Development, governance and Indigenous people: foregrounding the LNG precinct case in the Kimberley

Deborah Ruiz Wall

Institute for Culture and Society

University of Western Sydney

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Dedication

For David Augustus, Andrei Immanöel, Hala Sofia, and the late David Andrew de Bérgny Wall
Acknowledgments

My thanks go to my supervisors, Professor Tim Rowse and Dr George Morgan. I would also like to thank Professor Ien Ang, Dr Anna Shnukal, Dr Louise Fitzgerald, Dr Nicki Saroca, Dr Caitlin de Bérigny, Sarah Walls, Elizabeth Makin, Elaine Telford, members of the Women’s Reconciliation Network, my editor, Dr Guenter Plum, and my late husband, David Andrew de Bérigny Wall who, in different ways, have given me their support.
Author’s Authentication

I hereby declare that this thesis has not been submitted in the past in substance for any degree, that it is the result of my own independent research, and that all authorities and sources consulted are acknowledged in the Bibliography.
Glossary

Aboriginal Lands Trust (Western Australia)
The Aboriginal Lands Trust (ALT) was established by the Western Australian Aboriginal Affairs Planning Authority Act 1972 (WA) (AAPA Act). The functions of the ALT (s. 23 AAPA Act) are primarily to acquire and hold land and to use and manage that land for the benefit of persons of Aboriginal descent [Agreement, treaties and negotiated settlements project (ATNS) glossary of terms].

Caring for Country
An Aboriginal term to describe the protection and management of cultural and natural resources. Caring for Country comes with cultural responsibilities and rights (Griffiths & Kinnane 2010, p. iii).

Customary economy
The customary economy refers to a range of productive activities that occur outside the market and that are based on cultural continuities: hunting, gathering and fishing, land and habitat management, species management and the maintenance of biodiversity (Altman 2001b, p. 5).

Future Act Agreement
An agreement made under the future act provisions of the Native Title Act 1993 (Cth) about a ‘future act’ (a proposed activity or development that may affect native title) which requires an agreement with the native title parties in order for the performance of the proposed activity to be valid [Agreement, treaties and negotiated settlements project (ATNS) glossary of terms].

Governance
Governance refers to the evolving processes, relationships, institutions and structures by which a group of people, community or society organise themselves collectively to achieve the things that matter to them (Hunt & Smith 2008).

Governmentality
Michel Foucault’s notion of ‘governmentality’ employs ‘mechanisms of “policing” societies by which a population becomes subject to bureaucratic regimes and modes of discipline’ (Barker 2008).

Heritage
Aboriginal and Torres Strait Islander heritage is an important part of Australian heritage. Evidence of the occupation of Australia by Aboriginal and Torres Strait Islander people dates back more than 60,000 years. As well as historically important, Indigenous heritage is of continuing significance, creating and maintaining continuous links with the people and the land. Places that hold great meaning and significance to Indigenous people include: places associated with Dreaming stories depicting the laws of the land and how people should behave; places that are associated with their spirituality;
places where other cultures came into contact with Indigenous people; places that are significant for more contemporary uses. (Department of the environment, n.d.).

*Heritage Protection Agreement*

The Heritage Protection Agreement (the Agreement) is a template agreement for use in the south western region of Western Australia for which the South West Aboriginal Land and Sea Council Aboriginal Corporation (the Corporation) is recognised as the Native Title Representative Body under s. 203AD of the NTA. The Agreement is intended to be used where a mining company has applied for the grant of a mining tenement in relation to land over which a native title claim has been made ([Agreement, treaties and negotiated settlements project (ATNS), heritage protection agreement]).

*Indigenous Land Use Agreement*

A land use agreement is made between two or more parties, where a party with rights in land grants permission for another party (who may also have rights in the same area of land) to use the land for a particular purpose, or in a particular way, in exchange for rights, goods or services. A party to an Indigenous Land Use Agreement (ILUA) may include one or more native title groups, governments or private enterprise. ILUA is a voluntary agreement about use and management of land and waters under the NTA (Department of Premier and cabinet, n.d.).

*Leases*

An agreement between parties allowing one party to have a temporary interest in property and to use the property in accordance with the agreement. Leases generally allow parties to use the land as if they are the owner ([Agreement, treaties and negotiated settlements project (ATNS) glossary of terms].

*Pastoral leases*

All existing pastoral leases in Western Australia were granted under the repealed Land Act 1933 and will expire on 30 June 2015. Leases cannot be extended, and encumbrances cannot be rolled over. All pastoral leases renewed on 1 July 2015 will be granted for the same term and on substantially the same conditions as the current pastoral leases (Department of Lands, pastoral lease renewals, Government of Western Australia).

*National Native Title Tribunal (NNTT)*

The independent body established by the Native Title Act 1993 (Cth) to make decisions, conduct inquiries, reviews and mediations, and assist various parties with native title applications, and Indigenous land use agreements. (‘ILUAs’) (National Native Title Tribunal, n.d., 'tribunal's role').

*Owner of land*

Under section 18 of the Aboriginal Heritage Act 1972, the expression, ‘the owner of any land’ includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the
Petroleum and Geothermal Energy Resources Act 1967, in relation to the land. (Western Australia Consolidated Acts, the Aboriginal Heritage Act, s. 18).

The term ‘owner of land’ must not be confused with the term, ‘traditional owner’. This term has come into common use following the passage of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) which established mechanisms through which Aboriginal people could claim unalienated Crown Land in the Northern Territory on the basis that they are the ‘traditional Aboriginal owners’ of the land (Edelman, D., 2009).

Native Title
Native title is a form of land title that recognises the unique ties some Aboriginal groups have to land. Australian law recognises that native title exists where Aboriginal people have maintained a traditional connection to their land and waters, since sovereignty, and where acts of government have not removed it. (Department of the Premier and cabinet, n.d.).

Native Title Claims
Native title claims are ‘native title determination applications’ filed by Aboriginal or Torres Strait Islanders (native title claimants) in the Federal Court of Australia. Each application is a Federal Court proceeding seeking a determination as to whether native title exists or not and if so in what form. In Western Australia, the combined area of registered and determined native title claims covers approximately eighty five percent of the State’s land mass, with some also covering inter-tidal zones and sea areas (Government of Western Australia, n.d. , a, 'Land approvals and native title unit').

Native Title Representative Body (NTRB)
A Native Title Representative Body (NTRB) is a body recognised under the Native Title Act 1993 (Cth) (NTA). An NTRB has the powers and functions set out in s. 203B of the NTA including to support Indigenous people and native title holders to make various applications under the NTA, including claimant, objection, future act and compensation applications; and to negotiate Indigenous Land Use Agreements on behalf of Indigenous parties. (Government of Western Australia, n.d. , b, 'Land approvals and native title unit').

Native Title Determination
Under s. 13 (3b) of NTA, a determination of native title constitutes ‘an order, judgment or other decision of a recognised State/Territory body that involves a determination of native title in relation to an area within the jurisdictional limits of the State or Territory’. (Native Title Act 1993).

Mining Leases and Licences
Exploration and mining titles in Western Australia are granted in accordance with the Mining Act 1978 (WA). The Department of Mines and Petroleum (DMP) administers this Act. Mineral exploration and mining activities are
administered under the Act for onshore areas, and for offshore areas to a limit of (nominally) three nautical miles from the coast. There are a number of types of tenement, including prospecting licences, exploration, retention and miscellaneous licences, and mining and general purpose leases. (Department of Mines and Petroleum, n.d. c, ‘Mineral title approval process’).

**Exploration Licences**
Exploration activities may include extraction of a relatively small quantity of material in order to test the quality of the resource. On 28 June 1991 a graticular boundary (or block) system was introduced for Exploration Licences. The minimum size of an Exploration Licence is one block, and the maximum size is 70 blocks, except in areas not designated as mineralised areas, where the maximum size is 200 blocks. (Department of Mines & Petroleum, n.d. a, ‘exploration licences’).

**Prospecting Licences**
A prospecting licence entitles a person to enter land to prospect for minerals and to undertake activities necessary for that purpose, such as drilling bores, digging trenches and pits, taking samples for testing and taking water. The maximum area for a prospecting licence is 200 hectares. Prospecting licences must be marked out unless otherwise specified. The term of a prospecting licence is four years, with the provision to extend for one further four year period (Department of Mines and Petroleum, n.d., b, ‘prospecting licences’).

**Retention Licences**
A retention licence is a ‘holding’ title for a mineral resource that has been identified but is not able to be further explored or mined. It may be granted in respect of the whole or any part of land within the boundaries of a primary tenement (ie prospecting licence, exploration licence or mining lease or combination of such tenements. The term of a retention licence cannot exceed five years and is renewable for further periods not exceeding five years. (Department of Mines and Petroleum, n.d., c, ‘retention licences’)

**Right to Negotiate**
The future acts regime in the NTA gives registered native title claimants and determined native title holders limited procedural rights, the strongest of which is the right to negotiate. (National Native Title Tribunal, n.d., c ‘negotiation’)

**Traditional owners**
Indigenous people with customary rights to land under a range of Australian land rights and native title laws (Altman & Kerins 2012, p. xv).

**Examples of forms of land tenure**
Unallocated Crown Land – Not subject to any interests other than native title
Aboriginal Lands Trust Estate (WA) – Remnant Aboriginal Reserve Land allocated for the use and benefit of Aboriginal people. Managed under the Land Administration Act 1997 (WA) and the AAPA Act 1972 (WA)

Pastoral Leases – Land allocated under a lease agreement for the purpose of grazing cattle with provisions for alternative activities subject to approval. Pastoral leases in WA are managed by the Pastoral Lands Board and the Department of Planning and Infrastructure under the Land Administration Act 1997 (WA).

Heritage sites – is managed by ACMC under the Aboriginal Heritage Act 1972 (WA). The Aboriginal Heritage Act provides for the protection of sites of significance. The State of WA is deemed to be responsible for material culture. The Department of Indigenous Affairs manages access to sites.

