect of the development resulted in a significant 'Lock the Gate' campaign.[162]

All four LNG projects have negotiated land access agreements with the PCCC group, none of which are publicly available beyond ILUA extracts held by the NNTT. The start and finish times of the Curtis Island negotiations were concentrated between 2010 and 2013.[163]

The four Curtis Island LNG projects are:

1. Australian Pacific LNG (APLNG), a joint venture between Origin Energy 37.5 per cent, Conoco Phillips 37.5 per cent and Sinopec 25 per cent, including a 450km pipeline and a processing facility on Curtis Island;
2. Gladstone LNG (GLNG), a joint venture between Santos Limited 30 per cent, PETRONAS 27.5 per cent, Total 27.5 per cent and KOGAS 15 per cent, including a 435km pipeline and a processing facility on Curtis Island;
3. Queensland Curtis LNG (QCLNG), managed by the BG Group, with CNOOC to have 10 per cent of Train 1 and Tokyo Gas to have 2.5 per cent of Train 2, including a 380 km pipeline and a processing facility on Curtis Island;
4. Arrow LNG (Arrow), a joint venture between Shell Energy 50 per cent and Petrochina 50 per cent, including a 600 km pipeline to its processing facility on Curtis Island, and a 470km pipeline to another LNG processing facility at Fisherman's Landing, near Gladstone.

Four Environmental Impact Statements (EIS), conducted so as to concurrently fulfil the requirements of the relevant state legislation, have been approved for the Curtis Island LNG projects.[164] These EISs all contain social impact assessments in which only perfunctory reference is made to Aboriginal social, heritage and cultural impacts.[165]

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[161] Most minerals are reserved in the Crown in Australian jurisdictions which means there are very few Australian landowners who can veto mining on their land: see Michael Hunt, *Halsbury's Laws of Australia: Minerals and Petroleum Law* (Butterworths, 1997) 8-20.

[162] Stephanie Small, 'Farmers Concerned Over Coal Seam Gas Announcement' (ABC AM, 22 October 2010), <http://www.abc.net.au/am/content/2010/s3045086.htm>

[163] National Native Title Tribunal, *Future Act Applications* <http://www.nntt.gov.au/Future-Acts/Search-FA-Determinations/Pages/search.aspx>. Interview with Tony Johnson (via telephone, 30 August 2013).

[164] See Chapter 4, 'Queensland Legislation'.

[165] For example, the APLNG report has brief mentions of Aboriginal social, cultural and heritage concerns on approximately 15 pages of a 352 page report; the GLNG report briefly mentions Aboriginal social, cultural and heritage concerns on approximately 11 pages of a 314 page report; the QCLNG report has brief mentions of Aboriginal social, cultural and heritage concerns on approximately 17 pages of a 269 page report; the Arrow report has brief mentions of Aboriginal social, cultural and heritage concerns on approximately 27 pages of a 313 page

The Curtis Island LNG projects have come under criticism from environmentalists and the World Heritage Committee for the negative impact they are said to be having on the Great Barrier Reef.[166] This criticism has not gained the same media and public traction as similar environmental criticisms of Browse LNG.

In one of the few media mentions on the agreements, resource company Santos says that their GLNG Aboriginal land access agreements, covering both the Curtis Island plant and the pipeline corridor from Roma, were negotiated after a 'highly collaborative' process.[167] This view is not supported by evidence.[168]

### *C. Curtis Island LNG Agreements*

The significance of the lack of publicly available information on the Curtis Island LNG Agreements is discussed in Chapter 8, which concludes it is because the PCCC lack significant political power.[169] It was estimated that the four Curtis Island projects would cost $85 billion in construction phase.[170] When in operation, three of the four projects will produce approximately 25 million tonnes of LNG per year.[171] It was estimated that the Arrow LNG project would have produced up to 18 million tonnes per year.[172] When the Curtis Island LNG Agreements were signed between 2010 and 2013, LNG was priced between $450 and $600 per tonne.[173]

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report. Queensland Government, Coordinator General, 'Australia Pacific LNG Project: Coordinator-General's report on the environmental impact statement' (November 2010); Queensland Government, Coordinator General, 'Coordinator-General's evaluation report for an environmental impact statement Gladstone Liquefied Natural Gas—GLNG' (May 2010); Queensland Government, Coordinator General, 'Queensland Curtis LNG Project: Coordinator-General's report on the environmental impact statement' (June 2010); Queensland Government, Coordinator General, 'Shell Australia LNG project (also known as Arrow LNG Plant): Coordinator-General's evaluation report on the environmental impact statement' (September 2013).

166 See, for example, Australian Broadcasting Corporation, 'Great Barrier Grief', above n 124., Anthea Tinney et al, above n 122.

167 Santos, *GLNG Signs Largest Set of Indigenous Agreements in Australian Resources History* (2010) <http://www.santos.com/blog/archive/2010/08/24/agreements.aspx>.

168 Refer to Chapter 7, 'Curtis Island LNG, Description of Negotiations'

169 See Chapter 8, 'Curtis Island LNG, Aboriginal Political Power' and 'Conclusion'.

170 Gladstone Regional Council, *LNG Related Projects* <http://www.gladstone.qld.gov.au/lng-related-projects>. This includes $15 billion for the Arrow LNG project.

171 Queensland Government, 'First Shipment from Gladstone LNG Project' (Media Release, 16 October 2015). <http://statements.qld.gov.au/Statement/2015/10/16/first-shipment-from-gladstone-lng-project>.

172 'Greenfield Arrow LNG Project Cancelled: Shell Chief' *Gas Today*, 3 February 2015 <http://gastoday.com.au/news/arrow_lng_project_off_the_table/90961>.

173 Australian Government and Department of Foreign Affairs, above n 97, 2.

The following describes basic information on the four Curtis Island LNG projects' Indigenous Land Use Agreements (ILUA), together with any specific information known about their content.[174]

1. *Port Curtis Coral Coast and Australia Pacific LNG Pty Limited ILUA* (QI2010/042) ('APLNG agreement'), registered on 28 July 2011, parties to which are APLNG, PCCC group and the State of Queensland. The area that this agreement covers is 80 square kilometres around Gladstone, including parts of Curtis Island;
2. *Santos Petronas Port Curtis Coral Coast GLNG ILUA* (QI2010/011) ('GLNG agreement'), registered on 15 October 2010, parties to which are Santos, Petronas and PCCC group. The area that this agreement covers is 502 square kilometres, including parts of Curtis Island and a corridor west of Gladstone. This deal offers 300 'training opportunities', including a '$4 million employment training fund';[175]
3. *Port Curtis Coral Coast & QGC Pty Limited ILUA* (QI2010/009) ('QGC agreement'), registered on 17 January 2011, parties to which are QGC and PCCC group. The area that this agreement covers is 168 square kilometres, including parts of Curtis Island and a corridor north and south-west of Gladstone.

The QGC Indigenous Participation Action Plan (which covers QGC's entire Gladstone project, not just in relation to the Curtis Island plants) aims to employ 200 Aboriginal people in the construction phase, including apprenticeship and monitoring. [176] Traditional owner Tony Johnson said that while training provisions were included, they relied on government payments, meaning the amount the companies contributed was "miniscule".[177] GLNG2 noted that while agreements can have business development and employment and training provisions, 'often that content is already captured in other ILUAs with these groups'.[178] Similarly, GLNG1 noted that, while he felt it would have been a benefit for the group to have such provisions, 'they said that they were the most trained, educated people in the world because there was three or four proponents and they had a lot of opportunities through the other agreements, they just wanted

[174] The area of land covered by these agreements is large in comparison to the area covered by the Browse LNG agreements (3,414 hectares). For example, the QGC ILUA covers 168 square kilometres or 16,800 hectares. However it is unlikely that all this land is intended for use by the project (the QGC processing facility on Curtis Island covers 270 hectares). It is also probable that there are overlaps in the areas covered by the agreements. While it is not possible to draw any definitive conclusions about this, it may indicate a general lack of precision in the agreements, or an ambit claim.

[175] Petrina Berry, 'Indigenous Groups Slam Gas Deal' *Brisbane Times*, 27 March 2010. Whether these positions are directed towards PCCC traditional owners is unknown.

[176] QGC, 'Indigenous Participation Action Plan' (November 2010).

[177] Interview with Tony Johnson (via telephone, 30 August 2013).

[178] Interview with GLNG2 (Brisbane, 16 September 2013).

the cash, which is what we gave them.' [179] The GLNG plan was nominated for a 2014 'Queensland Reconciliation Award', although it is highly likely that any commitments are unenforceable and therefore cannot be directly compared to commitments contained in the Browse LNG agreements. It highlights that while there are examples of LNG companies espousing commitments to Queensland Aboriginal people, on examination these pronouncements appear vague or tokenistic.

4. *Arrow Energy and Port Curtis Coral Coast People Arrow LNG Project ILUA* (QI2012/092), ('Arrow agreement') registered on 24 April 2013, parties to which are Arrow Energy, the PCCC group and the State of Queensland. The area that this agreement covers is 1039 square kilometres, including parts of Curtis Island and an area around Mt Larcom.[180] The project has an 'Indigenous Participation Strategy' and an 'Indigenous Communities Social Impact Action Plan', both of which contain broad statements about intentions to ensure Indigenous people benefit from the project, including education, employment and training opportunities.[181]

It is not known why the State of Queensland is only listed as a party to two of the ILUAs.

Information was also sourced from research participants that was not specific to particular agreements, but relates to these four agreements as a whole.[182] The one area in which it can be said that an adequate amount of information is available is in relation to financial payments. Information obtained from traditional owners in terms of the financial payments contained in the agreements was consistent and indicated payments of $1 million from Santos,[183] payments between $1.2 and $1.75 million in unspecified agreements, [184] with payments from all four agreements being no more than $10 million in total. [185] Information from company

[179] Interview with GLNG1 (Brisbane, 17 September 2013

[180] National Native Title Tribunal, *Search Register of Indigenous Land Use Agreements* (2014). Note that the confidentiality of the agreements means that it is difficult to ascertain many basic aspects of these agreements. For example it is difficult to understand the exact legal form that the substantive agreements took: it is likely that the substantive content of the agreements were in 'ancillary agreements' (mentioned by several research participants) a term often associated with s31 agreements. The discussion contained here is of the broad benefits rather than the exact legal mechanisms under which they were negotiated. See also David Trigger et al, 'Aboriginal Engagement and Agreement-Making with a Rapidly Developing Resource Industry: Coal Seam Gas Development in Australia' (2014) 1 *The Extractive Industries and Society* 176, 12.

[181] Australia Pacific LNG, 'Environmental Impact Statement' <http://www.aplng.com.au/environment/our-environmental-impact-statement>.

[182] This discussion includes information given by LNG company representatives that was specific to particular agreements, however in order to maintain anonymity it is discussed here in a general manner.

[183] The researcher has chosen to anonymise the interview source of this information.

[184] The researcher has chosen to anonymise the interview sources for this information.

[185] The researcher has chosen to anonymise the interview sources for this information.

representatives, while not specific on figures, indicated that most companies paid 'an industry standard'[186] with one company paying about double what others paid.[187]

Unlike Browse LNG, Curtis Island LNG companies had to negotiate with traditional owners further along the pipeline corridors, and at the point that the coal seam gas was being extracted. This was given as a reason by some interviewees as to why the quantum between the agreements was so different. However, this claim does not appear to withstand scrutiny. The total length of the pipelines between the four Curtis Island LNG projects is 1735 km, which, if native title agreements were made for their entire length, would have cost a further $8.675 million to the four projects collectively. This is based on a figure of $5000.00 per kilometre given by GLNG1, [188] and therefore increases native title payments to approximately $18.675 million between the four projects. It is not known what, if anything, was paid to native title holders where the CSG is extracted, although several Western Australian LNG representatives noted that there is an ethos in the industry to pay more where the resource is being extracted.[189]

Given the paucity of information, these agreements will not be assessed against the O'Faircheallaigh criteria. Nevertheless, it is clear from the little information that is available that these agreements were weak. The traditional owners interviewed unanimously felt that they had signed off on very poor agreements. Two traditional owners independently described the Browse and Curtis Island LNG agreements as like "chalk and cheese".[190] PCCC traditional owner Kezia Smith worked in mining company Rio Tinto's community affairs and human relations departments for ten years, including at the Argyle diamond mine in the East Kimberley. Part of her job related to the Aboriginal land access agreements for these mines: "I know when they are pulling wool over your eyes",[191] she said. Smith said of the Curtis Island LNG deals:

> I have seen these deals ... and I am disgusted. It's not even a slap in the face. They are going to earn billions, and to pay us a shut up deal is just sickening. [192]

[186] Interview with GLNG1 (Brisbane, 17 September 2013). Interview with GLNG2 (Brisbane, 16 September 2013).
[187] Interview with GLNG1 (Brisbane, 17 September 2013).
[188] Interview with GLNG2 (Brisbane, 16 September 2013). This pipeline figure is likely generous given it does not subtract the pipeline paid for in the Curtis Island LNG agreements (which is unclear).
[189] Interview with Don Voelte (Sydney, 5 June 2014); Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[190] Interview with Kerry Blackman (Gladstone, 10 September 2013), Interview with Kezia Smith (Gladstone, 11 September 2013). It is worth reiterating that, given the Browse LNG agreements are publicly available, and attracted a great deal of media attention, almost all of the PCCC traditional owners had a good idea about their content.
[191] Interview with Kezia Smith (Gladstone, 11 September 2013).
[192] Interview with Kezia Smith (Gladstone, 11 September 2013).

When asked whether the Browse LNG and Gladstone LNG agreements were comparable, industry representatives indicated that they were vastly different: "in a different universe, different stratosphere", said one.[193] Nevertheless, GLNG3 of Santos described the agreements he negotiated as "fair".[194]

## V. CONCLUSION

This chapter has shown some similarities and several significant differences between the case study sites. A key difference that emerges from this survey is that around Gladstone colonial expansion occurred earlier than in the Kimberley, was more violent, involved greater numbers of settlers, more extensive land allocations and resulted in higher levels of dislocation of Aboriginal communities and families. While both Queensland and Western Australia had governments that practiced discriminatory policies against Aboriginal people up until the 1990s, the Queensland government's policies were particularly egregious.[195]

The chapter highlights the disparity in outcomes between the Browse LNG and Curtis Island LNG agreements. This difference cannot be attributed to the projected profit of each development given the Curtis Island LNG project has a larger profit potential than the Browse LNG project. The Curtis Island LNG agreements, while an essential part of an approvals process for large and complex developments, appear to contain little of substance. In contrast, the Browse LNG agreements contain very significant commitments for traditional owners.

This chapter also finds that the Browse LNG agreements were negotiated by a politically strong Aboriginal organisation with a long history of politically representing Kimberley Aboriginal people, including in agreement making with resource companies. In contrast, the Curtis Island LNG agreements were negotiated by the group themselves with minimal legal assistance and without the active participation of their native title representative body. The chapter introduced several other significant aspects of each negotiation, including the split in the Goolarabooloo/Jabirr Jabirr claim group and the 'No Gas' campaign against the Browse LNG development.

It is the work of the following chapters to determine whether and how these differences impacted agreement outcomes. However, two tentative conclusions can be drawn. The first is that neither differences in legislative regime nor the economic scale of the projects provide

[193] Interview with GLNG2 (Brisbane, 16 September 2013).
[194] Interview with GLNG3 (Brisbane, 17 September 2013).
[195] Judith Wright, 'A Shaft of Light' [1991] *Island* 44.; Evans, above n 125.

convincing explanations for the differences in agreement outcomes. The second is that historical factors and the political strength of the traditional owner groups may be important influences on agreement outcomes.

# Chapter Six
# Legal Pluralism, Aboriginal and Settler Law

## I. INTRODUCTION

The previous two chapters have described the location and legal framework of Browse LNG and Curtis Island LNG. Chapter 4 found that the Australian legal framework for each negotiation was similar, and provided traditional owners with procedural negotiation rights pursuant to the *Native Title Act* and potential consultation rights in the federal *Environment Protection and Biodiversity Conservation Act*. Chapter 4 also outlined Aboriginal law prior to British colonisation, its continuation post 1788 and possible status in the Kimberley and central Queensland. Chapter 5 described the location and history of each LNG development, how each negotiation proceeded and the agreements that were reached. It showed differences between the colonial history, the nature of land use, Aboriginal population and environmental characteristics of each area.

This chapter begins the detailed examination of the empirical data. It explores the impact of Aboriginal and settler law on each of the negotiations and on the agreement outcomes. Given the similarity of the settler legal regime of the negotiations, it will focus on how these legal regimes were applied, and particularly whether it differed between negotiations.

It first discusses the role of the *Native Title Act* and other legislation on negotiations. It asks whether native title rights can be viewed as the basis from which calculations of agreement benefits were made. It then discusses the role of compulsory acquisition, finding that its discursive impact differed between the two negotiations.

The impact of Aboriginal law on negotiations is discusses, as well as the role it played in regulating traditional owner negotiation approaches and its influence on the negotiations more broadly. In particular, this chapter looks at the way in which the continuing practise of Aboriginal law shaped the Aboriginal response to the proposed development in the Kimberley, and the impact that it had on the State and Woodside.

## II. BROWSE LNG

### *A. Australian Settler Law*

#### *1. Native Title Act*

##### *(a) Symbolic Value*

A view coming out of interviews was that the *Native Title Act* is a symbol of the increasing recognition that Australia is giving its Aboriginal citizens, and that this symbolic value was potentially more important than its actual terms. For example, state public servant SMGO said:

> I think too often people try and be lawyers and use how the *Act* is written and interpreted and the like, as opposed to standing back and saying what's its fundamental message. One of the fundamentals is recognising rights in land and saying if you want to use that land there's another interest holder that you've got to deal with.[1]

Many people intimated that the Act had a meaning that went beyond — and potentially contradicted — its strict terms. For example Duncan Ord said:

> Legislation isn't as far advanced as some of the negotiations got to and part of the issues since then have been yeah, we've talked about all these things but where are they going to be dealt with under the L.A.W.?[2]

Glen Klatovsky of the Wilderness Society, speaking of the split in the Goolaraboolloo Jabirr Jabirr claim group and who would eventually be found to be traditional owners, observed:

> For the vast majority of Australians…[when] an Aboriginal person who stands on their land, say Walmadan [the Goolaraboolooo term for James Price Point], and says that this is my land, my country, I don't think that people say, 'well, but what did the Federal Court decide?'[3]

SMGO too commented on this. He distinguished between those parts of the Act that set out how native title rights were recognised, and the future act regime, which he called the "transactional" part of the legislation. Of the latter he said:

> I've seen areas where people have high rights and interests and recognition but get nothing out of future acts because they're in such remote areas and places that people don't necessarily want to

[1] Interview with SMGO (Perth, 5 December 2012).
[2] Interview with Duncan Ord (Perth, 4 December 2012).
[3] Interview with Glen Klatovsky (Melbourne, 15 April 2014).

> go and do business … and others that have low rights in land that end up high value because someone wants to use that land. So there are a lot of inequities in the *Native Title Act*.[4]

Many interviewees also discussed the discursive impact of *Mabo* on broader Australian society, echoing much of the commentary discussed in Chapter 2. Wayne Barker was typical of many across all parties when he said "the *Mabo* decision started a conscious shift in broader Australia".[5] Eric Ripper, former Deputy Premier of Western Australia, called his government's stand on native title "a stand on principle, it was a moral stand" in comparison with the former government's "racist, divisive approach" resulting in the current climate in which "native title is no longer an issue of significant controversy" in Western Australia.[6] In a similar vein, traditional owner Mary Tarran said that:

> You couldn't hear a pin drop when a TO spoke. We weren't just little black faces around the table, we had voices. It would have been a different outcome if we had not been in the room. The *Act* means that we are the native title party – just that label has power. Labelling has power. We were not taken lightly".[7]

Maria Mann, former co-ordinator of Environs Kimberley, identifies this power as coming from the recognition of native title:

> Aboriginal people have the *Native Title Act* now and a little more power. People always had a very strong sense of who they are and where they come from. Native title legitimised that in the eyes of other people. It conferred some sort of bargaining power in terms of what could happen on country.[8]

*(b) The Right to Negotiate: Procedural Rights or Great Lever?*

In the interviews, there were two broad views of the impact of the 'right to negotiate' on the negotiation. One view was that this legal trigger was 'just a key to the door'. The other view was that it was 'a great lever'.

Most research participants described the *Native Title Act*'s role in the negotiations as one of numerous influences on the negotiation's framework. The terminology used across all parties was that it only provided a 'seat at the table', although Wayne Bergmann of the KLC described it as being less significant than that:

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[4] Interview with SMGO (Perth, 5 December 2012).
[5] Interview with Wayne Barker (Broome, 18 June 2013).
[6] Interview with Eric Ripper (Perth, 21 June 2013).
[7] Interview with Mary Tarran (Broome, 27 June 2012).
[8] Interview with Maria Mann (Perth, 7 June 2013).

> It's a bit of a key to the door, I don't know whether it gets you to the table.[9]

Duncan Ord of the Western Australian government emphasised the positives in this view:

> The whole thing didn't start solely on the basis that there was an impediment to getting access to land because of TOs [traditional owners] … [The *Native Title Act*] wasn't the main driver…the native title issues were seen much more [as] a technical matter. That once we got down the next layer of these things there will be native title interests that will be dealt with, and we'll need to make sure we've gained full clearance for our liabilities under the *Act*.[10]

Robert Houston, a KLC lawyer, said that the Act's key role was in forcing people to the negotiating table, and that beyond that, traditional owners had to use non-legal leverage to obtain the best deal.[11] The bar for good faith negotiations was so low, he added, that parties "have to just rock up".[12] This view echoed a common theme amongst traditional owner negotiators that the 'right to negotiate' afforded only very limited rights. Bergmann said that "from a legal perspective, we all knew that the *Native Title Act* gave you no rights."[13] However, he qualified this by talking about the difference that recognition of native title, and the subsequent 'right to negotiate', made to Aboriginal parties.[14]

The timelines of the Act and lack of veto right were singled out as having the most deleterious impact on traditional owner power. Bergmann said that the combination of these two things directly benefited proponents over traditional owners. It allowed companies to effectively "steamroll" Aboriginal rights in country because it allowed them to wait out the time period and then apply to the NNTT, who were highly unlikely to refuse them. [15] Cameron Syme was similarly damning. He said he tells his traditional owner clients that:

> The *Native Title Act* is not to protect and preserve Aboriginal people's rights and interests, it is to provide mining companies and government with ways to get access to country and take your rights away. What it first of all does, is tell you what you already know, it tells you that you are a traditional owner.[16]

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[9] Interview with Wayne Bergmann (Broome, 20 June 2012).
[10] Interview with Duncan Ord (Perth, 4 December 2012).
[11] Interview with Robert Houston (Broome, 15 June 2012).
[12] Interview with Robert Houston (Broome, 15 June 2012).
[13] Interview with Wayne Bergmann (Broome, 20 June 2012).
[14] Interview with Wayne Bergmann (Broome, 20 June 2012).
[15] Wayne Bergmann, "Mabo 20 Years On - Have Land Rights Delivered?" (National Press Club Address, Canberra, 27 June 2012).
[16] Interview with Cameron Syme (Perth, 12 June 2012); Interview with Robert Houston (Broome, 15 June 2012); Interview with Jeremiah Riley (Broome, 13 June 2013).

Informants from other parties, none of whom were lawyers, expressed similar views. Ord said that traditional owners have "very limited real legal powers to force various points on negotiation".[17] Senior state bureaucrat SMGO said that the Act was:

> Designed for acts to occur, it's not designed for those acts not to occur … I get a bit annoyed when I hear the argument that the tribunal has never said no, because they are applying the Act. The Act is not really intended to say no … I don't think it's the perfect instrument, but it's better than no instrument.[18]

Many people said that given the nature of the project the company would have had to reach an agreement with them, the 'right to negotiate' notwithstanding. Indeed, Bergmann characterised the *Act* as almost irrelevant in some cases:

> It's a bit of a patchwork quilt as to the outcomes of commercial negotiations. There are agreements where Aboriginal people out of the Kimberley have a right to negotiate that are basket cases. There are agreements in the Kimberley where Aboriginal people have no right to negotiate that are exemplary.[19]

Christine Robinson, a staffer at the KLC, said of the Act that it only provided them the right to be in the negotiation "room" and did not play much of a role after that.[20] She also felt that companies would have to deal with traditional owners because of the need to obtain a social licence to operate, even without the Act.[21] SFGO made a similar point, while pointing to a different motivation. She pointed out that the state government had no legal obligation to be a party to the negotiation and the fact that they did was reflective of a genuine desire to be doing something about Aboriginal disadvantage through economic empowerment rather than welfare.[22]

Jeremiah Riley of the KLC pointed to the fact of the Act's existence as being important. While the legal obligations contained within the Act ("I wouldn't call them protections") might not be strong rights, he said, the mere fact of their existence means that those seeking to do future acts have to pay heed to traditional owners. [23] Indeed, as discussed below, Riley believed that traditional owners did best when they deliberately ignored the limited rights offered by the Act.

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[17] Interview with Duncan Ord (Perth, 4 December 2012).
[18] Interview with SMGO (Perth, 5 December 2012).
[19] 'Wayne Bergmann, "Mabo 20 Years On - Have Land Rights Delivered?" (National Press Club Address, Canberra, 27 June 2012)', above n 15.
[20] Interview with Christine Robinson (Broome, 25 June 2012).
[21] Interview with Christine Robinson (Broome, 25 June 2012).
[22] Interview with SFGO (Perth, 7 June 2012).
[23] Interview with Jeremiah Riley (Broome, 13 June 2013).

State politicians provided a broader perspective. Politicians Geoff Gallop and Eric Ripper emphasised that the legal rights contained in the Act should not be discounted. Ripper said:

> I think that there is a role for government, but in the end, native title parties have legal rights, and it is the exercise of those legal rights that count.[24]

Similarly Gallop said:

> I think that you can't underestimate the power of the law. In politics, I always believed that one of the strongest forces in modern politics is the power and authority of process, and the right to be consulted. It is a powerful idea, and it is something that Aboriginal people now have.[25]

Gallop also pointed out that this meant that Aboriginal people now have access to "lots of lawyers who are able to fight the good fight".[26]

*(c) Authority to Negotiate*

The significant impact of Goolarabooloo litigation in relation to the *Native Title Act*'s authorisation provisions (among other things) was also raised. [27] Echoing the view from the literature, interviewees across all parties pointed out that native title rights carry with them the ability for traditional owners to cause substantial delays to projects. In particular, the splintering of the native title claim group — and associated litigation — caused delay and disruptions to the negotiations, as well as huge distress to traditional owner negotiators. Indeed, there was broad consensus that the authorisation provisions of the Act had a very profound impact on the negotiations, primarily because Joseph Roe was a named applicant at the time this site was chosen. When his opposition became clear, Roe was removed as a named applicant of the claim following a vote of the claim group in August 2010, a decision appealed to the courts but ultimately upheld in February 2011.[28] Another case brought by Joseph Roe challenged the KLC's authority to enter into the Heads of Agreement, an authority that the courts also ultimately found to be valid.[29] During this litigation the negotiation was forced to cease because of the allegation that the KLC did not have proper authority to be conducting negotiations. The cost of the litigation is unclear, however Roe agreed to pay the KLC $200,000 in legal costs by

[24] Interview with Eric Ripper (Perth, 21 June 2013).
[25] Interview with Geoff Gallop (Sydney, 18 July 2013).
[26] Interview with Geoff Gallop (Sydney, 18 July 2013).
[27] For an explanation, refer to Chapter 4, 'Native Title Act and Associated Case Law'.
[28] *Roe on behalf of the Goolarabooloo and Jabirr Jabirr Peoples v State of Western Australia* [2011] FCA 421.; *Roe v State of Western Australia (No 2)* [2011] FCA 102.
[29] *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809.

the end of 2012.[30] This litigation raised significant speculation as to how it was funded. There was a general reluctance to discuss this issue on the record, however it was pointed out that the person often named in litigation — Joseph Roe — was bankrupt and therefore others were probably paying for his litigation costs.[31]

The undetermined native title claim was the traditional owners' "Achilles heel", according to Wayne Barker.[32] Duncan Ord said:

> Had we been negotiating with determined native title holders, 99 per cent of the humbug of all this would not have been there. There would have been the certainty of cultural decision making that would have made this infinitely easier on the Aboriginal people themselves. Easier for the State in terms of the certainties and easier for industry because they weren't confronted with so many mixed messages coming at them.[33]

Ord also speculated that the tenor of negotiations would change if companies were dealing with traditional owners with finalised claims rather than merely registered claims. He believed that this might result in projects being seen as commercial negotiations rather than compensation negotiations. [34] It caused difficulties for the State government too, for whom delays in negotiations were equally frustrating. Said SFGO:

> The difficulty in this instance was that some of the legal challenges that were made under the *Native Title Act* processes meant that you couldn't negotiate with parties for periods of time until courts had determined ... so in fact the State couldn't be seen to pick a winner.[35]

However, the ability to delay and frustrate a project may also aid traditional owner leverage. Rob Houston said that if negotiations had ever really broken down it would have made the process "very difficult" for Woodside and the State.[36] The Goolarabooloo, whose litigation had caused numerous delays to the negotiation, had emphasised this point, he said.[37]

Traditional owners Frank Parriman and Mary Tarran were both of the view that the Goolarabooloo family's very public claims during the negotiations to have native title rights in

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[30] Kimberley Land Council, 'Annual Report' (2012) 28.
[31] Interview with Wayne Barker (Broome, 18 June 2013). It was generally assumed that Roe's legal costs were being met by people aligned with the 'No Gas' campaign. For the reasons why refer to Chapter 8, 'Aboriginality and Wilderness'.
[32] Interview with Wayne Barker (Broome, 18 June 2012).
[33] Interview with Duncan Ord (Perth, 4 December 2012).
[34] Interview with Duncan Ord (Perth, 4 December 2012). This is in spite of the legal regime being the same for registered or determined claims. Refer to discussion in Chapter 9, 'Property and the Common Law'.
[35] Interview with SFGO (Perth, 3 December 2012).
[36] Interview with Robert Houston (Broome, 15 June 2012).
[37] Interview with Robert Houston (Broome, 15 June 2012).

James Price Point were being made with an eye to influencing the future native title claim decision. Parriman said:

> Goolarabooloo claim that they were given the land and the culture by Jabirr Jabirr people but there is no evidence of that in my opinion. They are throwing in all these things, because he [Roe] uses these as a weapon to get what he wants [a favourable native title determination].[38]

He said that this led to huge difficulties for traditional owner negotiators:

> While I know that is my land, my actions and behaviour in the negotiating room were modified by the fact that there was a split in the claim group. It was tricky and very frustrating. I knew that I was speaking on behalf of the rightful owners of the land, the Jabirr Jabirr, but I was also representing the whole GJJ claim group, and I knew that some of them were not in support of the project. I said a couple of times to Cameron [Syme] that we have to sort out native title, not having it sorted was a huge weakness.[39]

*(d) Relationship between Native Title Rights and Quantum of Benefits*

As discussed in Chapter 4, the 'right to negotiate' is silent on how agreements benefits (if any) are calculated. The *Native Title Act* does provide a complicated (and potentially unconstitutional) regime for compensating for extinguished native title that makes reference to the commercial value of freehold.[40] In the Kimberley there was an assumption that James Price Point would eventually be found to be exclusive possession native title land.[41] Yet, Kimberley traditional owners were clearly able to ensure that agreement outcomes were not based on the commercial freehold value of land which was valued by the Western Australian Valuer General at $30 million for the purposes of compulsory acquisition.[42]

Don Voelte has been publicly explicit that the agreement was about far more than just paying traditional owners for their land.[43] Since the demise of the onshore project, he has strongly argued that the benefits should be paid anyway:

> It doesn't matter where that plant is at, the commitment was to the Indigenous people of that area. And if that gas ever gets produced, if it gets produced through the moon I don't care, that agreement holds water, and Woodside ought to honour it. And there is no reason that they don't honour it except that, frankly, the only thing I can see is, greed … It was about the mob, it was

[38] Interview with Frank Parriman (Broome, 21 June 2012).
[39] Interview with Frank Parriman (Broome, 18 June 2013).
[40] Refer to Chapter 4, 'Future Acts'.
[41] Interview with Mary Tarran (Broome, 27 June 2012).
[42] John Addis, 'James Price Point Land Acquisition Likely' *WA Today*, 1 May 2013.
[43] Paul Garvey, 'Woodside Obliged to Pay Says Ex-CEO', 14 September 2013.

> about the region, it was about the culture and history of the area. And if you tie the gas properly to an onshore area, it's that area, all along the coast.[44]

Two different views emerged of the way that participants believed that native title rights translated to the negotiations. One view — expressed by several people from the KLC and the claim group — was that:

> A lot of people don't accept that native title rights are a property right … many non-Aboriginal people find that hard to accept. I think it's still inherently elements of racism.[45]

Colin Barnett appeared to be touching on this view when he said of James Price Point:

> Now, this land, and I respect the traditional ownership, but this land legally is vacant Crown land and that's its legal status.[46]

Undoubtedly, the idea that native title law represents more than the sum of its parts is an idea far more beneficial to traditional owners than native title as an inferior property right. Wayne Barker illustrated these shifting influences perfectly when he said that traditional owner rhetoric would sometimes just appear as "bluster":

> The Kimberley Land Council, badabada, we represent the Traditional Owners. What does that mean, particularly when it's Crown land and [Premier] Barnett turns around and says 'that's all very fine Mr Barker, but it's our land and we can take it. You don't govern the country, we do'.[47]

*2. Compulsory Acquisition*

The State's ability to compulsorily acquire land heavily impacted the negotiations. It shortened the time period in which negotiations could occur, as well as acted as a constant and forceful reminder of the juridical power of the State. [48] It was also a potent reminder of past dispossession by State governments. The issue of compulsory acquisition was discussed in fairly similar terms by interviewees from Woodside, traditional owners and the KLC, who saw it as a 'sword of Damocles' to pressure traditional owners into coming to an agreement.[49] However, those from government expressed the view that compulsory acquisition had been used because

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[44] Interview with Don Voelte (Sydney, 5 June 2014).
[45] Interview with Cameron Syme (Perth, 12 June 2012).
[46] Colin Barnett on 'ABC TV, Q & A, 5 November 2012'.
[47] Interview with Wayne Barker (Broome, 18 June 2013). Note that when the determination of native title is made it will likely find that the land was never 'Crown Land' given the claimed native title rights and interests.
[48] Refer to the discussion on compulsory acquisition powers in Chapter 4, 'Western Australian law', and how those powers were used in Chapter 5, 'Browse Negotiations'.
[49] Interview with Wayne Barker (Broome, 18 June 2013); Interview with Frank Parriman (Broome, 18 June 2013); Interview with Christine Robinson (Broome, 25 June 2012).

of difficulties in the claim group's ability to authorise an agreement, rather than as a threat. The state negotiators felt that the issue had been alternatively misunderstood or overblown by the KLC, traditional owners and 'No Gas' campaigners.[50]

*(a) A Sword of Damocles*

A large majority of interviewees reported that compulsory acquisition "threats" had a profound impact on the negotiation, because "traditional owner support became a bit greyer",[51] meaning support could no longer be said to have been freely given. This was in contrast with the former Gallop/Carpenter government's position that traditional owners should consent to any development. Consequently, public statements by the State that they would use compulsory acquisition if no agreement was reached was described as a "game-changer" for many in the 'No Gas' campaign, who had been reluctant to campaign against it while Aboriginal consent was being freely given.[52]

Wayne Barker spoke for many traditional owners when he said that compulsory acquisition warnings reinforced the idea that while traditional owners "did have negotiation rights, we were not on the same playing field."[53] It was like a "gun to the head", he said, and meant that traditional owners were treated not as potential commercial partners but as "pests". [54] It also changed the relationship, he said, from "OK, let's try to find a solution to this" to one in which the tenor became:

> If you don't agree with the deal, you will be left only with the compensation under the *Native Title Act*, compensation for square meterage that we will take under the NOITTs ['notice of intention to take' pursuant to the *Lands Acquisition Act*]. So you either take your $1.5 billion or you take your [compulsory acquisition compensation]. It's like stacking the deck before you even get into the game. We went into the negotiation clearly of the mind that this is going to be a fight from that moment.[55]

[50] It was also the subject of litigation, brought down after the agreements were signed: *McKenzie v Minister for Lands [2011]* WASC 335. The State's attempt to compulsorily acquire the land at James Price Point was deemed invalid in a case brought by Phillip Roe and Neil McKenzie of the Goolarabooloo families: the Court held that the State's description of the area was insufficiently specific to fulfil the notification requirements for compulsory acquisition pursuant to s171(1) of the *Land Administration Act 1997* (WA).
[51] Interview with Robert Houston (Broome, 15 June 2012)
[52] Interview with Kate Golson (Broome, 12 June 2013).
[53] Interview with Wayne Barker (Broome, 18 June 2013).
[54] Interview with Wayne Barker (Broome, 18 June 2013).
[55] Interview with Wayne Barker (Broome, 18 June 2012).

Prominent Aboriginal leader Mick Dodson told a journalist that the State's use of compulsory acquisition was like 'theft of Aboriginal land and an invasion'.[56] Woodside interviewees were also clear that compulsory acquisition had a deleterious impact on the negotiation, particularly because of its undertones around the dispossession of Aboriginal land. Don Voelte said:

> Compulsory acquisition to me was not necessary. Colin [Barnett] always used it. I told the Woodside management team that I am not sure that I wanted us to be the beneficiary of compulsory acquisition. I told our team to hurry up and get a good deal up here. I thought that compulsory acquisition was the wrong way to do it, personally. Because again it was taking land, taking culture away from people. And I just didn't want to be part of that, personally. Although I recognised that there was every right to do that, under white man's law.[57]

Similarly Niegel Grazia of Woodside said that:

> Compulsory acquisition is a very emotive issue, albeit being the other side of the right to negotiate coin. And I think that the State missed an opportunity to see that good faith negotiating was upheld, and compulsory acquisition would have been an outcome rather than an intention.[58]

However, both these statements are somewhat at odds with a statement by Woodside that while they continued to work towards a negotiated agreement, compulsory acquisition would 'provide a greater deal of certainty for the development.'[59]

The threat of compulsory acquisition was also seen as undermining a site selection process that had seen the active participation of many Kimberley Aboriginal people. Betsy Donaghey of Woodside said that for these traditional owners:

> To then have the State talk about compulsory acquisition, I think to them was insulting. Even within Woodside we were certainly not 100% sure at the beginning that if this land was acquired solely by compulsory acquisition that we would have gone through with the deal.[60]

For traditional owners, compulsory acquisition was viewed primarily as a threat to take the land if they did not reach an agreement. Cameron Syme said:

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[56] Quoted in Vanessa Mills, 'James Price Point: Acquisition of Unallocated Crown Land or Theft of Aboriginal Land?', ABC News online, 2 September 2010.
[57] Interview with Don Voelte (Sydney, 5 June 2014).
[58] Interview with Niegel Grazia (Perth, 26 June 2014).
[59] Woodside Petroleum Ltd 'ASX Announcement: Update on Browse LNG Development Land Access' (2 September 2010).
[60] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

> Every time there was a major issue, the State government would send us a letter saying if you do not say yes to this, we are going to compulsorily acquire.[61]

This led to a situation in which, as recounted by Wayne Bergmann:

> The ultimate strategy was to prevent compulsory acquisition, at all costs. Barnett was absolutely frustrated, I don't know how many times I convinced him not to press the button.[62]

The issue was further complicated when some traditional owners in support of the project argued that any consent should be understood in light of the State's compulsory acquisition powers. Traditional owner Rita Augustine, for example, made a very prominent appearance on the Australian Broadcasting Commission's popular current affairs program *Q&A* insisting that traditional owners had no choice but to agree to the development because of threats of compulsory acquisition.[63]

*(b) It's a Tool, a Mechanism*

These views contrast markedly with the view of compulsory acquisition promulgated by the State. They said that compulsory acquisition notices were issued 'due to internal issues within the claimant group'. [64] Duncan Ord said he felt that compulsory acquisition had been "misrepresented":

> Compulsory acquisition was much more about the reality that you didn't have a claiming group that was united and therefore if some were going to agree and some weren't … you'll never get a ratified agreement … [or] a kind of open-ended negotiation that could go nowhere was not really practical. The Premier was painted as the bad guy in all this, but it was much more a broad understanding from all the parties this is the way we need to go.[65]

SMGO emphasised that compulsory acquisition is a technical tool:

> State governments compulsorily acquire land on a daily basis, not just Aboriginal lands. It's a tool, a mechanism.[66]

SFGO also emphasised the technical issues that had led to compulsory acquisition being required:

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[61] Interview with Cameron Syme (Perth, 12 June 2012).
[62] Interview with Wayne Bergmann (Broome, 20 June 2012).
[63] 'ABC TV, Q & A, 5 November 2012', above n 46.
[64] Colin Barnett, Premier, "State Government to Trigger Land Acquisition Process for LNG Precinct" (Press Release, 2 September 2010).
[65] Interview with Duncan Ord (Perth, 4 December 2012).
[66] Interview with SMGO (Perth, 5 December 2012).