List of Litigation cited

Nulyarimma v Thompson — [1999] FCA 1192
Rita Augustine v State of Western Australia [2013] FCA 338
Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809
Roe v Director General, Dept of Environment and Conservation (WA) [2011] WASCA 57
Roe v The Director General, Department of Environment and Conservation for the State of Western Australia [No 2] [2011] WASCA 58
Rubibi community v State of Western Australia (No 6) State of Western Australia [No 2] [2011] WASCA 58
The Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307

List of Legislative Acts cited

Aboriginal Affairs Planning Authority Act 1972 (WA)
Aborigines Act of 1905 (WA)
Aboriginal Councils and Association Act 1976 Cth
Aboriginal Heritage Act 1972 (WA)
Aboriginal Land Fund Act 1974 Cth
Aboriginal Land Rights Act (ALRA) 1976 (NT)
Aboriginal Offenders Act 1883
Aboriginals Protection and Restriction of the Sale of Opium Act 1897
Diamond (Ashton Joint Venture) Agreement Act 1981(WA)
Browse Land Agreement Act 2012 (WA)
Commonwealth Franchise Act 1902
Corporations (Aboriginal and Torres Strait Islander) Act 2006 Cth
Environmental Protection Act 1986 (WA)
Environment Protection and Biodiversity Conservation Act 1999 Cth
Justices Act 1902 (WA)
Invalid and Old Age Pension Act 1908 Cth
Labourers’ Registry Act 1884
Local Government Act 1995 (WA)
Mining Act 1978 (WA)
Museum Act 1969 (WA)
Native Aborigines Act 1936
Native Administration Act 1936
Natives (Citizenship Rights) Act 1944
Native Title Act 1993 Cth
Native Welfare Act 1963
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<th>Description</th>
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<td>ACF</td>
<td>Australia Conservation Foundation</td>
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<td>ACMC</td>
<td>Aboriginal Cultural Material Committee</td>
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<tr>
<td>ADM</td>
<td>Argyle Diamond Mines</td>
</tr>
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<td>AHA</td>
<td>Aboriginal Heritage Act 1972</td>
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<td>AHMS</td>
<td>Aboriginal Heritage Management System</td>
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<td>AIAS</td>
<td>Australian Institute of Aboriginal Studies</td>
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<td>AJV</td>
<td>Ashton Joint Venture</td>
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<td>Aboriginal Land Fund Commission</td>
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<td>Aboriginal Legal Service (WA)</td>
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<td>ALT</td>
<td>Aboriginal Land Trust</td>
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<td>AMAX</td>
<td>American Metals Climax</td>
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<td>APPEA</td>
<td>Australian Petroleum Producers and Explorers Association</td>
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<td>Aboriginal Torres Strait Islander Commission</td>
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<td>AWU</td>
<td>Australian Workers Union</td>
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<td>BDO</td>
<td>Business Development Organisation</td>
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<tr>
<td>COAG</td>
<td>Council of Australian Government</td>
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<tr>
<td>CRA</td>
<td>Conzinc Riotinto of Australia Ltd</td>
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<tr>
<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>DAP</td>
<td>Development Assessment Panel</td>
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<td>DEC</td>
<td>Department of Environment and Conservation</td>
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<td>DEWHA</td>
<td>Department of the Environment, Water, Heritage and the Arts</td>
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<td>Environmental Defender's Office</td>
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<td>FEED</td>
<td>Front End Engineering and Design</td>
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<td>Final Investment Decision</td>
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<td>Fly-in-fly out workers</td>
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<td>Floating Liquefied Natural Gas</td>
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<td>FPIC</td>
<td>Free Prior and Informed Consent</td>
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<td>GJJ</td>
<td>Goolarabooloo and Jabirr Jabirr</td>
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<td>GNA</td>
<td>Good Neighbour Agreement</td>
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<td>GNP</td>
<td>Good Neighbour Programme</td>
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<td>JV</td>
<td>Joint Venture</td>
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<td>Local Government Association</td>
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<td>Liquefied Natural Gas</td>
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<td>LSMUs</td>
<td>Land and Sea management Units</td>
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<tr>
<td>Mtpa</td>
<td>million tonnes per annum</td>
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<td>MPA</td>
<td>Management Plant Agreement</td>
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<td>NAEA</td>
<td>Northern Australia Environment Alliance</td>
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<td>NAILSMMA</td>
<td>Northern Australian Indigenous Land and Sea Management Alliance</td>
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<td>NATSIISS</td>
<td>National Aboriginal and Torres Strait Islander Social Survey</td>
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<td>NPM</td>
<td>New Public Management</td>
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<td>Acronym</td>
<td>Description</td>
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<tr>
<td>NDT</td>
<td>Northern Development Taskforce</td>
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<td>NRM</td>
<td>Natural resource management</td>
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<td>PES</td>
<td>Payment for Ecosystem Services</td>
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<td>PPA</td>
<td>Precinct Project Agreement</td>
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<td>Right to Negotiate</td>
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<td>SAR</td>
<td>Strategic Assessment Report</td>
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<td>WAI</td>
<td>Western Agricultural Industries'</td>
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<td>WAPC</td>
<td>Western Australian Planning Commission</td>
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Abstract

After four and a half years evaluating the viability of the establishment of the Browse LNG Precinct onshore at James Price Point in the Kimberley, Woodside and its Joint Venture Partners decided to abandon the project in April 2013. How Indigenous people in the Kimberley made their voices manifest in resource development discussions through their own internal governance system and through their interactions with the institutions of Government and transnational companies is the subject of my thesis. The Browse LNG Precinct proposal was contentious and caused deep divisions within family members, friends and employers in Broome. It became the site of a struggle for recognition of the many voices representing the competing interests of economic development, Aboriginal cultural heritage protection, and environmental conservation.

My particular focus is the notion of development by Indigenous people and by the Western Australian government particularly when Traditional Law intersects with Australian mainstream law over land held in common. I examine how notions of development and related values were manifested in practice at mining sites that overlapped with Indigenous sacred sites at Noonkanbah, Argyle and James Price Point. I have found that essentially, the Indigenous people’s voices are represented through the recognition space of state institutional apparatus. The design and operation of legislative acts enabled a system of control over how Aboriginal interests are to be governed within the framework of Australia's governance of mineral and natural resources.

Co-existence between Aboriginal and Western cosmology constitutes dynamic processes and the interplay for mutual recognition. In practice, the dominant system of control filters the Indigenous voice by its translation within the institutional practices of the Australian state and legal system.
Introduction

i Statement of thesis purpose

My thesis examines how Indigenous voices were represented in the governance of the Liquefied Natural Gas (LNG) Precinct development proposal in the Kimberley during 2008–2013. The focus of investigation in this case study is on how specifically Indigenous views were represented during the evaluation period of the LNG development proposal. The rationale for this research inquiry is to develop an understanding of the challenges Indigenous people experience in their efforts to determine their own future and obtain self-sufficiency and independence within the prevailing social and economic system.

How Indigenous people make their voices manifest in resource development discussions through their own internal governance system and through their interactions with the institutions of Government and transnational companies, is considered in my investigation.

During the period taken to evaluate the viability of the LNG precinct proposal (2008–April 2013), the key interest groups that emerged were: the Western Australian government; mining companies headed by Operator, Woodside Energy Ltd and its Joint Venture Partners; the native title claimants, Goolarabooloo and Jabirr Jabirr who were involved in negotiation with the miners; the Kimberley Land Council (KLC) which was the Native Title Representative Body (NTRB); the Federal government engaged in environmental approvals; and various conservation and resident advocacy groups in the Kimberley.

Indigenous voices were part of the interactions between all these interest groups until the Final Investment Decision (FID) was made in April 2013 to abandon the project.
ii Gaps in research

How Indigenous people of diverse backgrounds negotiate the paradoxical relationship between newness and conservation, cross-cultural adaptation and identity maintenance is rarely observed in social science literature (Kim 2001, pp. 67–68). Global demand for energy sources, recently from China and India (Jacobs 2011, p. 17, p. 20) put the Commonwealth and Western Australian (WA) governments’ position in natural alignment with resource developers whose activities had an impact on a society around Broome. This society included Indigenous people who still have a strong link to their tradition and heritage. Did the corporate and State development narrative begin to influence Indigenous thinking and acting, and what were the conditions that made this narrative so appealing? This question was worth exploring if indeed in the process of interactions between Indigenous communities and resource developers over the LNG Precinct project, it was possible that a multifaceted knowledge transmission occurred in ways that had not yet been documented. In this case study, the focus of documentation was the representation of Indigenous people from the grassroots up to the institutional level.

iii Agency, structure, hegemony and governance: a theoretical and empirical approach

I argue that the Aboriginal people’s interests in relation to the Browse LNG Precinct proposal at James price Point in the Kimberley from 2008-2013 were represented through the “recognition space” (Martin et. al. 2001, p.4) provided by the state institutional apparatuses of governance.

The recognition space refers to “the means by which the Australian legal system recognizes native title under Section 223 of the Native Title Act 1993 (Cth) (ibid). This use of this space has the potential to include or exclude Aboriginal participation depending on how, under their customs and traditions, Aboriginal landowners’ relation to lands and waters is translated into legal processes. My thesis seeks to identify the inclusion or exclusion of Aboriginal interests through a theoretical and empirical analysis of how
institutional processes operate.

The theoretical framework I use deals with the notions of ‘agency and structure’, ‘hegemony’, and distinctions of the functions between government, governance and governmentality in the context of resource development at James Price Point. First, I examine the functional use of these terms in relation to my inquiry into Aboriginal representation; second, I provide contextual examples drawn from my empirical work at James Price Point.

The possibility of the emergence of Aboriginal agency requires a structural and contextual account that explains the possible causes of events and outcomes. Agency is often expressed in terms of choice or the ability to choose one’s destiny and enhance one’s wellbeing. The performance of Aboriginal agency needs to be contextualized within underlying social conditions or structure. Structure is the setting that underpins the material conditions by which a range of actions may be performed (Joseph 2008, p. 69). The contested issue at James Price Point involves stakeholders with competing land use interests between industrial resource development, preservation of heritage sites, and environmental protection. The stakeholders consist of resource developers, the state, and Aboriginal landowners.

Aboriginal voice needs a platform for its performance to be heard and recognized. Hence, my research inquiry seeks to find the ‘recognition space’ and the processes by which institutional processes enable or constrain the representation or performance of varying Aboriginal interests. The state has a strong voice. The state, as Gramsci conceives it, is a means by which the dominant or ruling classes could pursue their hegemonic project (cited in Carnoy 1984, p. 97). Hegemony implies the process by which a dominant class exerts its control over another social group. Gramsci’s notion of hegemony mostly indicates the production of ‘generalized meanings’ and ‘spontaneous consent’ to the prevailing arrangement of social relations under
the cultural leadership of the dominant classes (Ang 1996). The positioning of Aboriginal interests lies within the context of the prevailing arrangement of social relations, and Aboriginal agency has to deal with the structure of power and the political agency that guards its own interests. Hegemonic social practice would strive to employ strategies that would secure consent from those affected by mining activity. Hegemony, a necessary feature of all societies, has a structural and agential aspect. The state’s social practice employs both these aspects of structure and agency, which provide the conditions of possibility for the emergence of the Aboriginal voice. Hence, the state is positioned as a hegemonic political agency mobilizing institutional state apparatuses within a structure. What provides agents with the powers and capabilities that enable them to act in various ways is ‘structure’. Giddens’ structuration theory provides a way to recognise the rules and resources embedded in social structure that individuals could use through their agency as a means of reproducing structure. Structure has a dual function with the capacity to constrain and enable agency (Barker 2004, p. 191). How structure operates can be linked to the notions of government, governance and governmentality (discussed below).

The Aboriginal community, affected by the land use proposal at James Price Point, needs to deal with the structure that confronts them and understand the prevailing arrangement of social relations. The Aboriginal people’s positioning within that structure enables them to have a voice and to represent their interest. The notion of ‘government’ is often associated with jurisdiction of control over people in a political community within a legal framework (Sterritt 2002). Government is equipped with the tools of control — institutional apparatuses and techniques — that give it access to power (see Foucault 1980, p. 119, p. 136) enabling the recognition of voices or social relationships within its domain. The notion of ‘governance’ focuses on the dynamic processes that apply to the social relations between groups. Groups of people, community or society organize themselves collectively to achieve the things that matter to them through evolving processes, relationships, institutions and structures (Hunt & Smith 2008, p. 9).
Governance involves the social practices of all contenders over a stake — for example, the contested land at James Price Point. The outcome of social practices will determine which political agency will have the final say on land use, and which of the contending interests will ultimately be upheld. The processes of governance are fluid and the outcome unpredictable. The focus of ‘governmentality’ is on the regulation imposed throughout the social order so that a population becomes “subject to bureaucratic regimes and modes of discipline” (Barker 2004, p. 58). The notion of governmentality could easily be associated with state institutional apparatuses that employ regulation and legislation to maintain the social order. In the context of governing and managing resource development, heritage and the environment, the state has created legislative tools such as the Mining Act 1978 (WA), the Aboriginal Heritage Act 1972 (WA), the Environmental Protection Act 1986 (WA), the Environmental Protection and Biodiversity Conservation Act 1999 (Cth), and the Native Title Act 1993 (Cth) — legislative acts that have relevance to James Price Point.