> It was only at that point when there was yet another round of court challenges, that if in fact the native title party came to the State and said in fact we can't achieve an ILUA by the timeframe … because they weren't confident that the named applicant could actually sign off on something, so therefore the only choice, effectively, was to go down the compulsory acquisition route.[67]

SFGO said that the government's hand had been forced into using compulsory acquisition by the sheer length of negotiations: "That was actually one of the reasons that we went down the land acquisition process."[68] Ripper neatly encapsulated these debates with "there is compulsory acquisition in a legal form, and there is compulsory acquisition as a principle."[69] He said that he believed that Barnett had made a political mistake by using compulsory acquisition, brought on by a mistaken belief that traditional owners were opponents of the project. [70] Indeed, Duncan Ord acknowledged that:

> I'm sure that Wayne [Bergmann] absolutely believes what he said, that it was unhelpful and probably for someone who was strongly supportive of the project for the social outcomes … he probably just saw that as making it harder for him to continue to convince the mob that it was a good thing.[71]

This view strongly resonated with traditional owners and Woodside representatives.

Frank Parriman said that compulsory acquisition tainted traditional owner consent: "I think we made an informed decision, but not a free one because compulsory acquisition is always hanging over our heads."[72] He said that:

> It angered me because we were in the process of good faith negotiation, and they didn't need to do it that early. It really upset me. To us it was stealing again, taking away our rights, disempowering us, because once they had the land, there would be no need for any further negotiations. At the end of the day, we knew we had to assign the land to them via the process of compulsory acquisition, but triggering it too early just alienated a lot of people.[73]

Mary Tarran had a slightly softer view but nonetheless largely concurred with Parriman:

[67] Interview with SMGO (Perth, 5 December 2012).
[68] Interview with SMGO (Perth, 5 December 2012).
[69] Interview with Eric Ripper (Perth, 21 June 2013).
[70] Interview with Eric Ripper (Perth, 21 June 2013).
[71] Interview with Duncan Ord (Perth, 4 December 2012).
[72] Interview with Frank Parriman (Broome, 21 June 2012).
[73] Interview with Frank Parriman (Broome, 18 June 2013).

> Compulsory acquisition, I would never have seen it as a gun to the head, but there was no need for it, it was a political stance, but we had been having a good faith negotiation.[74]

Eric Ripper, like many others, observed that compulsory opposition gave environmental groups — who had until then been involved in the site selection process — "implicit permission to bail out of the process."[75] The threats of compulsory acquisition gave the 'No Gas' campaign huge traction because — as Wayne Barker pointed out — the type of person protesting against the development also heavily ascribed to notions of Aboriginal self-determination.[76]

Glen Klatovsky of the Wilderness Society agreed that the 'No Gas' campaign had gained force from the Premier's threats to compulsorily acquire that land:

> Even the KLC who were in support of the project, were talking about feeling like they had a gun to their head. They were very unhappy with compulsory acquisition. And the first vote was not a 'yes I support the project' or 'no, I don't', it was a vote between a development with or without a benefits package. So the fact that only 62% supported it, given that, was a huge statement ... Going down the compulsory acquisition route was an incredibly bad strategic failure. I think that the process, while undoubtedly difficult, was progressing, and the Kimberley Land Council weren't going to scupper the development. So why he [Barnett] used compulsory acquisition is probably a question that he asks himself, as he goes to bed at night.[77]

Niegel Grazia said of this shift by the State that:

> The campaign ran away from itself because at the moment at which the State government talked about compulsory acquisition, the licence to operate questions started to come into play. And the carefully negotiated position of the NGOs, where they had all signed up to the position that one location is better than many, there was an opportunity to tear it down, not by all of those groups, but by some of them. Compulsory acquisition is a very emotive issue, albeit being the other side of the right to negotiate coin. And I think that the State missed an opportunity to see that good faith negotiating was upheld, and compulsory acquisition would have been an outcome rather than an intention.[78]

However, Grazia added that he thought that compulsory acquisition was necessary given that by that stage of the negotiation "behaviours had set in" and an agreement was still not

[74] Interview with Mary Tarran (Broome, 13 June 2013).
[75] Interview with Eric Ripper (Perth, 21 June 2013).
[76] Interview with Wayne Barker (Broome, 18 June 2013).
[77] Interview with Glen Klatovsky (Melbourne, 15 April 2014).
[78] Interview with Niegel Grazia (Perth, 26 June 2014).

forthcoming.[79] In response to a question about whether compulsory acquisition meant that traditional owners had no choice but to go ahead with an agreement, Colin Barnett pointed out somewhat disingenuously that they had voluntarily entered into a Heads of Agreement.[80]

*3. Environmental and Heritage Law*

Several KLC and traditional owner interviewees also emphasised the importance of the leverage provided by the *EPBC Act*'s strategic assessment.[81] It gave them traction, they said, because the Aboriginal social impact assessment that was carried out as part of this process provided baseline data on the social and economic status of Kimberley Aboriginal people. The data helped provide an empirical case for the powerful discourse of combating Kimberley Aboriginal disadvantage, as will be discussed in depth in Chapters 8 and 9. For example, when asked about the leverage that the KLC had, Christine Robinson said:

> We had the TOs [traditional owners]. They needed the TOs, they can't do this on any level without having the TOs. It is such a big resource project and it is so critical for everyone. If we had been representing someone different, we would not have had the strength. The TOs are really valuable for this project. They have to have them for the strategic assessment, they have to demonstrate informed consent, so that was our only power.[82]

However, less importance was placed on the strategic assessment by SFGO, who said that this baseline data was sometimes the subject of "overreach". She said that the recommendations of the strategic assessments were often brought to the State in different contexts, and:

> We said no, we won't contemplate that, and it was negotiated through and it was settled, it was bedded down. Well of course now, looking at the environmental approvals, it pops up again as if it's on the table for the first time. No, we've dealt with that, and the answer is no.[83]

This was not discussed by any other interviewees and, unfortunately for this research, no official from the Commonwealth agreed to be interviewed, leaving us to guess at the reasons behind the Commonwealth ordering of the strategic assessment. The most plausible reasons relate to the national prominence accorded the proposed Browse LNG development.

Research participants also discussed some other law peripherally.[84] Several KLC and traditional owner negotiators made brief reference to the *Declaration of the Rights of Indigenous Peoples*' standard

[79] Interview with Niegel Grazia (Perth, 26 June 2014).
[80] Colin Barnett, 'ABC TV, Q & A, 5 November 2012', above n 46.
[81] Refer to Chapter 4, 'B. Environment Protection and Biodiversity Conservation Act'.
[82] Interview with Christine Robinson (Broome, 25 June 2012).
[83] Interview with SFGO (Perth, 3 December 2012).

of 'free, prior and informed consent' (FPIC) as being the standard that negotiations should adhere to. However, this argument received short shrift. Duncan Ord, for example, said that given that Australia had not signed up to FPIC as the appropriate standard, it was "naïve" for the KLC to be running arguments along those lines.[85]

Cultural heritage legislation was very briefly mentioned. Eric Ripper mentioned that the negotiation was set up to consider Aboriginal heritage legislation and the *Native Title Act* together.[86] Niegel Grazia said of both native title and heritage legislation rights that:

> Boy, they can tangle you up in knots for a long, long time, and heritage is a great lever. So even if you think you have a pretty robust way through native title, you still have to play the heritage game.[87]

### *B. Authority of Aboriginal Law*

#### *1. In the Kimberley Aboriginal Domain*

Kimberley Aboriginal people have traditionally seen themselves as part of a single cultural domain, and this understanding of the Kimberley-wide nature of cultural obligations clearly continues.[88] Understanding that this underpins Aboriginal relationships and behaviour in the Kimberley is important for understanding why Kimberley Aboriginal leaders insisted that development benefits be distributed regionally. It also explains the broad regional support for the work of the KLC. In particular, the support of Aboriginal elders of the Kimberley was emphasised by many.[89] This broad regional support was important for leverage because it not

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[84] There was also litigation relating to state environmental approvals that followed the signing of the agreements. The first case related to the issuing of clearance permits and whether the project had been correctly categorised for environmental approvals purposes. The litigation continued after the finalisation of the agreements, with the Supreme Court of Western Australia finding that the decision of the Western Australian Environmental Protection Authority to approve the precinct under the *EP Act* was invalid because EPA members should have been disqualified from decision making because of pecuniary interests in the development, among other things: *The Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307. The effect of this decision was later overturned by the Western Australian parliament, which retrospectively validated the approvals by way of legislation: *Environmental Protection Amendment (Validation) Act* 2014 (WA).

[85] Interview with Duncan Ord (Perth, 21 June 2013).

[86] Interview with Eric Ripper (Perth, 21 June 2013).

[87] Interview with Niegel Grazia (Perth, 26 June 2014).

[88] In particular, refer to the discussion on the wunan in Chapter 4, 'Contemporary Practice of Aboriginal Law in the Kimberley'.

[89] Ciaran O'Faircheallaigh and Justine Twomey, 'Indigenous Impact Report Volume 2, Traditional Owner Consent and Indigenous Community Consultation: Final Report' (Kimberley Land Council, 3 September 2010) 41. Interview with Mary Tarran (Broome, 27 June 2012).

only meant that they had a broadly unified base, it also meant that they could credibly claim to represent this constituency to the outside world.[90]

*(a) Site Selection Process and Negotiation*

The site selection process involved consultation with all traditional owners' groups on the Kimberley coast. This was because of the 'bond and commitment' in the wunan, the Kimberley-wide relationship bond and trade network:

> Senior Aboriginal men and women took the position that all those Aboriginal people belonging to traditional land and sea country … had to be consulted … [they] reinforce the need to consider the wunan when making decisions, negotiating agreements and planning for benefits. They recognise that the proposed LNG development is a massive long life project, and that its impacts, positive and negative will be highly significant, felt throughout the Kimberley, and will have intergenerational effects.[91]

The KLC ran Kimberley-wide culturally appropriate information sessions in which traditional owners were asked what kind of future they wanted to create.[92] This process saw Kimberley-wide agreement that if any traditional owner group agreed to host the development, all Kimberley traditional owners would support them, and that if none agreed, they would all oppose it.[93] The wunan was often called on by members of the Traditional Owners Taskforce.[94] It was also the underlying reason behind the *Browse LNG Precinct Regional Benefits Agreement*, which was first spoken about in a:

> [D]iscussion of the 'ripples' or wider social impacts of an LNG Precinct, and how to ensure the 'sharing' of benefits among all of those affected. The underlying relevance of the wunan … was reinforced [by] … a senior Aboriginal Law man and TOTF [Traditional Owner Taskforce] member, [who] expressed the desire to 'paint' the cultural basis for benefit sharing. The elder used this graphic device whilst speaking of country and connection as a means to re-affirm the traditional and continuing cultural interconnections between all of the coastal native title claim groups. He did this as a pre-cursor to commencing more practical discussions about benefit sharing.[95]

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[90] The broader political influence of the KLC is discussed in detail in Chapter 8, 'Kimberley Land Council and Aboriginal Leadership'.
[91] O'Faircheallaigh and Twomey, above n 89, 26.
[92] Interview with Wayne Bergmann (Broome, 20 June 2012).
[93] Interview with Wayne Bergmann (Broome, 20 June 2012).
[94] O'Faircheallaigh and Twomey, above n 89, 27. The Traditional Owner Taskforce is explained in Chapter 5, 'Browse LNG Negotiations'.
[95] Ibid.

The importance of Aboriginal law continued during the negotiations, with traditional owner meetings being conducted in a culturally appropriate manner, and neighbouring groups being consulted over major decisions.[96] In particular, traditional owner negotiators emphasised the importance of the support of senior elders (known as Law bosses).[97]

This adherence to Aboriginal law is also seen in a set of confidential guidelines developed by the KLC and senior traditional owners for agreement making with resource companies. These are known as the 'Traditional Owners' Rules for Major Resource Developments' and were developed for negotiations prior to Browse LNG, and used for the Browse LNG negotiations. They stipulate that benefits must be paid on a Kimberley-wide basis, that any development must only go ahead with 'informed consent' of Kimberley traditional owners, contain clear requirements for how benefits should be structured, and stipulate levels for environmental protection, cultural heritage, employment and training provisions. They also set out clear roles for elders in relation to various aspects of the ongoing resource project.[98] These rules were used in negotiations as a benchmark against which offers from the State and Woodside were compared.[99] Several key aspects of the rules are clearly absent from the final agreement, or only present in a watered down form. These include that the State and Woodside would have a role in decisions regarding allocation of certain agreement revenues over Wardi and Aarnja Limited, and that payments under the agreements would not be calculated by reference to the value of LNG output. Overall, however, these rules show an expectation on the part of traditional owners that they will be respected as people with significant authority over the Kimberley. Their influence over the Browse LNG agreements shows that this authority was at least partially respected.

*(b) Kimberley Land Council*

A strong theme that emerged from interviews across all negotiation parties is that the strength of Kimberley Aboriginal leadership — coming particularly from elders, in keeping with traditional law and custom — was a key factor in understanding the Browse LNG agreements. In particular, the KLC was spoken about as having a long history of grassroots leadership, activism on issues important to Kimberley Aboriginal people on a regional basis, politically savvy, active in the

[96] Ibid 30, 41. The practice of Aboriginal law in negotiations accords with its role in the Argyle Diamond Mine negotiations, as described in Chapter 4, 'The Contemporary Practice of Aboriginal Law' and particularly by Kim Doohan, *'Making Things Come Good': Aborigines and Miners at Argyle* (PhD, Macquarie University, 2006) 216.
[97] O'Faircheallaigh and Twomey, above n 89, 41. Interview with Mary Tarran (Broome, 27 June 2012).
[98] Kimberley Land Council, 'Traditional Owners' Rules for Major Resource Developments' (copy on file with author). These rules are confidential and so cannot be quoted from directly.
[99] O'Faircheallaigh and Twomey, above n 89, 40–41.

community and being an organisation that nurtured Kimberley leaders. [100] Traditional owner Wayne Barker explained the nature of contemporary Kimberley Aboriginal governance in the following terms:

> I don't like people bagging the land council, because they are the only ones working for traditional owners. Can you say they have succeeded in every way? No, you can't, but no-one has, not even government. Pick another organisation with such a mandate from traditional owners. With KALACC [Kimberley Aboriginal Language and Culture Centre], the land council and the language centre, you have three organisations that truly represent the traditional owners. A democracy is what we are living in, and Aboriginal society is very democratic in any case.[101]

Wayne Bergmann pointed out that part of the KLC's strength is based on the continuing practise of Aboriginal law:

> KLC's got a history of thinking about the Kimberley, looking after everyone in the Kimberley as a whole. That's not just based on the looking at the politics, at employment and training, health statistics and that, it's based on our ceremonies that we practice, we link and participate with each other right across the Kimberley.[102]

Cameron Syme said that "a tight representative body or native title service provider" is a key factor in strong agreements, and that:

> Politically, the roots of the KLC are very strong in the Kimberley … people believe that the KLC is there for the greater good of the groups. TOs on a regional basis would believe that. So the KLC has this support from all of the regional traditional owners to be out there supporting individual traditional owners' groups in negotiations.[103]

Betsy Donaghey concurred that the KLC were able to maintain a largely united front:

> [E]ach time we had been asked to leave, it meant that an issue had come up, between the women and the men, or some of the families, and they wanted to resolve that. And they did a wonderful job of not exposing those. And when I say united front, I am talking about the Jabirr Jabirr, not the Goolarabooloo.[104]

Traditional Owner Mary Tarran said:

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[100] Discussed in detail in Chapter 8, 'The Kimberley Land Council and Aboriginal Leadership'.
[101] Interview with Wayne Barker (Broome, 18 June 2013).
[102] Interview with Wayne Bergmann (Broome, 20 June 2012).
[103] Interview with Cameron Syme (Perth, 12 June 2012). This regional identity is clearly drawn from the wunan, as discussed in Chapter 4, 'Contemporary Practice of Aboriginal Law in the Kimberley and Central Queensland'.
[104] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

> I don't let anything else influence me except for those old people and our cultural connections. The Jabirr Jabirr are spiritually and physically strong. At these negotiations we carried our community with us through the negotiations, and the regional beneficiaries, on our back. We were committed to them. Intermarriage, cultural obligations, everything came with us. And so while we were obliged to have the negotiation, we were stern in our negotiating ... You build a tower, and you have all these cables anchoring it up – that's what I had with our TOs.[105]

Jeremiah Riley believed that traditional owners negotiated best when they insisted they should not be bound by the Act's limited rights:

> It comes straight from cultural feelings, a sense of ownership ... the fact that isn't recognised by Australian law isn't really an issue, people still carry that sense into the negotiation room... if you were to negotiate on the terms of the *Native Title Act* you would just end up with a meagre amount….[106]

The continuing practise of Aboriginal law was emphasised by traditional owners during the negotiation. Wayne Barker said:

> Betsy Donaghey said to me over a quiet cup of tea, 'Woodside are bringing industry, money and jobs, State government is providing land, what are you guys doing?' I said faith and good will. And don't forget, 40,000 years of ownership, we are the traditional owners … The State government and you can come and go, this is our land, and we will fight and die for it.[107]

*2. In the Outside World*

The other way in which the Aboriginal law influenced proceedings was through the strength of native title rights across the Kimberley. Environmentalist Kate Golson, for example, referred to the fact that Kimberley is "covered" in strong native title determinations as being part of Kimberley Aboriginal people's leverage.[108] Niegel Grazia also referred to this:

> There are very high levels of native title in the Kimberley. The big polarising view, when you look at Victoria, New South Wales and chunks of Queensland where freehold title is more commonplace, and you compare it to the Top End, and Kimberley, Arnhem Land, South Australia, there is opportunity for claimants and native title holders. And so another part of the leverage comes from rights at white man's law.[109]

[105] Interview with Mary Tarran (Broome, 27 June 2012).
[106] Interview with Jeremiah Riley (Broome, 13 June 2013)
[107] Interview with Wayne Barker (Broome, 18 June 2013).
[108] Interview with Kate Golson (Broome, 12 June 2013).
[109] Interview with Niegel Grazia (Perth, 26 June 2014).

The leverage associated with strong native title rights was well understood by Wayne Bergmann who described the KLC's adopting a litigation strategy that focussed on creating native title litigation precedents.[110] In addition, the continuing practise of Aboriginal law was something that appeared to have been heard, understood and accepted to some extent by those negotiating with traditional owners and the KLC. For example, Niegel Grazia said that:

> There was something that Pat Dodson and Peter Yu challenged me on when I first arrived in Broome, did I have respect for the Yawuru?[111] And straight out of the city, I think I have respect for diversity, and good Christian values and so on. And I kind of had this academic approach, of course I respect the Yawuru people, and I respect the environment, and I respect the law, and that's where I got it wrong. As soon as you start talking about native title law, or the *Heritage Act*, they are not traditional constructs, they are white man's constructs. And if your whole basis for approaching respect is around meeting your legal obligations, then you are falling well short of the expectations of traditional leaders. And for me, that was a real insight, and it took me more than a year to fully understand that.[112]

Duncan Ord said that this had been brought into the negotiations particularly by elders:

> [T]he authority that we've lived on this country for a long time, we're still practising our culture there … so anything you do to this is going to be serious stuff and that vastly more able to be articulated by way of these elders coming in. And just the gravitas of that compared to say other regions where they've been fragmented or the elders have poor English skills or whatever.[113]

This view emphasised that James Price Point was Aboriginal land. Don Voelte, for example, described the initial 2005 decision by Kimberley traditional owners to refuse overtures from Woodside that:

> I respected their opinion, it was their land, we didn't want to be somewhere that we weren't invited or wanted.[114]

In addition, as detailed above, both Voelte and Grazia used the term 'white man's law' to differentiate Australian law from Aboriginal law.

Wayne Bergmann said that this attitude was deliberately fostered by the KLC so as to encourage resource companies not to act upon their legal rights under legislation.[115] Joseph Roe also called

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[110] Interview with Wayne Bergmann (Broome, 20 June 2012).
[111] Pat Dodson and Peter Yu are nationally prominent Kimberley Aboriginal leaders. The Yawuru are the traditional owners for Broome.
[112] Interview with Niegel Grazia (Perth, 26 June 2014)
[113] Interview with Duncan Ord (Perth, 4 December 2012).
[114] Interview with Don Voelte (Sydney, 5 June 2014).

upon the authority of Aboriginal law in his opposition to the project. He said of his opposition that 'he was defending his culture and "sense of country". Aboriginal supporters of the gas plant, he said, are just "out for the money".'[116] Goolarabooloo traditional owner Joseph Roe said of James Price Point:

> There are people there, still looking after the country ... still using it today for sustenance collecting, hunting, camping ... and what we're going to do? We're going to kill it with a gas plant. No, I don't think so mate.[117]

These ideas were routinely acknowledged by the State and Woodside but clearly were not universally accepted. Eric Ripper acknowledged it but said that:

> What I wanted to do was keep agreement making within the bounds of the law, as determined by the *Native Title Act* and the courts. My instructions to my officers were always that we will stay within the law, but we will adopt the most generous interpretation of what we can do within the law.[118]

Traditional owner Wayne Barker also talked about how this rhetoric was only sometimes accepted:

> When the rubber hits the road, how much does it actually weigh at the negotiation table, which is removed from all the world. Sitting in a room with these hard-nosed individuals who are saying 'this is what I will negotiate, this is what I will not negotiate'.[119]

According to Bergmann, a key way in which Aboriginal jurisdiction was recognised was through the State's enactment of the *Browse (Land) Agreement Act 2012* (WA) which, among other things, grants the LNG precinct to the native title party at the end of its life and guarantees that the State will not operate a gas processing facility anywhere else on the Kimberley coast.[120]

Wayne Bergmann said:

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[115] Wayne Bergmann, 'Native Title, Agreements and the Future of Kimberley Aboriginal People' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conference* (Aboriginal Studies Press, 2010) 189.
[116] Norimitsu Onishi, 'Rich in Land, Aborigines Split on How to Use It' *New York Times online*, 12 February 2011.
[117] Quoted in Jennifer Macey, 'Anger, Division over Decision to Use Kimberley Coast as Gas Hub' *Radio National AM*, 10 February 2010.
[118] Interview with Eric Ripper (Perth, 21 June 2013)
[119] Interview with Wayne Barker (Broome, 18 June 2013).
[120] *Browse (Land) Agreement Act 2012* (WA) s7, 8.

> I reckon it's the closest thing to a Treaty that Australia has ever signed, because it's an Act of Parliament, so it's the sovereign power of the State agreeing with an Indigenous group whose sovereignty is through native title.[121]

Carol Martin, the Kimberley region state member of parliament, while not using the language of sovereignty, expressed her support for the *Browse (Land) Agreement Act* in the following terms:

> This is the first time I have ever seen a State Agreement Act that recognises Aboriginal people as key stakeholders.[122]

Duncan Ord said of it that:

> It's remarkable to the degree that governments don't like fettering future governments at any time ... I think that that just is a clear demonstration that this wasn't just about a technical native title grant because the lawyers would say don't be crazy, don't do things like that.[123]

Members of the traditional owner negotiating committee did not discuss this aspect of the agreements using the language of treaty. This may be because the KLC leadership made a strategic decision to keep this view of the agreements confidential until it was passed into law: "We have been sitting on it quiet until it passes" said Bergmann. Asked whether he thought that the State shared his view, he said "No, they see it as a commercial agreement, 'We do this with mining companies all the time'".[124] SMGO said of it that:

> No, I won't go so far – it's State agreement aspects. It doesn't have treaty aspects. But I still think it's - personally - very significant … It has symbolic value for them.[125]

Many non-Aboriginal people involved in Browse LNG said that part of the power that traditional owners possessed came from being "closer to the land", a factor that appeared to reassure outsiders that they had been less impacted by colonialism, and were therefore still practising their culture and law. While this is one of the key factors that a court will look at when determining native title rights, it does not appear to be the power of native title law per se that people are referring to.

[121] Interview with Wayne Bergmann (Broome, 20 June 2012).
[122] Carol Martin MP, Second Reading Speech of the Browse LNG Bill 2012, (Hansard, 24 October 2012).
[123] Interview with Duncan Ord (Perth, 4 December 2012).
[124] Interview with Wayne Bergmann (Broome, 20 June 2012).
[125] Interview with SMGO (Perth, 5 December 2012).

## III. CURTIS ISLAND LNG

### *A. Australian Settler Law*

#### *1. Native Title Act*

##### *(a) The Right to Negotiate: Procedural Rights or Great Lever?*

In the Curtis Island LNG negotiations the 'right to negotiate' regime was spoken about in similar terms to Browse LNG. Traditional owner Nat Minniecon echoed the views of many traditional owners when he said that:

> It's a part of the legislative process that they have to come and talk to us. Yes, it puts us at the table, but it gives us no tools to deal with a proponent who has world-class lawyers. As to fairness, it's not. [126]

Similarly, Deputy Premier of Queensland Andrew Fraser echoed the views of his Western Australian colleagues when he said of the Act that:

> It's a fundamental advancement for Indigenous people to be able to be dealt into economic advancement. I would also emphasise the ability to do this. It's pretty contested whether it has resulted in that. And of course, one instance does not define the architecture of the legislation.[127]

GLNG1, of a Gladstone LNG company, spoke for many other Curtis Island LNG interviewees when he said of the Act that it gave traditional owners:

> A right to be at the table. It gives them some semblance of recognition, the fact that they can negotiate. [128]

GLNG2, also of a Gladstone LNG company, observed that traditional owners "are often frustrated with the legislation, they think it fails them or doesn't suit their purpose", but that for companies:

> I think that the RTN [right to negotiate] is a very good process. As long as you meet the provision for good faith, which is fairly practical and reasonable, you will essentially be granted the tenure. It does provide a process there … It can be a mutually beneficial process, we get our security of tenure and the group is compensated for their loss of native title.[129]

GLNG2 was asked about what leverage traditional owners have. He replied:

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[126] Interview with Nat Minniecon (Gladstone, 10 September 2013).
[127] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[128] Interview with GLNG1 (Brisbane, 16 September 2013)
[129] Interview with GLNG2 (Brisbane, 17 September 2013)

> To their downfall, they think that they leverage with things like cultural heritage, operational content. Legal-wise, unless they want to be very technical and get us on a formality, or a clause or trigger, not much.[130]

He was asked whether that was just for cultural heritage, or more generally:

> Just in general. With the RTN, they don't really have much of a lever, unless they can fairly state that our impact on their rights and interest is to a level that what we propose doesn't correlate.[131]

GLNG2 was asked about how the company works out compensation and said:

> Prior to the process, we get an internal budget and that is our baseline, and we work within that framework … We tell them a reasonable jump in point and go from there. How that compensation is structured, we can be flexible, we can fund initiatives, or maybe it's purely financial. It's up to the group and us to work something out.

Asked whether groups push the company beyond the "jump in point", he said "they try to", and when asked again whether they ever succeed in that, he said:

> No, not really. They have to be reasonable and practical as well. You don't want to set a precedent. And we think we are being very fair with our structure and our compensation process.

In direct contrast to Browse LNG, the 'right to negotiate' was spoken about in the Curtis Island LNG negotiation as being both the main enabler for the negotiations, as well as setting their framework. GLNG2 was also clear that it was the Act and associated case law that prevailed in negotiations. When asked what leverage the company has he said:

> It's not about leverage, it's just following the statute. It's pretty black and white. You have to go through the statutory process, and that's it. You get to six months, and if you don't have an agreement, you go to the Tribunal. It's fair to say that the threshold in Queensland—there was recently a case, I don't know the ins and outs, but it got to mediation and it was found that the good faith threshold was met because they funded meetings. That alone meets the criteria. Obviously the groups have a different idea of what good faith means.[132]

Asked whether his company ever went above or beyond the statute, he replied:

> There is no need to. The statute provides a process and a budget for what we consider to be reasonable compensation if it does ending up being monetary compensation. We are advised

[130] Interview with GLNG2 (Brisbane, 17 September 2013)
[131] Interview with GLNG2 (Brisbane, 17 September 2013)
[132] Interview with GLNG2 (Brisbane, 17 September 2013)

> internally legally and we work through it. When you really break it down and step back it's a fairly straightforward process.[133]

He was asked whether the six-month negotiation window was ever extended, to which he replied "No. It's just the six month period."[134] He added that "there are up to five meetings for an RTN process", and that the "legislation is black and white, it's pretty straightforward", and that extending the timeframe for negotiation beyond six months "would serve no purpose". [135] Similarly, GLNG3 who negotiated the agreements for Santos, said of negotiations:

> Because it's a five step process, and I tell them at the start that the first meeting will be about this, the second that, and at the fifth one we are going to sign.[136]

Asked whether each meeting lasts a couple of days, he replied:

> No, people get too tired. It's not overly complicated.[137]

Traditional owner Tony Johnson described feeling that they had no alternative but to accept the minimum standards of the Act. He said that traditional owners argued with the State and the companies to give them more time and more resources to negotiate, but that this argument fell flat:

> There weren't really any viable alternatives, because they were going to build the plant, and the *Native Title Act* was the framework we could work within, stay at the table, and have some sort of participation in the process at least.[138]

GLNG1 was asked whether the advent of native title had given traditional owners more leverage:

> Probably not as much as it did back in the 1990s, because everyone was scared and lawyers were scaring people. Everyone said, oh no, what are we going to do, we have to talk to these blackfellas … Most people understand that it's the same as environmental protections, they have to do it, so they do it. It is now a tick the box exercise [with] some semblance of recognition, the fact that they can negotiate.[139]

Traditional owner Nat Minniecon explained the differences between his groups' agreement and that of Browse LNG in the following terms "there are two different laws — that is, there is one

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[133] Interview with GLNG2 (Brisbane, 17 September 2013). Note that it is incorrect to say that the Act sets out a budget for negotiations.
[134] Interview with GLNG2 (Brisbane, 17 September 2013)
[135] Interview with GLNG2 (Brisbane, 17 September 2013)
[136] Interview with GLNG3 (Brisbane, 17 September 2013)
[137] Interview with GLNG3 (Brisbane, 17 September 2013).
[138] Interview with Tony Johnson (via telephone, 30 August 2013)
[139] Interview with GLNG1 (Brisbane, 16 September 2013)

*Native Title Act* but each State then puts their own spin to it."[140] Kerry Blackman said "in Queensland, our native title rights are always extinguished … We just see it [the Act] as a politically expedient thing to thieve Aboriginal land."[141]

Deputy Co-ordinator General Geoff Dickie said he believed that agreement benefits were generally lower in Queensland than in Western Australia, although there are no publicly available sources for this. He linked this to the strength of native title rights in Western Australia:

> With the precedents, if in Western Australia you went to the Tribunal, they would look at what the general level [of native title] was … and if you did the same in Queensland, if you had to get a determination, the determinations would probably be different in Queensland. So that sets a difference.[142]

GLNG2 implied that the State's legal power had swung firmly behind the company. When asked about the main leverage of the company, he answered by reference to the State's ability to requisition land and NNTT arbitration, saying "there is compulsory acquisition, that's the main one. Or arbitration under the right to negotiate process."[143] When this comment was put to Geoff Dickie, he said that while he did not feel that the State would just compulsorily acquire at the behest of companies, he acknowledged that others feel that the State would:

> Companies did go in and say 'well if you don't come to an agreement, we will get them to compulsorily acquire', I know where that comment comes from.[144]

*(b) Relationship between Native Title Rights and Quantum*

The majority of research participants across all parties said that it was likely that native title rights had been greatly diminished over Curtis Island, and this was a key explanatory factor in understanding the agreements. It was this factor, they said, that underscores the relatively low compensation paid in the agreements. The exception to this was GLNG3 of Santos who insisted that in the negotiations he conducted, the level of remaining native title rights were ignored:

> The way I talk about it is, upfront from the very beginning, "this is what the company has to do but on the other hand I am going to behave as if native title had not been extinguished … And then I say but we are not in the future acts nasty adversarial process, we are here in the 'let's

[140] Interview with Nat Minniecon, (Gladstone, 10 September 2013)
[141] Interview with Kerry Blackman (Gladstone, 10 September 2013).
[142] Interview with Geoff Dickie (Brisbane, 6 November 2013)
[143] Interview with GLNG1 (Brisbane, 16 September 2013)
[144] Interview with Geoff Dickie (Brisbane, 6 November 2013).

> negotiate'. So some people would feel that the power issue is definitive. My experience of being in it is that it really depends on how you approach the negotiation, what flavour it is.[145]

The other basis for the quantum of agreement benefits, potentially related, was that there was a 'going rate'.

When told of the low amounts that traditional owners said were in the agreements, Andrew Fraser provided a possible justification for that:

> Gladstone is just the end of the pipe, it is just the tap at the end. The reality of the value probably lies back at the resource, where it is extracted … [Curtis Island] it is where the huge capital investment is going, but really it's about a block of dirt, it is like a great big Telstra [telecommunications] tower.[146]

However, when asked whether traditional owners were paid more in the gas fields, he said that he couldn't comment, but that:

> I think that the companies underpaid the white land owners which wouldn't give me great confidence that they weren't underpaying the blackfellas.[147]

Geoff Dickie did comment on native title rights in the gas fields, saying that they were low rights:

> But there is a big disparity between agreements in Queensland and agreements in Western Australia. And some of that is about what native title exists where the resources are. In the Western Australian iron ore fields, it is all native title. In Queensland, in the coal fields, there is very little native title remaining. And in the gas fields, also very little.[148]

Andrew Fraser was speaking for many interviewees when he said:

> Gladstone has been developed for a long time. That might explain, in part why the TOs don't have a big part of the play, the earth was scorched a long time ago. I think in part it relates to the strength of …. native title is a continuum, so there are fractions of it right through to exclusive possession. The closer you are to exclusive possession, the stronger your ownership power, the stronger your purchase in the transaction. The Quandamooka people [of Stradbroke Island] are still there, there are not too many people who live on Curtis Island.[149]

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[145] Interview with GLNG3 (Brisbane, 17 September 2013). GLNG3 was the only person who had directly participated in negotiations to express this view in an interview.
[146] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[147] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[148] Interview with Geoff Dickie (Brisbane, 6 November 2013).
[149] Interview with Andrew Fraser (Brisbane, 5 November 2013).

It is worth noting that there are also very few traditional owners living at James Price Point, but that Aboriginal law does not require occupation for rights and interests to continue.[150] Tony Johnson echoed this as a major issue:

> The level of extinguishment of native title already done in our claim area, there was simply very limited 'claimable land' to be negotiated about. There is a dearth of national parks, nature reserves in the Gladstone area, it is known as the industrial hub of Queensland.[151]

Andrew Fraser compared the leverage of Curtis Island traditional owners with that of those in Cape York Peninsula in Queensland's much less developed north:

> The TOs around the bauxite deposits in the Cape have always been at the table of discussions about what is going to happen, and have a type of front-ended power.

When asked where this power comes from, he replied:

> It comes from the reality of their position as traditional owners. I don't think Rio Tinto wakes up in the morning and says 'what are we doing for traditional owners and their development?' ... They have to deal with the traditional owners because they are owners. So the answer maybe is that they have economic power, ownership is economic power. Rio Tinto doesn't have an abiding social commitment to the Indigenous people of Cape York separate to its commercial objectives.[152]

Importantly however, Fraser contrasted this attention to precise legal rights with the often heated debates over coal seam gas wells being placed on agricultural land, what he termed "whitefella agrarian land issues":

> That debate never made it past a moral outrage of 'we are all going to starve if the farmers aren't supported.' It never took into account the fact that, in my view, there were very different levels of land ownership that existed, for example leasehold rights. That should have been part of the debate.[153]

All three resource company representatives interviewed spoke of an 'industry standard' or 'going rate' for compensation — according to GLNG1:

[150] Refer to discussion in Chapter 4, 'Aboriginal Law',
[151] Interview with Tony Johnson (via telephone, 30 August 2013).
[152] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[153] Interview with Andrew Fraser (Brisbane, 5 November 2013).

> [O]n big infrastructure projects, everyone is aware of the standard … different groups got different amounts, marginal differences, not a great deal.[154]

As to whether any groups ever pushed the company beyond that framework, GLNG2 replied that "they try to" but whether they ever succeeded he said:

> No, not really. They have to be reasonable and practical as well. You don't want to set a precedent. And we think we are being very fair with our structure and our compensation process.[155]

Johnson described the attitude towards the quantum of agreement benefits as "we will give you what we think it's worth."[156]

*2. Compulsory Acquisition*

As in the Browse LNG negotiations, the issue of compulsory acquisition was highly significant to the Curtis Island LNG negotiations. Traditional owner Nat Minniecon said, echoing the view of all traditional owners:

> In every one of these negotiations it's like there is someone standing behind you with a big stick, and on that stick it says 'compulsory acquisition'. You don't sign, we are going to compulsorily acquire and you get naught.[157]

Curtis Island LNG, unlike Browse LNG, was not a negotiation that garnered public attention. Therefore, the main public issue that compulsory acquisition raised in Browse LNG — that traditional owners were not truly giving consent to the project — was not an issue for Curtis Island LNG. Kerry Blackman who negotiated the Arrow ILUA but not earlier agreements, said of his predecessors:

> They should have taken it to the edge and said "that's it, go down the compulsory acquisition route", and I think that would have pushed the stakes up higher … Because they just want to run over the top of us, get their project up via the compulsory acquisition route, or use the *Native Title Act* for their own self-interest.[158]

GLNG1 said, not entirely credibly, of compulsory acquisition that:

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[154] Interview with GLNG1 (Brisbane, 17 September 2013).
[155] Interview with GLNG2 (Brisbane, 16 September 2013).
[156] Interview with Tony Johnson (via telephone, 30 August 2013).
[157] Interview with Nat Minniecon (Gladstone, 10 September 2013).
[158] Interview with Kerry Blackman (Gladstone, 10 September 2013).