I mentioned previously that the positioning of Aboriginal interests lies within the context of the prevailing arrangement of social relations. The network of social relations at James Price Point involves the interests of transnational resource developers (Woodside and its Joint Venture Partners — BHP Billiton, Shell, BP, Chevron), the state, the Kimberley Land Council (the Native Title Representative Body), the Native Title Claim Group (Goolarabooloo and Jabirr Jabirr), other traditional owners and residents, and environmental organisations. The hegemonic strength of resource developers is derived from their positioning in the social structure that employs ‘capital as a social relation’ in its transaction with the state and Aboriginal landowners. In order to have access to land and resource, the political agency of the resource developers have to obtain consent both from the state that provides land leases and licences and from Aboriginal landowners who by law have been provided with certain rights concerning their traditional land. The articulation of capital as a social relation in the James Price Point project depends to some extent on the power of the state to “define, shape and be
part of a regime of accumulation” (Joseph 2007, p. 82). In practical terms, capital investments for resource development are a source of revenue for the state that enables it to fund its own projects and maintain the social order. In this sense, there appears to be a coalition of interests between the hegemonic political players around capital as a social relation. Hegemony, according to Joseph, constitutes two elements: one is agential, represented by the activities of agents; and the other, structural, related to the underlying social structures (ibid, p. 77).

My research inquiry utilizes both elements. The activities or social practices of hegemonic political agents such as the state and resource developers would demonstrate precisely what they aimed to achieve, independent of their discursive strategies or rhetoric for political purposes. The structural element that underlies social structures provides a deeper source of analysis. For example, an analysis of the actions of hegemonic agents based on ‘capital as a social relation’ driven by the principle of being part of ‘a regime of accumulation’ allows us to see which projects tend to be privileged and therefore, which interest groups are likely to be excluded from obtaining representation. Both hegemonic agents such as resource developers and the state could be seen as acting on the basis of being part of the regime of capital accumulation. The significance of analyzing the behaviour of political actors based on the underpinning structures of relations is that we are able to identify what social or economic projects are given emphasis or, what political policy is given preference. In terms of James Price Point, the contending policy issues, broadly put, are resource development, heritage conservation, and environmental protection where the legitimacy of the Aboriginal voice is derived from the ‘recognition space’ of native title rights.

Another point to consider concerning agency and structure is globalization. We see that the operation of resource developers activity transcends the national boundaries of the state so decisions about their investments are made based on criteria that are independent of national interests. In terms of global capital, the old notion of centre and periphery where the thinking
behind the geography of economic power structure contextualized from the centre (developed nations) to the periphery (third world countries) has been replaced by new thinking based on a “strategic geography of globalization” partly embedded in national territories (Held & McGrew 2007, p. 83). Contrary to the idea that globalization diminishes the regulatory authority of the state, the model of the new geography presents the hegemonic state as having more options “to participate in governing the global economy” (Joseph 2007, p. 83). Neo-Gramscists assert the relative autonomy of institutions and ideas from underlying economic configurations. Depending on the particular case, the social practices of hegemonic agents under examination, would show the weight of influence or power between global capital and state control that would have implications on the viability of proposed resource development projects.

My inquiry about James Price Point began with a review of settler-Aboriginal relationships based on state laws and policies that influenced the representation of Aboriginal voice (see Chapter 1). My approach in seeking to understand the structural ground of settler-Aboriginal relationship is to review ‘social practices’ from the time when the Swan River colony (now Western Australia) was incorporated into the British Empire in 1829. The governance of the Kimberley region was implemented through opening up the region through the development of the sheep, cattle and pearling industries. What made social and economic development possible were the material conditions of land, labour and capital — they were the underlying material conditions of the social structure during the pastoral colonial era. The constitution of the networks of social relations was grounded on these underlying material conditions. Given the frontier conditions on which the state operated, strategies were designed by the state to benefit the hegemonic projects of social groups. The state’s project was to open up frontier lands to economic growth and social development. The progress of regional development drew the interest of investors in servicing both domestic and overseas markets in the sheep, cattle and pearling industries. Chinese and other non-Europeans were in competition with British subjects
in relation to the employment of Aborigines. The colonial government’s strategy was through legislation — the passage of the Imported Labourers’ Registry Act 1884 (Willard 1923, p. 67; Jupp 2001, p. 203; Hornby 1884) purportedly to improve the conditions of indentured workers but the real aim was to prevent aliens such as Chinese and other non Europeans from obtaining a pearl shelling licence that would have enabled them to employ Aborigines. What this narrative shows is the dynamic processes involved in ‘capital as a social relation’ that has implications on the positioning of Aboriginal agency within the social structure in regard to their role as workers.

Another state practice was the introduction of the WA 1905 Aborigines Act aimed at expanding and developing the pastoral industry without the government incurring the cost of rationing ‘non-workers on pastoral stations’ (Jebb 2002, p. 77). Pastoral employers provided their Aboriginal workers sufficient rations of food, clothing and medicine. The state’s preoccupation in opening up frontier land was pastoral development and the social relations that it needed to manage revolved around pastoral stations owners and Aboriginal workers. Underpinning the structure of state policy decisions were the material conditions of capital, labour and land.

I now turn to another period in the late 1970s and 1980s involving state social practices and Aboriginal interests over mining projects in the Kimberley at Noonkanbah and Argyle Diamond Mines (see Chapter 2). My purpose is to see the impact of state policy implementation on Aboriginal agency and identify state positioning based on social practices that were underpinned by conditions relating to capital accumulation.

Before resource developers expressed interest in the potential existence of minerals in the Kimberley, the Commonwealth government’s assimilation or integration regulatory policy enabled the Yungngora people to become leaseholders of a pastoral station at Noonkanbah. Once the potential for mineral exploration became apparent, the Western Australian government
stepped in to block the Yungngora people’s attempt at stopping resource companies from gaining access to their land to begin oil exploration. The State government shifted its focus from the regulatory power over the leaseholders to the management of the state’s mineral resources that would secure for the state new forms of accumulation. The state’s political action is symptomatic of the emerging dominance of resource capitalism over pastoralism and agriculture, the effects of which have been apparent in local struggles over resource development right across Australia in recent history.

When the state amended the Aboriginal Heritage Act 1972, the amendment weakened the mechanisms by which it had previously been possible to protect heritage. Consequently, the levers available to traditional owners were diminished. We see the power dynamics of political agency in practice between the Yungngora people (represented by proxy by the Museum Trustees and the Aboriginal Legal Service) whose interest was to obtain protection of their land from mining intrusion, and the state (represented by the WA Minister for Mines and the Minister for Cultural Affairs). The state had the power to exercise strategic control through implementing or amending its various statutory legislation in relation to heritage, mining and environmental protection (see Chapters 2-4 and Chapter 6).

The notion of governance is illustrated at Argyle Diamond Mines where hegemonic social practice strives to employ strategies that would secure consent from those affected by mining activity. CRA initiated negotiation arrangements with family groups and began a measure of incorporating Aboriginal interests in mining projects. At Argyle, the WA government legislated the company’s agreement with the Indigenous landowners as an agreement between contracting parties (Aboriginal traditional owners and the mining company). The Kimberley Land Council (KLC) brokered the negotiation between the mining company and the traditional owners. The KLC’s social practice marked the beginning of the regime of agreement making with mining companies that resulted in the provision of social benefits to the local Aboriginal people. From a structural perspective, we see
the beginning of the incorporation of Aboriginal polity into ‘capital as a social relation’ and capital involving Aboriginal organisations that will eventually become part of a ‘regime of accumulation’.

The proposed LNG Precinct project at James Price Point in the Kimberley illustrates the notion that “social structures and agents are mutually co-determined” — a “fundamental insight of the structure-agency debate” (Held & McGrew 2007, p. 128). The project is represented by a mutuality of interests between the resource developers (Woodside & Joint Venture Partners), the state, and the Kimberley Land Council in their desire to obtain potential material benefits that would come from the establishment of the gas hub onshore. The social practices of these political actors were designed to establish the gas facility. However, political tension and instability are typical experiences in communities where hegemonic projects are being carried out. Hegemony will not necessarily secure the cohesion of social formation. Even if the state had tightly designed strategies to secure the conditions for the accumulation of capital, there would be no guarantee of an institutional fix. Even capital interests that appear to be aligned were actually fragmented, and so was the Aboriginal voice. Some Aboriginal groups valued the significance of their heritage sites more than the potential benefits that they would receive from the industrial development project that they saw was likely to damage sites that they regard as sacred.

I will show why, despite the alignment of interests between the state and the resource developers, the establishment of the project had not been successful. I will then conclude with discussing the terms on which Aboriginal people exercise limited agency in relation to the James Price Point project. To argue for the dominance of the ‘logic of capital’ is an oversimplification (Gramsci cited in Joseph, p. 73) for this position fails to consider the complexity and interdependence of elements that contribute to fragmentation (Held & McGrew 2007, p. 129). Analysis of divergent social practices is best grounded in the “historically contingent relations between capital, labor, and the state” or, the “complex coming together of underlying
structural processes and conscious agential projects” (Jessop cited in Joseph, p. 78).

While on the surface, Woodside Energy Ltd (the proposed foundation proponent for the Browse LNG Precinct) and its Joint Venture Partners would logically be assumed to have shared interests as they were investment partners after all, the fact was, each mining company, externally, held stake that competed with each other’s investments in similar gas projects (Murphy 2009). Furthermore, during the evaluation period for the James Price Point facility, some of the partners were canvassing alternative methods of processing Browse gas other than at James Price Point. Shell, for example, favoured the Floating Liquefied Natural Gas (FLNG) method offshore rather than the onshore facility preferred by the state and Woodside.

Aware of this ambivalence, the state acted to exert its power to put pressure on the Joint Venture Partners to stay in line with the James Price Point investment proposal. Again we see the interaction between the resource developers and the state based on ‘capital as a social relation’ driven by the principle of being part of a ‘regime of accumulation’. Both the Federal government and the State government stood to gain enormous revenue from the proposed establishment of the James Price Point facility. The dynamic processes of governance show political agency pursuing strategies to achieve individual purposes. The state’s power vis-à-vis the resource industry is derived from its regulatory authority to issue mining leases such as exploration, development and retention licences.

On 4 December 2009, the state (represented by the former Federal Minister for Resources, Mr Martin Ferguson) issued a directive addressed to Woodside’s Browse Joint Venture Partners that they develop a plan to produce LNG within 120 days as a condition the state is imposing for extending their retention leases for three years (News.com. 1 September 2011). Chevron, one of the partners told the US Consul General in Perth that the government was putting pressure on the Browse partners to “use existing
Woodside infrastructure in the Northwest Shelf and to develop the new James Price Point complex” (Newscom. 1 September 2011). In short, the intention behind this directive was “to force Browse partners to choose Woodside’s preferred development pathway” (Burton-Bradley 2011).

A Marxist political economy approach would regard an alignment of social force such as the alignment of interests between transnational capital and the local economy simply as a ‘hegemonic unified entity’ (Larner 2003, p. 510 cited in Howlett et. al. 2011, p. 303). This position is rigidly deterministic, tending to objectify structure as if structure is prior to human action. Rather than confine an understanding of structure to a perceived ‘alliance of capital interests’, Joseph maintains that looking at ‘capital as a social relation’ enables us to see the “emergence of a globally integrated economy” and the relationship of changes in forms of regulation and accumulation to hegemonic projects (Joseph, p. 82). Thus the political tension between resource developers and the state triggered by the state’s directive could have had unintended consequences. The final investment decision of the Joint Venture Partners did not support the establishment of the facility. There was uncertainty amongst the partners about the soundness of the capital expenditure required for commercializing the James Price Point option (Murphy 2009; Burrell 20123; Collins 2012). The conditions for accumulation were not fully conducive to commitment to investment at James Price Point. Part of the reasons is that the expected pre-orders for most of the proposed gas production could not be guaranteed. We see in this narrative a demonstration of the fragmented and uneven nature of globalization as well as an example of the workings of capital as a social relation. Joseph argues that the realignment of social forces would not directly bring about structural change in the economy; rather, it could be hegemonic instability that could be causing structural change.

I now conclude with a discussion of the terms on which Aboriginal people exercise limited agency in relation to the James Price Point project. Aboriginal representation is positioned within the dynamic processes of
social practices of political agency underpinned by an analysis of ‘capital as a social relation’. The inclusion of Aboriginal voice in mining projects was a byproduct of historical trends, in particular, the resource industry’s acceptance of its corporate social responsibilities that led to the use of social licence as the industry’s response to opposition to mining activities. The idea was that mining companies are not just reliant on government permission to conduct their business but that they recognize that there must be a level of acceptance of approval by local communities in relation to their operations.

The publication of the report, *Breaking New Ground: Mining, Minerals and Sustainable Development* (MMSD) in 2002 by the International Institute of Environment and Development, was considered a landmark report that embraced the idea of social licence (Owen & Kemp 2012). The resource industry also acknowledges that they need to consider concerns about sustainable development in relation to mining operations (Owen & Kemp 2012). Another consideration was the need for mining companies to respect Indigenous people’s rights to be involved in economic decision-making that affects their land — a principle stressed in the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Given these historical trends, mining companies can no longer ignore the need to involve Indigenous people in decision-making in mining transactions that affect their traditional land.

Given the broad global recognition of these principles, the state’s role is to provide the space for consent between the local Aboriginal people and the resource industry. The state’s provision for Aboriginal consent is through the implementation of the Indigenous Land Use Agreement (ILUA). This provision is drawn from the Native title Act 1993 that was passed after the High Court decision on Mabo that recognized Aboriginal land ownership prior to European settlement.

In practice, the state’s policy of social inclusion of Aboriginal interests is
implemented in such a way that the state's own interests (as part of the regime of accumulation) are not compromised. From the perspective of governmentality, the state had two options to enable the establishment of the gas facility, which is its primary object. One option was to facilitate Aboriginal landowners to engage in negotiation with Woodside that would provide them benefits and compensation in exchange for the surrender of their native title rights. The other option was for the state to compulsorily acquire the site. Two pieces of legislation are relevant tools of control to carry out the state's purpose. They are the Land Administration Act 1997 (WA) and the Native Title Act 1993 (Cth). Section 152 of the Land Administration Act 1997 (WA) allows for the extinguishment of native title “if a ‘future act’ could take place on land subject to ordinary freehold title” and “if State and Commonwealth law allows for the protection of sites which are of potential Aboriginal cultural significance” (Mortimer 2010). As traditional owners, Goolarabooloo and Jabirr Jabirr's native title claim was registered, though not yet determined in the Federal Court, they were entitled to the “right to negotiate” [Sections 24AA (5) & 25-26 of the Native Title Act 1993 (Cth)] to validate the future act (the establishment of the gas facility). If, however, agreement could not be reached (in negotiation with Woodside), the National Native title Tribunal or the relevant minister would have the final say to permit the future act (Mortimer 2010). Although Aboriginal voice is given some agency in resource development projects, the representation of their interests is quite restricted.

I now show the social practices at James Price Point in relation to the representation of Aboriginal agency. An analysis of social practices provides us some understanding of “what shapes, guides, and influences the intersubjective behaviour of people”. The KLC complained that during the consultation period, it was not given adequate information regarding details of the project so their ability to negotiate fair and reasonable agreements was constrained (Department of State Development, Browse Strategic Assessment Report, Appendix E-2). The principle of social inclusion requires that resource developers make sufficient information available to affected
groups and ensure that the recipients of information have the capacity to identify substantive content and understand its implications. Inadequate information from industry and from the state about the project was not in conformity with the UNDRIP principle mentioned above. Provision of adequate information is a measure of the resource industry's accountability to stakeholders. The KLC's second complaint was the lack of time and resources provided to undertake a thorough social impact study, undermining the quality of their report about the impact of the development project on the community.

The complaint referring to the inadequacy of vital information was the same issue raised by Goolarabooloo with the KLC, the Native Title Representative Body that has the task to represent the native title claimants’ intentions. Joseph Roe, Goolarabooloo senior leader, claimed that the KLC misled the traditional owners with insufficient information. He said that they were unaware that a vote would be held in April 2009 giving an in-principle support for the gas project. Consequently, many Goolarabooloo and Jabirr Jabirr traditional owners were not able to attend the meeting and so “different tribes, namely: Goolarabooloo, Jabirr Jabirr, Djabera Djabera, and Nyul Nyul, were not given voting rights” (Pers. comm 22 April 2009). Roe subsequently took legal action against the KLC, claiming that they were misrepresented by the KLC.

The vote undertaken in April 2009 gave in-principle support for the establishment of the gas facility. I asked the current KLC CEO years later (after the mining companies abandoned the James Price Point project) about that meeting whether consensus was the customary decision making method that traditional owners under Kimberley law and culture normally use. His response was that the KLC's role is to find a mechanism for decision-making in relation to governance processes (Pers. Comm., 15 September 2014). Methods other than consensus are used, he said, depending on the level of decision-making and the mechanism required (Pers. Comm., 15 September 2014). The method of decision-making held at the April 2009 meeting was
According to Held & McGrew (2007, p. 130), the action of interest groups, in general, would be “embedded in and affected by the social institutions in which they act”. A constructivist approach to structuralism holds that “collective norms and understandings define the “basic rules of the game” in which they [political agents] find themselves in their interactions” (ibid) and so “actors try to figure out the appropriate rule in a given social situation.”

The structural and agential aspects of hegemony provided some agency for the KLC to have a voice in negotiation arrangements with the resource industry. The KLC’s support for the gas facility indicates that it too was part of the so-called regime of accumulation. The action of the state indicated that it was determined to establish the gas facility. Veto rights were not available to the traditional owners, only the ‘right to negotiate’ benefits and compensation with the proponents of the project (the state and Woodside). This right provided to Aboriginal native title claimants, conforms to the Native Title Act 1993, ensuring that the state’s action in relation to the resource project is legal. Other Aboriginal interests that are not supportive of the gas project experienced difficulty in having their voice heard. Indeed the emergence of political agency of Aboriginal people would need a structural and contextual account that would explain possible causes of events and outcomes, and it is social structure that provides agents with the possibility of acting in various ways based on the positioning of agency within the networks of social relations.

In effect, the institutional processes at play, imperfectly dealt with by political agency with contending interests, both enabled and constrained the representation of the Aboriginal voice at James Price Point.
Overview

In 1967, Woodside, an oil and gas corporation began exploring offshore waters for oil and gas in the Kimberley region of Western Australia. The reserves remained undeveloped due mainly to the isolated location of the gas fields. The gas fields in Brecknock, Calliance and Torosa known as Browse Basin located in the Indian Ocean, 425 km north of Broome (map 1.1) with estimated reserves at 31.4 trillion cubic feet (Tcf), attracted a consortium of investors. The companies with exploration leases for the Browse LNG gas fields were Woodside Energy Ltd and its Joint Venture Partners (JV) – BP, BHP Billiton, Chevron and Shell. The leases were obtained mainly from the Commonwealth government and partly from the WA government.

The Browse Basin off the West Kimberley coast was discovered to have significant reserves of hydrocarbons, especially gas deemed ready for commercialization. Woodside operates one of the main significant hydrocarbon accumulations discovered from exploration wells – the gas/condensate at Scott Reef/Brecknock area (Browse LNG-Brecknock, Company profile).
Based on figures released by the Australian Bureau of Statistics, WA's resources industries merchandise export earnings of A$102 billion in 2010 accounted for 44.2% of national merchandise export income. (Prospect, 2011, p. 2).

The WA and Commonwealth governments seized upon the idea of finding a suitable processing site to liquefy natural gas for the export market. They reached the common goal of drawing in private sector investment to develop the country's mineral resources. Their immediate aim in the governance of West Kimberley's mineral resources was the commercialization of the Browse Basin's natural gas reserves, bearing in mind that they needed an industrial development plan that did not only promote economic development but also ensured adherence to environmental and Indigenous heritage laws. The state's governance of the proposed establishment of the Browse LNG Precinct at James Price Point involved the application of particular laws such as the Native Title Act 1993 (Cth), the Environmental...
Protection Act 1986 (WA), and the Planning and Development Act 2005 (WA) (see Appendices H, I and J for the relevance of these laws to the James Price Point project).

Highlights of events in relation to the Browse LNG Precinct narrative are outlined in Table 1.1:

<table>
<thead>
<tr>
<th>Date</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>15 April 2009</td>
<td>The KLC facilitated a meeting of the native title party voted to enter into a Heads of Agreement (HOA) with the State government and Woodside.</td>
</tr>
<tr>
<td>21 April 2009</td>
<td>The native title party entered into a HOA with the WA State and Woodside.</td>
</tr>
<tr>
<td>14 May 2010</td>
<td>Native title claimants, Joseph Roe (Goolarabooloo) and Cyril Shaw (Jabirr Jabirr) took legal action against the KLC claiming misrepresentation of the intention of the native title party. (Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809).*</td>
</tr>
<tr>
<td>May 2011</td>
<td>The KLC facilitated the native title party's final vote accepting compensation from Woodside and the State Government in return for surrendering native title.</td>
</tr>
<tr>
<td>30 June 2011</td>
<td>The Browse LNG Precinct Agreements were signed between the State of Western Australia, the Goolarabooloo Jabirr Jabirr People and Woodside Petroleum Ltd. The KLC on behalf of the NTCG surrendered their native title claim when it signed three agreements with the WA State and Woodside. *</td>
</tr>
<tr>
<td>September 2010</td>
<td>The WA Government began the process of compulsory acquisition of the Walmadany-James Price Point site.</td>
</tr>
<tr>
<td>15 March 2011</td>
<td>Joseph Roe took legal action against the Department of Environment and Conservation (Roe v Director General, Dept of Environment and Conservation (WA) [2011] WASCA 57).*</td>
</tr>
<tr>
<td>15 March 2011</td>
<td>Joseph Roe took legal action against the Department of Environment and Conservation (Roe v Director General, Department of Environment and Conservation for the State of Western Australia [No 2] [2011]).</td>
</tr>
<tr>
<td>6 Dec 2011</td>
<td>Neil McKenzie (Jabirr Jabirr) and Phillip Roe (Goolarabooloo and older brother of Joseph Roe) took legal action against the Minister for Lands in regard to compulsory acquisition of the James Price Point site (McKenzie v Minister for Lands ([2011] WASC 335). They alleged that the Precinct notices were invalid. The Supreme Court ruled that the Precinct notices were invalid because they failed to describe precisely the area of land to be taken.</td>
</tr>
<tr>
<td>25 June 2012</td>
<td>The WA Minister for Planning, Mr John Day amended the Shire of Broome Interim Development Order (IDO) under s. 102 of the Planning and Development Act. The effect of the amendment was</td>
</tr>
</tbody>
</table>

34
that the Browse LNG preliminary works could go ahead even if the grant given to Woodside were found to be invalid.*

5 July 2012 Richard Hunter (Goolarabooloo and first cousin of Joseph Roe) began legal action alleging that Woodside carried out illegal development without planning approval for four weeks between 21 May and 25 June 2012 (*Hunter v The Minister for Planning [2012] WASC 247*). The Supreme Court dismissed Mr Hunter’s case because the change in the planning instrument enabled Woodside to legally continue its works.