> Some people will say that it's like having a sledgehammer in your back pocket, if we can't agree we will just go to IFS ['infrastructure facilities of significance' under the *SDPWO Act*]. But we never said that. We have always said all along that we would have an agreement.[159]

Johnson, talking of compulsory acquisition and the role of the State government, said:

> We very rarely met with the State. But when push came to shove, when we were digging our heels in, including protecting significant cultural sites, we would always find ourselves in a meeting with the deputy Coordinator General and cohorts from State Development. And they would bring out the old compulsory acquisition stick.[160]

Geoff Dickie said:

> We did have to come back to some of the groups who were saying to us that this is what companies are telling us, that they would just go to the government to compulsorily acquire it, to make it clear to the groups who were concerned about that the government sees compulsory acquisition as a last resort. And it would have to be shown that companies had made reasonable offers to the group.[161]

*3. Environmental and Heritage Law*

There was very little discussion of laws other than native title law in the Gladstone LNG negotiations. A notable exception to this was from GLNG2 who indicated that Queensland heritage legislation was not well monitored by the State:

> The regulators in Queensland in this space are not overly proactive. With the cultural heritage stuff, if we have an issue they will ask us whether we have a CHMP, we say yes, and they say they don't want to know about it, figure it out.[162]

In clear comparison to Browse LNG, there is no evidence of litigation initiated in relation the Curtis Island LNG agreements. It is possible but unlikely that this may indicate a lack of causes of action: it more likely shows inadequate resourcing to cause delays to the Curtis Island developments.

### *B. Authority of Aboriginal Law*

The role of Aboriginal law in the Curtis Island LNG negotiations did not appear to be as extensive as for the Browse LNG negotiations. It was observed by two traditional owners that

[159] Interview with GLNG1 (Brisbane, 16 September 2013). Refer to the discussion in Chapter 4, 'Queensland Law'.
[160] Interview with Tony Johnson (via telephone, 30 August 2013).
[161] Interview with Geoff Dickie (Brisbane, 6 November 2013).
[162] Interview with GLNG1 (Brisbane, 16 September 2013)

while they may still possess knowledge about Aboriginal law and culture, this was not widespread. Kezia Smith said:

> The others [in the claim group] don't know our country, our bunda holes in the harbour, our dreaming stories, our old people told us this, it has been passed on from generation to generation, not made up like some of these other stories you hear. Everything I know about my country I have learnt from my elders, my grandfather Hector, his brother Uncle Nyulang.[163]

She compared this to what she had seen in her work with Aboriginal communities for Rio Tinto:

> I think that there is some part that has to do with Queensland society, and colonisation. Because a lot of that mob up there, they are still very traditional, a lot more traditional than we are down here. They haven't had their language, culture and land taken off them. They still own their land and were never taken from it. That's what it is, loss of connection to country. They moved them around to all the missions, why do you think there are so many problems on Palm Island? And then you bring in the Stolen Generation, and intergenerational trauma. What I have found with our TOs here, in comparison with the mob over in WA and NT, they are too afraid to speak.[164]

In Western Australia she said:

> They still have their traditional ways—elders still hold sway. They still had the Stolen Generation up that way, but they have retained a lot of their culture which means that the elders are first. They still have their land too, and have been living on their land for many generations, they never left. They have men's and women's laws, smoking ceremonies. And what your elders say goes. That has been lost here. I will speak up against my elders if I see them doing the wrong thing and people call that disrespectful but I say that we are no longer traditional people. White politics has got in the way of our traditional ways. Over there, you can't speak unless your elder gives you permission. My aunty has given me permission to speak.[165]

Neola Savage too contrasted traditional law and knowledge that she had with others members of the claim group:

> My family — the Johnsons — still retains a lot of their culture, we still have our songs, our dances, they were handed down to us. My father was a very cultural person, he would sing and dance all the time … When they used to say that they were going to take this land, I would end up crying. I don't know how many times I would cry about my country. I have that connection to Gladstone, it is my country, my father's country. We know Gladstone, we have a very spiritual

[163] Interview with Kezia Smith (Gladstone, 11 September 2013).
[164] Interview with Kezia Smith (Gladstone, 11 September 2013).
[165] Interview with Kezia Smith (Gladstone, 11 September 2013).

> connection to it. My father walked all over, fishing, hunting. My sisters and brother, we too roamed around too looking for bush tucker … When I look at our claim, our family are the only ones with any information about our traditional ways.[166]

Kerry Blackman said, despite the lack of corroborating evidence:

> We are a sovereign people, so in our hearts we believe that they can never actually take it away. And it's made more difficult in the areas where colonialism has had a great impact on our people, our land and our culture. I still think that our position is as we think, it's mind over matter. We can still think sovereignly and act sovereignly. I have spoken to some Native Americans, and they act sovereignly, as if their sovereign rights had never been extinguished.[167]

## IV. CONCLUSION

The Australian settler legal framework for both the Browse and Curtis Island LNG negotiations was similar, as shown in Chapter 4. Yet, this chapter has shown that the application of that law clearly differed between the two negotiations. In relation to the *Native Title Act*, this difference appears to have been in a number of ways. First, the way that quantum of agreements benefits were calculated. As discussed in Chapter 4, the 'right to negotiate' is silent on how agreements benefits (if any) are calculated. The *Native Title Act* does provide a complicated (and potentially unconstitutional) regime for compensating for extinguished native title that makes reference to commercial value of freehold.[168] In Curtis Island LNG, the supposedly low level of native title rights and interests appeared to be a significant factor in how agreement quantum was calculated. Another factor, possibly related, was the 'going rate' paid by companies in the region. In contrast, the quantum of benefits for the Browse LNG agreements did not appear to have been calculated in relation to the commercial value of the land. Nevertheless, strong native title rights were cited as leverage for Kimberley traditional owners in the negotiation. Chapter 9 speculates on why this is so, focusing particularly on the power of property in common law thinking.

Second, the way in which the 'right to negotiate' was interpreted, and how the timescale of negotiations was therefore conducted: the six-month period was a bare minimum (Browse LNG), or a strictly mandated procedure (Curtis Island LNG). Finally, the 'right to negotiate' was described in fairly similar terms by traditional owners from both negotiations. Yet, if the 'right to negotiate' did not exist it is plausible that Kimberley traditional owners would have been consulted and compensated for the Browse LNG development anyway. In comparison it is

[166] Interview with Neola Savage (Rockhampton, 11 September 2013).
[167] Interview with Kerry Blackman (Gladstone, 10 September 2013).
[168] Refer to Chapter 4, 'Future Acts'.

unlikely that PCCC traditional owners would have been consulted or compensated in relation to the Curtis Island LNG projects without the 'right to negotiate'.

Third, in relation to compulsory acquisition. Traditional owners in both negotiations described compulsory acquisition in broadly similar terms, yet the State only received public condemnation in the Browse LNG negotiations. This raises the possibility that Kimberley Aboriginal people have more capacity to restrict the use of compulsory acquisition. Is this because of strong native title rights? If so, does this perception derive from rights recognised under Australian settler law or Aboriginal law? This will be explored in the following chapters. What is clear from the discussion here however is that compulsory acquisition was mishandled by the Western Australian State government.

There was also a difference regarding how Commonwealth environmental laws were applied. The Commonwealth Minister ordered an *EPBC Act* strategic assessment for Browse LNG to take into account Kimberley Aboriginal people, but this was not done for the Aboriginal people around the Curtis Island LNG development. This suggests that Kimberley Aboriginal people are seen as stakeholders who need to be consulted while PCCC traditional owners are not. Western Australian land acquisition, environmental and heritage legislation provided leverage for Browse LNG development opponents because they had the means and motivation to litigate. No similar litigation was undertaken in central Queensland, probably because of a lack of resources to do so.

These findings raise intriguing questions about the practise of national law in different locations in Australia. There are significant differences in the character of each development location, as shown in Chapter 5. Did these differences play a role in how law was practised between locations, and the disparities between the agreements?

This chapter has also shown the impact of Aboriginal law on the Browse LNG negotiation. Chapters 2 and 4 raised several explanations for why 'law on the books' may differ from 'law in practise' in different contexts. These included the concept of legal pluralism, and the idea that several different sources of law may be in operation, or alternatively the discourses of law, and the possibility that the same law has different discursive and real impacts depending on context. Chapter 9 takes up the task of analysing these possibilities further.

The next chapter explores the way in which the conduct of the negotiations affected agreement outcomes.

# Chapter Seven
# The Negotiations

## I. INTRODUCTION

This chapter explores the conduct of the Browse LNG and Curtis Island LNG negotiations in depth, bringing together interviews and other evidence to provide a detailed description of the conduct of the negotiations, particularly the governments, organisation, companies and individuals who negotiated them, their length and tone, as well as the negotiation strategies, tactics and resources used by different parties. It asks whether the differences between the negotiations are explanations of the difference between the agreements, or whether they are symptoms of the underlying power held by negotiation parties.

## II. BROWSE LNG NEGOTIATION

### *A. The Parties*

#### *1. Traditional Owners and the Kimberley Land Council*

By the time of the Browse LNG negotiations, the KLC had extensive and recent experience in negotiating resource agreements. [1] They had developed policies and procedures around negotiations and community communication that they:

> Took into Koolan Island and Kimberley Nickel [agreements], we used interpreters to get everything into simple English. And that just rolled straight into the Kimberley Gas Agreement. When Barnett came on board, we were organised. But had the election been a year earlier, we wouldn't have been organised.[2]

Duncan Ord called the KLC a "well-oiled machine" that:

> [H]ad already done battle with government over Ord and other agreements so they had a fair idea where the space was, where the pressure points were and so on.[3]

#### *2. The Company*

Woodside is Australia's largest oil and gas company. It is listed on the Australian Stock Exchange and has its headquarters in Perth, Western Australia.[4] At the time of the negotiations

[1] The KLC's role in the negotiations is discussed extensively in Chapter 8, 'Kimberley Land Council and Aboriginal Leadership'.
[2] Interview with Wayne Bergmann (Broome, 20 June 2012).
[3] Interview with Duncan Ord (Perth, 21 June 2013).

Woodside possessed several characteristics that are essential for understanding the negotiations and agreements, Betsy Donaghey asserted. These were that then CEO Don Voelte had promised the market that the company would grow through Australia-based LNG and "the market had believed the growth story and built it into our share price, so we needed to deliver the growth story."[5] Ord echoed this view, saying that:

> My view is Woodside was an engineering company who were proudly Western Australian and looking to remain a Western Australian company and to grow, become a world leader in LNG production technology.[6]

In addition, Donaghey said:

> When the negotiations started, Woodside had in Don Voelte a CEO who was absolutely committed to making the project work. He said when he came to Woodside that he as CEO is allowed to have three personally driven priorities … one of them was gender diversity, another was Woodside's relationship with Aboriginal people. He didn't give me any parameters for the deal, and that is partly because he trusted me. But as close to instructions as I had was it had to be a deal we would be proud of. Don let me walk in there with real authority.[7]

Donaghey noted that Woodside had learnt from its experience with the Karratha community on the North West Shelf project:

> There were things we were proud of, but there were other things we could look back and say, how wrong did we get it.[8]

Don Voelte believed Woodside played a significant role in the strength of the agreements. When asked what power traditional owners have when negotiating with resource companies, he said:

> Depends on the values of the company. For Woodside, as long as I was leading it, it was huge, because we weren't going to trample on them. I have seen some miners in some other companies that will trample all over them. So they have no respect for the Aboriginal people. I

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[4] Woodside, 'Profile', < http://www.woodside.com.au/About-Us/Profile/Pages/home.aspx#.VpbwYRFYm2x>
[5] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[6] Interview with Duncan Ord (Perth, 4 December 2012).
[7] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[8] Interview with Betsy Donaghey (Melbourne, 19 August 2014). Woodside's North West Project processes its LNG in Karratha in the Pilbara, Western Australia. Its construction began in 1980. See Woodside, 'North West Shelf Project, <http://www.woodside.com.au/Our-Business/Producing/Documents/NWSV%20Corporate%20Brochure.PDF>

> have seen it, it still occurs out there. They all say the right things, but some really mean it, and some don't.[9]

Voelte's commitment to Kimberley Aboriginal people appears to be genuine, and is one that he has continued to push since leaving Woodside, including by publicly admonishing his successor for not honouring the Browse LNG agreements despite the project not proceeding.[10]

Other Woodside interviewees also expressed the view that the strength of the agreement was dependent on Woodside goodwill. However traditional owners disputed this. Wayne Barker, for example, erroneously believed that Woodside had not contributed to negotiation resourcing, clearly indicating his view of the company:

> Woodside didn't chuck in one brass razoo: billion dollar organisation that is crying poor.[11]

Barker also contrasted negotiators from the state government with Woodside negotiators. He described the latter as having "no concern about whether or not your child is dying"; they "are hired guns … you can't appeal to their good heart, because they don't have one."[12] KLC lawyer Rob Houston noted of the company:

> One thing about Woodside is that they've practically got no experience [of negotiating Aboriginal land access agreements], they're not like BHP or Rio Tinto who have to go negotiate with groups to build mines, because Woodside it's all offshore, and most of their experience has been bringing it to Karratha, and a lot of that predates native title and the establishment of the North West Shelf. I think they were very much learning on the run as well, and are probably not [as] advanced as say Rio Tinto in terms of acknowledging that you need to go in and build partnerships with traditional owners, you can't go in and say 'this is what we are going to pay' and 'this is our deal, like it or lump it' kind of thing.[13]

*3. Western Australia Government*

The government of Western Australia was actively involved in the Browse LNG negotiation, both as a party to the agreements and the future operator of the LNG precinct, as well as the provider of significant funding to traditional owners. State politicians and bureaucrats said that their involvement stemmed from a desire to have a greater level of control over the location of the development than they would normally have. Ord stated that:

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[9] Interview with Don Voelte (Sydney, 5 June 2014).
[10] Paul Garvey, 'Woodside Obliged to Pay Says Ex-CEO', *The Australian*, 14 September 2013.
[11] Interview with Wayne Barker (Broome, 18 June 2012). As is noted in Chapter 5, 'Site Selection Process' Woodside paid approximately $15 million to towards the site selection process and negotiation.
[12] Interview with Wayne Barker (Broome, 18 June 2012).
[13] Interview with Robert Houston (Broome, 15 June 2012).

> They were concerned that the nature of the original development of the Burrup ... [which had been] very much begging industry to come and establish an LNG project [leading] to industry being able to dictate the terms around how the state's gas resources were developed. And that the politics of gas companies were that they would develop the resource when it suited them, not when it suited Australia.[14]

In addition, the precinct was:

> [R]eflective of the State government's commitment to really want to address some of the Indigenous disadvantage in the Kimberley and see that philosophical drive of seeing some economic empowerment as a means of getting away from the welfare state.[15]

The later stages of the project saw Premier Colin Barnett spearhead the state's involvement. Many interviewees said that Barnett had staked his political reputation on being able to deliver the Browse LNG project in the Kimberley. Traditional owner Wayne Barker echoed the view of many across all parties when he emphasised that the project was Colin Barnett's 'legacy' project.[16] This was leverage not only for traditional owners. As Wayne Bergmann pointed out, "the Premier really wants the project, which gave Woodside leverage over the State."[17]

This meant that the project had the attention of top government politicians:

> Which is again something that wouldn't ordinarily happen. But he [Barnett] had a genuine interest in achieving that outcome, and I was able, I would be sitting up in Broome, things would go a little bit awry, or there would be some tenseness and they would want a commitment from the highest level, and I could literally pick up the phone and say 'is it possible to have a conversation' and it happened time and time again.[18]

As to whether any traditional owner group could pick up the phone to the Premier like that, SMGO said:

> Not necessarily. Why they could is because of the project. The Premier has invested a lot himself in this project and he wanted to ensure that there was a good outcome for everybody. I saw the same during the Ord negotiations and the Burrup negotiations when the lead was the Deputy Premier who was the person most passionate and the leader of the project.[19]

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[14] Interview with Duncan Ord (Perth, 4 December 2012).
[15] Interview with SFGO (Perth, 3 December 2012). This view was echoed by interview with SMGO (Perth, 5 December 2012).
[16] Interview with Wayne Barker (Broome, 18 June 2012).
[17] Interview with Wayne Bergmann (Broome, 20 June 2012).
[18] Interview with SMGO (Perth, 5 December 2012).
[19] Interview with SMGO (Perth, 5 December 2012).

This meant that the State negotiating team had "a negotiating committee which was made up of Directors-General but ultimately it was the Premier."[20] Bergmann observed that:

> The bureaucrats' strategy was, do not let the Premier in the room, because he will make decisions. Whereas, if we keep him out of the room, keep KLC's expectations down, and we know in a negotiation if you don't have the decision maker in the room, so, we left different key things to resolve with Don Voelte, to resolve with the Premier. And the bureaucrats hated it, because they said 'we are responsible for the administration of the bureaucracy, the Premier is not. He takes advice from us.' …
>
> And he certainly let them know who was in charge. And he conceded things that, why I've got respect for him, because it was commercial … He agreed to things that I think would have been a lot harder under the Labor Party – the State Agreement, there was no way in the world the Labor Party would have agreed to it. The bureaucrats, the Director Generals, were against it. So, whereas he [Barnett] said 'I don't have a problem with that. Crown solicitors, can we do it, I am not asking for your philosophical view, can we do it? OK, we are doing it.' And so he'd just cut through it, like that.[21]

Duncan Ord similarly observed that:

> There was robust comment from the politicians that that's what had been happening for a very long time, is that the bureaucrats ran the state and were largely servicing what industry wanted and that the politicians had lost control of the agenda. This was a tipping point where they decided to put their hands back on the steering wheel so yeah, you're right. You talk about power. That was the first exercise of political power over executive power in that kind of a project.[22]

As discussed in Chapter 5, the State of Western Australia's attitude towards native title has undergone a significant shift since the then government opposed the introduction of the *Native Title Act* in 1993. When asked about the general role of governments in native title agreement making, particularly when they are not a party, Eric Ripper said:

> I think that government does set a tone, and an ethos. Big companies that are keen to preserve their national and international reputations will respond to that tone and ethos.[23]

Several state bureaucrats commented that the State felt it had more stringent limits on its behaviour than a company might:

[20] Interview with SMGO (Perth, 5 December 2012).
[21] Interview with Wayne Bergmann (Broome, 20 June 2012).
[22] Interview with Duncan Ord (Perth, 4 December 2012).
[23] Interview with Eric Ripper (Perth, 21 June 2013).

> The government was a proponent and governments believe they've got to behave in certain ways whereas industry has different strictures on its behaviour … The native title parties are members of the West Australian community so the State government's interests are their interests as much as the broader sort of project interests.[24]

Several KLC and traditional owner interviewees argued that many aspects of the agreements involved providing services that should be the remit of government anyway. This echoes criticism in the literature about government abrogating responsibility for citizen services to resource companies.[25]

The change of government following the 2008 election had a significant impact on negotiations, according to interviewees across all parties. Whether this also negatively impacted agreement outcomes is discussed below. KLC and traditional owner interviewees generally lauded the Gallop/Carpenter government's site selection process as a genuine attempt to canvass their views. Then Premier Geoff Gallop said that the impetus for this process was:

> A recognition that never before had we trusted Aboriginal people with these sorts of decisions, we had always presented the decisions to them. The idea was to try something that had the potential to break through on the issue of development in the Kimberley, given the green opposition. We wanted it to happen, but not at the expense of Aboriginality.[26]

Interviewees from both the State and Woodside often pointed to the site selection process as evidence that Aboriginal people had been extensively consulted about the appropriate site, and that they had genuinely consented to having a LNG precinct on the Kimberley coast. The change of government led to a significant shift in approach.[27] Threats of compulsory acquisition by the Barnett government had a profound impact on the negotiation and directly led to a dramatic increase in opposition to the project.

However all of the State public servants interviewed downplayed the impact that this had on the final agreements. SMGO said that he felt that the change of government had made no difference to the State's approach, that:

> I think that both governments' approach at the time that they were dealing with it ... worked for the project. The previous government's conciliatory and consultative approach worked really well during the site selection process. The current government's approach once we had a site, we

[24] Interview with SMGO (Perth, 5 December 2012).
[25] Refer to the discussion on rent-seeking by governments in Chapter 2, 'Governments'.
[26] Interview with Geoff Gallop (Sydney, 18 July 2013).
[27] See discussion in Chapter 5, 'The Browse Negotiations'.

> need to get on and do it worked for the negotiation phase … The Premier said I'm here to govern and I'm here to make decisions and I'll be judged by my decisions and we'll make decisions. So that's his style and it worked and it got delivered the project site and delivered significant benefits for traditional owners. Not to say that the former government wouldn't have put a benefits package together to the same magnitude.[28]

### *B. Agenda Setting by the KLC*

The KLC took a highly strategic approach to the negotiations. This resulted in traditional owners exercising a significant amount of control over the negotiation agenda, and being well-resourced to conduct the negotiation. This degree of control over the negotiation agenda indicates a significant exercise of power by Aboriginal negotiators.[29]

Wayne Bergmann made it clear what he expected of potential proponents, stating that:

> If the companies aren't going to engage with us in a meaningful way that is going to create legacies and have a compensation package that creates precedents in the international community ... they're not welcome in the Kimberley from our perspective.[30]

This strategic approach is seen in the way in which the 'Traditional Owner Rules for Major Resource Development' [31] partially shaped the Browse LNG agreement outcomes. The TO Rules were used throughout the negotiation process as a barometer, that is:

> A system of 'traffic light' signals to indicate whether the positions being presented by Woodside and the State were close to, some distance from, or in basic conflict with the 'Traditional Owner Rules' on relevant issues.[32]

Bergmann emphasised the importance of consultation prior to the negotiation because:

> If the agreement has nothing that's important to you, it's a waste of time. May as well throw it in the bin. So the question to ask people was to say, what's important to you?[33]

There were both internal and external ways in which the KLC's influence over the negotiation agenda was limited. For example, during negotiations traditional owners and the KLC were unable to exert control over certain issues, particularly in relation to the Goolarabooloo litigation

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[28] Interview with SMGO (Perth, 5 December 2012).
[29] Refer to discussion in Chapter 2, 'Power'.
[30] Quoted in Matthew Carney, 'Interview with Wayne Bergmann', Four Corners ABC TV, 22 September 2008.
[31] Discussed in Chapter 6, 'Browse LNG, Aboriginal Law'.
[32] Ciaran O'Faircheallaigh and Justine Twomey, 'Indigenous Impact Report Volume 2, Traditional Owner Consent and Indigenous Community Consultation: Final Report' (Kimberley Land Council, 3 September 2010) 40–41.
[33] Interview with Wayne Bergmann (Broome, 20 June 2012).

and compulsory acquisition.[34] Nevertheless, it is clear that from the beginning of the search for a site to process Browse LNG gas that the KLC strenuously advocated for Kimberley Aboriginal people's right to be at the heart of decision making about the project, and for the impact on Kimberley Aboriginal people's lives to be beneficial.

This pre-negotiation advocacy also saw the KLC seek out early cooperation with traditional allies including environmental groups, churches and unions; and placed "an ad in the paper for expressions of interest to come and build an LNG plant in the Kimberley" following which they negotiated "confidentiality agreements with some of the biggest international LNG developers".[35] Bergmann later heard that the head of the World Council of Churches in Perth:

> Had knocked on the door of the Premier and said 'tut tut, we expect you to treat Aboriginal people in the Kimberley with respect'.[36]

These activities not only served to ensure that the KLC received support from its constituency and acted in accordance with Aboriginal law, they also sent an unambiguous message to the State and Woodside: Aboriginal people own the Kimberley, the KLC are the body that represents them and they are not to be underestimated. This message was clearly heard by the State and Woodside.

This stance continued during the conduct of negotiations. For example, Wayne Barker stated regarding his practice of chairing the meetings when they occurred in the Kimberley:

> As a chair, I made it my meeting, as I have always done. I walked into the negotiating meeting, said OK, this is blackfellas country so I am the chair of the meeting … we'd say, OK, we are going to have a cup of tea now.

It changed the dynamic of the meeting, he felt:

> It gave them the impression, that what we really wanted to do was not come in as poor dysfunctional Indigenous people pleading for a benefit.[37]

This message was also emphasised by having traditional owners from the Traditional Owner Negotiating Committee (TONC) in the negotiations at all times.

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[34] Refer to discussion in Chapter 6, 'Browse LNG, Compulsory Acquisition'.
[35] Interview with Wayne Bergmann (Broome, 20 June 2012).
[36] Interview with Wayne Bergmann (Broome, 20 June 2012).
[37] Interview with Wayne Barker (Broome, 18 June 2012).

### *C. Negotiation Length, Resourcing and Character*

The Browse LNG negotiations were long, well funded and highly adversarial. They took a personal toll on negotiators, particularly the traditional owners who formed the TONC. The length and adversarial character of the negotiation on the agreements was mostly considered to have been beneficial for traditional owners, subject to some important caveats. These are that the length of negotiation may have had a detrimental impact on the overall financial viability of the project. The adversarial nature of the negotiation likely impacted negatively on negotiation relationships[38] and would have made implementation of the agreement more difficult.[39]

All interviewees from the State and Woodside held a strong view that the negotiation had been too long. While several acknowledged that had traditional owners "settled it earlier [they] mightn't have got as much out of it", the dominant view was one of frustration at the length.[40] Several interviewees from the State and Woodside held the strong belief that had the negotiation been shorter, the project may have gone ahead. Whether this is a realistic view is entirely speculative. For example, Betsy Donaghey said:

> The other thing was that Cameron [Syme] correctly evaluated that if you are in these type of deals, time pressure is most on the resource developer. He thought that the longer it went, the more they could get. And I think that you could see that on some of what the State brought to the table, very late in the deal they brought some incredibly generous things. I am not saying his strategy was wrong, but I couldn't ever set a deadline, I couldn't ever say that if you don't agree to this by this day, it's over. I couldn't even do it from a negotiation point of view because they knew that if we were truly ever walking away from the deal Woodside would have a disclosure obligation [to the stock exchange].

While the impact of this on the negotiated agreement may have been beneficial, she said:

> [I]f we had done a deal far quicker, they might be building on James Price Point now. I can't predict, but we lost those unique set of circumstances that we had in Don … he was determined to make the project work. That is a unique set of circumstances. And when everything finished, and ultimately there is no project ... the single greatest regret is that I never successfully communicated to Cameron or to Wayne, or to any of the TOs that urgency mattered. That time going on could only make things worse.[41]

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[38] The importance of which are discussed below in E. 'Individuals and Trust'.
[39] At the time of interviews initial aspects of the agreements were being implemented and were not progressing well. Several interviewees commented that this was because trust had not developed sufficiently in the negotiation.
[40] Interview with SMGO (Perth, 5 December 2012).
[41] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

KLC staff and traditional owners did not share this view. Nevertheless, KLC staff largely concurred that the negotiation went too long, although Jeremiah Riley highlighted the mistrust between the KLC and their counterparties when he observed that:

> [From] the developer in this case there was more of a 'now now now, we need this now' and it just got to the point where 'you just say this all the time, and I can't believe you anymore'. It was always an absolute necessity to have everything straight away. And that's just the way they do business, you can't always take them at their word that they need it now. We should get it done fast and efficiently, but not be too dictated to by their deadlines.[42]

The negotiations were highly adversarial. Wayne Barker, for example, said of his party's approach:

> Sometimes we played softly with a velvet glove and sometimes we kicked some shins.[43]

Interviewees from all parties commented that this aggressiveness was a factor in extending the negotiations because of the mistrust it created. Cameron Syme was threatened by a senior federal politician that "your face will be on the front page of the national newspapers because you've got your snout in the trough."[44] Betsy Donaghey said that while the negotiation had been very tough:

> For me, it was my job, and I am not saying that is all it was, but it was not my identity or my heritage. It wasn't my life, my children's lives.[45]

Donaghey guessed at a plausible strategic motivation for adversarial negotiating by the KLC:

> From Cameron's point of view … one of the toughest things is that he has a client in the TOs who are understandably reluctant to do a deal … They haven't done a deal of this scope before … they were pilloried by some in the community. Wayne Bergmann had told me that there was real need to make everyone know that they had gotten the best possible deal. How do you do that if you agree early on? What is the easiest way to do that? Disagree, disagree, disagree and then go back and say, I tried ten times, I really can't get equity [a royalty].[46]

[42] Interview with Jeremiah Riley (Broome, 13 June 2013).
[43] Interview with Wayne Barker (Broome, 18 June 2012).
[44] Interview with Cameron Syme (Perth, 8 June 2013).
[45] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[46] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

Others considered that the experience may have also had positive impact on some participants; as a senior female government official (SFGO) believed, some traditional owners became "articulate negotiators and leaders" through participating in the negotiation.[47]

A common view amongst all negotiation participants was that the negotiation was well resourced. The resourcing[48] clearly was not given to the KLC in a vacuum and must be viewed in light of the pre-negotiation planning during the Northern Development Taskforce phase and the importance of Aboriginal consent to the State and Woodside. [49] KLC practitioners with experience in similar negotiations noted that the level of resourcing was both unusual — several noted previous negotiations in which they believed that the provision and withdrawal of funding was used as leverage by companies — and highly beneficial. Bergmann pointed out that his budget to negotiate was more than the total compensation package received in Gladstone.[50]

Donaghey described the philosophy behind the amount of funding the KLC received as:

> It was about having a negotiation of equals … In retrospect, we would have put bigger caps on it, but having said that, if the deal had gone ahead … people would not be mentioning [the amount].[51]

Several traditional owners and KLC staff expressed the view that part of their leverage was in being well-informed. Expressing a common view amongst KLC staff and traditional owners, Syme emphasised the importance of having adequate resourcing for the negotiation, particularly in relation to personnel who could serve a dual function:

> You need to have good advisors, the role of key people in the team is to take spears from the company and the government and insulate the TOs from some of that … We had a number of people who had good oil and gas experience. We did independent assessments of the project … information is power in the process.[52]

Syme said that his background working for Shell meant that he knew "$10 million in a project of this size is immaterial."[53] This experience, together with advice from the oil and gas industry, meant that the KLC did not "accept the rhetoric" of Woodside that "oh, that's so much money,

[47] Interview with SFGO (Perth, 3 December 2012).
[48] Refer to discussion in Chapter 5, 'The Browse Negotiations'.
[49] See Chapter 8, 'Browse LNG, Aboriginal Political Power'.
[50] Interview with Wayne Bergmann (Broome, 20 June 2012). Bergmann was brought over to advise the PCCC on their negotiations towards the end of their negotiation period. He said that by the time he arrived their agreements were already almost concluded.
[51] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[52] Interview with Cameron Syme (Perth, 12 June 2012).
[53] Interview with Cameron Syme (Perth, 12 June 2012).

it's tough making money in the LNG business." [54] Duncan Ord confirmed that the KLC sometimes used their independent valuations to good use, although at other times "I think they did accept that what Woodside was telling them were the fatal flaws [with their] negotiation position were genuine."[55]

Traditional owners also sought information on how Woodside had dealt with communities in the past. Wayne Barker described travelling to the Pilbara[56] on a fact-finding mission that resulted in being able to "point constantly and say this is where you messed up … so how are you going to do things differently?"[57] A very common view among KLC staff and TOs was that "the quality of the people the KLC had involved" was a key reason behind the strength of the agreements.[58] They employed "anthropologists, and engineers, economists, social scientists, archaeologists, lawyers, commercial players, staff … the gas team ended up with 40 staff."[59]

However, SFGO expressed some doubt as to whether increasing resourcing of negotiations necessarily leads to better outcomes for traditional owners, that after a certain point of adequate resourcing, "I would like a structure that actually provided some incentive to reach some agreement".[60]

### *D. Tactics*

The question of whether negotiation tactics make a difference to agreement outcomes is significant considering the emphasis given to this in negotiation literature. Chapter 2 found that negotiation theory explains the role of tactics in negotiations in two broad ways. The first sees tactics, strategy and individuals significantly impacting negotiation outcomes. The second places far less emphasis on what occurs in the negotiation room, focusing instead on a much wider range of factors, particularly power. Chapter 2 concluded that the latter is a more credible explanation.[61] In the interviews a clear difference was identified by participants between those tactics that could be construed as 'game-playing' or 'theatre' — terms used by people from all parties — and those tactics that drew on the underlying leverage of the parties.

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[54] Interview with Wayne Bergmann (Broome, 20 June 2012).
[55] Interview with Duncan Ord (Perth, 4 December 2012).
[56] The Pilbara is the region just south of the Kimberley known as a mining area, particularly of iron ore.
[57] Interview with Wayne Barker (Broome, 18 June 2012). As will be discussed in Chapter 8, 'Mining as Progress' these statements are likely to have had the effect of reminding all parties that they were committed to the idea that this development would combat Aboriginal disadvantage.
[58] Interview with Robert Houston (Broome, 15 June 2012).
[59] Interview with Wayne Bergmann (Broome, 20 June 2012).
[60] Interview with SFGO (Perth, 3 December 2012).
[61] Refer to Chapter 2, 'Negotiation Theory'.

Christine Robinson of the KLC said that examples of "game-playing" included people playing the "good guys, bad guys, the aggressor, the pacifier".[62] The KLC "contributed heavily to the game-playing", Robinson said, "all our language was 'being in the tent', 'keeping your powder dry', all military focussed" but as to whether it made a difference to outcomes, she was unconvinced: "I have no idea really". [63] Similarly SMGO of the Western Australian state government said of this kind of negotiation tactic that he believed that they made no difference to outcomes and that:

> I don't like to beat around the bush quite frankly. I sit and watch and muse over different negotiation styles … and when you're sitting around a table for as long as we did you get to know the styles and you can generally plan: well, we're going to go through this, this this and this and then we'll come out the other end.[64]

The vast majority of interviewees expressing a view on 'game playing' tactics believed that they did not make a difference to the agreement outcome. However, there was a strong view from all parties that tactics that drew on party power could make a difference in certain instances. One such tactic, discussed in the previous chapter, was the ability under the *Native Title Act* to "delay and frustrate" the company and State.[65]

Others also had an impact. The KLC used the media to attempt to apply pressure to the State and Woodside, although it was roundly acknowledged by traditional owners and KLC staff that "our story was hard to tell"[66] and was sometimes told in a way that "we were the bad guys".[67] However, the consensus view of the Aboriginal party was that the media could be useful for applying pressure to government to extend the period of the negotiation,[68] or for emphasising to government or Woodside where their behaviour may have been deviating from the accepted discourses of the negotiation.[69] Duncan Ord said that he believed that Aboriginal elders were used in a similar way, to remind the counterparties of these negotiation aims:

> If they felt there were roadblocks building up on key issues then the old people would be brought out to beat us up … [former Prime Minister] Paul Keating had that phrase 'throwing the

[62] Interview with Christine Robinson (Broome, 25 June 2012).
[63] Interview with Christine Robinson (Broome, 25 June 2012).
[64] Interview with SMGO (Perth, 5 December 2012).
[65] Interview with Robert Houston (Broome, 15 June 2012).
[66] Interview with Christine Robinson (Broome, 25 June 2012).
[67] Interview with Mary Tarran (Broome, 27 June 2012).
[68] Interview with Duncan Ord (Perth, 4 December 2012).
[69] Interview with Duncan Ord (Perth, 4 December 2012); Interview with Robert Houston (Broome, 15 June 2012).

> switch to vaudeville' and it regularly got thrown … sometimes it was a really good effect and sometimes less so.[70]

The most memorable tactic of the negotiation was elaborately performed by the KLC in a public park in front of the Mercure Hotel to highlight their view of the inequity of the offer then on the table. In Bergmann's words:

> We get a measuring tape and we roll out 180 metres, each metre is a billion dollars, step out Woodside at 120 metres, State at 60 metres … Commonwealth is 60 metres for the Petroleum Resource Rent tax, and you have offered us 20cm. And I stepped on it, and said 'does that look fair to you?' to Woodside and the State. 'Doesn't look fair to me'.[71]

Several traditional owner and KLC interviewees described this event as a 'game-changer' in the negotiation. [72] Interviewees from the State and Woodside did not categorise it in this way, although Betsy Donaghey of Woodside said:

> I will never forget the tape measure. And whenever the State was like 'can you all do more' [to us at Woodside], they brought up the darn tape measure.[73]

For Frank Parriman this event meant that the "claim group people actually saw the difference in compensation that we were all getting ... it was a shock to all concerned".[74] SMGO however felt that it made no difference to the negotiation, "but it was trying to make a point".[75] Like the media appearances that had the most impact, this tactical move likely made an impression because it actively challenged the view that Aboriginal people would be major beneficiaries of the gas hub, a discourse actively advocated by Woodside and the State[76].

### *E. Individuals and Trust*

Many interviewees from all parties emphasised the significant role played by particular individuals and trust (or its lack). There was a view that individuals who had decision making ability, experience in the area, existing relationships and trust with key players, and were committed to recognising Aboriginal rights and combating Aboriginal disadvantage could play a significant role in maximising agreement outcomes for traditional owners. The Browse LNG

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[70] Interview with Duncan Ord (Perth, 4 December 2012). Refer to the strength of this discourse in Chapter 8, 'Mining as Progress'.
[39] Interview with Wayne Bergmann (Broome, 20 June 2012).
[72] Interview with Wayne Barker (Broome, 18 June 2013); Interview with Frank Parriman (Broome, 21 June 2012).
[73] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[74] Interview with Frank Parriman (Broome, 21 June 2012).
[75] Interview with SMGO (Perth, 5 December 2012).
[76] For discussion of this discourse See Chapters 8, 'Mining as Progress' and 9, 'Mining as Progress'..

negotiation had significant input from the head of each negotiating party: Wayne Bergmann, Colin Barnett and Don Voelte.

The question of whether trust had developed in the negotiation was contested. While all parties agreed that trust is important, it was largely respondents from the State and Woodside who felt this had been achieved. Duncan Ord believed that Voelte had earned it when he had:

> Visited the Dampier Peninsula when he first took over the company and they'd said go away and he said all right, I won't be back, and he stood by that.[77]

Ord said that he felt that all parties had developed:

> Stockholm syndrome. Everyone became committed to each other in some sort of way … the desire to see everyone come out as a winner.[78]

Ord said that such a relationship could "add 50 per cent to the value of the agreement" because it aided the implementation of an agreement which in turn could attract other government and company funding.[79] Bergmann mirrored this sentiment, saying that where parties do not have a good relationship, agreements "don't deliver half of what they should".[80] Syme too emphasised that when companies are trusted by traditional owners they might get quicker and better access to country.[81]

However, KLC staff and traditional owners did not agree that trust had developed between the parties. [82] Traditional owner Frank Parriman felt that the State and Woodside had been "disingenuous" and had viewed traditional owners as "a thorn in their side … and they would do almost anything to get that thorn out."[83] He said of Woodside, "you can't take them at face value, they bullshit you."[84] Similarly, Wayne Barker felt that they had been viewed as "pests".[85] Barker deeply resented the State's threats in relation to compulsory acquisition, describing them as "a gun to the head" leading to problems when implementing the agreement. He said:

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[77] Interview with Duncan Ord (Perth, 4 December 2012). Ord was at one end of the spectrum in this view. It should be noted that he did not participate in the negotiation much beyond the change of government.
[78] Interview with Duncan Ord (Perth, 4 December 2012).
[79] Interview with Duncan Ord (Perth, 4 December 2012).
[80] Interview with Wayne Bergmann (Broome, 20 June 2012).
[81] Interview with Cameron Syme (Perth, 8 June 2013).
[82] A noteworthy exception was Duncan Ord who was spoken about favorably by KLC staff and traditional owners, see below.
[83] Interview with Frank Parriman (Broome, 18 June 2013).
[84] Interview with Frank Parriman (Broome, 21 June 2012).
[85] Interview with Wayne Barker (Broome, 18 June 2013).

> I was always on the assertive foot. Everybody else wanted to be friends, I didn't want to be friends with anybody, because we are not, and to pretend otherwise is false.[86]

Christine Robinson linked KLC negotiation aggression with their perceived lack of leverage:

> I think that we always had the David and Goliath, so we were very defensive. Ready to take offense at anything, even sometimes when I don't think they were actually intending to. That probably slowed it down too. If you think you are the underdog and you are fighting your way up, you have a certain attitude.[87]

Two senior government officials observed that traditional owners who had not experienced negotiations before were sometimes visibly upset by adversarial tactics because "they weren't in on the gamesmanship of it all".[88] Ord reflected that the State's approach might have been different had they known from the outset that non-professional negotiators would be in the room.[89] Mary Tarran, in the minority view amongst traditional owners on this point, had a kinder view: "we are like old dogs, everybody now knows each other".[90]

Duncan Ord, however was spoken about in very favourable terms. As a child his father had run the Broome abattoir and he knew many Aboriginal elders from that time. Said Wayne Barker:

> He is a favourite son of ours, a Kimberley son, because we have a very strong connection through his father.[91]

Betsy Donaghey similarly said:

> We lost something when Duncan had to move out … he had years of trust. He could come back and say, you all don't understand the issue, the issue is this.[92]

Donaghey reflected that:

> I thought that one way we were a bit hurt was that I am just not a social person … I never just went up to talk to people. And I am sure that I could have talked to Mary [Tarran] or some of the others, and we could have gone out and spent a few nights out on the land. And I never did

[86] Interview with Wayne Barker (Broome, 18 June 2013).
[87] Interview with Christine Robinson (Broome, 25 June 2012).
[88] Interview with SFGO (Perth, 3 December 2012).
[89] Interview with Duncan Ord (Perth, 21 June 2013).
[90] Interview with Mary Tarran (Broome, 27 June 2012).
[91] Interview with Wayne Barker (Broome, 18 June 2012).
[92] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

> that, but I can't do that. If I did that, I would spend three weeks beforehand, and I am not making this up, getting instructions on how you pee without a toilet.[93]

Donaghey reflected on an incident that demonstrated what could occur when some trust was present:

> Part of the problem was that we were going to be building a plant for 20-40 years. We honestly can't predict everything that we need to do inside there ... they would say that we were asking for a blank cheque to do anything, well, no ... We would go back to the engineers, and ask, can we possibly list it? And they said, well, we might need bore water, or we might need gravel pits. And those were the only specific examples that they could come up with. And we had another meeting to discuss these examples, and we could be slow to catch onto things, and Frank Parriman, every time the gravel pit came up, he would just look so uncomfortable. He was saying things like 'I might as well just go back to my job [as a youth worker] at the prison'. And I was sitting there, thinking, I have no idea what the problem is with the gravel pit.

She described asking Wayne Bergmann to explain what the issue was during a tea break:

> And he said, Betsy, when they did their business plans of what their businesses might be, the single most credible business that they thought they could get up and running early, was a gravel pit … And I went back in, and I said to Frank, is it acceptable to put something in there to say that if we need a gravel pit, the traditional owners will have first crack? And he accepted. And if we had not got to the point where, in this instance, Wayne Bergmann could tell that to me … I honestly think that we might have lost the deal because of a gravel pit that we didn't care about. So more than the emotion I think that it was the trust that built up.[94]

Wayne Bergmann also talked generally about the type of people he liked to deal with:

> You find out who the directors are, who the chair is, what age they are, what previous work they had. And basically, if they are under 65, they generally have different values about being successful. Over 65, they are more inclined to be considering legacies and leaving their mark on creating a good society.[95]

Duncan Ord expressed the view that such a description applied to Don Voelte:

[93] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[94] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[95] Interview with Wayne Bergmann (Broome, 20 June 2012).

> He was honour bound but also personally and emotionally committed to negotiating a kind of good faith agreement to meet that turnaround [in social disadvantage].[96]

Voelte said that, since the decision to pull out of the land-based project:

> I have been told by a lot of Aboriginal folks that they know I would have done it a different way. And that gives me a lot of support … I feel like I still have a personal stake in that agreement.[97]

The role that specific people played in the negotiation was also discussed. Don Voelte said:

> Betsy was the key for us, Wayne was the key for them, and honesty was important, and not breaking our word. [98]

Wayne Barker said of the State's chief negotiator after the election:

> The other thing that people don't quite give credit to is Gail McGowan, DSD [Department of State Development] — being a woman, being a mature lady too, she could see that this was an opportunity for us … she would promote to the DSD … that this would be a positive legacy that they could leave behind.[99]

## III. CURTIS ISLAND LNG NEGOTIATION

### *A. The Parties*

#### *1. Traditional Owners*

As noted in Chapter 5, the PCCC group was not represented by their native title service provider in the Curtis Island LNG negotiations. Those that negotiated the agreements ranged in professional experience, but none had experience in negotiating future act agreements. Kezia Smith, who had previously worked at Rio Tinto, did not negotiate any of the agreements.

This inexperience led to a female PCCC claimant giving the following explanation for the meagre benefits in the first three Curtis Island ILUAs:

> The old [native title] applicants had a lot of pull. I am not using that as an excuse. They had a lot of pull with people who had lived below the poverty line most of their lives. And if they say "we

[96] Interview with Duncan Ord (Perth, 4 December 2012).
[97] Interview with Don Voelte (Sydney, 5 June 2014).
[98] Interview with Don Voelte (Sydney, 5 June 2014).
[99] Interview with Wayne Barker (Broome, 18 June 2012).

> are talking three million dollars here" most of the time our old people will say "that's a lot of money, you've got me."[100]

The PCCC were also said by several interviewees to be a very fractious group.[101] These divisions meant that the claim group were not unified when it came to negotiating, and undertook little community consultation.

*2. The Companies*

Many interviewees, including PCCC traditional owners and resource company representatives commented that Santos was a company known for negotiating inadequate land access negotiations, as well as having a bad reputation in the industry more generally. GLNG1, on hearing what Santos had likely paid in the agreements said:

> [T]hat doesn't surprise me … Santos' reputation, it's not very nice, it hasn't been for 25 years. Santos is Santos.[102]

Andrew Fraser, then Deputy Premier, described Gladstone LNG companies as "their own worst enemy":

> I said to them on occasion that they were cutting off their nose to spite their face: "If you think that screwing a farmer from twenty grand to seventeen grand is going to make a difference to the economics of your project, when you are going to have to spend fifty grand on PR when [ABC Current Affairs program] *Four Corners* knocks on your door … The fact that they are at once the saviour of the economy and public enemy number one speaks volumes of their incompetence in this respect.[103]

Geoff Dickie implied that companies had behaved more predictably with traditional owners than with agricultural interests because they had experience in dealing with the former, and none with the latter. He said that when it came to native title, companies:

> Realised that they had to cough up for native title, and they had to make commitments about recognition, employment and training, businesses. And they knew about the procedures for getting meetings together. And they paid ridiculous amounts for sitting fees, they were way above what the State was prepared to pay. If the State had done the negotiations, there would

[100] Interview with PCCC female claimant (Gladstone, 10 September 2013). Of the PCCC interviewed, Tony Johnson and Neola Savage negotiated the first tranche of agreements and are described as 'old applicants'. They were replaced as applicants by Kerry Blackman and Nat Minniecon (among others).
[101] Interview with Neola Savage (Rockhampton, 11 September 2013); Interview with Tony Johnson (via telephone, 30 August 2013); Interview with Kezia Smith (Gladstone, 11 September 2013).
[102] Interview with GLNG1 (Brisbane, 17 September 2013).
[103] Interview with Andrew Fraser (Brisbane, 5 November 2013).

> have been no sitting fees, just the travel expenses. Whereas, they were up into the $500 or $600 a day in sitting fees, and with three proponents.[104]

Dickie's emphasis on the amounts paid by companies to individual negotiators rather than what companies paid in agreement benefits implies vastly different expectations from authorities in Western Australia compared to Queensland of best practice agreement making. What is clear is that companies did not believe that they had to pay a large amount to gain an agreement with the PCCC, despite the wealth of the projects. The reasons behind this view are discussed in detail in Chapter 8.

*3. Queensland Government*

Unlike the Western Australian government, neither bureaucrats nor politicians in the Queensland government took an active role in the Curtis Island LNG negotiations. Indeed, the two people from the State with most oversight of the projects — then Deputy Premier Andrew Fraser and then Deputy Coordinator General Geoff Dickie — knew very little of what occurred in the negotiations, or what was in the native title agreements.[105] Geoff Dickie spoke of some of the ways that the State did play a role:

> I don't think that there are any unemployed Aboriginal people in Gladstone, if they want a job. That was one of the other angles that we took at the Coordinator General's office was that in the approval process [for companies] they had to have an Indigenous Interaction Plan for employment, as well as compensation.[106]

The State's absence did not reflect a lack of interest in Curtis Island LNG or the broader Gladstone LNG projects. Indeed many traditional owners felt that the State was an invisible presence in the negotiating room through their compulsory acquisition powers. GLNG1, commenting on the importance of the industry to successive Queensland governments, said governments "were all so desperate for money."[107]

All PCCC traditional owners interviewed expressed the view that the State government prioritised the LNG industry over Aboriginal interests; that they were "hand in glove".[108] For example, Kerry Blackman said:

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[104] Interview with Geoff Dickie (Brisbane, 6 November 2013).
[105] Interview with Andrew Fraser (Brisbane, 5 November 2013); Interview with Geoff Dickie (Brisbane, 6 November 2013).
[106] Interview with Geoff Dickie (Brisbane, 6 November 2013).
[107] Interview with GLNG1 (Brisbane, 17 September 2013).
[108] Interview with Kerry Blackman (Gladstone, 10 September 2013).

> They haven't been around directly with our negotiations, but they have already negotiated their outcomes behind closed doors. In some cases, even to the point where they don't even take their own EIS studies seriously. They take the dollar over those things in the end. It goes to show that their ethics aren't up to scratch.[109]

A female PCCC claimant said:

> They are getting phenomenal royalties from these LNG companies. Of course they want to make the process a bit quicker, and get the projects through.[110]

Johnson said:

> I used to say that Anna Bligh should be called Pinocchio. When push came to shove, we got shoved. And so if it starts at the top like that, what could we expect further down? And in some senses, at least you know what you are going to get with a conservative government.[111]

When asked about this, Fraser was adamant that this government was not too closely aligned with the industry. He said that he did major battles with companies, telling them:

> If you take a look at the nature of Queensland, the legislative framework was entirely permissive. My advice to them was: the next time a government legislates in this space, it won't be to make the regime more permissive, it will be when you force us to act, and you will live to regret it.[112]

However, these were battles fought over agricultural land owned by non-Aboriginal interests, rather than over native title land. Andrew Fraser said:

> The companies started out with some pretty sharp practices, and the government stepped in to establish protocols around negotiation, and how to conduct it, but we didn't set a price. This was for the whitefellas.[113]

Fraser indicated that while he knew what white landowners were receiving from companies, he was not aware of what was being paid to traditional owners.[114] This lack of interest in native title agreement making was the usual practice of the Queensland government, according to GLNG1 who said that:

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[109] Interview with Kerry Blackman (Gladstone, 10 September 2013).
[110] Interview with PCCC female claimant (Gladstone, 10 September 2013).
[111] Interview with Tony Johnson (via telephone, 30 August 2013).
[112] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[113] Interview with Andrew Fraser (Brisbane, 5 November 2013). 'Whitefella' is an Aboriginal English term for Anglo/Celtic Australians.
[114] Interview with Andrew Fraser (Brisbane, 5 November 2013).

> The State has a traditional way of not offering any assistance to traditional owners in the negotiation process, even though it's a three party agreement. It's only where there is a surrender of native title that the State becomes involved. But with a RTN [right to negotiate], it's a three party as well, but they don't become involved in that either. They don't offer anything.[115]

He was asked whether they should be involved, to which he replied:

> For the benefit of the native title parties it would be nice. The State uses the position that the proponent wants it, the proponent should pay for it.[116]

However, he also added that State involvement might not increase the quantum of agreements, given "I don't think that the State's opinion would be much different to ours":[117]

> I do remember conversations about the fact that the State should have been here. But the State was never there … They were in the background, but they would never come to discuss with us.[118]

The role of governments in these negotiations, Fraser said, was to "set the rules of the game" but that:

> The government shouldn't be the price setter because you would end up with allocative inefficiency. And that's unlikely to be for the benefit of Indigenous people. I think it's also remarkably paternalistic to think that government needs to decide what the fair price is. And I think that if we are going to have aspirations of what Indigenous communities are capable of achieving, then the idea that government needs to be their agent in a negotiation is paternalistic.[119]

Some years earlier the PCCC had undergone a negotiation with the state government over the return of some parcels of land. Tony Johnson described the negotiation with the State that followed:

> When you negotiate with the State it's not a negotiation, it's just 'this is what will happen'. Some of the other applicants were driven around in a bus by the State, and were told 'you can have that one (block of land), but you can't have that one', and there was some toing and froing in the bus. That was how those transactions were done.[120]

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[115] Interview with GLNG1 (Brisbane, 17 September 2013).
[116] Interview with GLNG1 (Brisbane, 17 September 2013).
[117] Interview with GLNG1 (Brisbane, 17 September 2013).
[118] Interview with Neola Savage (Rockhampton, 11 September 2013).
[119] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[120] Interview with Tony Johnson (via telephone, 30 August 2013).

After this, Johnson said, "our view was simply that anything, specifically land, we could get back was a bonus."[121]

### *B. Agenda Setting by the PCCC*

The interviews and other available evidence shows that the four Curtis Island LNG agreements were preceded by short negotiations that seemed to be a *fait accompli* at commencement, received almost no public attention, and in which traditional owners were inadequately funded and advised. Traditional owners described the power differential between themselves and the companies as extreme. Tony Johnson said of it that "what we were facing was already a hurricane, and we didn't have any defences to it."[122] These factors, together with the confidential nature of the agreements, means that far less information is available on their conduct than on the large, lengthy and detailed Browse LNG negotiations.[123] The following description of the Curtis Island LNG negotiations and their impact on negotiation outcomes is consequently far shorter than that for Browse LNG above.

The three Gladstone LNG (GLNG) representatives interviewed — who had combined experience of the four projects — said that agreement outcomes had been almost completely pre-determined by the companies, and had not been shifted during the negotiation process. GLNG2 described how his company worked out what compensation would be:

> It's just a baseline from previous negotiations, and just being practical and working it in a set amount.

Similarly, GLNG3 of Santos said of his instructions:

> In a company, the decision-maker is the executive. The methodology I used is to make sure that the key decisions of what was going to be put onto the table had already been made. The fence posts.[124]

Asked whether that meant that there is a 'ballpark' figure for these agreements, he said:

> That's right. We don't work outside … prior to the process, we get an internal budget and that is our baseline, and we work within that framework.[125]

This was a fact not lost on traditional owners. In the words of Tony Johnson:

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[121] Interview with Tony Johnson (via telephone, 30 August 2013).
[122] Interview with Tony Johnson (via telephone, 30 August 2013).
[123] In comparison with the Browse LNG negotiations, which generated hundreds of newspaper articles, the Curtis Island LNG agreements were the subject of just a handful of media mentions.
[124] Interview with GLNG3 (Brisbane, 17 September 2013).
[125] Interview with GLNG2 (Brisbane, 16 September 2013).

> I don't think it mattered what we did, it would not have improved our position, in fact if we had been performing back flips, handstands and acrobatics there would have been no change to the outcomes.[126]

Neola Savage similarly said of the negotiations that:

> I just felt so disempowered. We are talking about country, and we have no rights whatsoever over it.[127]

GLNG3 agreed that it was he who was running the negotiations, not traditional owners. When the latter tried to wrest control to discuss possible royalties, GLNG3 indicated he said:

> Well, no. You are just assertive, "sorry, I can't do it". They say "I am going to walk out now" and I say "OK". I have process rules, you can walk out, no problem, but you have to come and tell me why, whether you do it privately or not, and then I don't mind if you walk out or not.[128]

Traditional owners did attempt to change the dynamic set by the companies, but appeared to have little success. Neola Savage said:

> When we negotiated, they wouldn't listen to us. Tony Johnson was very strong, and they wouldn't listen to him. When I think about it now, we shouldn't have accepted what they offered. But they had us over a barrel.[129]

Tony Johnson said:

> We probably needed direct political action, street marches, blocking heavy machinery, engaging with unions, churches, etc., but again, I have serious doubts about the impact of such actions anyway as the Queensland government was hell bent on having the LNG industry in Queensland … We were not as strategic as we should have been, and that is not just with the benefit of hindsight, we were thinking that as we were going through the process. It became more and more apparent that we may have ultimately got a better deal if we had acted collectively, but there was just indecent haste to do it. [130]

Given that the agreements' outcomes were almost entirely determined by the companies, it is very hard to see that the negotiations had any significant impact on their content. The negotiations, therefore, can be seen as a barometer for traditional owners' leverage, which was

[126] Interview with Tony Johnson (via telephone, 30 August 2013).
[127] Interview with Neola Savage (Rockhampton, 11 September 2013).
[128] Interview with GLNG3 (Brisbane, 17 September 2013).
[129] Interview with Neola Savage (Rockhampton, 11 September 2013).
[130] Interview with Tony Johnson (via telephone, 30 August 2013).

likely assessed by the companies prior to negotiations as being low, an assessment that did not change during negotiations.

### *C. Negotiation Length, Resourcing and Character*

As previously discussed in Chapter 6, the Curtis Island LNG negotiations were relatively brief, reflecting the lack of issues genuinely up for discussion, the approach of the companies and the fact that negotiations were conducted within the minimum time frames set by the *Native Title Act*. However, both GLNG3 and GLNG2 were keen to emphasise that the company could be flexible in negotiations, citing as examples minor procedural matters, including how benefits would be paid, and "flexibility re meetings, we are happy to meet on country, in town."[131]

Johnson, likely indicating his view that he was unable to alter company positions, said of company negotiators:

> I figured that some of them had pretty short shrift themselves. So I tried not to be too obnoxious.[132]

GLNG3 of Santos was in the minority in saying that he would describe the agreements he negotiated as fair, and the negotiations as "friendly", despite also commenting that:

> [H] aving said that, people were angry with each other, often angry with the company … I could have women crying, men screaming.[133]

Traditional owners understood that the companies were not sending high-level decision-makers in to the negotiations: these were people who had little sway within their company, and were not being forced by traditional owners to find out whether they had to reassess their initial instructions. Neola Savage, for example, said:

> I said to them I don't want to say yes to you because you are destroying our land … they would say that it wasn't them, it was the company they worked for.[134]

Several traditional owners also complained about a lack of information on the content of the agreements given to general members of the claim group. A female Port Curtis Coral Coast (PCCC) traditional owner, who was not negotiating the agreements, described authorisation meetings in which she did not know the full content of the agreement she was supposed to be voting for:

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[131] Interview with GLNG2 (Brisbane, 16 September 2013).
[132] Interview with Tony Johnson (via telephone, 30 August 2013).
[133] Interview with GLNG3 (Brisbane, 17 September 2013).
[134] Interview with Neola Savage (Rockhampton, 11 September 2013).

> We never got any paperwork, it was just all put up on an overhead projector. So there was no ability to consider it.[135]

A notable, but distinctly outlying, impression of negotiations was that:

> The international standard of FPIC [Free Prior and Informed Consent] — and I always say that is met by agreement — so free, prior and informed consent, by definition after a negotiation, that is met ... And you can then report on it in your sustainability material.[136]

In contrast, and more credible given the weight of evidence, Tony Johnson said of the negotiations:

> I am yet to find an English dictionary meaning of negotiation that is anything like the process we were forced to endure.[137]

Traditional owners in the Curtis Island LNG negotiations were generally funded for two lawyers to represent them in negotiations.[138] Almost all traditional owners commented that they believed that they would have had stronger outcomes had they been better resourced in the negotiations. A common view was that they needed to be able to engage more professionals to advise them. The absence of strategic planning and unity of purpose amongst traditional owners meant that they had little ability to insist on funding for adequate professional representation, nor were they able to successfully seek out pro bono advice. Johnson said that:

> The only advice that we got was legal advice. When we sought funding for environmental scientists and other things to look at the impact of the industry on the harbour and on the foreshore in particular, that was denied. They were doing the EISs — the average seemed to be about 12,000 pages — and the only response that our group did was one that I did. We didn't have financial or economic advice. The State made clear that they weren't going to pay for anything like that — that would have been the responsibility of the proponents, and they just weren't interested.[139]

GLNG2 confirmed this, saying that companies were fulfilling their 'good faith' obligations by providing funding for legal advice. The amount that this would be was worked out according to a company schedule.[140]

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[135] Interview with PCCC female claimant (Gladstone, 10 September 2013).
[136] Interview with GLNG3 (Brisbane, 17 September 2013).
[137] Interview with Tony Johnson (via telephone, 30 August 2013).
[138] Interview with Tony Johnson (via telephone, 30 August 2013).
[139] Interview with Tony Johnson (via telephone, 30 August 2013).
[140] Interview with GLNG1 (Brisbane, 17 September 2013). Interview with GLNG2 (Brisbane, 16 September 2013).

### *D. Tactics*

There was some evidence of divide and rule tactics being used by companies. Tony Johnson observed that:

> Part of the composition of our group included people who were either unemployed or on pensions so money became a carrot for them. Applicants were coming to all sorts of arrangements without the consent or knowledge of the rest of the applicant group … If we were going to get up any sort of opposition, it's pretty hard to do that when people are on the payroll of the project proponents. Santos was far and away the worst of the worst in this regard.[141]

GLNG3 put a positive spin on this aspect of his company's behaviour: "When I started at Santos, there were no Indigenous negotiators, so the first thing I did was employ a few Indigenous men to negotiate."[142] However, Neola Savage said of Santos that GLNG3 and these Aboriginal negotiators "would sit around and kid you up."[143] Kezia Smith said of companies that:

> [T]o be honest, I feel they see us as dumb blackfellas. They see our loopholes, and they take advantage of that.[144]

Traditional owners spoke about strategies and tactics that they should have — in hindsight — employed, but noted that the negotiations were so stressful, under-resourced and short that they were not used.

Geoff Dickie, then Deputy Coordinator General, commented that the PCCC had leverage because of their ability:

> To create bad publicity. The companies were quite sensitive about having a good public image. They have been more sensitive recently, but at that stage they all still wanted to be seen to be doing the right thing by Aboriginal groups.[145]

This is in direct contrast to GLNG2, who said that:

> We've had some adverse publicity, but nothing that has gone mainstream; it's been in Indigenous publications. We have had a protest here, people from the PCCC, I had an effigy of myself burnt in the street. It was an interesting day. They were quite irate at the time. Looking for attention.

He was asked whether they received the wanted attention to which he replied "no".[146]

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[141] Interview with Tony Johnson (via telephone, 30 August 2013).
[142] Interview with GLNG3 (Brisbane, 17 September 2013).
[143] Interview with Neola Savage (Rockhampton, 11 September 2013).
[144] Interview with Kezia Smith (Gladstone, 11 September 2013).
[145] Interview with Geoff Dickie (Brisbane, 6 November 2013). Yet, as noted above, there were only a handful of brief media mentions on the Curtis Island LNG agreements.

Several LNG company representatives mentioned traditional owner demeanour in passing ("men yelling, women crying"[147]), but none spoke of these things having any impact on agreement outcomes. Arguably, what underlies the lack of memorable negotiation manoeuvres is the sheer lack of Aboriginal leverage that would have given weight to any such move.

### *E. Individuals and Trust*

As the above discussion makes clear, the negotiations were too perfunctory for particular individuals to make any significant difference to agreement outcomes. This observation does not denigrate the PCCC traditional owners who negotiated the deal. They were talented and dedicated individuals. The length of the negotiations contributed to the high levels of distrust that PCCC traditional owners had for the LNG companies, as has been described above.

## IV. CONCLUSION

This chapter has shown a correlation between the character of the negotiations and their outcomes: the benchmark Browse LNG agreements were negotiated after a long, hard-fought and well-resourced process, with significant input from the most senior leaders of Woodside and the State. In contrast, the Curtis Island LNG agreements were preceded by perfunctory negotiations, negotiated by low-level company representatives and inadequately resourced traditional owners that resulted in poor outcomes for traditional owners.

It was not the differences between negotiation tactics or style that drove these different agreement outcomes — although they are likely to have played some role. Rather, the way the negotiations were conducted is indicative of the underlying power of the respective parties. Chapter 2 argued that power is exercised when a negotiation agenda is formulated.[148] This is upheld by the empirical observations of this chapter. In particular, the chapter shows how controlling the agenda of negotiations can be an 'exercise of power'.[149] They also show how the 'seemingly important topic' of Aboriginal disempowerment in central Queensland never became an 'issue' in the wider community.[150]

In the Kimberley, the KLC are an organisation with experience of agreement making and, as the last chapter showed, has a solid basis in Aboriginal law. In contrast, the PCCC did not use their

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[146] Interview with GLNG2 (Brisbane, 16 September 2013).
[147] Interview with GLNG3 (Brisbane, 17 September 2013).
[148] Refer to discussion in Chapter 2, 'Power'.
[149] Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1964) 56 *The American Political Science Review* 948.
[150] Matthew A Crenson, *The Un-Politics of Air Pollution: A Study of Non-Decisionmaking in the Cities* (The John Hopkins Press, 1971)., Steven Lukes, *Power: A Radical View* (Palgrave Macmillan, 2nd ed, 2005). John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press, 1982). In contrast to the literature on agenda setting, this was clearly not an 'invisible' exercise of power in the Browse LNG negotiations.

native title service provider or any other significant political organisation in negotiations. This difference will be discussed further in the next chapter.

Tactics were useful in the Browse LNG negotiations when they helped to highlight the underlying leverage of traditional owners. In comparison, it appears that there was almost nothing that occurred in the Curtis Island LNG negotiations that forced companies to change their pre-negotiation positions.

The impacts of the intentions and ethos and character of the companies in each of the case studies are less clear. Woodside under Don Voelte showed a genuine desire to respect Aboriginal traditional owners, and this is likely to have made some positive difference to the Browse LNG agreement outcomes. In contrast, Queensland LNG companies did prioritise traditional owners. The question remains, however, of exactly what difference this makes to agreement outcomes. This is discussed further in Chapter 9, 'Conclusion'.

It is apparent that the State played a significant role in each negotiation, although from a markedly different standpoint. The active involvement of the State of Western Australia resulted in increased leverage for traditional owners in the Browse LNG agreements. The key to this leverage is not the government's involvement in the development per se, but in the intent behind that involvement: Western Australia was committed that this development would make a positive difference in the lives of Kimberley Aboriginal people. In comparison, the State of Queensland was absent from the Curtis Island LNG negotiations and had little interest in the development's potential impact on traditional owners. Nevertheless, Queensland clearly had a strong interest in achieving the development. The reasons behind these different approaches will be discussed in Chapter 9, which speculates that they are due to the differences in resource development culture discussed in Chapter 2, 'Governments'. Chapter 9 proposes a tentative solution for governments to ensure greater fairness in negotiations.

Finally, this chapter could not explain why the rationale for calculating benefits was different between negotiations, however the power differential between traditional owners of the Kimberley and Curtis Island points to the start of an explanation. Clearly emerging out of this discussion is the importance of organisational and structural factors, particularly the key strategic role played by the KLC.

The next chapter discusses the highly significant influence that structural factors — particularly history, development location and political power — had on the Browse LNG and Curtis Island LNG agreement outcomes.

# Chapter Eight
# Place, Power and the Impact of History

## I. Introduction

This chapter focuses on the power of each traditional owner group, and where it originates. In particular, it emphasises the key role of the Kimberley Land Council and the lack of a corresponding organisation to support traditional owners in negotiating agreements in central Queensland. It explores whether the differences in power can be attributed to where the respective developments are placed. It also discusses the relationship between the development's location and the importance that companies and governments gave to reaching an agreement with each traditional owner group. For Browse LNG, the Kimberley was widely perceived as a place with a large and influential Aboriginal population, very significant wilderness values and little industrialisation. In contrast, Curtis Island was seen as an industrialised place where traditional owners were not a group whose views should be weighted heavily.

The strong impact that history has on these views, and on the negotiations and their participants, is discussed throughout.

## II. Browse LNG

The most significant explanations given by interviewees for the Browse LNG agreements were the substantial size of the projected income stream; that it was to be the first significant industrial development — and the first LNG plant — on the Kimberley coast; and the State's desire to establish an industrial base in the Kimberley with attendant benefits of job creation in a low employment area. These reasons were coupled with the perception of the Kimberley as a remote area of high environmental and cultural attributes, a large and socially disadvantaged Aboriginal population, little industrialisation and high native title rights. In addition, the development was to occur within the jurisdiction of the KLC, a strong Aboriginal political organisation. The complex interaction of these factors is discussed below.

### *A. Projected Income Stream*

It is clear that the projected income stream of Browse LNG is part of the explanation for the substantial quantum of the Browse LNG agreements. Traditional owner Frank Parriman expressed the unanimous view that, given the project would reap significant profit:

> I don't think they could afford to be seen to be giving Aborigines a pittance for it because they would look totally racist. Knowing how much they wanted the development to go ahead – the State was pushing them to do it, you could see the greed in their eyes, $185 billion. So that was leverage for us, knowing how much they wanted it.[1]

Similarly, a senior male Western Australian public servant (SMGO) said that the size of the benefits package came about because of "the economics of the project."[2]

### *B. Aboriginal Political Power*

The political power of Kimberley Aboriginal people is a key explanation for the strength of the Browse LNG agreements. Almost all interviewees talked about the large increase in traditional owners' political power that occurred within living memory, pointing to changing times as an explanation for that increase. Former Premier of Western Australia Geoff Gallop, for example, said that a major difference between the Kimberley and the Pilbara was timing of resource developments:

> [The Pilbara] developed in the 1960s when Aboriginal land rights weren't a major issue. In the Kimberley at that time was the Argyle dam, and the poor Aboriginal people then were just removed. There's the difference.[3]

Wayne Barker, when asked whether he felt Aboriginal voices carried more weight than prior to the *Mabo* decision, said:

> Yes. People listen to us. I believe it's because the *Mabo* decision started a conscious shift in broader Australia. I think that the apology, and the reconciliation march across the Sydney Harbour Bridge was a huge statement about how the people of Australia wanted to address this issue. That momentum is percolating across into negotiations about native title rights and interests. Maybe it's appeasing a guilt of the past, or affirming that they themselves feel indigenous to this country.[4]

Geoff Gallop presided over a Western Australian government that reversed previous opposition to native title. He said his government's position had been greatly helped by resource companies changing their opposition:

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[1] Interview with Frank Parriman (Broome, 18 June 2013).

[2] Interview with SMGO (Perth, 5 December 2012). The right to negotiate applies to all registered claims for native title, and therefore does not depend on what type of native title rights will eventually be recognised by a court – see Chapter 4, 'Right to Negotiate'.

[3] Interview with Geoff Gallop (Sydney, 18 July 2013).

[4] Interview with Wayne Barker (Broome, 18 June 2013).

> I remember meeting with Leon Davis of Rio Tinto and telling him that I was having a challenging time [on native title], and he said to me, 'that's not an issue for us anymore, we negotiate, we don't oppose native title'. This really created a different framework.[5]

Traditional owners also noted this change in power relations. Mary Tarran said "I felt very powerful and I still do — I don't let anything else influence me except for those old people and our cultural connections."[6] Tarran contrasted the level of control she felt she had over the Browse LNG precinct with other historical Kimberley developments:

> We weren't prepared for development when the town expanded, we weren't prepared when mission gates closed or when work closed up, when pearling masters closed, we had no education.[7]

Several people contrasted the Browse negotiations with the Noonkanbah dispute. SMGO, for example, said that:

> Noonkanbah would not happen today. People want to interact with Aboriginal communities in a different way.[8]

Geoff Gallop said that this power came from the fact that the Kimberley "is largely wilderness and there has been less impact of mining there, and there is just more land." He was asked whether this gave people like Wayne Bergmann more political sway, and he said:

> Yes it does. I do think that the Goldfields as compared with the Kimberley, for example, is very different when it comes to the power dynamic. This is because of the numbers of Aboriginal people in the Kimberley, secondly, the state of the Aboriginal leadership in the Kimberley – Peter Yu, Pat Dodson, Wayne Bergmann, the Roe family – these men are major players, and they are in Broome. Unfortunately, in other areas, they do not have that clout or status. There is also more possibility for native title because of less development … I think another part of the power equation has to be the unity of the Aboriginal voice.[9]

However, this optimism was not present across the board. For example Frank Parriman said that he did not feel that times had changed significantly and that when dealing with governments and companies he felt that he heard:

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[5] Interview with Geoff Gallop (Sydney, 18 July 2013).
[6] Interview with Mary Tarran (Broome, 27 June 2012).
[7] Interview with Mary Tarran (Broome, 13 June 2013).
[8] Interview with SMGO (Perth, 5 December 2012).
[9] Interview with Geoff Gallop (Sydney, 18 July 2013).

> A lot of fuzzy wuzzy stuff but it is disingenuous. Underneath, it is still the same.[10]

Similarly, Jeremiah Riley, himself a traditional owner from elsewhere in Western Australia, said, when asked whether being a traditional owner carries weight with governments:

> Yes and no. Not in the way that you would want it to. I think at the highest levels people really don't seem to care as much.[11]

Wayne Bergmann pointed out that while times have changed, the history of colonialism continues to impact on the Kimberley today. For example, he talked about Weaber Plain in the East Kimberley, named after German brothers who shot and killed Aboriginal people with impunity in the early twentieth century. Local Aboriginal people had talked to council about changing the name, he said:

> But the Wyndham East Kimberley Shire wouldn't change it. So all the old people, whenever they remember Weaber Plain, they think of these murdering brothers.[12]

*1. Kimberley Land Council and Aboriginal Leadership*

There were also many Kimberley specific reasons cited for Kimberley Aboriginal power. Underlying almost all of these explanations is that the colonial impact on the region was less than elsewhere in Australia. One of the consequences of less colonial devastation is that Aboriginal law continues to operate in the Kimberley. As discussed in Chapter 6, this had a significant impact on agreement outcomes in the Kimberley by facilitating a large measure of Aboriginal unity for the work of the KLC in negotiations. It also potentially impacted the operation of Australian settler law. The political power of the KLC is discussed here.

SFGO pointed out that "like any group" the KLC had periods in which their effectiveness varied:

> They have periods of strength and then periods where they are a bit lost in the wilderness for a while. But I think because they were born coming together out of Noonkanbah … they had something to fight for.[13]

[10] Interview with Frank Parriman (Broome, 18 June 2013).
[11] Interview with Jeremiah Riley (Broome, 13 June 2013).
[12] Interview with Wayne Bergmann (Broome, 20 June 2012). See Lily O'Neill, 'Forgetting the War, Celebrating the Murders', Overland, 20 August 2014, available at https://overland.org.au/2014/08/forgetting-the-war-celebrating-the-murders/
[13] Interview with SFGO (Perth, 3 December 2012).

Niegel Grazia talked about the great influence wielded by the KLC as a result of their position as the pre-eminent Aboriginal organisation in the Kimberley. However, he also touched on how the KLC is sometimes viewed by governments:

> Part of Wayne's and the KLC's leverage at this point, before we had identified any specific land, we just wanted to come walking on country and the KLC doesn't represent everybody, some of them won't have a bar of them, but part of the leverage comes from the fact that this company recognised that if we wanted to do a deal we had to engage with the Kimberley Land Council. And more likely than not, the KLC would be the broker ... Something I realised when I was doing a government affairs role back in the 2000s was that if you think that you can go into the Kimberley, with the Kimberley Land Council at your throat, and end up with a good result, who are you kidding?[14]

Grazia's comment about attempts to bypass the KLC by government departments was echoed by several KLC employees who also spoke of their frustrations with having to continually convince government of their key role in the Kimberley. This was far less likely to occur where they were dealing with individuals from the State who had experience of working in the Kimberley, they said.[15] For example, Betsy Donaghey, who had not had any previous experience working with Aboriginal communities, expressed confusion about the role of the KLC:

> And were we talking to the wrong people? If Wayne called me, and we chatted, was that, in fact, causing resentment? But then we would make feelers directly to the TOs, those were never welcomed.[16]

Many interviewees from all parties also pointed more generally to the strength of Aboriginal leadership in the Kimberley. SFGO, for example, said that certain Kimberley Aboriginal leaders would have "walk up" status to government ministers and to the United Nations.[17] In particular, interviewees universally lauded the leadership role of Wayne Bergmann as the CEO of the KLC. Eric Ripper, musing on the 'No Gas' campaign said "I think that the real Indigenous hero in all this is Wayne Bergmann, not Joseph Roe."[18] Don Voelte said of Bergmann that:

> I have all the time in the world for Wayne. I cannot believe the hell that he must have gone through. He's a big man. Wayne impacted me. In a small way, and I don't want to be misunderstood on this – you know how Nelson Mandela impacted the world … and I don't want

[14] Interview with Niegel Grazia (Perth, 26 June 2014).
[15] Duncan Ord was mentioned as a key example.
[16] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[17] Interview with SFGO (Perth, 3 December 2012); Interview with Niegel Grazia (Perth, 26 June 2014).
[18] Interview with Eric Ripper (Perth, 21 June 2013).

> to embarrass Wayne, but I just want to say that it's kind of the same thing, on a smaller scale. He is a true believer … Some of the politicians didn't respect him, they would talk nice around him … But I will say that there are people like Martin Ferguson [then Commonwealth Resources Minister] that had huge amount of time for him. He and Ian McFarlane [subsequent Commonwealth Resources Minister] …
>
> Colin Barnett, he was more of a pragmatist, and he had his ups and downs with Wayne, but at the end of the day he would always whisper in my ear and say "Wayne's a great man, he's doing the right thing". So I would say that all the key public figures, except for maybe the local folks in Broome, they all admired Wayne at the end of the day. Maybe we had a kind of collective society of feeling a bit bad for him, for all the hell that he was going through from the different areas, but we were extremely respectful of him for how brave he was.[19]

Wayne Barker, discussing the key reasons behind Bergmann's support by the wider Kimberley Aboriginal population, said that he:

> [I]s uniquely placed. He had a very strong connection to all the traditional owners in this project, including right across the Kimberley. Being brought up by the Kimberley Land Council, as a Kimberley Land Council son, so I have a lot of respect for him. He could see, from a young man's perspective, what needed to be achieved here. He was learning as he was going but he had the capacity to see, what I don't know I will go and ask.[20]

Bergmann himself attributed his confidence in the negotiation to his substantial experience in agreement making: "at a personal level I became more confident of the right and wrong way to do things."[21]

### *C. Relationship Between Power and Place*

A significant explanatory characteristic of the proposed Browse LNG project was that it was to be the first major LNG development on the Kimberley coast. This characteristic resulted in the Kimberley Aboriginal voice having significant sway. The possible reasons for this are discussed here using discourse analysis. The relationship between power and place is discussed below, as well as the discursive links between Aboriginality, wilderness, and resource development.

[19] Interview with Wayne Bergmann (Broome, 20 June 2012).
[20] Interview with Wayne Barker (Broome, 18 June 2012).
[21] Interview with Wayne Bergmann (Broome, 20 June 2012).