16 July 2012 The Chairman of the Environment Protection Authority (EPA), Dr Paul Vogel presented the EPA report to the Minister for the Environment recommending that the Browse LNG Precinct be approved.

December 2012a The Shire of Broome did not endorse Woodside’s project application due to insufficient time to hold community consultations.

December 2012b The Chairman of the Kimberley Joint Development Assessment Panel (KJDAP), Paul Kotsoglo overrode the Shire’s decision awarding retrospective planning approval to Woodside for investigative works done at James Price Point.

December 2012c Paul Kotsoglo resigned from his public service position. He took up a private sector position related to the KJDAP-approved Woodside project.

4 April 2013 Richard Hunter and the Wilderness Society took legal action in the Supreme Court against EPA and the WA Minister for the Environment challenging the validity of EPA’s decision-making processes.

12 April 2013 Woodside and Joint Venture Partners decided not to go ahead with the Browse LNG Precinct project proposal stating that the project concept did not meet the commercial requirements for a positive final investment decision.

19 August 2013 The Supreme Court ruled that EPA’s approvals of the James Price Point Precinct project were unlawful and invalid.*

* Cases narrated in Chapter 6

v Methodologies

My thesis seeks to examine how Indigenous voices were represented in the governance of the Browse LNG Precinct development proposal at James Price Point in the Kimberley between 2008-2013. The rationale for this research inquiry is to develop an understanding of the challenges Indigenous people experience in their effort to determine their own future and obtain self-sufficiency and independence within the prevailing social and economic system.

The representation of Indigenous interests in the Browse LNG Precinct
development proposal is complex. The initiator of the project, the Western
Australian government had to ensure that the proposed project met all the
legal requirements. Woodside Energy Ltd and its Joint Venture Partners
needed to comply with all the state regulatory conditions required to
establish the LNG Precinct. A number of state and Commonwealth Legislative
Acts were relevant in the representation of Aboriginal interests such as the
WA Aboriginal Heritage Act (AHA) 1972, the Mining Act 1978, the
Environmental Protection Act (EP) 1986, and the Environmental Protection
and Biodiversity Conservation Act (EPBC) 1999.

The site selected for the LNG Precinct was not only subject to a native title
claim but was also an Aboriginal heritage site. The Native Title Act (NTA)
1993 relates to a “future act” — a proposed activity or development that may
affect native title. NTA requires resource developers to engage in an
agreement with the native title parties for the activity to be valid. The
Kimberley Land Council (KLC) a Native Title Representative Body (NTRB)
with statutory obligation, represented the native title claim group,
Goolarabooloo and Jabirr Jabirr people who, it turned out, were intensely
divided in relation to support for the proposed project. This division was
subsequently highlighted by public protests and litigious action.

In the context of my research field, I understood that the estimated $30-40
billion LNG project proposal had sharply divided Indigenous families in
Broome and that I was entering into a conflicted research field environment,
namely — that resource development proposals generate complex political
identifications and divisions that bring to light the complex character of the
Indigenous social order.

Indigenous research needs to take into account ‘relational ontology’, that is,
the notion of the ‘social’ requires an understanding of the connection that
human beings have with “the living and the nonliving” — “with land, with the
earth, with animals, and with other beings” (Chilisa 2012, pp. 20-21). Hence,
dealing with research involving Indigenous knowledge would need to shift
assumptions made about the nature of reality and values from a Western ‘I/you’ relationship that gives emphasis on the individual to an ‘I/we’ relationship (Ibid). Furthermore, an indigenous paradigm from a relational epistemology — that all the systems of knowledge [are] built on relationships” (Wilson, 2008, p. 74) — needs to bear in mind that “knowledge” is relational and is “shared with all of creation” (Chilisa 2012, p. 56). The implication of this is that Indigenous informants understand that they are “answerable” to all relations when undertaking (or participating in) research (Ibid). As an illustration, one of my informants, Mary Tarran, a member of the Traditional Owners Negotiating Committee (TONC) when asked “who can speak for Country” looked at me intently, and responded that we were living in the eternal Dreaming...that her ancestral spirits were listening to each word she spoke (Pers. Comm, 15 September 2014). A postcolonial interview method, as Emagalit (2001, pp. 208-209) stresses, invokes:

relational ways of knowing to enable the use of an interview guide that brings to the discussion ways in which people are connected with one another, the environment as well as topics absent from the standard vocabulary of academic disciplines.

This was why part of my research method involved walking on the Lurujarri Heritage trail with local traditional owners in order to learn from the elders and experience first hand their more intimate connection to Country that is distinct from Western perspectives. Chapter 5 of my thesis explores the encounter between Aboriginal and Western cosmologies in relation to the Browse LNG Precinct development proposal as it conjoins or collides with the notion of “sacred sites”. I sought to find the bridge where Aboriginal voice and Western perspectives of development might occur. One of my non-Aboriginal informants, Jeanné Brown who was inducted into the Jabirr Jabirr culture at Walmadan (James Price Point) by the late Goolarabooloo Boss and custodian, Paddy Roe referred to the notion of Aboriginal ‘ownership’ where the land ‘owns’ the inhabitants whereas the Western concept — a “whitefella notion” is of “owning things and owning land” (Pers. Comm., 8 October 2010).
Linda Smith (1999) goes beyond a ‘post colonial’ research approach challenging the notion that colonialism has ceased and advocating instead an approach that decolonizes methodologies. She argues that the binary of the colonizer/colonized does not take into account “the development of different layerings which have occurred within each group and across the two groups” (Smith 1999, p. 27). She points to the implication of the language of the colonizer appropriated by the colonized, that is, that the use of that language becomes the means by which the ‘mental universe of the colonized’ is dominated. My research project on the representation of the Aboriginal voice seeks to consider what Smith describes as the “different layerings which have occurred…” (ibid) by respecting and giving recognition to the diversity of (political) positions amongst Indigenous people in the Kimberley.

I recall Homi Bhabha’s (1994, p. 54) concept of “the space in between” that led some researchers to speak of a “third space” (Moquin 2007):

In the third space, indigenousness is interrogated to include the voices of those disadvantaged on the basis of gender, race, ethnicity, ableness, health, socioeconomic status, sexual orientation, age, and so on. In the space in between, “all cultural statements and systems are constructed, therefore all hierarchical claims to the inherent originality or ‘purity’ of cultures are untenable.”

Hierarchical claims by Indigenous leaders in relation to the Browse LNG project were not cohesive. Some Indigenous organisations such as ‘Save the Kimberley co-chaired by a Jabirr Jabirr traditional owner, Neil McKenzie challenged the gas pipeline proposal whereas the Indigenous native title representative body, the KLC’s Executive Director indicated the land council’s support for the proposal.

In spite of the contestations and divisive engagements that characterized the political environment during the evaluation period of the proposal, the formal approval processes involved were widely publicized through the official channels of the State government, Woodside, the various
environmental groups that closely monitored these engagements, and the KLC itself. The government approval processes were, in general, publicly accessible. The Kimberley LNG Precinct strategic assessment, Indigenous impacts report, Volumes 2-3 contained details of the process of the traditional owners’ consent and Indigenous community consultation and Aboriginal social impact assessment. The WA Department of State Development, Woodside Energy Ltd, the KLC were all pro-actively releasing information about the progress of the evaluation of the feasibility of the project. I also sourced KLC Annual reports and details of Project Agreements from the Department of State Development website. Documentation and reports made available by organisations that were opposed to the project were also accessible. I gained access to other information that I might not otherwise been able to obtain such as the letter sent by Goolarabooloo to the Department of Indigenous Affairs in relation to cultural heritage sites. Comprehensive results of court action were also accessible online. Media reports covered the events closely. The reason for making accessible to the broader public much of the significant documents could be attributed to the desire of the proponents (The WA State government and Woodside) to promote the benefits of the LNG Precinct proposal and counter balance the negative publicity in the media about the development project by groups opposed to it. Close scrutiny by the political agency of environmental advocates could also be the reason for the State government’s proactive approach in disseminating current and relevant information about the progress of the project.

Given the breadth of the research sources required in my research and the fact that other traditional owners’ interests encompassed both heritage and development concerns, it was critical that my consideration of the range of Aboriginal voices not be limited to the ‘recognition space’ provided by the formal institutional processes of governance. Exclusive interviews with the KLC staff were therefore not essential for the successful completion of my research project. Access to public information, KLC annual reports, results of court cases, and some interviews with KLC employees were corroborated.
sources that provided validation to conclusions reached.

**vi Researcher positionality and ethical issues**

A range of Indigenous views had to be canvassed during the evaluation of the Browse LNG development proposal from 2008-2013 including the views of relevant non-Indigenous stakeholders. The proposed Browse LNG project would have had enormous economic, environmental and heritage impact in Broome, in the Dampier Peninsula overall where the LNG site was to be located, and the broader Kimberley region. It was imperative therefore that Indigenous representation of interests is examined within the broader structural conditions that provided the possibility for Aboriginal agency to have a voice.

My research design entailed acknowledgment of and respect for the diverse views of traditional owners, including the views of the KLC, the organisation that formally represented the native title claim group, and the values inherent in those views. A number of paradigms inform a research design that deals with Indigenous research methodologies such as what Chilisa (2012, p. 100) refers to as a ‘[p]ostcolonial Indigenous’ paradigm involving:

>[p]ostcolonial indigenous knowledges [that] enable researchers to unveil knowledge that was previously ignored, enabling the researcher to close the knowledge gap that resulted from imperialism, colonization, and the subjugation of indigenous knowledges.

Prior to undertaking my research fieldwork in 2010, I already developed a strong relationship with many Aboriginal people in the community when I lived in Broome for a few months in 2008 undertaking an oral history project about Aboriginal people with Filipino ancestry. From the network of people and organisations that I had built during this period in the Broome community, I was able to obtain suggestions about potential participants for my research project.
vii Selection of Respondents

I sought the advice of some Indigenous people and organisations including the KLC. I have classified the names suggested to me into the following categories:

i) Indigenous participants
   - KLC staff – selected in regard to their knowledge and involvement in the LNG negotiation and approval processes
   - Traditional owners and Broome residents – selected in relation to their traditional owner and Broome residency status

ii) Non-Indigenous participants
   - Environmental advocacy groups – selected to obtain information about their views on development models and the reason for their opposition to the LNG project
   - Individuals associated with Goolarabooloo – selected to obtain their views on notions of development and the value placed upon Aboriginal heritage sites
   - Members of peak organisations in Broome – selected because of their local knowledge about development politics in the Kimberley
   - Business proprietors – selected to obtain some idea of their attitude to the LNG development in the context of business development in the Kimberley overall

The result of the categories then was a list of viable participants:

i) Indigenous participants
   - KLC staff – selected in regard to their knowledge and involvement in the LNG negotiation and approval processes

1) Nolan Hunter, KLC Executive Director interviewed after Woodside and Joint Venture Partners abandoned the project. He succeeded KLC Executive Director, Wayne Bergmann
2) Mary Tarran, TONC interviewed after Woodside and Joint Venture Partners abandoned the project.

3) ‘Rosalyn’ – TONC member interviewed during the project’s approval process

ii) Traditional owners and Broome residents – selected in relation to their traditional owner and Broome residency status

1) Richard Hunter – a native title claimant, Goolarabooloo senior law man who took the State Government to court over EPA approval process.