*1. Social Licence to Operate*

The significance of Kimberley Aboriginal political power was evidenced by the importance placed on Aboriginal consent for the Browse LNG development. This consent was clearly important to the state government and Woodside in both phases of the negotiation.[22]

Former Deputy Premier Eric Ripper, explaining his government's decision to prioritise Aboriginal consent, said of his government's so-called traditional owner 'veto' over sites:

> The Kimberley is a very sensitive area, to get a development in the Kimberley was going to be extremely difficult because environmental groups were likely to make it a national icon. If the environmental groups and the Aboriginal groups together opposed the project, then it could be extremely difficult to achieve.[23]

KLC lawyer Robert Houston expressed the view of almost all traditional owners and KLC staff when he identified Aboriginal consent as being key to Browse LNG's social licence to operate. He said that consent was essentially a:

> Shield that the State and Woodside have against all the claims of green groups, the community of Broome … so essentially, whatever happens, and however fractured the relationships become, the State and Woodside need traditional owners…Because this project is so contentious…any argument that Woodside or the State have a social licence is completely dependent on there being an agreement with traditional owners.[24]

Most interviewees across all parties agreed with Houston's sentiment on this point. Christine Robinson also pointed to the potential international alliances available to the Kimberley Aboriginal people:

> If the Jabirr Jabirr had gone against it as well, the KLC would have been able to bring in a lot of other political support within Australia and probably internationally.[25]

Many people, particularly from the Aboriginal side of negotiations, saw Aboriginal consent as constituting Woodside's 'social licence to operate'. KLC employee Christine Robinson pointed out that "Woodside has a reputation, and it has to manage it. It has to be seen to be a good corporate citizen."[26] Woodside CEO Don Voelte said that for his company the business case of

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[22] The two phases occurred before and after the State election of September 2008, see Chapter 5, 'The Browse LNG Negotiation'.
[23] Interview with Eric Ripper (Perth, 21 June 2013).
[24] Interview with Robert Houston (Broome, 15 June 2012).
[25] Interview with Christine Robinson (Broome, 25 June 2012).
[26] Interview with Christine Robinson (Broome, 25 June 2012).

"doing the right thing" includes "moral authority" and becoming "an employer of choice".[27] Where companies run roughshod over the interests of communities, Voelte said that they:

> May have short term gains, but over the long term they get caught out. And it normally ends in tears.[28]

Wayne Bergmann said that he was all too aware that the company was giving a much higher priority to Aboriginal consent than it had done in the past:

> I said to Don Voelte, prove to me, implement what we've got in the Kimberley agreement to the Pilbara, where you currently have your operations. Why have you got an agreement down there that is different to what you have been prepared to accept up here? You don't actually have an agreement down there...[29]

However the question of whether the development would have been possible without Aboriginal consent received mixed responses. Those in the 'No Gas' campaign were unanimous in their view that Aboriginal consent was vital to the project. For example, Bob Brown said that:

> I think that the mining industry … are well aware that a united Aboriginal voice is going to beat them, particularly because it will bring public opinion on side.[30]

Wayne Barker said that had traditional owners not consented to a development, Colin Barnett:

> [W]ould have had a tough battle politically, for his political survival. Because we would have had another Franklin River Dam … they had the Sea Shepherd turning up, Bob Brown, Missy Higgins, this was serious.[31]

The majority of KLC staff and traditional owners also echoed this view. However, both Cameron Syme and a Western Australian senior female government official (SFGO) believed that the development did not need Aboriginal consent to proceed. The latter said that while an agreement was desirable, the State had to think about what was in the best interests of all Western Australians, and that without Aboriginal consent it would have been "politically possible,

[27] Interview with Don Voelte (Sydney, 5 June 2014).
[28] Interview with Don Voelte (Sydney, 5 June 2014).
[29] Interview with Wayne Bergmann (Broome, 20 June 2012).
[30] Interview with Bob Brown (Cygnet, 28 July 2013).
[31] Interview with Wayne Barker (Broome, 18 June 2013). Franklin River Dam was a high profile environmental campaign of the 1980s to prevent a dam being built in Tasmania. Missy Higgins is a prominent Australian singer.

albeit challenging".[32] Eric Ripper and a senior male government official (SMGO) both observed that the question was moot because Aboriginal consent had been given.

The large majority of interviewees from the State and Woodside expressed the view that it was unlikely that the majority of Broome residents would have been in favour of the development. KLC lawyer Jeremiah Riley pointed out that Broome's population is traditionally fairly left-leaning and environmentally focussed, and that Broome has never been a mining town. [33] Environmentalist Kate Golson observed that:

> Woodside presented itself differently here: one meeting I sat in on, Woodside were asking us how they should build their workers' village just outside of town. And someone asked them how did they usually build it, and they replied that they knew that Broome was a different sort of town, with a long history, tourism, very special to you people, so we are not going to use our existing models here. Which we thought was really bizarre.[34]

Several non-Aboriginal people campaigning against the gas hub suggested that the State and Woodside made a strategic mistake by focussing on Aboriginal support and ignoring those in Broome who opposed the development. However, the state government were aware that many in Broome would be opposed to the project, no matter the inducements offered to them. [35] Duncan Ord observed that for many environmentalists who had initially participated in the Northern Development Taskforce[36] "their intent was never to have it processed anywhere, it was really always a group of people who are opposed to fossil fuels being used." [37] The State therefore likely knew that they would encounter significant opposition from Broome residents, and calculated that Aboriginal consent would suffice in its place.

*2. The Kimberley is an Aboriginal Place*

Pat Lowe, a founder of Environs Kimberley, said that in the Kimberley Aboriginal people's "moral power" was more apparent than elsewhere because:

> Most of the communities up the coast, the traditional owners have never left their land, and there is no question about that. Whereas elsewhere, people have been moved around, and that has

[32] Interview with SFGO (Perth, 7 June 2013).
[33] Interview with Jeremiah Riley (Broome, 13 June 2013).
[34] Interview with Kate Golson (Broome, 12 June 2013).
[35] Interview with Eric Ripper (Perth, 21 June 2013).
[36] Refer to the discussion in Chapter 5, 'Browse LNG Negotiations'.
[37] Interview with Duncan Ord (Perth, 21 June 2013).

> been undermined. Here, people know where they come from, still practise their tradition, and I think that gives them a much stronger feeling of rights.[38]

Christine Robinson compared the Kimberley with areas of southern Australia:

> The Kimberley is still much more, it's an Aboriginal nation ... it's still really obvious that this is an Aboriginal country, you walk down the street, whereas in the city, the numbers are different.[39]

Niegel Grazia, among many others, said that the history of the Kimberley was an explanation for the power of traditional owners and therefore the strength of the Browse LNG agreements:

> Particularly when you get up into the north of the west Kimberley, there is a lot of connection to land that is, largely, uninterrupted. People were walking off the land in the 1960s. There would be people in eastern Australia who wouldn't believe you. And I believe that that is a difference, and it's a difference in the strength of the fight, of the self-belief … they can stand up and have a damn good fight. And remember that the KLC was formed before land rights. So there is something to be said about history, and modern civilisations are the same: why are some countries war-torn and impoverished, and some aren't? … And maybe the measure of your capacity to have a fight has a link to the scale of the agreement.[40]

The Goolarabooloo opposition to the precinct also emphasised this message. Joseph Roe, for example, often made references to his position as a key protector of his culture in his public statements, a role that was repeatedly emphasised by 'No Gas' protestors and the media. In an open letter to Woodside, Roe wrote that the proposed development:

> [I]s a dangerous and frightening prospect for the Traditional Owners and Custodians. Without Country, there can be no Culture. Law cannot be practised. Nor can the Country be "kept quiet" and safe. Culture cannot exist without Country, nor Country without Culture.[41]

Maria Mann, former coordinator of Environs Kimberley, was typical of much of the 'No Gas' discourse when she said that the Goolarabooloo were "critical" to the anti-gas campaign:

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[38] Interview with Pat Lowe (Broome, 12 June 2013).

[39] Interview with Christine Robinson (Broome, 25 June 2012).

[40] Interview with Niegel Grazia (Perth, 26 June 2014).

[41] Joseph Roe, 'An Open Letter from Traditional Custodian Joe Roe to Browse JV Partners Shell, Chevron, BHP and BP Regarding Proposed Gas Plant at James Price Point' <http://www.savethekimberley.com/an-open-letter-from-traditional-custodian-joe-roe-to-browse-jv-partners-shell-chevron-bhp-and-bp-regarding-proposed-gas-plant-at-james-price-point/>. In addition, when Roe appeared on ABC TV's current affairs program *Q&A* he described himself as "the law boss of that country where Mr Barnett wants to build his gas hub" 'ABC TV, Q & A, 5 November 2012'.

> They were the hub around which everybody else gathered. They had the ultimate reason for protecting James Price Point, and they had a very clear argument and vision for leaving it the same, and preserving it until the end of time. This was really powerful. And people did defer to them. Their needs and their arguments were paramount. It was their country, and they stood to lose more than anybody else.[42]

Bob Brown, former leader of the Australian Greens party and 'No Gas' campaigner, said that Aboriginal opposition to the project was "fundamental" and that without it the environmental opposition would not have stopped the precinct because "to me it's cut and dried in that the Kimberley is still largely an Aboriginal province, because of population, living culture, language and country."[43] He identified the power of the Goolarabooloo as stemming from an "openness" about their culture, and particularly songlines, to the broader public:

> It is a very special place in that sense, that they are prepared to talk about how that place evolved, and that there are songlines going across to central Australia and the north. It is an eye-opener to a lot of non-Aboriginal Australians, and a lot of Aboriginal Australians I expect. Paddy Roe [Joseph Roe's father] had understood that unless the culture was opened up and celebrated, it would ultimately fall.[44]

The power of Aboriginal Australians more generally, Brown said, came from:

> The better education of the wider population in Australia, a greater awareness that we weren't founded by Captain Cook, that we have the world's oldest living culture.[45]

Likewise, Kate Golson commented that the fact that Kimberley Aboriginal people were still on their traditional country "clearly demonstrates their connection" to non-Aboriginal people. [46] Brown talked about being shown burial sites on the LNG precinct site, which clearly had a profound effect on him. He said that he told protesters:

> "I put my hand in the sand, and I will stay with this issue all the way through, I will not abandon it". I was bound to it.[47]

Pat Lowe said:

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[42] Interview with Maria Mann (Perth, 7 June 2013).
[43] Interview with Bob Brown (Cygnet, 28 July 2013).
[44] Interview with Bob Brown (Cygnet, 28 July 2013).
[45] Interview with Bob Brown (Cygnet, 28 July 2013).
[46] Interview with Kate Golson (Broome, 12 June 2013).
[47] Interview with Bob Brown (Cygnet, 28 July 2013).

> Thank God for Goolarabooloo really, because then we could say that it's not 'the Aboriginal people' who want this … We were always up against the argument that Aboriginal people had decided. In the media, it was always 'the Aboriginal people have decided', so it always looked like we opposed 'the Aboriginal people'. Whereas it was much more nuanced than that. And we were supporting one group.[48]

Kate Golson said:

> Goolarabooloo, if you open up that can, what a force. Whether you agree with everything that is said by them. The Lurujarri Trail and its association with French universities among others.[49]

*3. Aboriginality and Wilderness*

The reasons why Aboriginal consent was important are clearly intrinsically linked with the location of the proposed development. One of the arguments of the 'No Gas' campaign was that Aboriginal people in opposition to the project were more committed to protecting their culture than those in support. This discourse saw that Aboriginal people in support of the development as a threat to wilderness. For example, a protest sign seen around Broome said: 'KLC: Killing Land and Culture'. [50] Bob Brown contrasted a meeting he had with the Goolarabooloo families "We had the sand dune as the floor, and had the vine thickets around, and there were cultural sites", with his meeting with Jabirr Jabirr traditional owners at an office in Broome:

> [A] very modern building with air-conditioning … a plate of fresh-cut sandwiches under plastic … it is very much what I am used to in parliament.[51]

A French filmmaker, Eugénie Dumont, released a documentary in August 2012 about the 'No Gas' campaign that heavily featured the Goolarabooloo family but made no mention of the Jabirr Jabirr in support of the project other than to point out that consent could not be given in the face of compulsory acquisition.[52] Another prominent protester against the precinct, Louise Middleton, said that one of the effects of the Stolen Generation was that people came back to country:

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[48] Interview with Pat Lowe (Broome, 12 June 2013).
[49] Interview with Kate Golson (Broome, 12 June 2013). See Chapter 5, 'Split in the Claim Group' for the discussion on the Goolarabooloo.
[50] Personal observation, Broome 2011.
[51] Interview with Bob Brown (Cygnet, 28 July 2013).
[52] Eugénie Dumont, 'Heritage Fight' (August 2012)

> [K]nowing nothing of their culture, coming back to their people with the pure notion of cashing in on their ignorance ... You have people like me who are gadiya [non Aboriginal] who fight tooth and nail for culture, and you have Indigenous people now who are fighting tooth and nail to sell it.[53]

Ciaran O'Faircheallaigh noted of this tension that: 'they are a manifestation, albeit extreme, of a deepening rift between Green and Black interests in relation to development in Australia's resource-rich regions'. This came after, he said:

> A widespread assumption in Australia that Black and Green groups are natural allies. It was assumed they share a commitment to looking after the environment, and in particular to stopping development in areas of high environmental and cultural significance.[54]

It was a message the traditional owners in support of the project found offensive. Frank Parriman was the subject of a protest brochure that depicted his face covered in dollar signs. He was scathing about protestors who:

> [P]ainted a few people like heroes who should be worshipped, but they were just using them in one way. There were a few that I thought got captivated by this so-called elder. The type of person that travels to India to become enlightened, they are obviously searching for something in their own lives. There are many misconceptions about culture, and people are manipulating it to suit their own needs.[55]

Christine Robinson, commenting on Roe's status in the gas controversy, said:

> Quite frankly, there is a lot of anger about it because those who know Joe, we know that he is not the black Elvis.[56]

Eric Ripper called Roe's integrity further in doubt when he recounted how:

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[53] Louise Middleton, cited in Eugénie Dumont, 'Heritage Fight' (August 2012). It is worth noting that Middleton presented no evidence on any connection between Jabirr Jabirr in support of the project and people from the Stolen Generations.

[54] Ciaran O'Faircheallaigh, 'Green - Black Conflict over Gas Development in the Kimberley: A Sign of Things to Come?' *The Conversation*, 18 October 2011.

[55] Interview with Frank Parriman (Broome, 18 June 2013).

[56] Interview with Christine Robinson (Broome, 25 June 2012). Among other violent incidents, Joseph Roe pleaded guilty to assaulting a 15 year old boy with a "large stick". According to ABC News, Roe blamed the stress of the 'No Gas' campaign for the attack: ABC News, 'Gas hub opponent Roe fined for assault on teen' (11 March 2013) <http://www.abc.net.au/news/2013-03-11/roe-fined-for-assault-on-teen/4566340>

> In a meeting with me, Joseph Roe said he would support the project on his land provided the benefits went to him and his group, and the benefits sharing model was abandoned. He did not want benefits shared Kimberley wide.[57]

Duncan Ord said he believed that the issues about who were the traditional owners had been "largely promoted by the 'No Gas' group".[58] This narrative was explicit. It was deeply resented by Jabirr Jabirr traditional owners. Mary Tarran said of the 'No Gas' campaigners that they were:

> Screaming blue murder about damage to country … [but that] even with bitumen and tar over the land, it's still our land. You can't destroy spirit … it's a living thing. I could go down to Melbourne, Sydney and my country is still in me.[59]

It led to acrimonious insults being traded by both sides. KLC chief executive Nolan Hunter[60] said that 'the hate mail came so thick and fast he now instructed staff at the KLC office not to open letters with their bare hands'. Hunter said that 'green groups have betrayed the region's Aborigines' saying that those opposed to the hub had called him a 'money hungry coconut'. He said "for them, the environment can stay pristine and the people in it can live in poverty and destitution."[61]

This 'coconut' insult appeared in a letter described as a 'newsletter', and was widely condemned, including by Woodside chief executive Peter Coleman.[62] However, as pointed out by Pat Lowe, environmentalists also condemned this newsletter and suspect it was produced by a "loopy bloke" acting alone.[63] The 'newsletter' led to questions in parliament, including the following from local MP Carol Martin speaking in support of the development:

> Aboriginal people have been colonised so many bloody times: first, by the British; second by the do-gooders; third, by the missionaries; fourth by industry; and now, by the bloody greenies![64]

Underlying this discussion about 'real' traditional owners is a discourse linking wilderness and Aboriginality. As discussed above, part of the reason Aboriginal consent was considered important for the project was because it was the first major industrialisation planned for an area of high environmental value. The discursive link between Aboriginality and wilderness is

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[57] Interview with Eric Ripper (Perth, 21 June 2013).
[58] Interview with Duncan Ord (Perth, 21 June 2013).
[59] Interview with Mary Tarran (Broome, 27 June 2012).
[60] Nolan Hunter took over from Wayne Bergmann as CEO of the KLC in March 2011.
[61] Paige Taylor, 'Coconut Slurs as Woodside Gas Deal in the Kimberley Riles Greens', The Australian, 21 September 2011. 'Coconut' is a derogatory term denoting an Aboriginal person who behaves like a white person.
[62] Paige Taylor, 'Woodside Boss Slams Kimberley Hate Campaign', The Australian, 23 September 2011.
[63] Interview with Pat Lowe (Broome, 12 June 2013).
[64] Western Australia, Parliamentary Debates, Legislative Assembly, 24 October 2012, 7624 (Carol Martin, MP).

implicitly made by the manner in which the *Native Title Act* and its case law determines native title rights: those whose land is more 'wild' have more legal right to it. The counter-narrative surrounding the protection of culture was that Kimberley culture law bosses had given their blessing and support to negotiators because of the potential change it represented to the health, wealth and happiness of Kimberley Aboriginal people. Barker pointed out that the 2011 KLC annual general meeting passed a motion that stated that 52 different traditional owner groups supported the Jabirr Jabirr in agreeing to the development.[65] Parriman said of non-Aboriginal protestors using Aboriginal culture:

> Maybe some of them genuinely think that they don't want the Aboriginal way of life to be destroyed, but it is already being destroyed by alcohol, drugs and violence. Our biggest scourge now is going to be foetal alcohol syndrome. If those things are not addressed, the next generation coming through will not know how to administer culture. There are many misconceptions about culture, and people are manipulating it to suit their own needs. The biggest threat to culture is the dysfunction among us, it is a much bigger threat than any development.[66]

However this counter-narrative did not gain the same media traction as the narrative linking Aboriginality with wilderness.

*4. Mining as Progress*

The other significant discourse to the negotiations was that the Browse LNG precinct would significantly reduce Aboriginal disadvantage in the Kimberley. Rita Augustine, an elder and named applicant on the native title claim, directly invoked it when she put the following question to Bob Brown on ABC TV's *Q&A* programme:

> The suicide rate among our young people in the Kimberley is an epidemic. The money we will get if the project goes ahead is not going into our back pockets. We are going to use it to save our people's lives and our culture through education, jobs and better health and housing. Is that too much to ask for? I know you care about the whales and dinosaur footprints, but what about us?[67]

This discourse about Aboriginal development was created by the KLC, according to Rob Houston. He said:

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[65] Interview with Wayne Barker (Broome, 18 June 2012).

[66] Interview with Frank Parriman (Broome, 18 June 2013).

[67] Rita Augustine, cited in 'ABC TV, Q & A, 5 November 2012', above n 41.

> It's something that Wayne Bergmann has been very good at, in terms of using the media, and essentially trying to create a bit of momentum in the eyes of government, that this is going to be a great thing for the region because it is going to deliver all this to traditional owners, and it's a great opportunity to empower previously disempowered Indigenous communities. And then once you plant that seed in the minds of the people, the key decision makers, it's going to be very difficult for them to back away from that, particularly when there have been lots of public statements about 'this is going to be self-determination like you have never seen before'.[68]

Similarly environmentalist Pat Lowe observed that once government started using the rhetoric of combating Aboriginal disadvantage it "makes it more difficult to start using the heavy boot".[69] It was a discourse used extensively by traditional owners, the State and Woodside, particularly in their public utterances. For example, the following press release from the State is typical:

> The development of the Browse Basin gas reserves represents a rare opportunity to address indigenous disadvantage across the Kimberley … Premier Colin Barnett said the agreement was the most significant act of self-determination by an Aboriginal group in Australian history.[70]

Don Voelte also spoke of his commitment:

> As they told me oftentimes, we have lost our kids, we don't want our grandchildren lost. That meant a lot to me.[71]

All interviewees from both the State and Woodside said that this commitment was genuine on their part, and also on the part of the other. The majority of traditional owners and KLC staff appeared to believe in the State's commitment to them. However Woodside's commitment was strongly questioned. Wayne Barker was at the extreme end of this view when he said of Woodside:

> You can't appeal to their good heart, because they don't have one. Because it's industry. But with State government, you are dealing with people, and State government has a different perspective. They have to deal with hearts and minds of people because they represent the people.[72]

Christine Robinson felt that this concern was overused by the State and Woodside:

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[68] Interview with Robert Houston (Broome, 15 June 2012).
[69] Interview with Pat Lowe (Broome, 12 June 2013).
[70] Colin Barnett, Premier, "Consent Agreement Reached for Kimberley LNG Precinct" (Press Release, 6 May 2011).
[71] Interview with Don Voelte (Sydney, 5 June 2014).
[72] Interview with Wayne Barker (Broome, 18 June 2012).

> If I heard one more time how much the State and Woodside really cared about the TOs I would have been sick.[73]

Don Voelte invoked several discourses, including significantly reducing Aboriginal disadvantage and Aboriginal ownership of the Kimberley, when explaining why his company agreed to pay much more than the land was valued at:

> It was about the mob, it was about the region, it was about the culture and history of the area. And if you tie the gas properly to an onshore area, it's that area, all along the coast. That agreement was not about money, it was about commitment, it was about jobs, everything else that improves the lot of the group of people that traditionally owned that part of the country … So they can take the gas to the moon as far as I care, the agreement should still hold.[74]

Betsy Donaghey commented on the explicit link between this discourse and the history of colonialism in the Kimberley:

> One of the very first meetings, one fellow asked me whether I was prepared to commit to something that I couldn't, it may have been equity ... and I had to say, no I am not, I can't guarantee that ... [I found out later] that there had been another suicide in the community days before. He then said, you don't understand what I am going through. And so he went back, literally to colonisation and what it had meant for his family. And he could trace back to his great great grandfather. Everybody who had died. And I was sitting there, and I had literally never encountered this. And I recall saying ... is this what our meetings are going to be like? Because I had no idea. For me, it was my job, and I am not saying that is all it was, but it was not my identity or my heritage.[75]

When asked what difference an emotional appeal like this made to the deal, Donaghey replied "maybe at the margin".[76] However, she recounted an occasion:

> When Cameron and Wayne, not very subtly, had me sit down with the older ladies, and you would have sworn those ladies were 80 years old, but they weren't, and listened to their story, which would have been completely emotional if they hadn't shoved a video camera in my face. And those were things that I was hearing for the first time ever.[77]

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[73] Interview with Christine Robinson (Broome, 25 June 2012).
[74] Interview with Don Voelte (Sydney, 5 June 2014).
[75] Interview with Betsy Donaghey (Melbourne, 19 August 2014). It is worth noting that Donaghey was born and raised in the United States, although has lived in Australia for many decades. She is an engineer: her involvement leading the Browse LNG negotiation was her first experience of negotiating an Aboriginal land access deal.
[76] Interview with Betsy Donaghey (Melbourne, 19 August 2014).
[77] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

However, as noted by SFGO, 'combating Aboriginal disadvantage' had potentially negative ramifications for traditional owners. She said:

> You can't ask for equal footing in the commercial space and be treated as equals, and then play the victim, the Indigenous politics card, when you are not getting your way.[78]

It was a discourse treated with disdain by those opposing the development. Pat Lowe was typical when she said that the rhetoric was always something governments and companies "trot out because of the moral power of Aboriginal people. If it is good for them, it must be good".[79] She said of it:

> You would have thought it was Voelte's purpose in building this gas hub, to help Aboriginal people. Who did they think they were kidding?[80]

Similarly, Kate Golson said "Woodside's rhetoric on that was pretty basic stuff, it wasn't deep".[81] Several traditional owners said that 'combating Aboriginal disadvantage' gained less media traction than purely environmental discourses. Parriman, for example, said that:

> You can be when you are advocating for the environment, it's a feel good thing, you don't have to have the facts.[82]

Ord too touched on this when he compared the high profile events of the 'No Gas' campaign to the same people's response when the on-shore development was cancelled:

> There haven't been too many rock concerts for giving to people in poverty, potential suicide victims.[83]

There is another aspect to the discourse that emphasised the benefits of resource extraction to Aboriginal people. This emphasised the importance of resource extraction more generally, and particularly to the State of Western Australia. Pat Lowe said that:

> I would be fascinated to know how many politicians have shares in Woodside, for example. So when you are talking about the company and government, you are talking about the same thing, and the *Mining Act* overrides everything else. And Western Australia identifies as a mining state.[84]

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[78] Interview with SFGO (Perth, 3 December 2012).
[79] Interview with Pat Lowe (Broome, 12 June 2013).
[80] Interview with Pat Lowe (Broome, 12 June 2013).
[81] Interview with Kate Golson (Broome, 12 June 2013).
[82] Interview with Frank Parriman (Broome, 18 June 2013).
[83] Interview with Duncan Ord (Perth, 21 June 2013).
[84] Interview with Pat Lowe (Broome, 12 June 2013).

SFGO, when asked about the description of Western Australia as a state that strongly identifies with mining, said that she felt that it was "overplayed".[85] The most persuasive evidence of the discourse of Western Australia as a mining state in action was the close relationship that appeared to exist between Woodside, State politicians and bureaucrats. There appeared to be several crossovers between these groups, including that Brian Pontifex, the former general manager of Browse LNG for Woodside was hired as Barnett's chief of staff in 2010. [86] A common view amongst traditional owners and the KLC was that State and company allied with each other to the detriment of traditional owners. Frank Parriman, for example, described feeling that the negotiation was "two against one".[87] Traditional owners publicly accused the State of acting on the behest of Woodside in relation to compulsory acquisition.[88] This view had clearly been heard by all people interviewed from the State, but was unanimously rejected by them. Several interviewees pointed out that the government and Woodside had many significant disagreements, both related and unrelated to the Browse LNG agreements. Said SFGO:

> Of course they [Woodside] have economic power, they are a significant company, and of course all of your companies, no matter what state, territory, they will generally have knowledge of, or capacity to access the decision-makers … but does that mean that government just does what they say? No, I don't believe it does … I don't accept that as a criticism because I think we actually played with a straight bat to all parties. By the nature of these negotiations, and just by dint of geography, the fact that you are in Perth and therefore more likely to run into each other in a day-to-day setting.[89]

When asked about the leverage that Woodside wields in Australia, Niegel Grazia said:

> [W]hen you work for Woodside your card can get you into a lot of places, because we are a big Australian oil and gas company, senior enough job title will get you a meeting.[90]

Geoff Gallop observed that resource companies who were genuinely committed to respecting native title had:

> [M]ore power than before because this power is now linked with authority, they have legitimacy now that they are no longer trying to challenge native title.[91]

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[85] Interview with SFGO (Perth, 7 June 2013).
[86] Chalpat Sonti, 'Browse LNG Proponent now Barnett's right hand man', WA Today, 7 January 2010
[87] Interview with Frank Parriman (Broome, 21 June 2012).
[88] Flip Prior, 'Traditional Owners Focus Anger at Woodside', The West Australian, 9 September 2010
[89] Interview with SFGO (Perth, 3 December 2012).
[90] Interview with Niegel Grazia (Perth, 26 June 2014).
[91] Interview with Geoff Gallop (Sydney, 18 July 2013).

## III. CURTIS ISLAND LNG

### *A. Projected Income Stream*

There was broad consensus that the Curtis Island LNG projects were economically very significant — Andrew Fraser said "the only thing that is happening in the Queensland economy at the moment is the investment from the gas industry.[92] Yet, whether explicitly or by inference, most interviewees across all parties agreed that the large projected income stream of the projects was not a point of leverage for traditional owners. As discussed previously, this appears to be because of the way that agreement benefits were conceptualised. Traditional owners were being paid for the use of small parcels of land that had weak native title rights; they were not being given a share in the projects, nor treated as significant stakeholders in the projects themselves. Traditional owners recognised and unsuccessfully attempted to change this basis for calculating agreement outcomes: for example, traditional owner Tony Johnson talked of finding out the:

> Level of profit of the Santos deal ... This just made our position worse as we had an idea about the obscene profitability of the projects, but there was no correlation between profits and compensation.[93]

### *B. Aboriginal Political Power*

Interviewees across all parties took the view that PCCC Aboriginal people had little leverage in these negotiations, particularly in comparison to Kimberley Aboriginal people. Kezia Smith was able to provide a unique insight into how traditional owners are treated between states:

> Rio [Tinto] do have some very good indigenous relations programs and reputation in some areas, however they are not consistent from state to state, and I can say that because I have been working for Rio Tinto for the past ten years. Coming from the west, and the Northern Territory where I have spent most of my career in the mines, this royalty is toilet paper compared to what they pay their TOs over there. And I know because I have seen the payments, and I know the people.[94]

Smith said that she felt that this difference was due to several factors:

> I find that the mob up in NT [Northern Territory] and WA [Western Australia] have a bigger voice, and if they use that voice against the company, well, there are thousands of them. Not like here, you come to a meeting and only the loudest gets heard, and the person that has a corporate entity backing them gets the goods … I just think that when it is time for them to speak for

[92] Interview with Andrew Fraser (Brisbane, 5 November 2013). See discussion of their worth in Chapter 5, 'Curtis Island LNG Agreements'.
[93] Interview with Tony Johnson (via telephone, 30 August 2013).
[94] Interview with Kezia Smith (Gladstone, 11 September 2013).

> country, there are so many of them fighting for the same thing … They are more respected, there is another level of respect there that I don't see here, between government, companies and TOs. There are a lot more people in political roles and high prominent positions in the NT and WA.[95]

Smith said:

> If you are talking about a power ratio [between LNG companies and traditional owners], it is 90/10 over here. If you are talking in the west, it is 50/50, maybe 60/40, it is more even. The companies have a lot of pull over here, they have pushed their weight around. They have the government on their side because the government are greedy too.[96]

Traditional owner Nat Minniecon discussed the impact of history on contemporary leverage:

> Let the record show that Queensland was the place where our people were put into places like Woorabinda and Cherbourg. The deliberate act of taking this mob and putting them up in Palm Island and Yarrabah, and bringing those blackfellas down here was a way of saying to them that they were on another man's country. There is also the fear that the protector is coming to get your kids, middle of the night, get in the car, we have to get out of here because the protector is coming to get our kids.[97]

GLNG2 also commented on the level of continuity of connection to land as a significant factor in negotiation leverage:

> I think that in the native title space, you will find that Western Australia, a lot of the groups have more connection, or are first generation. Queensland was heavily diluted, a lot of missions in the early 1900s, a lot of the groups we deal with, none of them live on country, they have never been there before. I think that a lot of that has been lost … I think that if a group had a real connection and was really established, then they would have more leverage. I think that has something to do with that. The Queensland space is just so messy at times.[98]

Indeed, GLNG3 of Santos appeared to take a rather self-serving approach to Aboriginal disempowerment when he said that he preferred traditional owners to have less experience of the commercial world:

> The danger of having people who are extremely skilled is that you will end up with them capturing the process from everyone else in the group, and no-one will know what's going on. To some extent, ironically and counter-intuitively, it's better to have the old lady who was never

[95] Interview with Kezia Smith (Gladstone, 11 September 2013).
[96] Interview with Kezia Smith (Gladstone, 11 September 2013).
[97] Interview with Nat Minniecon (Gladstone, 10 September 2013).
[98] Interview with GLNG2 (Brisbane, 16 September 2013).

> educated, because she knows something about something. And other people know something about something else, and together they make up a puzzle of what the community is. And you are trying to strike a deal with the community, not an individual. When you have young, highly educated people signing off on a deal, I worry about the risk of that decision sticking.[99]

Smith also highlighted the lack of traditional owner unity:

> We are in two worlds here, but even more non-traditional than that mob over there [in WA]. When they go into their meetings, they have already worked out a strategy beforehand. They are all then voting for the same thing. They might not all agree, but they have been given all the information and they must respect their elders. Here, you might see a bit of it, but agreement is achieved through bullying and harassment. That is not the traditional way ... So it's cultural, and you have to drill down and work out why their ways make them more respected by white people than we are here. And when I talk about culture, I am talking about respect for elders, connection to country. And I think that has a big impact on the way that deals are done.[100]

The other view was that traditional owners did, in fact, have some leverage with companies: "the company is concerned with risk and access", said GLNG3.[101] Similarly, Geoff Dickie said that of traditional owner leverage that:

> A lot of it is the ability to delay and go through the court process, and also to create bad publicity. The companies were quite sensitive about having a good public image. They have been more sensitive recently, but at that stage they all still wanted to be seen to be doing the right thing by Aboriginal groups.[102]

Dickie did not share the view that PCCC are disempowered, potentially indicating the existence of groups with even less leverage:

> The PCCC was recognised as pretty organised, a tough bunch, and they had good lawyers who had worked for them on a number of negotiations around Gladstone. And some of the other groups you wouldn't have left on their own with major companies … And we had seen them all [traditional owner groups] when we were doing the State-wide ILUA [Indigenous Land Use

[99] Interview with GLNG3 (Brisbane, 17 September 2013).

[100] Interview with Kezia Smith (Gladstone, 11 September 2013). Refer to discussion in Chapter 5, Browse LNG – Split in the Claim Group' for why Kimberley traditional owners are still thought of as a unified group.

[101] Interview with GLNG3 (Brisbane, 17 September 2013).

[102] Interview with Geoff Dickie (Brisbane, 6 November 2013). Dickie is referring to the fact that the broader Gladstone project received significant criticism for its use of agricultural land for coal seam gas wells. This resulted in a widespread 'Lock the Gate' campaign.

> Agreement] around exploration. We had a pretty good knowledge of who was capable and who had good legal support. At Gladstone, they had a well-established negotiation capability.[103]

However, this view of the traditional owner leverage is at odds with PCCC attempts to garner publicity about the agreements. For example, GLNG1 described failed attempts by PCCC owners to draw attention to what they saw as inadequate agreement benefits.[104]

Smith added that environment groups did not appear particularly interested in the views of traditional owners, although "I have started a dialogue with the Conservation Council, but they are in Bundaberg".[105] Tony Johnson said that he believed that there was little political will to see the rights of traditional owners upheld in Queensland. Neola Savage also pointed to the lack of cohesion of the PCCC group as a factor in their poor outcomes: "all the industry is happening in Gladstone, where I was born and bred. All the other people on the committee were from Bundaberg."[106] Fraser contrasted the PCCC group with traditional owners from the Cape York Peninsula who both, he said, had access to politicians at the highest levels and "have a type of front-ended power" which he linked with strong native title rights.[107]

Tony Johnson, on being asked whether they considered involving Queensland South Native Title Services (QSNTS) in the future act negotiations, indicated a distrust of this body that was a reflection of PCCC internal dynamics, as well as a lack of confidence. He said:

> No, because they were just setting up shop. I had worked for the rep body and I knew what their capacity was, they had no lawyers with any real commercial experience and I didn't want to go there … As the body that certified the ILUAs [Indigenous Land Use Agreements], I would have liked Queensland South to be at the table for the certification. But I wouldn't have been comfortable with their capacity to do the negotiations. But of course there is a role where there is some capacity. But in our group there were already some questions about internal representation, and that more people should have been represented, and if we had devolved that responsibility to Queensland South we would not have survived as applicants.[108]

[103] Interview with Geoff Dickie (Brisbane, 6 November 2013).
[104] Interview with GLNG1 (Brisbane, 17 September 2013).
[105] Interview with Kezia Smith (Gladstone, 11 September 2013).
[106] Interview with Neola Savage (Rockhampton, 11 September 2013).
[107] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[108] Interview with Tony Johnson (via telephone, 30 August 2013).

Meanwhile, a female PCCC claimant said that while it would be easy to blame QSNTS for not having the capacity to participate in negotiations, she laid the blame for this at the feet of governments "I also see the bigger picture: native title bodies aren't resourced."[109]

### *C. Relationship Between Power and Place*

#### *1. Gladstone is Industrial*

There was a consensus that Gladstone is an industrial town in which environmental considerations were a low priority, despite Gladstone Harbour's inclusion in the Great Barrier Reef World Heritage Listing. The corollary is that it is not an area identified as an Aboriginal place. Andrew Fraser said of the development area:

> If the world wants a Paris, it needs a Gladstone … the world needs those kinds of industries, and the best thing that can happen is that they are concentrated and managed in the one shed. And Gladstone has always known that about itself. Just as the GFC [Global Financial Crisis] was about to take shape, Gladstone had ridden this amazing investment boom and had just started to get local activism around environmental issues. It was almost 'un-Gladstonian' to ever question anything about industrial progress. The GFC hit, and there were massive layoffs of contractors, and Gladstone turned on a dime.[110]

Tony Johnson gave a different perspective to this insight when he said of the Queensland government that "my personal view is that the Queensland government considers that the real Aborigines live in Cape York."[111] Libby Connors of the environmental group 'Save the Reef' said a similar view pervaded environmental groups who would have made far more of an effort for a similar development in Cape York:

> It would have brought the Wilderness Society in. They won't go near Gladstone. They are one of the groups that says it's already gone.[112]

Connors observed that the 'environmental movement' in Gladstone "was just me and Drew [Hutton] for a while there, and the local conservation groups came in."[113] It is a town in which industry is dominant:

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[109] Interview with PCCC female claimant (Gladstone, 10 September 2013).

[110] Interview with Andrew Fraser (Brisbane, 5 November 2013).

[111] Interview with Tony Johnson (via telephone, 30 August 2013). The Cape York Peninsula saw far less colonial encroachment than elsewhere in Queensland, and is generally considered to still be largely a 'wilderness'. It has high levels of native title.

[112] Interview with Libby Connors (Brisbane, 16 September 2013).

[113] Interview with Libby Connors (Brisbane, 16 September 2013).

> It's just been so hard to fight because, even though there are lots of sympathetic people in Brisbane, we can't all get together and protest in Gladstone without a great deal of organising because the LNG companies have bought out every motel room, every caravan park, within 100km radius of Gladstone. You can't hire a boat to get into the harbour, they have all these restricted areas.[114]

*2. Queensland is a Mining State*

Another discourse that appears to have been relevant to the negotiations relates to the nature of Queensland settlement and resource exploitation. For example, Andrew Fraser pointed out that Queensland is "the only State where the majority of people live out of the capital city."[115] This may lead, he said, to a situation in which:

> I don't think that there is a rule of thumb that Queensland Aboriginal interests get buried in the political discourse, but I do think that they are susceptible to getting crowded out by the whitefella land use issues. And I think that the cultural predisposition in Queensland, that we are all in our bones of the bush, despite the reality of demographics, I think that can crowd out some of the space. It's not unusual for media outlets in Queensland to run a bush series; they don't ever run a traditional owner series.[116]

Instead, the power of 'Mining as Progress' was spoken about. For example, Libby Connors observed that Queensland's unicameral parliament resulted in a lack of "critical culture", a state of affairs that, coupled with "lousy media", make it "really hard to get points up". She said that:

> Queensland has such a culture of mining, and to get those farmers to get up and say no [to coal seam gas], you have no idea how hard that was. There is just not that culture of standing up and saying no, there is a culture of never being anti-anything. Because mining was so strong in the 1980s under Bjelke-Petersen, there was a real "mining is good" ethos in Queensland.[117]

Andrew Fraser commented that:

> I think it's been just by sheer economic force that they have any good relations … big wages tend to create 'good relations' regardless of the environmental and cultural desecration that will

[114] Interview with Libby Connors (Brisbane, 16 September 2013).
[115] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[116] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[117] Interview with Libby Connors (Brisbane, 16 September 2013). Connors is also heavily involved in a campaign against coal seam gas on agricultural land.

> occur … everything in Gladstone was an economic debate, it wasn't a notion of the public interest. The community was very much ranked lower than the march of 'progress'.[118]

Several PCCC traditional owners made similar observations about the dominant role that resource extraction played in the Queensland psyche. This led to companies having great influence, as several people pointed out. According to traditional owner Neola Savage:

> They have so much power. The government wants them there, because they've got their greedy little hands in there too, they're getting a lot of money from it. We get nothing.[119]

Andrew Fraser said that his government's support for the industry was not unqualified:

> The government took a clear position that they were in support of gas to the election. We didn't have religion about it, but we did have a clear view of the economic opportunity, and the importance of the export potential into the future.[120]

The majority view coming from interviewees was that the LNG companies were only marginally concerned with community views on the developments, including those of traditional owners, and that they viewed the Gladstone community as one primarily satisfied by economic concerns. Traditional owner Tony Johnson observed of the LNG companies that:

> Once they got the deal, they just wanted to walk away. And that's a reflection of how they have behaved overall, that the relationship is virtually non-existent.[121]

In comparison with Browse LNG, there is almost no evidence of any discourses that helped to bolster traditional owner leverage in the Curtis Island LNG negotiations. Many of the same appeals were made by PCCC traditional owners as were made in the Browse LNG negotiations — including a call to combat Aboriginal disadvantage and make amends for past dispossession and injustice. However, they simply did not have the same weight as when those discourses were used in the Browse LNG negotiations.

One LNG company representative suggested that traditional owners should have emphasised employment and social benefits more during negotiations, perhaps suggesting that combating Aboriginal disadvantage could hold some power in central Queensland.[122] Certainly all LNG

[118] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[119] Interview with Neola Savage (Rockhampton, 11 September 2013).
[120] Interview with Andrew Fraser (Brisbane, 5 November 2013).
[121] Interview with Tony Johnson (via telephone, 30 August 2013).
[122] Interview with GLNG1 (Brisbane, 17 September 2013).

company interviewees saw the native title agreements as partially fulfilling their corporate social responsibility.[123] Company representative GLNG1, in the minority, took a differing view:

> I have been surprised by the company with its CSR involvement, we are very much focussed on now assisting them to get into business opportunities, rather than just paying straight cash. This depends on which managers are in charge — some managers will just say that they don't care, pay the money, get the job done. Whereas my boss says that we want to say that we have developed so many people, had so many business opportunities.[124]

GLNG3 emphasised the benefits to a company of behaving properly, saying that if during the negotiations "I kick people, what do you think they will be doing to me if I need another future act?"[125] This point was taken up by interviewees from Woodside who were all very surprised when the Curtis Island LNG agreement outcomes were put to them. Betsy Donaghey, for example, expressed disquiet at whether the agreements would last:

> It would be interesting to see how the Gladstone deal is panning out, what robustness is this going to have in five to ten years?[126]

## IV. CONCLUSION

This chapter has argued that one of the most persuasive explanations for the differences in agreement outcomes is the strength of Aboriginal political influence, and particularly the active presence or absence of a strong Aboriginal political organisation. In the Kimberley, the KLC is a key factor behind the strength of the agreements. The KLC has broad Kimberley traditional owner support, significant experience of agreement making, political influence, personnel and resourcing. The political influence of Kimberley Aboriginal people, including through the KLC, was also a significant reason why the Gallop/Carpenter governments prioritised Aboriginal consent for the project, along with a very genuine desire on the part of that government to better include Aboriginal people in decision making about their lives. In contrast, the Curtis Island LNG negotiations were negotiated by the group themselves, with few resources and no support from the state government. When looking at why the agreements are not beneficial to traditional owners, this absence of a regional political organisation seems critical. This also relates to more specific causal factors, including that PCCC traditional owners had very little experience of

[123] Interview with GLNG1 (Brisbane, 17 September 2013); Interview with GLNG3 (Brisbane, 17 September 2013); Interview with GLNG2 (Brisbane, 16 September 2013).
[124] Interview with GLNG1 (Brisbane, 17 September 2013).
[125] Interview with GLNG3 (Brisbane, 17 September 2013).
[126] Interview with Betsy Donaghey (Melbourne, 19 August 2014).

agreement making, and were unable to source adequate resources for the negotiations. Their lack of power explains the lack of publicly available information on the Curtis Island LNG agreements: the PCCC were not able to gain public traction with their complaints about the negotiations or resulting agreements.

The location of the proposed developments had a critical impact on the power or lack of power of traditional owner groups. Kimberley Aboriginal people were seen as core stakeholders in what occurs in the Kimberley, and therefore the Browse LNG project itself, and the rightful beneficiaries of any development. This appears to have been the rationale behind how the Browse LNG benefits were quantified.

Several discourses are instructive in understanding this: the first is that the Kimberley is an Aboriginal place. This power comes both from the outsiders' perception that the Kimberley is an Aboriginal domain, as well as an internal Aboriginal acceptance of it as a regional cultural entity. These are clearly closely aligned with the discussion of Aboriginal law in Chapter 6. The second discourse influential on the negotiation and its outcomes is the widely touted idea that the Kimberley LNG precinct had the potential to be a 'game-changer' for Aboriginal disadvantage in the Kimberley. While this discourse had the potential to paint Aboriginal people as disempowered supplicants — and indeed, some of the language associated with the 'No Gas' campaign touched on this — traditional owners and the KLC successfully infused this discourse with a striking combination of pathos and empowerment. This second discourse is thus strongly linked with the first. However, it was a discourse that found itself in opposition to — and often drowned out by — one that emphasised the Kimberley as a pristine wilderness. The third discourse discussed here is one that emphasises the importance of resource extraction to the Australian economy. It was a less visible discourse in the negotiations than the other two, although this may well indicate the level of its acceptance rather than its absence.

In contrast, the Curtis Island LNG agreements were negotiated in a place viewed as being highly industrialised, where traditional owners were not significant stakeholders, but merely people with low level native rights. This meant that companies did not treat the agreement making process with Curtis Island traditional owners as significant, nor were traditional owners able to alter this position during the negotiations. The Curtis Island LNG agreements clearly show that a project's ability to pay generous land access benefits does not ensure that it will.

In addition, the Queensland State appears to actively encourage resource development without the same safeguards that the Western Australian government put in place to protect the interests

of Kimberley traditional owners. This will be discussed in Chapter 9.

The ‘combating Aboriginal disadvantage’ discourse did not have the same power in central Queensland. While the language of the Curtis Island LNG negotiations did emphasise the importance of resource development to the people of Queensland, this was to the exclusion of traditional owners because of the industrial nature of central Queensland. Curtis Island LNG saw the success — indeed it was so successful it was almost invisible — of a discourse emphasising the importance of resource extraction.

This chapter also looked at the impact of history. The history of colonisation and past dispossession results in much poorer prospects for recognition of native title rights in central Queensland, a contributing factor itself to the poor agreement outcomes, as Chapter 6 made clear. It also resulted in the displacement of people from similar cultural and language groups from their land and from each other. The experience of the PCCC suggests that this makes it much harder for Queensland traditional owners to form strong political organisations, because not only are people less geographically proximate to each other, they are also likely to find it harder to maintain solidarity and less likely to practise traditional law and custom. In comparison, Aboriginal people in the Kimberley continue to think of themselves as a single cultural entity.

The next chapter concludes this thesis by exploring the empirical findings in light of the literature and theory discussed in Chapters 2 and 4. It also answers the key questions posed at the beginning of this thesis.

# Chapter Nine
# Conclusion

## I. Explaining Agreement Outcomes

Analysis of thesis data shows that the place of each development, and the legal, historical and political context in which it occurs, are essential to understanding the Browse LNG and Curtis Island LNG agreement outcomes. The interaction of these factors is complex and generates discourses — for example, that Gladstone is a heavily industrialised area and that therefore Aboriginal people have less influence, or that the Kimberley is an Aboriginal domain and therefore traditional owners are seen as stakeholders in the development — that are themselves powerful.

This chapter analyses these results in light of the existing literature and the theoretical framework proposed in Chapters 2 and 4. Explanations for the differing outcomes are multiple and lie in the way the negotiations were conducted, the manner in which the law was applied, and the impact of history, state behaviour and political influence. Several key themes emerged from these explanations.

The first of these themes is the impact of law. This includes not only that the continuing practise of Aboriginal law gave authority to Kimberley traditional owner negotiators, both within the Kimberley Aboriginal domain, and externally in relation to the outside world, but also the impact of place on the way that law is practised.

The second is the rationale behind the calculation of benefits: the Curtis Island LNG agreement benefits were determined by the resource company based on a 'going rate', presumably based in part on their assessment of the strength of remaining native title rights, while the Browse LNG benefits reflected a recognition that traditional owners, and Kimberley Aboriginal people more broadly, were key stakeholders in the development itself.

The third is that of location. It is closely linked with the first and second themes, and relates to the way that each development area was viewed — the Kimberley as a pristine wilderness, Curtis Island as part of a heavily industrialised area — and the impact that this perception had on traditional owner power, particularly discourses of who are 'real' Aboriginal people.

The fourth is the attitude of the respective State governments, and the impact these had on agreement outcomes.

The fifth is that of political influence: Kimberley traditional owners, with and through the KLC, prepared for negotiations in a well-resourced, organised, strategic and unified manner, and exerted significant influence over senior company and government figures, while traditional owners in Gladstone reacted to negotiations as they occurred. This highlights the importance of Aboriginal agency.

The sixth, agenda setting, is closely linked to the fifth. It relates to the manner in which traditional owners in the Kimberley were able to exert control over the negotiation agenda, while traditional owners in central Queensland had little control of the negotiation agenda.

This chapter analyses these themes, arguing that they fall broadly into three analytical levels. The first and narrowest level involves negotiation explanations, being the extent to which negotiation tactics and strategy were determinative to outcomes. The second level is organisational and institutional: primarily the way in which the active presence of a strong political organisation, and the nature of the state government involvement, are significant explanations for traditional owner power and the way it is exercised. The third and broadest level relates to structural explanations for the differing results. These include the underlying character of each state and the impact of history on place, the level and extent of existing native title rights and the expectations and lived experience of traditional owners, including their ability to form powerful political organisations.

This chapter discusses the empirical findings in light of this analysis. It does this by reference to the research questions. It concludes that organisational, institutional and structural explanations are the most convincing reasons to explain why these negotiations resulted in different outcomes. A logical conclusion of the finding that organisations are important, is that Aboriginal agency is vital, and that building organisational capacity is the most promising method by which traditional owners can increase negotiation power and maximise benefit outcomes. The chapter assesses these empirical findings in light of the theory examined in Chapters 2 and 4, in order to set out the theoretical contributions of the research. It argues that a composite theoretical approach is needed to understand how the agreement outcomes came about.

Chapter 3 detailed Robert Yin's case study method,[1] including how case study results can be analytically generalisable to theoretical propositions. It is a process that requires case study results to be compared with theoretical propositions drawn from the theory and literature.

[1] Robert K Yin, *Applications of Case Study Research* (Thousand Oaks, 2nd ed, 2003); Robert K Yin, *Case Study Research: Design and Methods* (SAGE Publications, 1984); Robert K Yin, *Case Study Research: Design and Methods* (SAGE, 4th ed, 2009).

Where findings are in accordance with these theoretical propositions they can be said to be analytically generalisable: where they vary, further research is required to test their strength. This chapter notes where findings fall into these categories, particularly in the Conclusion.

### *A. Negotiation Explanations*

The negotiation theory canvassed in Chapter 2 was divided into two broad categories: one that recognised the key role played by the underlying power dynamics of negotiating parties, and another that is most concerned with the conduct of negotiations. Chapter 2 argued that the former was ultimately far more credible than the latter.[2] This argument is borne out by the empirical findings in Chapters 6, 7 and 8, particularly the finding that negotiation tactics are only of use where they reinforce or refer to an existing source of negotiation leverage. The research has very clearly shown that the conduct of the negotiation is unlikely by itself to alter the power dynamic of a negotiation.[3] Successful negotiation strategy is best understood as emanating from a group's organisational, institutional and structural power. Therefore, this research upholds the work of negotiation theory writers including Jeswald Salacuse, and challenges the work of others, including Roger Fisher and William Ury.[4]

The findings show that there is little in negotiation theory that provides credible proposals for how parties may increase their negotiation power. A key exception to this, as discussed in Chapter 2, is Bacharach and Lawler's work which argues that in order to increase negotiation power a party should provide something that the counterparty needs, or alternatively stop them from getting it elsewhere.[5] This advice is useful to some extent: resource companies need to develop a project without delay or cost overruns, which can be impacted by demands from a powerful Aboriginal community. However, this literature does not provide credible advice on how a community becomes more powerful.

As predicted in Chapter 2, power and its use are at the heart of almost all the factors that explain the sharply different agreement outcomes of Browse LNG and Curtis Island LNG. The conduct of negotiations is evidence of the power differential between parties. The comparison of these two negotiations demonstrates how controlling the agenda of negotiations can be an 'exercise of

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[2] Refer to Chapter 2, 'Negotiation Theory'.

[3] This contradicts some of the negotiation literature canvassed in Chapter 2, as was predicted.

[4] Jeswald W Salacuse, 'How Should the Lamb Negotiate with the Lion? Power in International Negotiations' in Deborah M Kolb (ed), *Negotiation Eclectics: Essays in Memory of Jeffrey Z Rubin* (PON Books Harvard Law School, 1999). Roger Fisher and William Ury, *Getting to Yes - Negotiating Agreement Without Giving In* (Hutchinson, 1982).

[5] Samuel B Bacharach and Edward J Lawler, 'Power and Tactics in Bargaining' (1981) 34 *Industrial & Labor Relations Review* 219; Edward J. Lawler and Samuel B. Bacharach, 'Power Dependence in Collective Bargaining' (1986) 3 *Advances in Industrial and Labor Relations* 191.

power',[6] as suggested in the work of Peter Bacharach, Morton Baratz, Steven Lukes, Matthew Crenson and John Gaventa. [7]

The empirical results show that negotiation tactics by themselves had no ability to alter the existing power dynamics of negotiations, or to alter outcomes.[8] Negotiation tactics only had an impact where they reflected a party's power. For example, the demonstration of the worth of a negotiation offer using a measuring tape in front of the Broome Mercure Hotel was a powerful tactic for traditional owners. This is because it brought into sharp relief the disjuncture between the rhetoric of Aboriginal people as key beneficiaries of the development and the agreement benefits then on the table. Likewise, negotiation tactics from the company and State also worked best where they highlighted power that these parties possessed in the negotiation. For example, traditional owners commented that the timing of compulsory acquisition threats appeared to be used as a reminder of the power of the state government in both negotiations. Where negotiation tactics did not draw on an underlying element of leverage — for example where negotiation participants were merely adopting different negotiation personas — they fell flat: for example, people's attempts to adopt negotiation personas of "the good guy, the bad guy".[9]

The place of the development — its history, demography, geography, the political strength of traditional owners and their legal rights — is clearly central to understanding why negotiation tactics will have an impact. For example Curtis Island traditional owners tried during the negotiation to have the 'right to negotiate' procedures recognised for what they are: minimum standards only. They were ignored, because PCCC traditional owners simply did not have enough political power for resource companies to take their demands seriously. In comparison, it is clear that Woodside and the State accepted similar demands from Kimberley traditional owners in the Browse LNG negotiations. The reasons for this, discussed below, relate to organisational and structural explanations of Kimberley traditional owner power. A focus on negotiation tactics alone cannot therefore provide an explanation for agreement outcomes. This finding was both predicted by the discussion of negotiation theory in Chapter 2, as well as acknowledged by almost all research participants.

Negotiation preparation, on the other hand, was shown to be effective at improving outcomes in the Kimberley, if not for Curtis Island. For traditional owners in the Browse LNG negotiations extensive and strategic planning for the negotiations including, for example, the gathering of

[6] Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1964) 56 *The American Political Science Review* 948.
[7] Refer to the discussion in Chapter 2, 'Power'.
[8] As discussed in detail in Chapter 7, 'Tactics'.
[9] Interview with Christine Robinson (Broome, 25 June 2012).

baseline data to complete strategic assessment reports, and the formulation of 'Traditional Owner Rules', emerged as an important way to ensure that power was put to use in the negotiation. Having these things in place for a negotiation requires medium to long-term planning. It is thus strongly linked with a group's ability to organise itself. Neither planning nor successful tactics are stand-alone aspects of traditional owner power. They should be understood as the means by which negotiation power is exercised and so cannot be understood without reference to the sources of power on which they rely. Longer term strategic planning is discussed below in relation to both the continuing practise of Aboriginal law and the organisational ability of the KLC, and the lack of a corresponding organisation actively involved in the Curtis Island negotiations.

### *B. Organisational and Institutional Explanations*

#### *1. Aboriginal Organisations*

Chapter 2 discussed the concept of 'social licence to operate' [10] the idea that resource developments should attempt to seek a broad community agreement to development taking place. The extent to which companies genuinely engage with this concept is varied and depends on the particular company involved, the proposed development and the location of that development. The empirical evidence shows that an agreement with Kimberley Aboriginal people was given much higher priority than an agreement with Curtis Island traditional owners. This was due to multiple factors related to the location of each development, as discussed previously. The empirical findings of this thesis support a contingent definition of 'social licence to operate' that depends on how powerful the relevant community is.

The case study comparison has provided two examples of projects, with significant economic potential, paying very different agreement benefits: traditional owners negotiated a more beneficial agreement through a politically strong Aboriginal organisation that is grounded in Aboriginal law. The findings therefore uphold O'Faircheallaigh's finding that organisational capacity is central to achieving good agreement outcomes.[11]

The KLC's authority derives from both within the Aboriginal domain of the Kimberley, and in representing this domain to the outside world. Its authority in the outside world is constituted by several factors. The first is the recognition by some people in the negotiation of the continuing operation of Aboriginal law, and the varying level of respect and deference they

[10] For 'social license to operate', refer to discussion in Chapter 2, 'Resource Companies'.

[11] Ciaran O'Faircheallaigh, 'Negotiations Between Mining Companies and Aboriginal Communities: Process and Structure' (Working Paper 86/1995, Centre for Aboriginal Economic Policy Research, 1995).

accord it, as demonstrated in Chapter 6. The second is that the KLC represents a sizeable constituent group which has — often through the KLC, but also through the other two significant Kimberley Aboriginal organisations, the Kimberley Aboriginal Language and Cultural Centre and Kimberley Language Resource Centre — exercised significant influence over matters that impact Kimberley Aboriginal people. It meant that, despite a high profile split in the claim group, the KLC still had a mandate in the Browse LNG negotiations from a broadly united Aboriginal membership. This clearly ties in with the history of the Kimberley. It is worth repeating Niegel Grazia on this point:

> Something I realised when I was doing a government affairs role back in the 2000s was that if you think that you can go into the Kimberley, with the Kimberley Land Council at your throat, and end up with a good result, who are you kidding?[12]

Part of these three Kimberley organisations' strength is in training leaders. This is also a significant explanation of outcomes, shown by the key role played by the leadership of Wayne Bergmann.

In contrast, the Curtis Island LNG agreements were concluded without the active involvement of a significant Aboriginal organisation.[13] When looking at the reasons that people gave for why the agreements were not beneficial to traditional owners, this absence can be seen behind many of them. These include that the PCCC group had very little experience of agreement making, were unable to source adequate negotiation resourcing, and had little negotiation leverage to move the companies from their pre-determined negotiation position. Clearly, these organisational explanations are deeply embedded in their historical context, as discussed below.

*2. The State Governments*

The Western Australian government's approach helped to increase traditional owner negotiation power, despite the significant change in attitude that occurred with the change of government in 2008. Throughout both phases, it remained the proponent of the Browse LNG development, as well as explicitly linking the proposed development with a discourse of combating Aboriginal disadvantage in the Kimberley. In comparison, the Queensland government was almost totally absent from the Curtis Island LNG negotiations, despite being a clear advocate of development in general. This appears to contrast with the more active role it took chastising companies for

[12] Interview with Niegel Grazia (Perth, 26 June 2014).
[13] For the reasons why QSNTS was not used see Chapter 8, 'Curtis Island LNG – Aboriginal Political Power'.

their behaviour in coal seam gas well negotiations on agricultural land.[14]

This research supports Howlett's and Trebeck's conclusions that the State is 'a major determinant of the constraints and opportunities faced by the various actors involved in mineral development in Australia', despite the different approaches witnessed.[15] In contrast to what was seen in Howlett's research, however, this work saw the Western Australian government behaviour bolster traditional owner negotiation power. It was not presence or absence of the State governments in the negotiations that had the most impact. Rather, what was decisive was the stance that government took on how traditional owners would be seen in relation to the development: as stakeholders in development or people with weak native title rights. This observation is also borne out by Howlett's findings that the Queensland government's pro-resource extraction attitude in the Century Mine negotiation was one that largely excluded Aboriginal interests, and therefore had a negative impact on the Aboriginal negotiating position.[16] The research highlights the positive impact on traditional owner leverage that can occur when a government publicly prioritises the interests of Aboriginal people.

The Commonwealth government's impact on Aboriginal power in the negotiations is much less clear given the paucity of empirical evidence. It is highly likely, however, that the Commonwealth Environment Minister's agreement with WA to undertake a strategic assessment under the *EPBC Act* increased negotiation power for traditional owners. It did this by creating additional subject areas, together with processes through which traditional owners were consulted, and therefore additional arenas in which they could pursue their desired outcomes.

*3. The Companies*

The ethos and leadership of particular companies had an impact on agreement outcomes. At the time that the agreements were signed, Woodside had a CEO who was genuinely committed to ensuring that traditional owners' lives would improve as a result of the Browse LNG development. This commitment stands in sharp contrast to the ethos of Gladstone LNG companies, which by all accounts, had little interest in this outcome. However, it is clear that the behaviour of companies is not constant, and can be heavily influenced by contextual events.[17]

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[14] As described in Chapter 8, 'Queensland is a Mining State'.

[15] Quote from Catherine Howlett, *Indigenous Peoples and Mining Negotiations: The Role of the State* (PhD, Griffith University, 2008) 201. Katherine Anne Trebeck, 'Tools for the Disempowered? Indigenous Leverage Over Mining Companies' (2007) 42 *Australian Journal of Political Science* 541.

[16] Catherine Howlett, above n 15, 186–7.

[17] For example, the change in behaviour of Rio Tinto following their disastrous Bougainville operations, as discussed in Chapter 1: Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004).

Indeed, Woodside may have gone through such a change in recent times given the evidence from former employees that their operations in Timor Leste and Karratha did not prioritise community concerns.[18] Woodside employees were clear that they believed that such a change had occurred because Don Voelte believed that it was the right thing to do. However, it is certainly plausible that this moral imperative took on greater significance in the context of the Kimberley, particularly after Voelte's 2005 meeting with traditional owners at which he was told that they would not support a development. In contrast, Queensland LNG companies did not give priority to an agreement with traditional owners.

### *C. Structural Explanations*

#### *1. The Underlying Character of Each State*

The Western Australian and Queensland governments took very different approaches to these negotiations. Chapter 2 discussed several articles on the underlying character of each state. Western Australia, Head and Harman argue, had historically used its resource rents to develop a State with little infrastructure.[19] Galligan argued that the Queensland government in the 1960s to 1980s extracted significant *de facto* resource rents from the coal industry to prop up its failing monopoly, Queensland Rail. [20] In addition, historically Queensland's regions developed independently of Brisbane and infrastructure was built haphazardly.[21]

The Browse LNG development saw evidence that suggests a 'developmentalist' approach, primarily in the way that successive governments took an active role in the LNG site (with the State acting as proponent), including Premier Colin Barnett staking his political reputation on its delivery. In addition, the evidence has shown a clear desire on the part of the State to use Browse LNG to not only improve Aboriginal disadvantage in the Kimberley, but also the broader Kimberley region. As Chapter 5 showed, the Western Australian government was in active dispute with Woodside Energy over the latter's decision to process LNG offshore, a move that the state sees as far less beneficial to Kimberley development and employment.[22]

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[18] Interview with Betsy Donaghey (Melbourne, 19 August 2014); Amanda Whyte, 'Cowboys Ogres and Donors – A Decade of CSR in Practice – NZ, Australia, Timor-Leste and Indonesia' <http://www.laohamutuk.org/Oil/Sunrise/2011/WhyteCSRMay2011.pdf>.

[19] B.W. Head, 'The State as Entrepreneur: Myth and Reality' in *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982).

[20] Brian Galligan, 'Queensland Railways and Export Coal' (1987) 46 *Australian Journal of Public Administration* 77.

[21] B.W. Head, above n 19; John Phillimore, 'The Politics of Resource Development in Western Australia' in Martin Brueckner et al (eds), *Resource Curse or Cure ?* (Springer Berlin Heidelberg, 2014) 25; Ross Fitzgerald, *A History of Queensland: From the Dreaming to 1915* (University of Queensland Press, 1986).

[22] Refer to discussion in Chapter 5, 'Demise of the Land-Based Project'.

In contrast, the Queensland state was almost completely absent from the Curtis Island LNG negotiations, but parties perceived that its stance firmly supported the LNG companies. This contrasted with the more active approach they took to non-Aboriginal agricultural interests. This suggests an 'entrepreneurial' or 'rentier' approach to the native title land access agreements of the Curtis Island resource development.[23] There is not enough evidence to draw broader conclusions about whether the observed approaches of the two state governments are indicative of the underlying character of each state. However it raises intriguing questions that should be investigated further.

*(a) Mining as Progress*

These potential differences in state character may have contributed to the different reception of certain discourses. For example, the theoretical framework predicted the dominance of a discourse emphasising the importance of resource extraction to the Australian nation. Indeed, as noted in Chapter 5, both Western Australia and Queensland identify as mining states. This was borne out by the empirical findings. However, different versions were dominant in each locale. In central Queensland, former deputy Premier Andrew Fraser referred to the Gladstone LNG project as the "only thing" happening in the Queensland economy.[24] Many others also spoke of the economic force of the projects, which acted to silence any opposition. Importantly, however, the Queensland version of this discourse did not include Aboriginal development.

In the Kimberley, in comparison, this mining discourse was closely aligned to an emphasis on countering Aboriginal disadvantage in the Kimberley. For the State and Woodside, it was accepted both because it was the 'right thing to do' and because of the significant influence of Kimberley Aboriginal people. 'Combating Aboriginal disadvantage' was used by the State and Woodside as a 'shield' against the 'No Gas' movement, as described in Chapter 8. Its dominance in Browse LNG meant that the use of compulsory acquisition for acquiring native title interests was controversial because it clashed with the government's message emphasising Aboriginal decision making over development in the Kimberley.

*2. Impact of History*

The impact of history emerged as a strong explanation for contemporary power or disempowerment of each Aboriginal group. When examining the history of Aboriginal and non-Aboriginal relationships in each development location, it is clear that they followed the same

[23] A 'rentier' approach 'where the state collects royalties but does little else to facilitate mineral development' see B.W. Head, above n 19, 51. An 'entrepreneurial' approach is where a government seeks to maximise their share of an agreement with a view to making a profit, see Galligan, above n 20, 86.
[24] Interview with Andrew Fraser (Brisbane, 5 November 2013).

broad pattern as elsewhere in Australia, with Aboriginal people being subject to a changing policy landscape from their non-Aboriginal compatriots: first subjugation and later assimilation and self-determination. Yet, as Chapter 5 made clear, there were differences between each location. In central Queensland, the colonial advance occurred earlier and was more brutal and devastating for the local population than in the Kimberley.

History continues to shape the present, not only in the poorer prospects for recognition of native title rights in central Queensland, but also in the displacement of people from similar cultural and language groups from their land, and from each other. As demonstrated in Chapter 7, the PCCC are known as a group with numerous internal disputes. The displacement of people makes the practise of Aboriginal law much harder and the formation of strong political organisations harder, because not only are people less geographically proximate, they are also less likely to identify with each other if cultural and familial links are not strong.

The history of the area is also evident in negotiation participants' lived experience of dealing with power. When answering general questions about their sources of power, Aboriginal interviewees involved in the Curtis Island LNG negotiations often answered by firstly rejecting the idea that they were in a position of power, and then referring to dispossession, displacement, removal of children and infantilising bureaucratic practices as explaining its absence. These historical injustices clearly continue to have an impact on Aboriginal people's daily lives. They shape the circumstances into which they are born, the expectations that their parents have of them, the way in which the world relates to them, and the way that they relate to the world. As Stanner astutely noted of this type of 'powerlessness', it is 'generations deep', and 'self-perpetuating and self-reinforcing'. [25] Gaventa observed similar 'self-sustaining' patterns of power and powerlessness.[26]

The history of each place also had a clear and direct impact on the strength of native title rights that will be recognised by the Federal Court in the eventual native title determinations. As was made clear in Chapter 6, strong native title rights provide significant leverage in a negotiation. In addition, historical reasons provide the most convincing explanation for the demographic make-up of each region, which was also shown to be a potent aspect of traditional owner power. Historical reasons account for other factors that were shown to be relevant in the negotiations but were independent of site-specific structural reasons, including the continuing impact of the

[25] WEH Stanner, *After the Dreaming* (ABC Enterprises, 1968) 46.
[26] John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press, 1982) 256.

*Mabo* decision, and the advent of concepts including corporate social responsibility and social licence to operate.

One of Howlett's major theoretical findings was that the Century Mine negotiations saw an influential pro-mining discourse combine with a powerful anti-*Mabo* discourse to exert significant influence over the negotiations. [27] When comparing the discursive influences of these case studies to those of Howlett's study, it is clear that a pro-mining discourse continues unabated. However, an anti-*Mabo* discourse was almost entirely absent, arguably because the recognition of native title rights is no longer an issue of significant controversy. This is not to say that native title rights are now universally or even widely respected, but that their recognition is no longer feared. There is also ample evidence that discursive forces are now operating to enhance traditional owner leverage in the Kimberley, but not in central Queensland. In particular, the view of the Kimberley as an Aboriginal domain was clearly a source of power for traditional owners. Finally, history clearly also has a significant impact on companies and individuals, as discussed above in the section on 'LNG companies'.

*(a) Aboriginality as Wilderness*

History has also had a profound impact on the geographic and environmental values of each case study site, and particularly how each site is viewed. The Kimberley is still seen as an Aboriginal wilderness, while Gladstone — despite its proximity to the Great Barrier Reef and Gladstone Harbour's inclusion in the world heritage listing — is known as an industrial area and seems to be defined as 'not' Aboriginal. These characterisations are undoubtedly based in reality yet they also carry important discursive power. It brings to mind Foucault's observation that:

> Each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[28]

There is ample and persuasive evidence across both negotiations for the proposition that the idea of Aboriginality is closely intertwined in many non-Aboriginal Australians minds with that of wilderness. There are several versions of this discourse. One version is very closely associated with the continuing shadow of *terra nullius* because it depicts Aboriginal people as wilderness

[27] Catherine Howlett, above n 15, 186–7.
[28] Michel Foucault, 'On Power' in LD Kritzman (ed), *Michel Foucault: Politics, Philosophy, Culture - interviews and other writings, 1977-1984* (Routledge, 1988) 131.

dwellers, occupying an unaltered landscape when European colonisers arrived.[29]

For example, in the Browse LNG negotiation a discourse that emphasised the Kimberley as a wilderness both vied and aligned with the discourse that emphasised the Aboriginal nature of the Kimberley. Both, however, were productive of, and built on, Aboriginal power. In contrast, the Gladstone LNG negotiation saw the failure of discourses that empowered traditional owners, and the success — indeed it was so successful it was almost invisible — of a discourse emphasising the importance of resource extraction.

Another version of this discourse portrays Aboriginal people as enemies of wilderness where they are seeking to industrialise traditional land in partnership with the developmental state. This version was widely discussed at the time that this research was being conducted, following Professor Marcia Langton's Boyer Lecture series of late 2012 in which she accused prominent environmentalist Tim Flannery of racism for his expressed concern that a national park in Queensland had been de-listed and handed back to traditional owners. [30] This idea that wilderness was at threat from some Aboriginal people was clearly in play in the Browse LNG negotiations. It is worth repeating Louise Middleton on this point in her comment about the Goolarabooloo occupation of James Price Point. She said — apparently without corroborating evidence — that as a result of the Stolen Generations, people were coming back to country:

> [K]nowing nothing of their culture, coming back to their people with the pure notion of cashing in on their ignorance ... You have people like me who are gadiya [non Aboriginal] who fight tooth and nail for culture, and you have Indigenous people now who are fighting tooth and nail to sell it.[31]

As discussed in Chapter 8, this discourse says not only that Aboriginal people in so-called 'pristine' areas like the Kimberley are more closely in touch with their traditional law and custom (an idea clearly privileged by native title case law) but also that Aboriginal people who want to adhere to traditional law and custom will strongly reject development on their land. It is thus a discourse that appears to have emerged from a greater understanding of Aboriginal people's relationship with their land that has developed in recent years, yet it nevertheless both simplifies and restricts what this relationship should look like. Behrendt and Kelly for example bemoan the fact that 'many non-Aboriginal people believe that Aboriginal people living within the city

[29] See, for example, the stinging critique of the view of the Australian landscape prior to 1788 as 'unaltered': Bill Gammage, 'The Biggest Estate on Earth: How Aborigines made Australia (Allen and Unwin, 2012).
[30] ABC Radio National, 'Lecture 4: The Conceit of Wilderness Ideology', *The Boyer Lectures*, December 2012.
[31] Louise Middleton, cited in Eugénie Dumont, 'Heritage Fight' (August 2012)

have lost their links to their country'.[32] Mick Dodson said of this:

> There would be few urban Aboriginal people who have not been labelled as culturally bereft, 'fake' or 'part-Aborigines', and then expected to authenticate their Aboriginality in terms of percentages of blood or clichéd 'traditional' experiences.[33]

Both Mary Tarran and Frank Parriman actively rebutted the central tenets of this discourse when speaking of the 'No Gas' campaign. Tarran, for example, said that while impacting sacred sites should always be avoided:

> Even with bitumen and tar over the land, it's still our land. You can't destroy spirit, you can never destroy spirit.[34]

Similarly, Parriman pointed out that human dysfunction was a greater threat to culture than a development on country.[35]

This discourse painted Aboriginal opposition to any development as legitimate, and therefore Aboriginal support for the project as coerced or driven by greed. It also meant that those Goolarabooloo opposing the project at James Price Point were largely able to assume the mantle of being seen as the 'real' traditional owners by the media and general public, because it appeared they were seeking to preserve, rather than plunder, country. Given that most of this opposition occurred after the signing of the Browse LNG agreements it did not appear to significantly impact agreement outcomes, but it is nevertheless instructive on the power of this discourse in action. In the period that followed the signing of the Browse LNG agreements, this meant that those Aboriginal people protesting against the LNG precinct were portrayed as fighting to preserve their culture. This combination of ideas forms a very powerful discourse. As discussed in Chapter 2, it is one that writers including Noel Pearson, Marcia Langton and Michael Dodson have attempted to combat.[36]

It was also seen strikingly in the perceived absence of wilderness in Curtis Island LNG, with the concurrent assumption, often explicitly stated, that this meant that the PCCC were not 'traditional enough'.

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[32] Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Sydney: The Federation Press, 2008), 99

[33] Mick Dodson, 'The End in the Beginning: Re(de)fining Aboriginality' (1994) 1 *Australian Aboriginal Studies.*

[34] Interview with Mary Tarran (Broome, 13 June 2013).

[35] Interview with Frank Parriman (Broome, 18 June 2013)..

[36] Marcia Langton (ed), *Well I Heard It On The Radio and I Saw It On The Television* (Australian Film Commission, 1993). Dodson, above n 33. Noel Pearson, 'Mabo: Towards Respecting Equality and Difference (The Boyer Lectures)' (Australian Broadcasting Corporation, 1993).

## II. THE ROLE OF LAW

Law plays a complex role in the differing outcomes that result from negotiations carried out under the *Native Title Act*'s 'right to negotiate' provisions. It is clearly an important procedural right for traditional owners. Without the 'right to negotiate' it is likely that the PCCC would not have been consulted or compensated in relation to Curtis Island LNG at all.

Nevertheless the 'right to negotiate' provides only weak legal rights to Aboriginal traditional owners. The regime, together with the associated case law of the NNTT, means that traditional owners cannot stop developments on their land. It also means that traditional owners who are inclined to allow development on their land may encounter difficulties in convincing a resource company to reach an equitable agreement. Without political power to hold companies to account, these provisions alone are unlikely to lead to substantial agreement outcomes for traditional owners. The ability of traditional owners to use the Act strategically — for example, to delay regulatory approvals — is dependent on having access to legal and other technical advice.[37] This too is dependent on a group's political power.

However, as discussed above, the symbolism and discourses of law can form part of Aboriginal people's power. In addition, there is a complicated link between the level of native title rights and negotiation outcomes, despite the law being silent on this issue. The empirical results point to a strong connection between high levels of native title rights and beneficial negotiation outcomes. However, high native title rights are only a partial explanation for outcomes. The power of high native title rights is discussed below in 'Legal Pluralism' and 'Property and the Common Law'.

### *A. Discourses of Law*

The Act had significant discursive power in the Browse LNG and Curtis Island LNG negotiations. It held the hope of *Mabo* as well as continued past practices of dispossession. One possible explanation for the way in which the 'right to negotiate' differed between the case study negotiations is the discursive impact of native title law.

In each respective development, the nature of the land being claimed was an important explanation for the difference in agreement outcomes. Native title law contains the explicit proviso that land that has been extensively developed by non-Aboriginal interests is unlikely to give rise to native title rights. Where this occurs, its Aboriginal owners no longer have native

[37] See particularly Sir Tipene O'Regan, Lisa Palmer and Marcia Langton, 'Keeping the Fire Burning: Grievance and Aspiration in the Ngai Tahu Settlement Process' in Odette Mazel, Lisa Palmer, Maureen Tehan and Kathryn Shain Marcia Langton (ed), *Settling With Indigenous People* (The Federation Press, 2006) 44. Also refer to discussion in Chapter 6, 'Native Title Act'.

title rights and interests in their land: they are no longer 'traditional owners'. The corollary is that land itself is also no longer 'traditional'. This discourse had significant impacts in relation to the Curtis Island LNG negotiations. These possibly include the refusal to recognise traditional ownership where traditional owners are seeking to industrialise land.

Kimberley traditional owners adopted a clear strategic position that they would not be bound by the minimum standards of the Act, a position that was certainly heard, albeit not always respected, by their counterparties. This had its basis in the continuing practise of Aboriginal law and was largely accepted by the State and Woodside. It effectively meant that they were not held to the minimum requirements of the Act, most significantly in relation to the length of negotiations. The State and Woodside clearly heard the message that traditional owners and the KLC would not be bound by the limited protections of the *Act* and therefore respected, to some extent, continuing Aboriginal law.

In contrast, PCCC traditional owners tried to have the 'right to negotiate' procedures recognised as minimum legislative standards for negotiating that should not set the boundaries for agreements. They were ignored because PCCC traditional owners simply did not have enough political power for resource companies to have to take their demands seriously. This work has clearly shown that native title agreement making does not occur in isolation: that statements refusing to be bound by minimum standards of legislation have no power by themselves.

### *B. Legal Pluralism*

This thesis has shown evidence of a continuing and powerful system of Aboriginal law in operation in the Kimberley, one that is respected and recognised by both Aboriginal and non-Aboriginal people, although clearly to differing extents. In contrast, the Curtis Island LNG negotiations showed little evidence of this, although it does not follow that Aboriginal law does not still operate among the Aboriginal groups concerned. The continuing system of Aboriginal law and governance in the Kimberley is powerful for two primary reasons. First it means that the Kimberley continues to be a single cultural domain in which Aboriginal people think of themselves as a unified and culturally connected group. This has a profound impact on their ability to politically organise, as this thesis has shown. It also ensured support for traditional owners and the KLC from within the Kimberley Aboriginal community after the Kimberley-wide decision to support the site selection process for the precinct. This support gave the KLC a significant power base to conduct negotiations from, which continued despite the high profile split in the claim group. Continuing Aboriginal law also means that native title rights are stronger and more extensive.