2) Joseph Roe – Goolarabooloo traditional owner and senior law boss

3) Theresa Roe – Goolarabooloo traditional owner

4) Mary’ – Jabirr Jabirr traditional owner and Broome resident

5) Evelyn Masuda – traditional owner and Broome resident

6) Ellen Puertollano - traditional owner and Broome resident

7) ‘Rebecca’ - traditional owner and Broome resident

8) ‘Sylvia’ – Jabirr Jabirr traditional owner & business proprietor in Broome

9) Madeleine’ - traditional owner and Broome resident

10) ‘Tony’ - Jabirr Jabirr & Bardi traditional owner and Broome resident

11) ‘Sharon’ – Ngumbarl traditional owner of the James Price Point site

12) ‘Gary’ – Yawuru and Jabirr Jabirr traditional owner

13) ‘Mark’ – Bardi traditional owner and business proprietor

14) ‘Oscar’ – young Bardi Beagle Bay traditional owner

15) Darren Galvin – Port Hedland traditional owner, critical of the impact of mining in the Pilbara

16) Bruno Dann – business proprietor of Twin Lake Cultural Park. The site of his business is near the James Price Point site.

17) ‘David’ – an Aboriginal interpreter who works for a peak Aboriginal organization in Broome. His contribution related to consulting with traditional owners and the need to use appropriate cultural processes

18) ‘Shirlita’ – Ngumbarl traditional owner of the James Price Point site
19) Alan Pigram – Yawuru traditional owner and founder of the ‘Families of Broome’ who, with Mitch Torres and Dr Anne Poelina, presented an anti-gas petition to Parliament in Canberra

20) Peter Matsumoto – councilor, Shire of Broome Council

21) Ian Perdrisat – Director of the Kimberley Institute and columnist for the National Indigenous Times

22) Anne Poelina – Director of the Kimberley Institute, Deputy President of the Shire of Broome Council that got elected on a ‘no gas ticket’

23) ‘Bert’ – social science research employee at the University of Notre Dame in Broome

24) 'Michaela’ – Djungan traditional owner active in oral history in Broome

iii) Non-Indigenous participants

Environmental advocacy groups – selected to obtain information about their views on development models and the reason for their opposition to the LNG project

1) Wade Freeman – Project Officer, Australian Conservation Foundation in Broome

2) Martin Pritchard – Director of Environs Kimberley

3) Peter Tucker – co-chair of Save the Kimberley with Jabirr Jabirr man, Neil McKenzie

Individuals associated with Goolarabooloo – selected to obtain their views on notions of development and the value placed upon Aboriginal heritage sites

4) Frans Hoogland – non-Indigenous Lurujarri Heritage Trail guide initiated into the culture by Goolarabooloo founder, Paddy Roe

5) Isabel’ – assistant to Joseph Roe, Broome resident

6) Jeanne Brown – former art teacher in Victoria who was inducted into the culture by Goolarabooloo founder, Paddy Roe

7) ‘Ada’ – former staff member of the KLC who had experienced walking the Lurujarri Heritage trail
Members of peak organisations in Broome – selected because of their local knowledge about development politics in the Kimberley

8) Paul Lane – Director of the Kimberley Institute
9) Howard Pedersen – Senior policy officer, Kimberley Institute
10) Deanne Lightfoot – Coordinator of the Kimberley Interpreting Service

Business proprietors – selected to obtain some idea of their attitude to the LNG development in the context of business development in the Kimberley overall

11) Mike Hulme – Broome resident and ecovillage developer
12) Marion Manson – non Indigenous proprietor of Twin Lake Cultural Park with her partner, Bruno Dann
13) Nic Wevers – former councilor of the Shire of Broome and business proprietor, active in the ‘no gas campaign’
14) ‘Edward’ – tour operator based in Broome
15) Maryanne Petersen – Executive Officer of the Broome Chamber of Commerce
16) ‘Sebastian’ – proprietor of a real estate agency, against the gas development
17) ‘Sergio’ – business proprietor, member of Environs Kimberley opposed to the LNG project

viii Confidentiality

I have developed a Participant Consent Form that I gave to the participants indicating that: they have read the participant information sheet and had been given the opportunity to discuss the information and their involvement in the project with the researcher; that the procedures required for the project and the time involved had been explained to them, and any questions they had about the project had been answered to their satisfaction; that they
gave consent to the audio-digital recording of their interview; that they understood that their involvement was confidential and that the information gained during the study could be published and that no information about them would be used in any way that revealed their identity; and lastly, that they could withdraw from the study at any time, without affecting their relationship with the researcher now or in the future. The form was signed by them and dated and their return address was provided in the form.

Some of the participants did not mind their identity to be disclosed such as environmental group advocates. Pseudonyms were used for those who wished their identity withheld from the public.

**ix Interview method used**

Although a set of questions was prepared, I have found them not to be entirely useful for my purpose. The dynamic turn of events during the period of the evaluation of the LNG proposal meant that I had to take into account in my inquiries new developments as they unfolded. Considering that the development proposal divided families and put a strain on friendship within the local community, structured or semi-structured interviews would have posed risks to some informants if they were attached to organisations involved in mining benefit negotiations or, have relatives or friends who were employed in these organisations. In a small town such as Broome, local people tended to be know each other so relationship and trust building with them on my part was essential. I have decided to use the unstructured or nonstandardized, open-ended interview technique, allowing participants to follow their interests and thoughts (Chilisa 2012, p.205) and enabling a reflective system of thought drawn from the “wisdom and traditions of people” (Emagalit 2001, p. 4). Permission was obtained to record these interviews. Supplementing these interviews were personal communication before and after the Joint Venture Partners abandoned the project. My understanding of the development/heritage issues was enhanced by my interaction with the community in informal gatherings where some
traditional owners expressed concern over the impact of the LNG project.

I also employed the method, participant observation. I participated in the Lurujarri Heritage Trail Walk that I felt that was necessary to obtain some knowledge of the value and significance of the heritage claim for the sacred sites. Goolarabooloo’s main objection to the establishment of the LNG Precinct was the likelihood of the development activity being harmful to the local people’s sacred heritage sites.

**x Qualitative research: mixed method**

The focus of my research is the operation of institutional apparatuses of governance within which I locate the inclusion, exclusion and efficacy of agency of politically and culturally heterogeneous Kimberley Aboriginal people.

I employ a qualitative research method that involves mixed methods of data gathering that includes analyses of relevant court cases and Legislative Acts, Annual reports, WA State policy transition concerning the governance of Aboriginal people, heritage reports, and interviews with traditional owners and Kimberley residents who held divergent views. My research approach weaves a network of interrelated elements — pre-structured contexts’, agency and structure, performativity, and discourse strategies on development. The way the thesis is structured does not apply a strictly sequential or chronological approach but presents interdependent parallel narratives. In the conclusion of the thesis, all the distinct but interdependent parallel narratives are integrated to make the inter-relationship of contexts visible and give transparency to the conceptual and political foundation that underpins and shapes contemporary institutional practice of ‘agreement making’ in the way it operated at the Browse LNG Precinct at James Price Point.

The advantage of the use of multiple methods is “to increase the accuracy of research findings” and “to generate new knowledge through a synthesis of
the findings from different approaches...” to hear different voices and bringing into play multiple constructions of a phenomenon” (Gilbert 2008, pp127-128). Complementarity, a multiple method approach, aims “to reveal the different dimensions of a phenomenon and enrich understandings of the multi-faceted, complex nature of the social world” (Greene 1989, pp 255-74). The challenge or risks in adopting a mixed method approach for the researcher is the enormity and complexity of the data that need to be linked and the time and effort required to achieve the depth of analysis sought.

Having decided to undertake a mixed method approach, I formulated a contextual and conceptual frame in three stages: one, was a historical background — a) institutional practice of State policy regime transitions in the Kimberley with the aim of tracing the evolution of laws and policies that influenced the representation of Indigenous agency; b) a review of mining negotiations with traditional owners at Noonkanbah and Argyle in the Kimberley. A review of the application of interacting Legislative Acts and techniques of governance in the contest between Aboriginal heritage and mining/state interests would have a bearing on the efficacy of Indigenous representation or agency; c) identify the agreement making culture that began at Argyle Diamond Mines with the active participation of the KLC. I wanted to see how the practice at Argyle foreshadowed and influenced the agreement-making framework applied at James Price Point and how it shaped the representation of Aboriginal interests.

Stage two focused on the Browse LNG Precinct proposal at James Price Point.

Having explored the pre-structured historical context, I could now focus on my case study at James Price Point beginning with a) identification of the institutional apparatuses employed to facilitate the establishment of the LNG processing plant for the Browse gas reserves by the interacting political agency of the state, the resources sector, and the Aboriginal traditional owner. Within this institutional framework, I could evaluate the representation of the traditional owners; b) explore the encounter between
Aboriginal and Western cosmologies through the laws and regulations that constituted the juridical ‘recognition space’. My purpose was to identify firstly, the distinctiveness of each culture and secondly, the cultural language employed that made possible the exercise of Indigenous agency; c) evaluate the performance of traditional owners’ agency through their engagement in five legal cases.

Stage three explored alternative development models in contrast with the notion of development articulated by the State political agency and the KLC over the proposed LNG Precinct. The distinct voices expressed about the project represent divergent discursive practices of Aboriginal and non-Aboriginal people in Broome as narrated in sections within Chapters 4 and 7.

Outline of Chapters

My application of a contextual and conceptual research approach was the structuring of the chapters of my thesis in the following order:

Chapter 1 - ‘Pre-structured contexts’ — explores historical background concerning the evolution of settler-Aboriginal relationship traced from laws and policies that influence the representation of the Indigenous voice;

Chapter 2 - ‘Pre-structured contexts’ — examines specific case studies of Noonkanbah & Argyle mining negotiations that illustrate the political dynamics in the application of interacting Legislative Acts and techniques of governance in the contest between Aboriginal heritage and mining/state interests that have a bearing on the efficacy of Indigenous representation or agency;

Chapter 3 - ‘Pre-structured contexts’ — examines the beginning of the agreement making culture formulated at Argyle Diamond Mines with the background of the establishment of the Kimberley Land Council and the impact of the Aboriginal Land Inquiry in 1984; ‘agency & structure’ — to
trace the beginning of the agreement making culture that began at Argyle Diamond Mines with the active participation of the KLC and how it foreshadowed the agreement-making framework that was established at James Price Point, and identify the transformation that took place in the representation of Aboriginal interests;

Chapter 4 - Agency & structure’ — identifies the institutional apparatuses employed to facilitate the establishment of the LNG processing plant for the Browse gas reserves by the interacting political agency of the state, the resources sector and the Aboriginal traditional owners, leading to the construction of agreement process;

Chapter 5 - ‘Agency & structure’ — explores Western cultural legal background that represents Western cosmology in dialogue with Aboriginal cosmology to examine the representation of Aboriginal voice within the WA State’s juridical recognition space. I make the assumption of the institutional imperative that Aboriginal representation can only employ its agency through the WA State’s juridical recognition space;

Chapter 6 - ‘Performativity’ — evaluates performativity of political agency within the juridical recognition space with emphasis on the representation of Aboriginal interests;

Chapter 7 – Discourse on development — examines discourse on development models in contrast with the notion of development that was articulated in connection with the proposed LNG Precinct;

Conclusion – integrates all findings from each chapter.
Chapter 1
The Framework of 'Representation': Aboriginal Voices in the Kimberley

This dissertation traces the representation of Kimberley Aboriginal people's voices. Investigating the representation of Aboriginal voices in the Kimberley would have to begin with the history of colonization of the Kimberley when frontier lands were occupied. The Swan River British Colony (now Western Australia) was established in 1829. The settlers developed the lands through pastoral colonialism, at a time when Aboriginal voices were virtually muted. Settler-Aboriginal relationship evolved from frontier violence to the enactment of Legislative Acts (Aborigines Protection Act 1886 and Aborigines Act 1905) that, in the Kimberley, involved 'Protection' legislation that took Aboriginal children away into missions and reserves. Aboriginal workers were employed in pastoral stations with little or no pay but ration provision for their keep. In time, Aboriginal people gained access to welfare benefits and citizenship rights until in 1993, the NTA enabled them to claim native title.