Secondly, it has a powerful impact on non-Aboriginal people and meant that the KLC could confidently assert that it represented this important constituency to the outside world. The literature on legal pluralism and multiple jurisdictions discussed in Chapter 4 argues for the recognition of multiple systems of law in legal systems. This recognition, it is argued, is powerful because law-making is a sovereign act. In the negotiation room, a continuing Kimberley Aboriginal jurisdiction meant that traditional owners were 'self-authorising people'. [38] Their ownership of the Kimberley formed the basis for their interactions with Woodside and the State, and the demand that the *Native Title Act* should not limit negotiations.

A 'self-authorising' attitude cannot be adopted without having a basis in reality. The empirical findings in this thesis demonstrate that the advice given by negotiating theory: 'If you think you've got it, then you've got it'[39] is erroneous. In the Kimberley, negotiation behaviour was based on practices and behaviour that is embedded in millennia old laws and customs. This thesis argues that such confident expressions of power find a receptive audience because they are similar to Western notions of political and juridical power, which are similarly rooted in land and sovereignty. This idea is discussed further directly below.

### *C. Property and the Common Law*

As discussed in Chapter 4, the way that the common law thinks about property raises several important issues for the research. The first is that property is equated with power. The second is that the common law recognises that property ownership, particularly land, can be determined by the way that people occupy, communicate and behave towards it.[40] This understanding of the way the common law thinks about property may help to explain non-Aboriginal reactions to Aboriginal claims to land.

The need for communication about property to be understood is important. [41] It raises the question as to whether the belated acknowledgement of Aboriginal rights to land has resulted in the broader community being able to hear Aboriginal claims to land more clearly and accept them more readily. However, equally important is the possibility that non-Aboriginal people can easily, unconsciously and erroneously, apply common law conceptions of property to Aboriginal land ownership. The Browse LNG negotiation showed that when some non-Aboriginal people see Aboriginal people occupying and interacting with their land, they see behaviour that could be

[38] Richie Howitt, 'The Other Side of the Table: Corporate Culture and Negotiating with Resource Companies' (No. 3, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 1997).
[39] Nadja M Spegel, Bernadette Rogers and Ross P Buckley *Negotiation Theory and Techniques*, Butterworths, 1998, 172
[40] Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 294.
[41] Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 15.

ownership, whether native title rights have been recognised or not.[42] The context in which that behaviour occurs is vital to whether or not it will be viewed as an indicia of ownership, whether it is a 'suitable' possessory act. [43] This work argues that context is often viewed through a common law prism that prioritises occupation. This contrasts with the Aboriginal law discussed in Chapter 4 which emphasised that Aboriginal peoples' rights and interests in land continues even if they rarely visit or occupy it.[44]

This common law prism on Aboriginal rights and interests in land potentially had a direct impact in the Browse LNG negotiation. The Goolarabooloo were widely viewed by non-Aboriginal people as the 'true' traditional owners of James Price Point despite a very strong native title claim by the Jabirr Jabirr. This was because they acted in a way that non-Aboriginal people think traditional owners should act: they were seen camping at James Price Point, had long welcomed national and international visitors to talk about traditional law and custom, and were vocal in the media that they were the traditional owners of the area. This misunderstanding shows how broader Australian society misunderstands Aboriginal law and custom by seeing it through its own lens.

However, traditional owners could potentially put this misunderstanding to positive use. Native title is both Australian law and representative of a powerful idea: that Aboriginal people could be recognised as land-owners. The two are often found together: where Aboriginal people are seen as being on their traditional land by the world at large, they often also have native title rights in that land. However, this research suggests that it may be possible to use native title's symbolism even where Aboriginal people do not possess strict legal rights, or where native title has been extinguished. The Goolarabooloo are making a very public claim to land that will probably be found to have high native title rights, but this idea could also apply to land where native title is extinguished. There are other Aboriginal groups around Australia whose native title claims have not succeeded but who nevertheless have the potential to make strong and believable claims to their traditional land, for example the Yorta Yorta people of northern Victoria and southern New South Wales.[45]

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[42] See Chapter 8, 'Aboriginality and Wilderness'.

[43] Carol Rose, 'Possession as the Origin of Property' (1985) 52 *The University of Chicago Law Review* 73, 76.

[44] Marcia Langton, 'The Estate As Duration: "Being in Place"' in Lee Godden and Maureen Tehan (ed), *Sustainable Futures: Comparative Perspectives on Communal Lands and Individual Ownership* (Routledge, 2010) 75. It also contrasts with native title law on this point which finds that a continuing physical connection is not required: *Western Australia v Ward* (2002) 213 CLR 1, 85 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[45] The Yorta Yorta lost their native title claim but are known as being a strong group, see discussion in Chapter 4, 'The Native Title Act and Subsequent Case Law'.

## III. How can Traditional Owners Maximise Negotiation Benefits?

The research has shown that structural and organisational explanations are the most convincing explanations for the differences between the Browse and Curtis Island LNG agreement outcomes. The interaction between these explanatory levels is clearly strong. For example, there is a significant correlation between strong political organisations and successful negotiation strategy and tactics, which in turn results in strong agreement outcomes. This is supported by the literature as discussed in Chapter 2. There is also a strong link between the history of the area, and the strength of traditional owner organisations. For example, colonial devastation to traditional owners in central Queensland is a key reason for low levels of native title rights given the proof requirements of native title law.[46] It is also a significant explanatory factor behind a lack of traditional owner structural power, which in turn means that traditional owner negotiation strategy and tactics had little traction in the negotiation.

These findings raise the important question of whether traditional owners are able to lessen the negative impacts of history. There are clearly some areas in which this is harder to do than others — for example, in relation to the level of native title rights ultimately determined by a court. However, as discussed in Chapter 3, Foucault argued that history had its greatest impact when it went unacknowledged: what he called the 'long baking process of history'[47] and Stanner referred to as a 'cult of forgetfulness'. [48] In order to be free of the past, Foucault argued, people need to continually uncover which aspects of the past continue to influence present events.[49] Coupled with the observation that a strong Aboriginal organisation is a highly significant reason behind the strength of the Browse LNG agreements, this strongly points to Aboriginal agency as playing an important role in counteracting the strong impact of history, increasing negotiation power and maximising agreement benefits. The extent of this agency will heavily depend on the context in which it is attempted.

### *A. Aboriginal Agency*

It would be a mistake to say that the link between historical and structural empowerment or disempowerment is inevitable. This is important because it potentially highlights what steps traditional owners can take to consolidate or increase their power even if historical factors do not aid their contemporary leverage. The discussion in Chapter 8 showed that Aboriginal agency is vital to the task of increasing traditional owner power, particularly through building and

[46] Refer to discussion on proof and continuity in Chapter 4, 'The Native Title Act and Subsequent Case Law'.
[47] From 'Nietzsche, Genealogy, History', in Michel Foucault et al, *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984* (New Press, 2003), 354.
[48] Stanner, above n 25, 24–25.
[49] Clare O'Farrell, *Michel Foucault* (SAGE, 2005) 72.

maintaining Aboriginal law and powerful Aboriginal organisations. In order to represent their community, these organisations must consult widely and have their foundation in the law of their members. Aboriginal organisations should be an expression, both to the community and to the outside world, of that community's unity, purpose and agenda. These organisations will help to even the playing field of the agreement making process. In particular, low-level native title rights (either in determined claims or where they are the likely outcome of as yet determined claims) should not be viewed as fatal to success in a negotiation.

When negotiating, traditional owners should build alliances with other traditional owner groups or like-minded non-government organisations and individuals, and actively plan for future agreement making, including ensuring that they will be adequately resourced. During negotiations, traditional owners can put their power into action through agenda setting; using tactics that highlight power; ensuring that trust and relationships develop; and the strategic use of media.

The research has also demonstrated the importance of key individuals — and leadership more generally — to understanding negotiations and their outcomes. This corresponds with Doohan's findings in relation to the Argyle Good Neighbour Agreement.[50] However, as has also been made clear, the impact that these individuals are able to have depends on the organisational, institutional, legal and structural context in which they find themselves. This thesis has shown that structural disempowerment in central Queensland (and likely elsewhere in Australia) is significant. The task involved in exercising agency in this context is therefore likely to be difficult, although not impossible.

### *B. Discourses of Power*

Traditional owners might increase their power by encouraging the use of discourses that may increase favorable outcomes. As Foucault pointed out, discourses can be produced 'not in order to arrive at the truth, but to win'.[51] Discourses with clear potential for positive and negative ramifications for traditional owners have been discussed in depth in this chapter.

### *C. Role of Governments*

There is a strong argument that governments should be using their legal power and resources to level the playing field between traditional owners and resource companies.[52] They have a vested

[50] Kim Doohan, *'Making Things Come Good': Aborigines and Miners at Argyle* (PhD, Macquarie University, 2006).
[51] O'Farrell, above n 49, 66.
[52] Refer to discussion in Chapter 2, 'State Governments', particularly Santiago Dondo and Joe Fardin, 'Santiago J Dondo and Joe Fardin, 'Parties to Mining Agreements with Indigenous Groups: A Proposal for Argentina,

interest in doing so given they are committed to improving health, social and educational outcomes for Aboriginal Australians, and agreement making represents one possible means of achieving this. As Eric Ripper said, governments "set a tone, and an ethos ... Big companies that are keen to preserve their national and international reputations will respond to that tone and ethos."[53] This thesis argues that governments should be ensuring greater fairness in negotiations in 'right to negotiate' negotiations. It proposes a way in which this could be done: making the exercise of state government compulsory acquisition powers conditional on resource companies being able to show evidence of fair and respectful dealings with traditional owners that went beyond the good faith requirements of the *Native Title Act.* This may include demonstrating that consent was genuinely sought and that the company provided proper resourcing to negotiate. Proper resourcing would mean adequate funds for legal and other advice, to a level required by the development in question.[54]

## IV. CONCLUSION

This thesis set out to explore how traditional owners can maximise benefits from the agreement making process, despite being at a legal, financial, political and resourcing disadvantage to resource companies. It also sought to provide a detailed and rich description of the two case study negotiations.

By closely examining two negotiations, one in which traditional owners were able to negotiate benchmark agreements in spite of the inequalities inherent in the process, this thesis has shown several important ways in which traditional owners can maximise benefits from the agreement making process. It began by observing the paucity of information available in what occurs during the agreement-making process. The research has successfully helped to fill that gap by undertaking an in-depth empirical examination of agreement-making and its outcomes from the perspective of all negotiation parties, with a particular emphasis on maximising agreement outcomes.

The thesis argues that a complex combination of organisational, institutional and structural factors form the most convincing explanation for the differences in agreement outcomes between Browse LNG and Curtis Island LNG. Structural explanations are the most useful for

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Drawing on the Experience in Australia, Peru and Canada' (2013) 32 *Australian Resources and Energy Law Journal* 241, 241.

[53] Interview with Eric Ripper (Perth, 21 June 2013).

[54] This proposal is deliberately vague as to whether this should be a legal requirement or government policy. It was proposed in Lily O'Neill, 'The Role of State Governments in Native Title Negotiations: A Tale of Two Agreements' (2015) 18 *Australian Indigenous Law Review* 29.

understanding the contemporary power or disempowerment of the Aboriginal groups studied, while organisational and institutional explanations provide the best explanations for the successful exercise of traditional owner power.

A critical question is the extent to which these factors are dependent. For example, the empirical evidence showed a complicated link between strong native title rights and beneficial agreement outcomes. However it is not known to what extent this link would exist in relation to groups without political power. Would the PCCC have done better (and if so, how much) if they had exclusive possession native title on Curtis Island, for example? Or if they had significant political sway but continued to have low native title rights? Or if Woodside had been involved in Curtis Island LNG, or Santos in Browse LNG? There are no easy answers to these questions given that this thesis has shown that negotiations are never entirely predictable[55] and that negotiation outcomes are determined by a complex range of interconnected factors. What it has shown however is that structural and organisational power of traditional owners is key to maximising agreement outcomes.

The thesis adds to the existing literature in several important and generalisable ways. It confirms and bolsters findings in existing literature on how traditional owners can maximise benefits from the agreement making process, including by affirming the importance of: a strong and unified political body; strategic alliances; and adequate funding. It also confirms the importance of traditional owner power to negotiations, and that this power is often location specific and heavily impacted by history. How companies relate to traditional owners depends primarily on their power, and also on the characteristics of the individual companies. It shows specific ways of how this occurred in the Kimberley, and what happened when these aspects were not present in central Queensland. It suggests that traditional owners should position themselves as key stakeholders in a development.

The thesis confirms that the State plays a large role in these agreements, even when it is not a direct party to the eventual agreement; and suggests new empirical insights in the power that can accrue to traditional owners when the State is committed to Aboriginal people being key stakeholders in a development. In relation to the economic size of the proposed project, this thesis showed a clear exception to the proposition that traditional owners will have more negotiation power in correlation with the economic significance of the project.

[55] Upholding Stephen Weiss' finding: Stephen E. Weiss, 'Creating the GM Toyota Joint Venture; a Case in Complex Negotiation' (New York University, Graduate School of Business Administration, the Center for Japan-US Business and Economic Studies, 1987) 311.

The thesis and empirical observations make several important theoretical contributions. The thesis suggests that certain discourses relating to Aboriginal people shaping development on country are in the process of changing, but that mining discourses nonetheless remain strong. It provides confirmatory empirical evidence that Aboriginal law continues to operate in the Kimberley, together with new empirical evidence that this jurisdiction is coming to be accepted by non-Aboriginal people. It finds that this Aboriginal law is an important source of Aboriginal power. In addition, the research provides one of the few empirical examinations of real world negotiations that test negotiation theory. In particular, this work shows that parties' negotiation tactics have an impact only where they refer to sources of power.

The research gives empirical evidence supporting the theory that discourses have a profound impact on groups' power. Another significant finding of this work is in relation to negotiation theory. The thesis demonstrates that understanding negotiation parties' source of power is essential to explaining negotiation outcomes, and that negotiation strategy and tactics can only be successful where they draw on these sources of power. In addition, it was argued that legal theory on land ownership, legal pluralism, sovereignty and jurisdiction can explain non-Aboriginal reactions to Aboriginal behaviour and communication about their land. This finding has potential implications for how groups might combat a lack of native title rights. There are several gaps between the empirical findings and the matters that can be explained by these theories. The most obvious of these relates to the underlying character of the state of Queensland. This thesis has hypothesised that it has a 'rentier' approach to resource extraction, however clearly further research on this point is required before any conclusions can be drawn.

The final word goes to Jabirr Jabirr traditional owner Frank Parriman, a decent man if ever there was one. Reflecting on the negotiation, he encapsulated a conundrum that traditional owners face when negotiating land access agreements with resource companies:

> I just hope that everything turns out well, that people do get jobs out of it, do build better lives out of it. That's my goal, I don't want anything to do with it personally, I have a decent job, if I ever leave, I will get a job somewhere else, not at Woodside. In my heart, I don't think I could be a part of something that is killing country, even though I agreed to it, maybe I could be part of the regional benefits, distributing that, or be part of the monitoring group making sure that Woodside does what it's supposed to. But as for working for them, no. Not me.[56]

[56] Interview with Frank Parriman (Broome, 21 June 2012).

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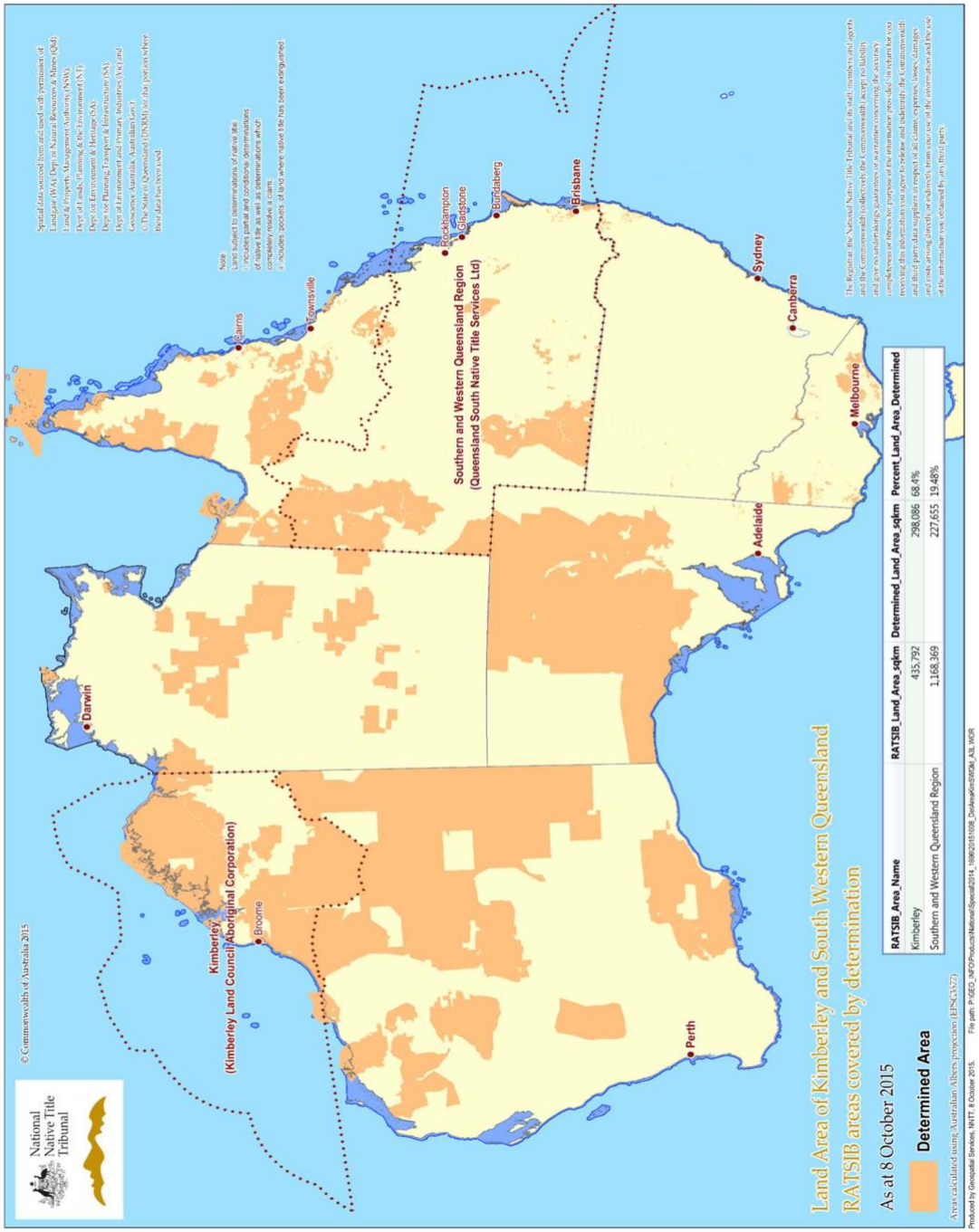
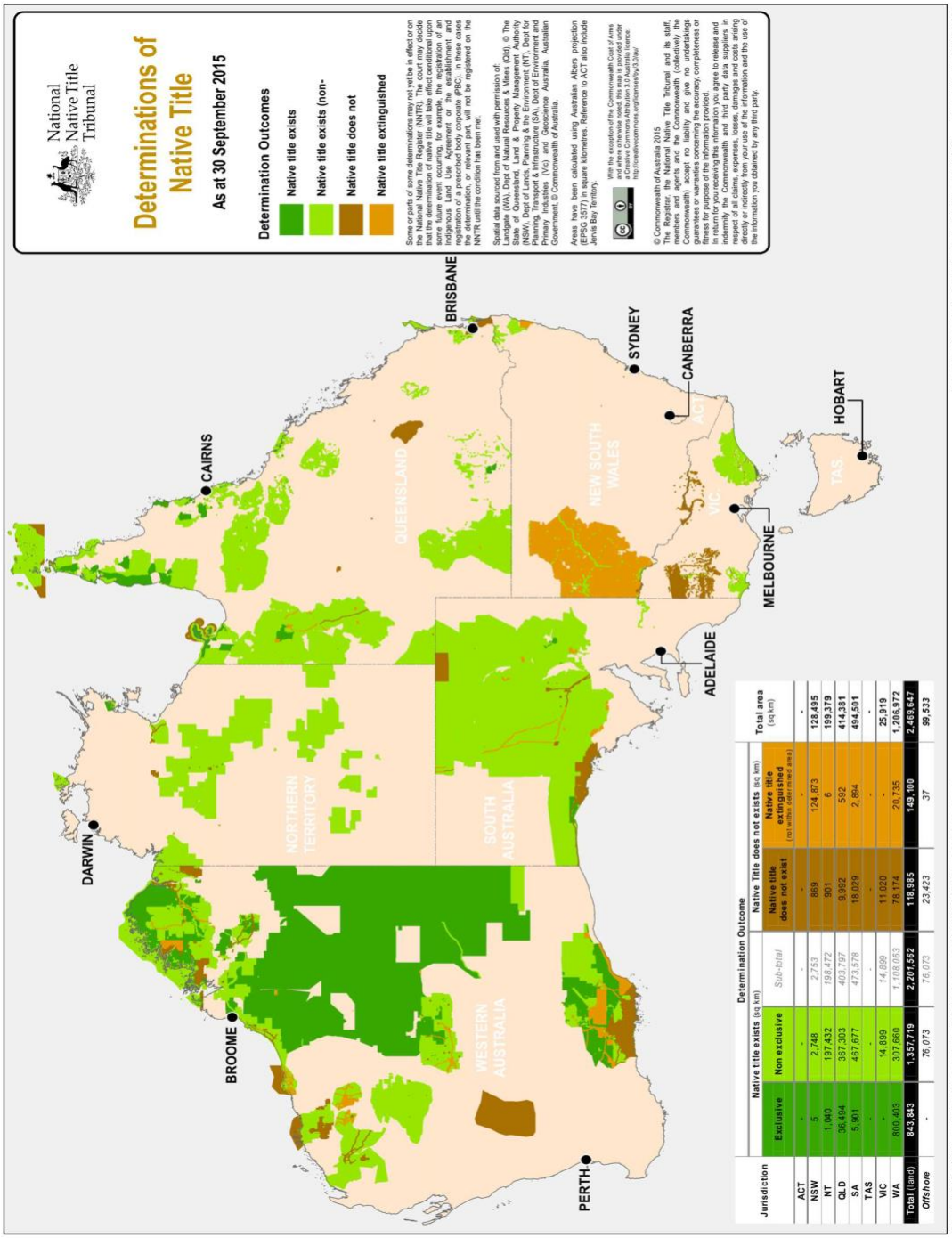
# Appendices

# Appendix 1 - Maps

## MAP 1: CLAIMED AND DETERMINED NATIVE TITLE IN CASE STUDY AREAS



## MAP 2: DETERMINED NATIVE TITLE IN AUSTRALIA




| Jurisdiction | Native title exists (sq km) | | | Native Title does not exists (sq km) | | Total area (sq km) |
|---|---|---|---|---|---|---|
| | Exclusive | Non exclusive | Sub-total | Native title does not exist | Native title extinguished (incl. where determined area) | |
| ACT | - | - | - | - | - | - |
| NSW | 5 | 2,748 | 2,753 | 869 | 124,873 | 128,495 |
| NT | 1,040 | 197,432 | 198,472 | 901 | 6 | 199,379 |
| QLD | 36,494 | 367,303 | 403,797 | 9,992 | 592 | 414,381 |
| SA | 5,901 | 467,677 | 473,578 | 18,029 | 2,884 | 494,501 |
| TAS | - | - | - | - | - | - |
| VIC | - | 14,899 | 14,899 | 11,020 | - | 25,919 |
| WA | 800,403 | 307,660 | 1,108,063 | 78,174 | 20,735 | 1,206,972 |
| Total (land) | 843,843 | 1,357,719 | 2,201,562 | 118,985 | 149,100 | 2,469,647 |
| Offshore | - | 76,073 | 76,073 | 23,423 | 37 | 99,533 |

Prepared by: Geospatial Services, National Native Title Tribunal 21/10/2015 Geotrack Number: GT2015/1964

Filepath: P:\GED_INFO\Products\National\National_Overview\2015_09_30_Maps_and_Stats\2015_09_30_Determined_Outcomes.mxd

# Appendix 2

**TABLE OF ON-THE-RECORD RESEARCH INTERVIEWEES**

| **Browse LNG** | **Role during negotiation** | **Date and place of interview** |
|---|---|---|
| **Kimberley Land Council Staff/Consultants** | | |
| Wayne Bergmann | Chief Executive Officer (CEO) | Broome, 20 June 2012 |
| Rob Houston | Lawyer | Broome, 15 June 2012<br>Broome, 14 June 2013 |
| Cameron Syme | Consultant lawyer, Browse LNG lead negotiator | Perth, 12 June 2012<br>Perth, 8 June 2013 |
| Christine Robinson | Manager, Browse LNG project | Broome, 25 June 2012 |
| Jeremiah Riley | Paralegal | Broome, 13 June 2013 |
| **Traditional Owners** | | |
| Frank Parriman | Jabirr Jabirr, member of Traditional Owner Negotiating Committee (TONC) | Broome, 21 June 2012<br>Broome, 18 June 2013 |
| Mary Tarran | Jabirr Jabirr, member of TONC | Broome, 27 June 2012<br>Broome, 13 June 2013 |

| | | |
|---|---|---|
| Wayne Barker | Jabirr Jabirr, member of TONC | Broome, 18 June 2012<br>Broome, 18 June 2013 |
| **State of Western Australia** | | |
| Duncan Ord | Senior government official on Browse LNG project, one-time chief negotiator for the State. | Perth, 4 December 2012<br>Perth, 21 June 2013 |
| Senior male government official | Senior government official on Browse LNG project | Perth, 5 December 2012 |
| Senior female government official | Senior government official on Browse LNG project | Perth, 3 December 2012<br>Perth, 7 June 2013 |
| Geoff Gallop | Premier | Sydney, 18 July 2013 |
| Eric Ripper | Deputy Premier | Perth, 21 June 2013 |
| **Woodside Energy Pty Ltd** | | |
| Don Voelte | CEO | Sydney, 5 June 2014 |
| Niegel Grazia | Browse LNG implementation manager | Perth, 26 June 2014 |
| Betsy Donaghey | Browse LNG lead negotiator | Melbourne, 19 August 2014 |
| **Development** | | |

| **Opposition** | | |
|---|---|---|
| Bob Brown | Australian Senator, leader of the Australian Greens political party | Cygnet, 28 July 2013 |
| Maria Mann | Coordinator, Environs Kimberley (local Kimberley environmental non government organisation) | Perth, 7 June 2013 |
| Pat Lowe | Founder, Environs Kimberley | Broome, 12 June 2013 |
| Kate Golzon | Volunteer, Environs Kimberley | Broome, 12 June 2013 |
| Glen Klatovsky | National Kimberley Campaigner for The Wilderness Society | Melbourne, 15 April 2014 |

29 interviews/ 21 people

| **Curtis Island LNG** | **Role during negotiation** | **Date and place of interview** |
|---|---|---|
| **Traditional Owners** | | |
| Tony Johnson | Registered applicant and agreement negotiator | via telephone, 30 August 2013 |
| Neola Savage | Registered applicant and agreement negotiator | Rockhampton, 11 September 2013 |

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| Kerry Blackman | Registered applicant and agreement negotiator | Gladstone, 10 September 2013 |
| Anonymous female claimant | PCCC traditional owner | Gladstone, 10 September 2013 |
| Nat Minniecon | Registered applicant and agreement negotiator | Gladstone, 10 September 2013 |
| Kezia Smith | PCCC traditional owner | Gladstone, 11 September 2013 |
| **State of Queensland** | | |
| Andrew Fraser | Deputy Premier, Treasurer | Brisbane, 5 November 2013 |
| Geoff Dickie | Deputy Coordinator General, Office of the Coordinator General | Brisbane, 6 November 2013 |
| **Gladstone LNG** | | |
| Anonymous GLNG3 | Negotiator, Santos | Brisbane, 17 September 2013 |
| Anonymous GLNG1 | Senior manager LNG industry | Brisbane, 17 September 2013 |
| Anonymous GLNG2 | Senior manager LNG industry | Brisbane, 16 September 2013 |
| **Precinct Opposition** | | |
| Libby Connors | Volunteer, 'Save the Reef' | Brisbane, 16 September 2013 |

12 interviews/12 people

# Appendix 3

**MATERIAL FOR ETHICS APPROVAL — EXPLANATION OF RESEARCH AND INTERVIEW QUESTIONS**

## EXPLANATION OF RESEARCH

**PROJECT TITLE:** Power Dynamics Under the Native Title Act: A Study of Agreement Making and Its Negotiated Outcomes

**NAME OF RESEARCHERS:** Ms Lily O'Neill, Assoc. Prof. Maureen Tehan and Professors Miranda Stewart and Ciaran O'Faircheallaigh

## INTRODUCTION

Lily O'Neill is a PhD student in the School of Law at the University of Melbourne. Her supervisors in this research are Associate Professor Maureen Tehan and Professor Miranda Stewart of the University of Melbourne and Professor Ciaran O'Faircheallaigh of Griffith University.

Agreement making between native title holders and resource companies can reap great benefits for Indigenous groups. Equally, however, native title holders can experience significant pitfalls when negotiating agreements with resource companies, including receiving fewer entitlements through negotiated outcomes than they could have received under general legislation. This research seeks to find out why traditional owners achieve widely different results under the *Native Title Act*'s 'right to negotiate' provisions.

The two traditional owner groups that this research focuses on are the native title holders of the Kimberley and the Gladstone areas. The research will take the form of case study examinations of two negotiations relating to the potential exploitation of natural gas deposits: the construction of processing plants for the onshore deposit in the Bowen-Surat Basin and the offshore Browse deposit off northern Western Australia.

Lily O'Neill is seeking to interview Traditional Owners of the Kimberley and South Queensland, and representatives of the Kimberley Land Council, South Queensland Native Title Services, relevant companies and the Western Australian, Queensland and Federal governments.

**WHAT AM I BEING ASKED TO DO?**

We obtained your name as someone who could provide information on this topic from the public record. Whether you choose to be interviewed is entirely up to you, and you can withdraw your consent to the interview at any time. The purpose of this research is to understand the approach and motivations of both parties in this negotiation. Therefore you will be asked questions relating to how you view the importance of the LNG project, the approach you are taking in these negotiations and to what extent you are building a relationship with the other party in these negotiations.

We would like to tape record the interview so that we have an accurate record of what you say. However, if you do not want the interview to be tape recorded, Lily O'Neill can instead take extensive notes of what you say. After the interview, you will be sent a detailed summary of the interview that you may wish to comment on:- for example you may feel that you did not express yourself correctly during the interview and wish to amend an aspect of what you said.

We estimate that the interview will last approximately 1-1.5 hours.

If you would like to participate, Lily O'Neill will contact you to arrange a mutually convenient time for the interview. Before the interview commences, you will be asked to indicate that you have read and understood this information by signing a consent form. This consent form will give you the option of being identified in the published research anonymously (by use of a non-identifying acronym) or by name.

**IS WHAT I SAY CONFIDENTIAL?**

The organisation for which you work and/or the negotiation you are associated with will be identified in published research associated with this project. You can choose to be cited anonymously however given this research will only interview a small amount of people (approximately 20 – 30) it may still be possible for others to identify you. You will be reminded of this fact before the interview commences.

Our records of our interview with you will be stored securely for at least five years (in accordance with normal University procedures). If you ask to withdraw from the project at any state, we will destroy all records of your interview. Lily O'Neill will not ask you to disclose any information about illegal activities, information that is the subject of legal professional privilege or is commercial-in-confidence. If at any point you believe you may have mistakenly disclosed information that you should not have, please inform Lily O'Neill of that fact and she will not use that information in her research.

The only reason that we will disclose your information is if we are legally obliged to do so, for example if we are ordered to do so by a court.

**FURTHER INFORMATION**

If you have any further questions about any aspect of this research, you can contact Lily O'Neill on +61417630475 or loneill@student.unimelb.edu.au, Maureen Tehan on +61 3 8344 6204 or m.tehan@unimelb.edu.au; Miranda Stewart on +61 3 8344 6544 or m.stewart@unimelb.edu.au; Ciaran O'Faircheallaigh on +61 7 3735 7736 or ciaran.ofaircheallaigh@griffith.edu.au.

This research has been approved by the University of Melbourne's Human Research Ethics Committee. If you have any concerns about the way this research is being

conducted, please contact the Committee. You can write to the Executive Officer, Human Research Ethics, The University of Melbourne, Victoria 3010, or phone 03 8344 2073 or fax 03 9347 6739.

**Interview Questions**

At the commencement of the interview, the researcher will explain the nature of the research being undertaken, and what the interviewee will be asked to do. Consent will be obtained from the interviewee both orally and in writing. The following is a list of discussion points. Some questions may be altered or omitted depending on the person being interviewed.

**Background**:

Interviewee's role in the negotiation, how they know the parties involved, previous involvement in negotiations/native title claims

**Negotiation objectives**:

a) What did you hope to achieve out of the negotiation process when it commenced?

b) Did these objectives change during the negotiation process and if so, why?

c) Were your objectives met at the end of the process?

**Agreement outcomes**:

a) Do you believe that you reached a good agreement? If so, for whom?

b) Why do you think you reached the agreement that you did?

**Influencing factors**:

a) Do you feel that you were in a position of power in these negotiations? Why/why not?

b) What impact did law have on these negotiations? For example, the requirement to negotiate in good faith, lack of veto rights over development, case law of National Native Title Tribunal.

c) Can you identify the factors (political, social, history, legal etc) that contributed to (or hampered) your position of power?

d) What do you think are the factors that helped or hampered the other negotiating parties to achieve their negotiation goals?

e) Do you think that the amount of power you had in these negotiations is reflected in the agreement you reached?

**Other:**

a) If, in the future, you are involved in a negotiation of this sort again, what are the things that you would do differently?

b) Do you have anything else to add?

# Appendix 4

## SUMMARY OF THE BROWSE LNG AGREEMENTS

### Browse (Land) Agreement

Parties:

- The Honourable Brendon Grylls, MLA, Minister for Lands, acting on behalf of the State of Western Australia (signatory Brendon Grylls, witnessed Gary Hamley)
- Kimberley Land Council, acting on behalf of the Native Title Party (signatories Tom Birch and Frank Davey, witnessed Cameron Syme)

| Section | Summary |
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| Recitals | C – the State is entering into this Agreement because "the LNG Precinct is a unique and important project for the State of Western Australia, the particular circumstances of which justify the State's entry into this Agreement."<br>D – the State is entering this Agreement in relation to:<br>a. Limiting use of the Precinct<br>b. Limiting further LNG development on Kimberley coastline<br>c. Remediation and rehabilitation of LNG Precinct land after the end of precinct life<br>d. Grant of title within the LNG Precinct to the Native Title Party at the end of precinct life |
| 1 | Interpretation |
| 2 | Ratification and Operation<br><br>This Agreement will not come in to operation until the Western Australian parliament has passed an Act of Parliament. This Bill will be introduced by 30 June 2012 (or later as agreed by the parties) and must be passed by 30 June 2014 (or later as agreed by the parties). |
| 3 | Permitted Use of LNG Precinct<br><br>The LNG Precinct may only be used for activities relating to LNG production, and with the administration and management of the Port. |
| 4 | Precinct Closure<br><br>The State must consider the Precinct closure 50 years following commencement, and inform the Native Title parties of their decision, and must make a Closure Decision 100 years following commencement, unless the parties agree otherwise. |
| 5 | Port at End of Precinct Life<br><br>The Port may continue to operate after the end of the precinct life, after |

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| | consultation with the Native Title party, but at the absolute discretion of the Native Title party nonetheless.<br><br>Given the precinct will be granted to the Native Title party at the end of the precinct life, if the Port continues to operated, the State will pay rent on commercial terms to the Native Title party. |
| 6 | Remediation of Precinct Land and Facilities<br><br>Remediation and rehabilitation of the LNG Precinct will be carried out as soon as practicable at the end of the precinct life, to paid for by the State.<br><br>Within six months of closure, the State will prepare a LNG Precinct Baseline Report on, inter alia, existing facilities and any suspected contamination.<br><br>The condition that the site must be rehabilitated to must be consistent with current standards at the time it is to be carried out. |
| 7 | Grant of Precinct Land<br><br>The Native Title party will be granted the land taken up by the Industrial Precinct, Third Party Contractors' Site and Workers' Accommodation Site following the end of the Precinct life. The form of title of this grant will be determined by the State and Native Title Party in consultation, and if there is no agreement, the grant will be unconditional freehold. The State will pay for fees relating to the registration of this grant, but will not be liable for provision of services like road upgrades or service connections. |
| 8 | Limitation of further LNG Development on the Kimberley Coastline<br><br>The State agrees not to operate, authorise or permit any other gas processing facility on the Kimberley coastline. |
| 9 | Assignment<br><br>The Native Title Party may not assign its rights under this Agreement to any body unless it is a prescribed body corporate pursuant to the Native Title Act. |
| 10 | Variation<br><br>The parties, by agreement, may vary this Agreement, the variations to be tabled in parliament within 12 sitting days of agreement. |
| 11 | Term<br><br>This Agreement terminates on the date when the State has fulfilled the last of its obligations. |

**Browse LNG Precinct Project Agreement Summary**

**Parties:**

1. State of Western Australia (signatories Colin Barnett (Premier), Brendon Grylls (Minister for Lands), witnessed Gary Hamley))
2. Goolarabooloo Jabirr Jabirr Peoples (signatories Rita Augustine, Anthony Edward Watson and Ignatius Paddy in their capacity as the applicant under section 61 of the Native Title Act for and on behalf of themselves and the Native Title Claim Group (the Native Title Party), witness Cameron Syme)
3. Woodside Energy Limited (the Foundation Proponent) (signatory Peter Coleman, witnessed Michael Hession)
4. Broome Port Authority (signatory Laurie Skervingie, witnessed Victor Justice)
5. LandCorp (signatory David Steven Rowe, witnessed Ross Holt)

| **Section** | |
|---|---|
| A | Recitals:<br>The Native Title Party is the registered native title claimant for the land and waters the subject of the Native Title Claim. The area the subject of the Native Title Claim includes the land and waters in the vicinity of James Price Point. The Native Title Claim Group say this about their country:<br><br>*Wanjubjin Bur (Mother Country)*<br>*This place is Mother's country.*<br>*It gives life.*<br>*It is a place with gullies and springs that fill with water in the rains.*<br>*When I am far from Mother's country, she is always in my heart, travelling with me.* |
| B | The State intends to establish the LNG Precinct in the vicinity of James Price Point. |
| D | Briefly describes the negotiation period, including Heads of Agreement, entered into on 21 April 2009 by Woodside, the State and the Native Title parties. |
| F | Parties have negotiated in good faith, and complied with provisions of Part 2, Div 3, Subdivisions M and N of the *Native Title Act*. |
| H | Agreement is pursuant to s28(1)(f) and s31 of the *Native Title Act* and satisfies those section's requirements. |
| I | Establishment of LNG Precinct is "an opportunity to address Indigenous disadvantage for Aboriginal people across the Kimberley". |
| 1 | Definitions |
| 3 | Warranties:<br>• The Native Title parties have the full power and authority to enter into this Agreement, and do so pursuant to the Native Title Act. 3.1(c) |

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| | • All parties warrant that the Native Title party has not entered into this Agreement because of any gifts, entertainment, commission, fee, rebate or any other benefit of significant value. |
| 4 | Establishment of the Precinct:<br>• Consent to Establishment of LNG Precinct, in which native title is surrendered and Future Acts consented to.<br>• Establishes a 3km Buffer Zone around the Precinct, in which native title is not surrendered and no new tenure will be created.<br>• Consent to Future Ancillary Titles<br>• Consent to all Precinct Approvals |
| 5 | Acknowledgments and Indemnity:<br>• Benefits are consideration for future acts, etc<br>• Agreement has come about as a result of good faith negotiations under Subdiv P of the Native Title Act (5.2(a))<br>• Native Title Party will not challenge or adversely affect the Takings, Precinct Notices, or Project Rights<br>• Native Title to be extinguished in the LNG Precinct for the life of the project, however, if a native title determination is made in relation to the area, at the end of the LNG Precinct life, the State will support an application that Native Title exists (5.4(b)) |
| 6 | Benefits are in full and final compensation of use of native title land, except for any possible Future Ancillary Titles.<br><br>Commitments in relation to certain challenges: in relation to procedures if a person purports to act on behalf of the Native Title Party (6.5), "certain challenges" are set out in confidential item 6 of Sch. 5. |
| 7 | Changes to the Native Title Claim:<br>• If native title is found not to exist in the LNG Precinct Area, this Agreement will continue nonetheless, however certain benefits will cease and others, including those set out in the Regional Benefits Agreement, will continue.<br>• Procedures if a New Native Title Party is found to hold native title in the LNG Precinct Area. |
| 8 | State Benefits<br>• State provides benefits to Native Title Party for the claim group as a whole, however, it is not required to enquire as to where payments are going.<br>• Native Title Party to formulate Rules for the new Economic Development Fund and the Indigenous Housing Fund, subject to the approval of the State. |
| 9 | Economic Development Fund<br>• State to pay $10 million to set up the Economic Development Fund 9.1(a) |

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| | • Initial purpose of the EDF is to increase capacity of Native Title Claim Group through sustainable business and employment opportunities, creating and expanding businesses in which the NTCG have equity; investment and building asset ownership 9.3<br>• Initial objects include: working with Woodside to nominate training, employment, contracting opportunities associated with the LNG Precinct. |
| 10 | Indigenous Housing Fund<br>• State to pay $20 million upon registration 10.1(a)<br>• Initial Purpose is to encourage and assist home ownership and Indigenous housing developments in the Kimberley<br>• Objects include establishing home ownership, training and employment relating to housing construction, development of aged/social/supportive housing.<br>• The Native Title Claim Group Administrative Body must prepare annual reports on its operation (10.6) |
| 11 | Grant of Freehold Land<br>• State to grant Native Title Party 2900 ha of land entirely within their claim area, in a nominated form of tenure, including unconditional freehold<br>• Grant land location must agreed to between Native Title Party and the State, and taking into consideration certain factors.<br>• To take effect after the Secured Foundation Proponent Date, being the date that Woodside's receives a final investment decision or secure their industrial lease, whichever is the later.<br>• The grant of this land will not necessarily require a surrender of native title, however if its proposed use and tenure is incompatible with native title, the grant will require that native title be surrendered. The grant land will then become the subject of a Grant Land ILUA (11.8) |
| 12 | Administrative Body Office Land:<br>• Lot 363, corner Ivy Link and Gwendoline Crossing in the Blue Haze Light Industrial Estate, Broome, to be transferred to the Administrative Body. |
| 13 | Native Title Party Housing Land:<br>• 1st stage will be residential lots and house and land packages in the Broome North Development worth $4.25 million. These will be held by the Administrative Body on trust for the Native Title Claim Group. To be used consistently with the objects etc of the Indigenous Housing Fun. To be provided following the Commencement Date (date agreement is signed)<br>• 2nd stage will also be residential lots and house and land packages in the Broome North Development worth $4.25 million. To be provided in 2013/2014.<br>• 3rd stage will be residential lots in the Broome North Development |

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| | with a value of $1 million, and 15 hectares of englobo developable land on the corner of Fairway Drive and Magabala Road. To be provided in 2014/2015. |
| 14 | Precinct Facilities Transfer<br>• The State agrees to consider the transfer of Facilities with the Precinct if the State decides that the Port will either cease operations or not operate beyond the Precinct Life. |
| 15 | Administrative Body Funding<br>• The State will pay $5 million to fund the establishment and operation of the Administrative Body. This funding will be in two stages |
| 16 | Foundation Proponent (Woodside) Benefits<br>• Set out in Schedule 5, all with CPI indexing<br>• $3 million prior to front end engineering and design commencing<br>• $10 million on the execution of the Agreement<br>• $5 million when Woodside receives a final investment decision (Project FID) or secure their industrial lease, whichever is the later<br>• $10 million on the first LNG cargo<br>• $5 million if a final investment decision is reached on any new LNG Train (the liquefaction and purifaction facilities at a LNG plant)<br>• Annual payments of $3.6 million, first payable on the later of Project FID or the grant of certain leases, and finishing in the final year of commercial production (annual payments)<br>• $400,000 to the Native Title Administrative Body (admin payments)<br>• If the life of the Project exceeds 30 years from the date of the first LNG cargo, annual payments and admin payments will increase by 50%<br><br>Payments under the Regional Benefits Agreement<br>• $4 million annually to the Kimberley Enhancement Trust, first payable on the later of Project FID or the grant of certain leases<br>• $1.3 million annually to the Regional Education Fund Trust, for the benefit of Kimberley Indigenous People from the commencement date to year of final production<br>• Additional payments for additional LNG Trains, payment to depend on train capacity<br>• If the life of the Project exceeds 30 years from the date of the first LNG cargo, the three payments above will increase by 50%<br><br>Payments to the Business Development Organisation<br>• $1.4 million per year from Commencement date, for 10 years<br>• $400,000 annually from the eleventh year until the final year of |

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| | commercial production<br>• Contracting opportunities worth a minimum of $5 million per year, from commencement to completion of the Project<br><br>Other commitments<br>• Employment and training opportunities to both the Native Title Claim Group and other Kimberley Indigenous People, of at least $1.3 million per year<br>• Business development opportunities (as set out in Sch 13)<br>• For a period of 6 years, pay a total of $8 million towards a Reading Recovery Program<br>• Up to $1 million a year for 10 years for a Indigenous Ranger Program<br><br>Confidential Benefits<br>[left blank]<br><br>Implementation Manager<br>• Woodside will employ an Implementation Manager whose role is to facilitate the ongoing relationship between all parties to this agreement |
| 17 | Proponents Benefits Fund<br>• The Proponents Benefits Fund is the fund into which Woodside will be making its payments, whose purpose is to deliver to the Native Title Party proponent benefits. |
| 18 | Proponent Asset Transfer<br>• At end of the project, or 30 years after the 1st LNG cargo, the Native Title party can request a title transfer of the Precinct's accommodation facilities at written down book value. |
| 19 | Additional Proponent Benefits<br>• Payable if an Additional Proponent (a company or person other than Woodside, the Foundation Proponent) starts to process and export LNG at the Project site.<br>• If no new agreement is agreed to between the Additional Proponent and the native title party, the following benefits are payable – as set out in Sch 4, to be calculated on an LNG Train basis. If a new agreement is to be negotiated, it must be on a good faith basis.<br>• Schedule 4 sets out the following benefits – Milestone payments are also payable to the Native Title party, being:<br>a. $6.35 million within 30 days of the Additional Proponent becoming secured<br>b. $3 million within 30 days of their first LNG cargo<br>c. $5 million for each LNG Train above three<br>d. $1.2 million annual payments<br>e. $135,000 annually to Administrative Body<br>f. $135,000 annually to Business Development Organisation for the |

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| | life of their participation, and $335,000 for 10 years.<br>g. $2 million annually for each LNG Train above three<br><br>To the Regional Beneficiaries:<br>• $1.8 million annually to the Regional Beneficiaries, plus $1 million for each LNG Train above three<br>• $1 million to the Dampier Peninsula Native Title Parties annually for each LNG Train above three<br><br>Employment and Training<br>• The Additional Proponent will develop and implement an Employment and Training Management Schedule with the native title Administrative Body, and fund training programs worth $450,000 annually<br><br>Business Development<br>• Guaranteed contracting opportunities worth $1.7 million<br>Reading Recovery<br>• $2.7 million for Reading Recovery programs<br><br>Ranger Program<br>• $3.35 million for an Indigenous Ranger Program<br><br>Implementation Manager<br>• The Additional Proponent will employ an Implementation Manager<br><br>Accommodation Facilities Transfer<br>• The native title party have a right to request transfer of accommodation facilities<br><br>Increased Additional Proponent Benefits<br>• If the Additional Proponent exceeds 30 years from the date of its first LNG cargo, it will increase annual payments, payments to admin body and payments to Regional Beneficiaries by 150% every year thereafter. |
| 20 | Establishment of Corporate Entities and Ratification<br>• The Native Title Party must establish as soon as practicable after the commencement date the Administrative Body and the Corporate Trustee. |
| 21 | Administrative Body<br>• The Administrative Body will have responsibility for the Economic Development Fund, Indigenous Housing Fund, Proponent Benefits Fund, and will hold the Grant Land for the benefit of the Native Title Party.<br>• Will be registered either under the CATSI Act, or the Corporations Act |

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| | • Its objects include the use and distribution of benefits, liaising with governmental and non-governmental agencies, undertaking community development, including the relief of poverty<br>• Keep a register of all Native Title claim group members seeking employment, training or contracting opportunities<br>• Must prepare annual report for the State Implementation Authority (the relevant government authority) on the distribution of funds |
| 22 | Corporate Trustee<br>• To be a public company limited by guarantee, incorporated pursuant to the Corporations Act<br>• To be a wholly owned subsidiary of the Administrative Body<br>• To receive, manage and invest funds on trust for the Native Title Party, and to ensure that these benefits are distributed equitably<br>• To prepare Trust Deeds for the Economic Development Fund, Indigenous Housing Fund, Proponent Benefits Fund, and the Grant Land<br>• Board of the Corporate Trustee is to include two independent directors, one nominated by the Native Title Party, the other nominated by the State. If no independent director has been appointed, the Corporate Trustee cannot exercise any of its powers.<br>• The Corporate Trustee may use up to 10% of the funding from the Economic Development Fund and the Indigenous Housing Fund to fund its operation. |
| 23 | Annual Audit |
| 24 | Suspension Events<br>• Includes if the native title party lodges a new application for a determination of native title in relation to the LNG Precinct |
| 25 | Suspension of Benefits for Maladministration<br>• Including failure to implement benefit objectives |
| 26 | Replacement of Corporate Trustee |
| 27 | Management of the LNG Precinct<br>• Comprises equal representation from the Port Authority, LandCorp, the Native Title party, the Foundation Proponent, and any Additional Proponent, all representatives having authority to speak on behalf of their organisation |
| 28 | Control of Precinct<br>• The State is the owner of the LNG Precinct, port to be vested in the Port Authority<br>• LandCorp responsible for the establishment and operation of the Precinct, other than the Port. The Precinct will be the subject of |

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| | Crown Leases.<br>• Native Title Party are the site managers of the Third Party Contractors' Site (an area of approx 200ha) |
| 29 | Land Access<br>• Native Title Party have access to the LNG Precinct, save where restriction is needed for health, safety or security<br>• A Land Access Management Schedule has been developed – Sch. 10. This includes:<br>a. Native Title Party's access to the Buffer Zone be unrestricted, save any restrictions imposed by law<br>b. NTCG and the public to have free and unfettered access to the beach and intertidal zone twice per year<br>c. The Native Title Party to provide a schedule of desired Precinct Visits at the start of each year, for which they are responsible for travel, accommodation and attendance (no specified maximum number). Provision for other visits not provided at start of year. |
| 30 | Management Schedules<br>• Set out in Schedules<br>• Precinct to be run to the standard of good and prudent LNG practice for operation and maintenance of such facilities. |
| 31 | Aboriginal Cultural Heritage<br>• Set out in Sch 7:<br>a. The Site Manager and the Native Title Party must develop Cultural Heritage Management Principles on the management of Aboriginal Sites<br>b. No less than every three years, each Proponent must consider international cultural heritage practices as carried out at other onshore LNG precincts, but their implementation is at the Proponents' absolute discretion. |
| 32 | Environment Management<br>• An Environment Management Schedule set out in Sch. 8, which stipulates that compliance with existing legal obligations is a minimum, and includes:<br>a. Each Site Manager must consult with the Native Title party on matters including evaluating potential environmental impacts, mitigation and management measures and ongoing environmental impact research.<br>b. Quarterly meetings are to be held between the Site Manager and the Native Title Party, the purpose of which is to review environmental matters relating to the site and to address any concerns.<br>c. Monitoring – the Site Manager must consult with Native Title in relation to environmental monitoring plans<br>d. Steps to be taken if recommendations by the Native Title Party in relation to environmental measures are not taken up by the Site Manager |

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| | e. Reporting requirements<br>f. That a Compliance Officer, employed by the State, be responsible for environmental compliance in the Precinct, as well as managing the relationship between the Native Title Parties and the State.<br>g. The Foundation Proponent will consult with the Native Title Party in relation to the use of groundwater from the Broome aquifer. If the Native Title Party receives independent advice that such use will impact negatively on the aquifer, they may direct the Foundation Proponent to modify its use; obtain water from deep bores; or from desalinated seawater. The Foundation Proponent can continue to use the Broome aquifer in certain circumstances.<br>h. This agreement does not derogate from the State's own regulatory process in relation to water<br>i. Measures in relation to Risk of Serious Environmental Harm, including where the Native Title Party may escalate any concern to the relevant environmental regulator.<br>j. The Proponent must consider international environmental best LNG practice at least every three years. |
| 33 | Employment and Training<br><br>The parties acknowledge the potentially significant employment and training benefits available out of the LNG Precinct.<br><br>The manner in which these will be provided is set out in the State Employment and Business Development Management Schedule, set out in Sch. 14. It states, inter alia:<br>a. The Management Schedule relates to commitments made by the State, LandCorp and the Port Authority to the Native Title Party<br>b. Each government entity must prepare an Indigenous Participation Plan in relation to their LNG precinct operations which contains employment and business management commitments, strategies and initiatives for achieving affective Indigenous workforce strategy and has implementation procedures. If, after five years, the Native Title Party considers that the commitments are not being reached, the parties will meet and agree on further measures to be taken.<br>c. Each government entity will endeavour to provide contracting opportunities to suitably qualified indigenous businesses, in accordance with the government entities normal procedures, and on market terms.<br>d. Each government entity will aim to achieve a 20% Indigenous workforce by the end of the first 5 years of operations; and a long term target that the percentage of Kimberley Indigenous People employed by government agencies involved in the LNG Precinct will reflect the overall population spread, and will not be less than 40% of LNG-related workforce.<br>e. Each government entity will "genuinely engage" with the Native Title Party in relation to employment targets each five year period. Targets may be varied by written agreement, and made public on an annual basis. Progress must be reported publicly on an annual basis.<br>f. Indigenous Employment Principles: the government entities must |

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| | work with the Native Title Party to maximise Indigenous employment opportunities, in particular to the Native Title Group and with a focus on Indigenous women. Suitable members of the Native Title Claim Group listed on employment and contracting register (see 21.13) must be invited to apply for employment and training opportunities as they arise.<br>g. Indigenous Training Principles: each government entity must, were practicable, ensure that their workplaces are conducive to Indigenous employees, must develop career paths and leadership opportunities for Indigenous employees, must not treat irrelevant criminal records as an impediment, and must provide Indigenous women with training opportunities throughout the life of the LNG precinct.<br>h. At each Precinct Management Committee meeting, the Native Title Party will be provided with a summary of employment positions and contracts filled by Native Title Party members or Kimberley Indigenous People, as well as upcoming opportunities.<br><br>The Foundation Proponent's obligations in relation to employment and training are set out in item 4 of Sch 5 (see above), and the Foundation Proponent Employment and Training Management Schedule contained in Schedule 12. It sets out, inter alia:<br>a. The Foundation Proponent is committed to maximising Indigenous employment, in particular that of the Native Title Claim Group, and will establish Indigenous employment initiatives and specific training programs targeting the Native Title Claim Group and Kimberley Indigenous People;<br>b. Ensure that contractors and subcontractors have workplaces that are conducive to Indigenous recruitment, retention and promotion;<br>c. Specific career path for Indigenous employees with leadership development opportunities;<br>d. Indigenous women to be provided with training and employment opportunities;<br>e. Irrelevant criminal records are not be treated as an impediment;<br>f. Incremental targets, including that 300 Indigenous people will be employed during the construction phase, and 15% of the Precinct-based workforce by the end of the first five years;<br>g. At the expiry of the first five year period, the Foundation Proponent will genuinely engage with the Native Title Party in relation to employment targets for the next five year period;<br>h. Progress towards targets will be reported publicly in the Foundation Proponent's sustainability report.<br>i. Employment preference – the Foundation Proponent will apply a preference to job applications that fulfil the requirements of the advertised position: firstly to members of the Native Title Claim Group, and secondly to Kimberley Indigenous People. These people will be employed subject to the usual terms and conditions of employment;<br>j. Training initiatives throughout the project life, including work ready training, and ongoing operations training and training of new starters; |

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| | k. The obligation on the Foundation Proponent to provide summaries of all employment positions filled by members of the Native Title Claim Group, Kimberley Indigenous People or other Indigenous people, as well as upcoming employment opportunities. |
| 34 | Business Development and Contracting<br><br>The parties acknowledge the potentially significant benefits offered by the establishment of the LNG Precinct to the Native Title Party and Kimberley Indigenous People. The manner in which these are to be provided is set out in the State Employment and Business Development Management Schedule, set out in Sch. 14. See above.<br><br>The Foundation Proponent's obligations are set out in Sch 5 (Foundation Proponent's Benefits, see above) and Sch 13 (Foundation Proponent Business Development and Contracting Management).<br><br>Sch 13 sets out, inter alia:<br>a. Business development and contracting commitments, including that the Foundation Proponent must provide guaranteed contracting opportunities, as per Sch 5, item 4.2 (see above, $5 million). If this guaranteed contracting level is not reached over a five year period, the Foundation Proponent and the Native Title Party will meet to analyse the reasons and implement further measures.<br>b. The construction contract for operations phase accommodation will require the successful contractor to engage in a joint venture with an entity 100% owned by members of the Native Title Claim Group, subject to certain conditions.<br>c. Within ten days of the commencement date, the Foundation Proponent will consult with the Native Title Party on the establishment of a NTP-owned business to undertake the removal and haulage of gravel within the land and water of the native title claim, funding for which will be paid for by the Foundation Proponent for Business Development Organisation (see above, Sch 5, item 4.1)<br>d. At each committee meeting, the Foundation Proponent will provide the Native Title Party with a summary of all contracts associated with NTBs or Ibs and a list of all activities that may provide future contracting opportunities.<br>e. The Foundation Proponent is not obliged to offer any contract on anything but a commercial basis. |
| 35 | Cultural Awareness Training<br><br>The Parties have developed a Cultural Awareness Training Schedule, as set out in Sch 9.<br><br>It sets out, inter alia:<br>a. The purposes of Cultural Awareness Training is to familiarise |

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| | people with Aboriginal traditions and cultures of the region and the precinct; to promote knowledge and understanding of Aboriginal tradition and culture; to foster good relationships between Aboriginal and non-Aboriginal people.<br>b. Site Managers will engage Indigenous businesses to develop and procure the delivery of one day cultural awareness training in relation to that Site Manager's activities.<br>c. Site Managers should use their best endeavours to ensure that any invitees complete a site induction, including 15 minutes of cultural awareness content delivered by a member of the native title claim group by video<br>d. Invitees who will be based at the precinct for three months or more, or are at senior management, will complete substantive substantial cultural awareness training each year.<br>e. Senior personnel will undertake extended cultural awareness training of up to two days.<br>f. The cultural awareness training will be reviewed after three years, and if the site managers and the native title party agree that the training has not fulfilled its purposes, persons previously required to complete training on an annual basis will then be required to complete it on a six-monthly basis.<br>g. Aboriginal Personnel will be given instruction to familiarise themselves with the work culture and expectations of the site manager, etc, have work induction programs explained to them in a culturally appropriate manner, with the aim that they feel comfortable in participating in the site manager's activities. |
| 36 | Additional Proponents<br><br>The State is entitled to appoint any Additional Proponents to the LNG Precinct on the same basis as the Foundation Proponent, given certain conditions. |
| 37 | Proponent Project Closure and Decommissioning<br><br>The Proponent must give notice to all other parties at least 12 months prior to the cessation of LNG production. |
| 38 | Decommissioning Management Schedule<br><br>Decommissioning Management Schedule, as set out in Sch 11, states, inter alia:<br>a. The principles of decommissioning, including that each site manager must remediate the land on which their activities are carried out on at the end of the life of those activities;<br>b. That a Decommissioning Plan Notice must be developed no later than five years prior to the date the proponent reasonably expects that it will issue a closure notice. This plan must be developed with input from the Native Title Party and regard to Indigenous employment opportunities;<br>c. The Native Title Party must be met with, consulted and informed |

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| | at all stages of the decommissioning; |
| 39 | Proponent Accommodation Facility Transfer<br><br>The Proponent must provide to the Native Title Party an inventory (Asset Transfer Information) of the Accommodation Facilities remaining at time of transfer, the written down book value of these facilities, details of any chattels that the proponent may be willing to transfer, a copy of the lease (or other tenure) to that part of the Workers' Accommodation Site. This must occur on 30 years following the first LNG cargo.<br><br>Within six months of receiving this information, the Native Title Party must notify the proponent and the State whether it wishes to request the transfer of the Accommodation Facilities. If it does not request them, the Accommodation Facilities will be decommissioned.<br><br>The Foundation Proponent must maintain its accommodation facilities in good order and fit for human habitation until, and if, transfer is requested.<br><br>After the issue of Asset Transfer Information, the State will consult with the Native Title Party and the Proponent to determine the standard of services to be provided to the Accommodation Facilities to be transferred such as road upgrades, services connections and headworks charges.<br><br>In relation to the costs of transfer, the Proponent will pay fees like registration fees at the Western Australian Land Information Authority and the duty payable under the *Duties Act 2008* (WA), while the Native Title Party will pay general or legal expense incurred, taxes normally borne by the landowner and the provision of service to the Accommodation facilities.<br><br>The Proponent must pay for an environmental site assessment of the Workers Accommodation site.<br><br>The Proponent continues to have access to the accommodation facilities, notwithstanding any transfer, and will decide whether they continue to require their use. The rent to be paid to the Native Title Party is the rent payable for accommodation of a similar nature in Broome.<br><br>The State has sole discretion as to the accommodation facilities are required for the continued operation of the LNG Precinct post transfer. Any transfer to the Native Title Party will be conditional on relevant leases being granted to the proponent. |

**Regional Benefits Agreement Summary**

Parties:

- State of Western Australia
- Minister for Lands

- Conservation Commission of Western Australia
- Kimberley Land Council
- Woodside Energy Limited

| **Section** | |
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| Background | Contains benefits which 'seek to improve the educational, health, social and economic well being of Aboriginal people across the Kimberley'. |
| 1 | Definitions and Interpretation<br><br>Regional beneficiaries: the Native Title Party, the Dampier Peninsula Native Title Parties, the Kimberley Native Title Parties, and other Kimberley Indigenous People. |
| 2 | Terms of Agreement |
| 3 | Warranties |
| 4 | Rules of Funds<br><br>The Regional Body, in consultation with the State, will formulate the rules (by reference to the objects and purposes) of the Regional Economic Development Fund, the Regional Indigenous Housing Fund, the Regional Education Fund and Cultural Preservation Fund. The Rules go for approval to both the State and the Foundation Proponent. |
| 5 | Discharge of Payment Obligations<br><br>The State and Foundation Proponent not responsible for the manner in which their payments are spent.<br><br>CPI Adjustment |
| 6 | Regional Economic Development Fund<br><br>The State will pay $20 million to the Regional Economic Fund within 60 days of the Secured Foundation Proponent Date.<br><br>The purpose of the Fund is to assist the regional beneficiaries benefit from the economic opportunities arising out of the establishment of the LNG Precinct and to increase wealth and self-sufficiency and address disadvantage and long-term poverty though business development, employment opportunities, investment and building asset ownership.<br><br>The objects of the fund are to facilitate engagement with the Foundation Proponent to achieve the above. Initial general objects are to increase the number of regional beneficiaries in positions of employment, and the number of indigenous-owned businesses. |
| 7 | Regional Indigenous Housing Fund |

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| | The State to pay $30 million to the Fund in instalments over a period of 25 years. First instalment of $10 million is to be paid five years after the Secured Foundation Proponent Date.<br><br>The purpose of the fund is to assist regional beneficiaries to enter into home ownership, as well as increasing available safe, secure and suitable accommodation, assisting the generation of wealth and assisting poverty disadvantage through asset ownership.<br><br>The objects of the Housing Fund include to establish a corporate housing company; identify and facilitate housing for the aged and other social housing, housing for apprentices and trainees, and worker accommodation. |
| 8 | Regional Education Fund<br><br>The State to pay $20 million in annual instalments of $1 million over 20 years into the Fund. First instalment to be paid within 60 days of the Secured Foundation Proponent Date.<br><br>The Fund's objects include: increasing the number of Indigenous students who complete year 12; increasing trade, vocational and university enrolments. |
| 9 | Cultural Preservation Fund<br><br>The State to pay $8 million in annual instalments of $500,000 over 16 years. First instalment to be paid within 60 days of the Secured Foundation Proponent Date. Its purpose is to assist regional beneficiaries (in particular young people and those at risk) to enhance and protect their cultural heritage. This is to include activities and events 'on-country', the recording, preserving and cataloguing of culture and history, the protection of ethnographic sites, and sponsorship of community based media. |
| 10 | Kimberley Enhancement Scheme<br><br>The State to pay $108 million from the Secured Foundation Proponent Date in $5 million (for the first 16 years) and $2 million annual instalments thereafter.<br><br>The Purpose of the scheme is to supplement existing social programs, liaising between regional beneficiaries and government and non-government agencies. The objects of the Scheme include to work towards self-governance 10.5(b). The Scheme's Management Committee must include at least 2 reps from the native title group, 1 from the Dampier Peninsula native title group and 1 from Kimberley native title parties. The Management Committee is to coordinate actions to deal with social and economic issues arising out of the LNG Precinct.<br><br>Strategic Plans must be devised every five years, and the State can withhold funding if those plans do not meet the required standard. No more than |

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| | 10% of it's funding is to be spent on administration costs. |
| 11 | Dampier Peninsula Fund<br><br>The Regional Body must establish the Dampier Peninsula Fund. The aim of the Fund is to improve the general welfare of registered native title claimants on the Dampier Peninsula.<br><br>Its objects are for the relief of poverty; housing, including short term housing relief; medical assistance; dental care; child care and care for the aged and disabled; transportation and provision of community and social infrastructure. Access to this fund is limited to members of the Dampier Peninsula Native Title Parties. |
| 12 | Grant land<br><br>On the Secured Foundation Proponent Date, the State grants to each Kimberley native title party, other than the Native Title Party and the Dampier Peninsula Native Title Party, an area totalling 600 ha of freehold or other land. The grant of this land does not require a surrender of native title. |
| 13 | Conservation and Heritage Areas<br><br>State to pay $15 million to the Regional Body from the Secured Foundation Proponent Date in annual instalments of $1.5 million for 10 years for the creation of conservation and heritage areas. The purpose of these areas is for the exercise of native title rights, the conservation of cultural significant sites, to contribute to community development through joint management projects, increasing biodiversity, rehabilitation of land, promoting Indigenous culture and heritage.<br><br>The location of these areas will be come to by the State, working with the TOs (by way of the KLC or Regional Body). The land is chosen pursuant to certain factors.<br><br>These areas may be created as Conservation and Heritage Reserves, or Conservation and Heritage conditional freehold. The areas will be managed by the Indigenous Holding Entity, through a Joint Management Body. The Joint Management Body will prepare and implement management plans for the land. The Indigenous Holding Entity will develop relevant Cultural Management Plans, which documents the aspirations of the TOs; considers collaborative 'on-country' management; considers tourism and access; establishes a vision. |
| 14 | Indigenous Land Reform on the Dampier Peninsula<br><br>The State commits to reforming Indigenous land on the Dampier Peninsula to enable forms of tenure that support home ownership. This process will identify areas of land currently held by the Aboriginal Lands Trust or the Aboriginal Affairs Planning Authority – the KLC will identify priority land |

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| | and the appropriate entity to which it could be transferred.<br><br>The criteria for the land parcels to be reformed include: the economic development, living, social, cultural etc aspirations of the relevant TOs. The areas the subject of land reform will become the subject of a Land Reform Indigenous Land Use Agreement. |
| 15 | Resolution of Native Title Claims<br><br>The State will work with the KLC to develop a timeframe for the comprehensive resolution of native title applications in the Kimberley and Dampier Peninsula. |
| 16 | Commonwealth Commitments<br><br>The State will assist the KLC to pursue the establishment or identification of an appropriate body for the delivery of Commonwealth funds to the Kimberley region, for the purpose of addressing regional Indigenous issues, which may be the Regional Body. |
| 17 | Additional Proponents<br><br>See the Project Agreement |
| 18 | Establishment of Corporate Entities and Ratification<br><br>The KLC must establish both the Regional Body and the Regional Trustee under either the CATSI Act or the Corporations Act. |
| 19 | Regional Body<br><br>The State is to pay $20 million in $2 million annual instalments.<br><br>The Objects of the Regional Fund include to establish and administer the Regional Economic Development Fund, the Regional Indigenous Housing Fund, the Cultural Preservation Fund and Kimberley Enhancement Scheme. It may also manage or hold land on behalf of the Grant Land Claim Group if required and undertake community development for the benefit of regional beneficiaries, including the relief of poverty and illness etc. It must also monitor the performance of the Regional Benefits Agreement.<br><br>Membership of the Regional Body is open to all regional beneficiaries who are 18 years and older.<br><br>The Regional Body must give priority to (in order): the Native Title Claim Group, the Dampier Peninsula Native Title Parties and the Kimberley Native Title Parties, Indigenous people residing in the Kimberley. |
| 20 | Regional Trustee<br><br>The Regional Trustee is to be a public company limited by guarantee, |

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| | registered in accordance with the Corporations Act, as a wholly-owned subsidiary of the Regional Body. The Regional Trustee receives, holds etc any assets held on trust for the regional beneficiaries.<br><br>The Regional Trustee is to establish trusts for the bodies including the Regional Economic Development Fund Trust, etc.<br><br>The Trustee must distribute benefits in accordance with this Agreement, and to the levels of priority: the Native Title Claim Group, the Dampier Peninsula Native Title Parties and the Kimberley Native Title Parties, Indigenous people residing in the Kimberley, and to the comparative needs of relevant regional beneficiaries. |

# Appendix 5

### ASSESSMENT OF THE BROWSE LNG AGREEMENTS

These agreements are measured against Ciaran O'Faircheallaigh's criteria and scoring system for assessing agreement outcomes.[1] His eight criteria relate to environmental management (scores between 0 and 6); cultural heritage protection (scores between 1 to 5); rights and interests in land (scores between -5 to 5); financial payments (as a percentage of expected project output); employment and training (minimum to substantive); business development (scores between 0 to 5); Aboriginal consent and support (scores between 1-7); and implementation (the extent to which resources have been allocated to implementation). These criteria are alternatively on a scale, cumulative, or absolute (in relation to financial payments).

In summary, the Browse LNG agreements rate highly on the O'Faircheallaigh criteria.

### *(a) Environmental Management*

The *PPA* stipulates that existing legal environmental obligations are a minimum.[2] It also sets out the role that the native title party will take in relation to environmental management, which includes that they have a monitoring role in relation to environmental matters; that they must be consulted at least quarterly in relation to potential environmental impacts and their mitigation and management; that the State must employ someone to monitor the plan; and that Woodside agrees to conduct and consider ongoing research about environmental best practice. These environmental protections likely fall around point 4 (of 6) on the threshold: 'Indigenous parties may suggest enhanced environmental management systems; project operator must address' and therefore represent a significant improvement on the legislation. More significantly, the *PPA* also sets out specific requirements in relation to groundwater including that the native title party can obtain independent advice on its use, and if that advice deems necessary, direct Woodside to change its use of that water, including by obtaining water from deep bores or using desalinated seawater: this aspect likely falls on point 6 of the scale, increasing the overall score to 4.5.

[1] Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton et al (eds), *Honour Among Nations* (Melbourne University Press, 2004) 303–328.
[2] Cl.32 and Sch. 8 *PPA*

### *(b) Cultural Heritage*

The *PPA* outlines terms on which cultural heritage plans must be developed. These terms stipulate that impacts to Aboriginal sites must be avoided where practicable, or otherwise minimised. The *PPA* also sets out international best practice on cultural heritage management principles must be canvassed every three years, but that does not include a requirement that these practices must be implemented. Given Western Australia's low legislative threshold in this area, these represent an improvement on the legislation, and likely fall at point 3 (of 6) on the threshold, representing some increase on the protection offered by law: 'the developer must minimise damage….consistent with commercial requirements.' The *PPA* also sets out a fairly comprehensive programme whereby precinct employees undergo cultural awareness training: O'Faircheallaigh identifies as being a factor that can aid a culture in which cultural heritage management is respected.[3]

### *(c) Rights and Interests in Land*

The agreements contain extensive provisions relating to rights and interests in land. This includes stipulating that while native title is extinguished in the precinct during the life of the project, the State will support an application that native title exists at the end of the project life.[4]

In addition, it specifies:

1. The State to grant 2900ha of land in any form of tenure to the native title party, and house and land packages worth $9.5 million, plus 15 ha of developable land in Broome.[5]
2. The State to grant 600 ha of land, in freehold or otherwise, to non-Dampier Peninsula traditional owners.[6]
3. State commits to land reform on the Dampier Peninsula to ensure that Aboriginal tenure that will enable home ownership.[7]
4. At the end of the precinct life, the State will consider transferring all facilities, including the port, to the native title party, subject to certain conditions.[8]
5. At the end of the precinct life, the native title party can buy the accommodation facilities from Woodside at its original cost minus depreciation.[9]

[3] See Sch. 9 *PPA*. O'Faircheallaigh, above n 1, 317.
[4] s5.4(b) *PPA.*
[5] Cl.11 &13, *PPA*
[6] Cl.12 *RBA*
[7] Cl. 14 *RBA*
[8] Cl14 *PPA*

The agreements therefore rate 4 (out of a scale ranging from -5 to +5). In addition, the agreements also stipulated that the State would enact a State Agreement, being the *Browse Land Act*, which states that there will be no other LNG processing plants on the Kimberley coast other than that agreed by the traditional owners in the Browse Agreement. This type of agreement doesn't appear to have any precedent in Australia, and signifies a significant fettering of future government actions by traditional owner and while not directly relevant to the O'Faircheallaigh criteria, should nonetheless be understood as a right and interest in land.

### *(d) Financial Payments*

The total minimum purely financial payments that the agreements assign to Aboriginal beneficiaries are $552.4 million — $301.4 million from Woodside and $251 million from the State — over the life of the project. This does not include any payments that are discretionary, including payments that would be made if further proponents also used the precinct. The majority of these payments are tied payments for certain goals, including education, social and cultural development.

### *(e) Employment and Training*

The agreements have extensive provisions relating to employment and training, including strategies and implementation procedures to increase Aboriginal workforce participation. In addition to cash payments that are targeted towards employment and training, the State and Woodside also commit to:

1. Native title party the site managers of the third party contractor site;[10]
2. The State aims for a 20% Aboriginal workforce by the end of the first five years, with a long-term target of 40% of the workforce being Aboriginal. They also agree to revising employment targets each five years following an engagement period. The native title party and Aboriginal women will be particularly targeted for employment, and the State must ensure, where practicable, that their workplace is conducive to Aboriginal employees, and will not treat irrelevant criminal records as an impediment to employment;
3. Woodside aims to have 300 Aboriginal people employed during the construction phase, and 15% Aboriginal workforce by the end of the first five years of operations. Like the State, it also commits to ensuring a workforce conducive to Aboriginal people, including

[9] Cl.18 *PPA*
[10] Cl.28, *PPA*

by providing training and ignoring irrelevant criminal convictions, providing Aboriginal women with specific opportunities and by publically reporting its progress towards its targets.[11]

The agreements do not include concrete employment targets or a specification that Aboriginal employees will be preferred over others where they are capable of becoming suitably qualified. Nevertheless, their provisions relating to employment and training are substantial given the inclusion of aspirational employment targets, cross cultural awareness programs (including introducing Aboriginal employees to company culture), and public reporting requirements on targets and training programs.

*Business Development*

The business development provisions of the agreements make both financial commitments, as well as making contractual opportunities available to traditional owners.

The financial commitments are:

1. The State to pay $20 million to Regional Economic Development Fund for business development and employment and training.[12]
2. Woodside to pay $1.4 million per year for ten years, then $400,000 per year until completion.

Potential contractual opportunities contained in the agreements are:

1. Woodside to make available guaranteed contracting opportunities on commercial terms worth $5 million per year throughout the project, which, if not met within five years, will be the subject of a review by Woodside and the native title party;
2. That the construction of accommodation will be conducted by a joint venture that includes a company 100% owned by the native title party;
3. The native title party will have the first opportunity to bid for a gravel removal business, for which Woodside will provide business development training;
4. All Aboriginal business associated with the precinct will be the subject of reporting; [13]
5. The State to 'endeavour' to provide contracts to Aboriginal businesses, in accordance with normal government procedures and on market terms.[14]

[11] Schs. 9, 12 and 14 *PPA.*
[12] Cl.6 *RBA*
[13] Cl.16 *PPA*

These provisions rate a 4 (out of a possible 5), because of the business development training, joint venture opportunities, and guaranteed contracting opportunities. They would rate higher if they contained a general preference for Aboriginal businesses and did not require contracts to be on market terms.

### *(f) Aboriginal Consent and Support*

This requires an assessment of what the agreements require of the Aboriginal parties in terms of consent and support for the development. O'Faircheallaigh points out that some projects may have extensive provisions in agreements relating to Aboriginal consent for the project when, in reality, the community do not support the development but feel they had little choice but to consent. This criteria requires weighing up of the benefits the agreement offers with the consent and support required of the Aboriginal party.

The Agreements require the native title party to provide all relevant consents as required by the *Native Title Act*. However this consent is not unqualified, particularly in relation to environmental issues that may arise issues, as described above. These provisions therefore rate a 3. This is at the lower end of this scale (1 being for basic consents, 7 being for unqualified support), particularly when weighed against the magnitude of agreement benefits.

### *(g) Implementation*

O'Faircheallaigh notes that the implementation of an agreement hinges on a range of factors, some of which may not relate to agreement content. Nevertheless, agreements may contain stipulations that aid the implementation of an agreement. These include employing people specifically to oversee implementation of the agreement and ensuring that Aboriginal groups have capacity to implement aspects of the agreement.

The Browse Agreements create two bodies – Waardi Ltd (the regional body) and Aarnja Ltd (the traditional owner body) — to oversee the implementation of benefits. Waardi Ltd is given certain oversight powers over the performance of the RBA.[15] The Agreements also stipulate that Woodside employ an implementation manager. This criteria does not require a numerical assessment, however it is clear that the agreements contain fairly extensive provisions relating to implementation.

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[14] Sch. 13 *PPA*
[15] Cl.19 *RBA*