The account of the failed Browse LNG Precinct proposal (during 2008–2013) could be more wholly understood if contextualized within the historical frame of the Kimberley people's history, and the evolution of state policy and legislation that provided the platform for their voices to be heard and represented. The evolution of settler-Aboriginal relationship can be traced through policy regime transitions from 'Protection', 'Assimilation' to 'Self-Determination'. During the Self-Determination policy regime, the self-representation of Aboriginal people began when the Commonwealth Government encouraged the incorporation of Aboriginal associations. This narrative would not be complete without including the voices of those who opposed the LNG project at James Price Point. It appears in the last Chapter of this thesis.

This broad landscape is the framework with which I examine the representation of Kimberley Aboriginal voices from the experiences of Noonkanbah, Argyle, and principally of the Browse LNG Precinct proposal at
James Price Point. The Swan River colony (the future Western Australia) was incorporated into the British empire in 1829 (Pedersen & Woorunmurra 1995, p. 15) . The opening up of the region through the development of the sheep, cattle and pearling industries was marked by frontier violence and Aboriginal people’s dispossession of traditional land. The WA 1905 Aborigines Act that gave the Chief Protector the “right to remove Aboriginal adults to any district or institution if he believed it was in their interests” (Jebb 2002, p. 77) marked the beginning of the WA Protection or segregation policy of paternalism. The motive behind the WA 1905 Aborigines Act was to expand and develop the pastoral industry without the government incurring the cost of rationing “non-workers on pastoral stations” (Jebb 2002, p. 77). Under the WA 1905 Aborigines Act, Aboriginal people with “employment permit “were exempt from the removal clauses” thus they could remain in pastoral stations under the auspices of European managers and stockmen who then had easy access to an Indigenous labour force (Jebb 2002, p. 77). Pastoral employers supplied their charges sufficient rations of food, clothing and medicine. Changes in the social and economic conditions in the pastoral industry in the 1960s resulted in the movement of Aboriginal people to towns and reserves (see Jebb 2003, p. 281).

Settler-Aboriginal relationship was managed in fields of governance through Legislative Acts that provided the mechanism for the representation and institutional recognition of Aboriginal people’s land rights interests. WA State government agreements later struck with Indigenous people in relation to the use of traditional lands involved complex interrelated laws. The most relevant laws are the AHA, the Environmental Act 1984 (EP); and the NTA. The AHA aims to protect heritage sites of significance to persons of Aboriginal descent, EP aims to protect the environment of the State, and NTA aims to develop a mechanism that would protect native title within a workable land management regime that includes the interests of the state and developers such as mining companies. The state designed a number of legislative devices to establish processes that would guide mining companies, Indigenous people, and the state in securing their respective interests. An
account of the colonial settlement in the Kimberley and the evolution of policy perspectives that had an impact on Kimberley Aboriginal people is described in 1.1.

1.1 Colonial settlement in the Kimberley

The first British explorers landed on the Kimberley’s shores in 1837 to examine the suitability of the lands for future colonial settlement. The Northern exploration journals of George Grey, leader of the British Kimberley exploration party in December 1837 prompted an interest in further expeditions to evaluate the economic potential of the lands (Pedersen & Woorunmurra 1995, p. 17). Some two hundred Victorians formed the Camden Harbour Association in the early 1860s proposing to the Western Australian Government that they lease four million acres around the area that Grey described. Pastoralism dominated the Kimberley region’s economy when European settlement of the Kimberley region began around 1885 with the arrival of the Duracks and the MacDonalds to set up cattle stations (Kimberley Development Commission, n.d. ‘resources’). The Kimberley region covers about 423,500 sq km from the Great Sandy Desert in the south through the escarpments of the Kimberley Plateau and Timor Sea in the north. It is Western Australia’s most northern region. The landscape of the Kimberley has been evolving over a period of at least 250 million years. Aboriginal occupation of the Kimberley based on archaeological work to date was at least 55,000 years ago. Given its proximity to Timor and New Guinea, the region may have been one of the first places occupied, with early arrivals traversing 200–400 km of open water (Kimberley Society Inc).
In the 1880s, pastoralists from Queensland and New South Wales established their cattle runs in the Kimberley. The most prominent pastoralists were the Durack family (1880s) and Isadore Emanuel from England (Bolton, 1981). Before this period, only a few scattered sheep stations existed in the 1860s. Emanuel transported sheep to the West Kimberley in four shipments between 1884 and 1885. The Emanuel family first established the Noonkanbah pastoral station in 1886. Noonkanbah became the first permanent settlement of non-Aboriginal people in the region. By 1908, a 100,000 acre sheep station had been established at Noonkanbah. In the ensuing years, investors were attracted to service both domestic and overseas markets in the sheep, cattle and pearling industry.

Pastoral colonization was not all peaceful. Frontier violence between pastoralists and Aboriginal people occurred over sheep losses on account of sheep killing by a ‘community in flight’ such as the Bunuba people whose land was occupied for pastoral use and who needed a ‘readily available food supply’ (Pedersen & Woorunmurra 1995, p. 42). Jandamarra was the
Aboriginal hero of the Bunuba resistance against colonial rule in their country from 1894 to 1897 (Pedersen & Woorunmurra 1995, p. 197). Aboriginal workers became the backbone of the pastoral industry without whom the pastoralists ‘could never have made the money they did’ (Pedersen & Woorunmurra 1995, p. 198). As part of the objective of opening up frontier land to economic growth and social development, the colonial government sought to manage settler-Aboriginal relations. The pastoral colonization of the Kimberley was pivotal to the State Government’s quest to be free from Britain’s political control (Howitt 2001, pp. 224-225). The pastoral and industrial development of the country was thus essential for the realization of state sovereignty. By 1898, Broome had become the busiest cargo port in the North West. The new jetty constructed with a cattle ramp in 1896–1897, and the building of the tramway sparked the growth of the town.

Plate 1.1: The jetty constructed in Broome (now dismantled) (Wall, D R and & D. Hunt, 2008)

1.2 Evolution of political policy perspectives of governance: Aboriginal-state relations and Legislative Acts

The evolving state policy outlook could be roughly categorised into the Protection era (19th century–1940s), the Assimilation era (1950s–1970s), and the Self-determination era (1970s). Protection laws that were enacted could be traced from the English House of Commons Select Committee on
Aborigines 1837 Inquiry that, because of concerns over the exploitative conditions faced by Aboriginal people, made a recommendation that special codes of law be adopted to protect them, that government employees in each colony be appointed as protectors, and that missionaries for Aboriginal people be sent to Australia for their protection.

1.2.1 The policy of Protection

Various legislation enacted from the 1880s through to 1967 attempted to regulate the dysfunctional Aboriginal–settler relationship. The Protection policy implemented was hardly protective of Aborigines. The Aboriginal Offenders Act 1883 gave the squatters wide and sweeping powers over Aboriginal people. The role of ‘Protector’ was often delegated to pastoralists in remote areas. The policy of ‘Protection’ was a boon to the pastoralists’ labour supply at the expense of the social dislocation of Aboriginal families. The squatters (pastoralists) were able to convict and sentence Aborigines to prison terms of up to six months and order whippings of fifty lashes. The Imported Labourers’ Registry Act 1884 sought to improve the conditions of indentured workers but the Act was aimed at preventing aliens (Chinese and other non-Europeans) from obtaining a pearl shelling licence that would have enabled them to employ Aborigines (Ganter 2006, pp. 63-64). Nearly sixty years after the 1837 Inquiry, missionaries were sent to Australia and codes of law were introduced for the protection of Aborigines. The Trappists (a Cisterian Order) established the Beagle Bay Mission in 1895 accommodating Aboriginal babies, children and youth up to age 20 (see Choo 2001, p. 57; Nailon 2005, p. 140).

With the expansion of settlement and frequent occurrences of frontier violence and mistreatment of Aboriginal people, WA in 1886 adopted the policy of ‘Protection’ of Aborigines (ALRC 1986, par. 25). Policy implementation included isolating and segregating full-blood Aborigines on reserves while ‘half-castes’, especially children, were subject to attempts at assimilation (see Beagle Bay Mission). Contact between ‘full-blood’ Aborigines and non-Aborigines was restricted to avoid ‘interbreeding’ (ALRC
The Protection legislation passed by the Queensland Parliament, the Aboriginals Protection and Restriction of the Sale of Opium Act 1897, shaped the legislation that was passed in Western Australia, South Australia and the Northern Territory (Wicks 2008). Dr Walter Roth, a former Protector from Queensland was concerned that the protective measures of the Aboriginal Protection and Restriction of the Sale of Opium Act (1897) had been open to abuse. In 1904, he headed a Royal Commission and assisted in introducing the Aborigines Act of 1905 in Western Australia giving legal guardianship for all Aboriginal children to the Chief Protector; making cohabitation illegal between Aboriginal and non-Aboriginal people, any marriage between them now requiring approval from the Chief Protector; and forbidding Aboriginal people from entering prohibited areas around creek estuaries and town boundaries (see Yu 1999). Protection, however, had the reverse effect: imposition of heavy ‘regulation’ and control of Aboriginal subjects. Section 9 of the Aborigines Act of 1905 gave the Minister power to regulate their lives through removing Aboriginal people from one reserve to another, and s. 15 required those intending to employ an Aboriginal or female half-caste to obtain the permission of a Protector.

From 1901, the Pallotines ran the mission as part of the Catholic Diocese of Broome. The Commonwealth Franchise Act 1902 excluded Aboriginal people from the right to vote. In 1904, the WA Government commissioned Walter Roth, an administrator, to head the Royal Commission to inquire into the condition of the Natives (Choo 2001, p. 110). The Roth Commission examined: the administration of the Aborigines Department, the employment of Aboriginal people, the Aboriginal police system (Police Protectors), the treatment of Aboriginal prisoners, and the distribution of relief. Finding many abuses of the rights of Aboriginal people, the Commission recommended provisions for protection. On acceptance of the Roth Commission’s recommendation, the WA Aborigines Act 1905 was passed. Under s. 8 of this Act, the Governor appointed the Chief Protector of Aborigines in WA as the legal guardian of WA Aboriginal children under 16. In remote areas, the role of ‘Protector’ vested in the Aborigines Act of 1905
was delegated to station managers or policemen. Before the Aborigines Act of 1905, the European authorities did not have the legal authority to ‘force parents to give up their children’ even though they favoured the removal of children of mixed parentage from their bush environments (Choo 2001, p. 143). Aboriginal people were not to enter prohibited areas around creek estuaries and town boundaries. The Governor had the power by proclamation to declare any Crown Lands to be reserves for Aborigines. The State Minister was empowered to remove or keep Aborigines within the boundaries of the reserve, or move them from one reserve to another (s. 12 of the Aborigines Act of 1905). The Chief Protector was given the right to ‘remove Aboriginal adults to any district or institution if he believed that it was in their interests’ except those under an employment permit (Jebb 2002, p. 77). Enshrined in this law was ‘the overriding ideal’ of the development and expansion of the pastoral industry that would ensure that Aboriginal people remained on pastoral stations under the control of European managers and stockmen. Employers were only required to give their workers sufficient rations, clothing, blankets, and medicines when required. A system of work permits gave minimal protection for Aboriginal workers. The workers were liable to prosecution if they left their workplace without the consent of their employers. Aboriginal and Torres Strait Islander people who experienced this period of governance referred to it as ‘living under the Act’ (McGregor 1998, pp. 278-280).

In the remote Kimberley region, pastoralists could employ whole communities under a general permit without having to identify the names of individual workers (Jebb 2002, pp. 79-80). The WA Government’s policy of ‘Protection’ involved separating children from their families and limiting freedom of movement. From 1905, Government Department Heads with responsibility for Aboriginal welfare were appointed the guardians of children at the Mission. From 1907, the Sisters of St John of God ran the Mission school and the girls’ dormitory. The fact that Kimberley Aboriginal people did not have access to the Commonwealth Invalid and Old Age Pension Act 1908 Cth meant that they had no financial resource to draw from
and were virtually under the total control of pastoral managers and owners unless they were under the authority of missionaries. The Aborigines Department was severely underfunded for undertaking the task of protection of people in remote areas, so the role of Protector was delegated to pastoral employees, and in exchange, there was minimal government interference in employment conditions contracted at pastoral stations (Jebb 2002, p. 79). Station owners and managers were issued with permits to keep ‘Blackfella workers’ on the station. If Aboriginal workers under permit absconded from work, the Act legalised the police practice of returning absconders to stations.

In 1934, a Royal Commission into Aboriginal Affairs was formed under M. D. Moseley SM to investigate the social and economic conditions of Aboriginal people including allegations of ill treatment. The Moseley Commission supported the continuation of the pastoralists providing Aboriginal people rations such as the supply of ‘[b]lankets, boots and clothing in exchange for work, “in lieu of wages”’ (see Jebb 2002, p. 157). Shocked at the number of deaths from illness borne by the malaria epidemic and influenza while Moseley was conducting his inquiries, one of the Moseley Commission’s recommendations was the introduction of a voluntary Aborigines Medical Fund that enabled pastoralists to pay £1 for each permanent worker annually towards a Fund that would cover all Aboriginal dependants at the station. The Commission’s recommendations were put into effect in the Native Aborigines Act 1936. This Act placed Aboriginal children under the guardianship of the Commissioner. Aboriginal drover Eric Lawford (born 1930) described the conditions at the pastoral stations in the Kimberley where Blackfellas put up fences, cut posts and rails with axes, looked after the horses, and maintained the windmills (Marshall 2011, pp. 33-34). The work they did was not paid but they received two shirts, two pairs of trousers a year, boots, hats, canvas swag and blankets. They went bush during the wet season and returned and picked up their swags in the store for the mustering season. The life that drover Lawford described, reflected the period of ‘pastoral paternalism’ involving Yungngora Traditional owners.
who worked and provided free or inexpensive labour for the white owners at the Noonkanbah pastoral station while managing to live in their own country. In general Aboriginal voices were muted during the ‘Protection’ regime.

The Federal Government called a conference of state and federal officials in 1937 at which, ‘assimilation’ for some Aboriginal people was adopted as official policy (Australian Museum a). Part-Aboriginal people were to be absorbed into white society whereas Aboriginal people not living a tribal life would be educated. All the rest were to stay on reserves. The move to give some Aboriginal people access to welfare benefits in the late 1940s indicated the shift towards the ‘assimilation’ of Aboriginal people into Australia’s civil society. From the 1940s, government benefits, entitlements and citizenship rights began to reach some Aboriginal people. In 1941, Commonwealth Child Endowment payments were extended to children of ‘detribalised’ parents. In 1943, Aboriginal people who held Exemption Certificates were given access to Commonwealth invalid and old age pensions and maternity allowance. Aboriginal people who could prove that they had adopted a ‘civilised life’ and did not associate with Aboriginal people who did not have citizenship rights received limited rights under the Natives (Citizenship Rights) Act 1944. Commonwealth Unemployment and Sickness Benefits were extended to Aboriginal people regarded as living in ‘detribalised’ European lifestyle conditions.

F. E. Bateman, R.M. was asked to survey existing native institutions as defined in the Native Administration Act 1936 (‘Native Affairs Inquiry’, The West Australian, 7 August 1947). The Bateman Report (1948) recommended the repeal of past ‘protective’ measures in favour of the assimilation of Aboriginal people into the general community (Bateman 1948, p. 19). The report noted that the non-payment of wages in the Kimberleys resulted in much criticism overseas. It recommended that permanent full blood employees in the pastoral industry in the Kimberley district be paid a small wage in the ‘form of goods through the employers’, and that schooling be provided by qualified school teachers on Government institutions considering the vast store of potential labour “waiting to be trained to fit into
our civilisation” (Bateman 1948, p. 26). Not until 1948 with the appointment of the new Commissioner, S.G. Middleton succeeding Bateman, that the shift towards mainstreaming the care of Aboriginal children occurred (Haebich 2000, p. 282).

1.2.2 The policy of ‘Assimilation’

The policy of ‘Assimilation’ of Aboriginal Australians was confirmed and formally adopted at the Third Commonwealth-State Native Welfare Conference in Canberra in 1951. While the WA government adopted the Assimilation policy in 1951, the policy of segregating full blood Kimberley Aborigines on stations was not substantially altered (Jebb 2002, p. 205). Considering that around 85% of Nyungar Aboriginal families still lived on reserves in 1957 for most of the year, these families hardly had an effective ‘voice’ that represented their interests. Meanwhile, the cattle stations and the meatworks industry in Wyndham, Derby and Broome were flourishing in the 1950s (Hawke 2013, p. 79). Change was in the air in the 1960s heralded by the new social movement reaching Australian shores from other parts of the Western world – the anti-war movement, counter culture, black rights, land rights, and feminism – were themes preoccupying the eastern states in Australia (see Introduction, Hawke 2013). In the Kimberley and in Northern Australia, the semi-feudal co-dependency relationship between station bosses and Aboriginal workers and their families was about to change. The right to vote had already been legislated for Commonwealth elections in 1962, with Queensland being the last State to provide Indigenous enfranchisement in 1965 (see the 1967 Referendum– Fact Sheet 150). The WA Native Welfare Act 1963 was amended with the aim of integrating ‘natives into the general community’ and providing special welfare measures during the transitional period of the removal of provisions and regulations that were restrictive for Aborigines. For the first time, Social Service Benefits were paid directly to Aboriginal Australians. However, in the north west of Australia in remote areas, Social Security payments were still administered on their behalf partly because Aboriginal people’s physical movement was limited. Managers, welfare officers, and missionaries struggled ‘to fit older
Aboriginal people from isolated stations into Social Security guidelines’ (Jebb 2002, pp. 258–259). The system relied heavily on the station managers’ verification of birth year, names, and gender. Aborigines became ‘passive’ recipients of welfare, reliant on a support program based on Western family structures and lifestyles. Many did not understand the purpose of the support payments. Some thought it was to replace the goods and services they had obtained through hunting and gathering or to compensate for underpaid work in the pastoral industry, on missions, or settlements (Smith 1991, pp. 45–46). Within six months of age pensions being made available on Kimberley missions, reserves and stations, pension recipients increased from 1 in 1953 to 667 (Jebb 2002, p. 260). Social Security funds completely ‘financed ration allowances to Aboriginal adults in the Kimberley’ so the Department saw that it no longer needed to continue these allowances (Jebb 2002, p. 260).

The 1967 Referendum was another watershed. The Commonwealth Referendum was held on 27 May 1967 to determine whether two references in the Australian Constitution, which discriminated against Aboriginal people, should be removed. Under scrutiny was s. 51 of the Australian Constitution that read:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

> 127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted (The 1967 referendum – Fact sheet 150, National Archives of Australia).

The Referendum result gave effect to the removal of the words in the Australian Constitution – ‘other than the aboriginal people in any State’ and to the repeal of ‘aboriginal natives should not be counted’ (The 1967 referendum – Fact sheet 150, National Archives of Australia). Consequently, the Commonwealth now had the power to legislate in relation to Aboriginal people, and take into account Census results when dealing with state needs.
The Commonwealth then took some responsibility for policy in Aboriginal affairs from the States. Sullivan (2011a, p. 2) remarked that the period of the public debate leading to the 1967 Referendum was both progressive and assimilationist. The state’s implementation of the assimilation policy, Sullivan (2011a, pp. 2-3) claimed, was ‘predicated on the need for tutelage before Aborigines could be expected to assimilate’ (my emphasis).\textsuperscript{11}

The removal by the Commonwealth Conciliation and Arbitration Commission of a racially discriminatory clause from the Federal Pastoral Industry Award in 1967 resulted in the phasing in of equal wages for Aboriginal pastoral workers from December 1968 in the Kimberley region (Skyring 2009). Aboriginal men working on the stations were paid between $6 and $20 per week while the award was between $38.90 and $41 per week, less $9.41 for food and accommodation; Aboriginal women who worked on the stations were paid between $3 and $10 per week, but many were paid nothing at all (Skyring 2009). With access to cash welfare benefits, Aboriginal people could now spend cash in town but with newly acquired financial independence came the price of embracing individual responsibility. The equal wages award produced unintended consequences for Aboriginal people in remote areas who ‘found themselves under-educated, no longer able to remain on their traditional lands and struggling to overcome the legacy of generations of institutionalisation’ (Sullivan 2011a, p. 3). Others felt empowered by the change. Some Aboriginal workers at Noonkanbah approached the station owner to request to grant them an excise from a portion of his lease. Granting this request would have allowed members of the community to return to Country and work independently in their traditional land. The request was refused even though the station owner needed labour. The relationship between Aboriginal workers and the management of the station turned sour. The physical and social conditions at the station deteriorated.

An incident concerning a water tap ignited the now fragile relationship between the workers and management. Back in 1970, management gave the community a single water tap that was a source of grievance for Aboriginal residents because whenever a dispute occurred between Aboriginal workers
and management, the tap was turned off (Kolig 1987, p. 45). Disputes came to a head in August 1971 when an Aboriginal woman called Biddy was dismissed ‘for wasting water on the lawn sprinkler’ (Hawke 2013, p. 176). The dismissal followed by a death of an old woman triggered a mass walk out in 1972 by Aboriginal workers who all headed for the outskirts of Fitzroy Crossing (Howitt & Douglas 1983, p. 62). Many pastoral station managers and owners were opposed to the award wage equality reform. They were reluctant to pay award wages considering that the low wage system prior to the wage reform in effect provided massive subsidy to pastoral station owners (Skyring 2009). Many Aboriginal workers, evicted from the stations, ended up in refugee camps at Fitzroy Crossing, Halls Creek and Derby.

In 1973, the Whitlam government introduced a new policy outlook, ‘Self-Determination’, to replace the ‘Assimilation’ policy. This move was partly a response to the problems of dislocation experienced by Aboriginal people when the equal wages award came into effect. This policy change, Rowse (2002, p. 230) points out coincided with a structural change in the economy that ‘reduced the demand for rural and uncredentialled jobs’; that is, Aboriginal Australians’ work options in these areas had become ‘economically superfluous’. The notion of ‘self-determination’ presupposed a reduction in Indigenous dependency. With the decline and withdrawal of missions, ‘self-determination’ acknowledged that Aboriginal people could choose their own lifestyles (Maddison 2009, p. 26). The policy was attuned to the broader international law-making convention of ‘decolonisation’ (Whitlam Institute, n.d. a)

The Commonwealth Government began to fund Aboriginal self-help organizations and encouraged the development of incorporated community-based Indigenous organizations. The incorporation of Aboriginal community associations in fields of governance marked the beginning of ‘self-representation’ in the Kimberley. For the state, the advantage in dealing with incorporated groups was that the conduct of business would be compatible with government processes and legal protocols. The state would be able to facilitate capacity building and training in Aboriginal governance and at the
same time demand accountability over access to Indigenous programs. Indigenous organizations sprang up all over Australia at local and regional levels dealing with community management, landholding and infrastructure provision. Incorporated community associations became a vehicle for the delivery of government-funded services to community members. Indigenous operated organizations in health, housing and legal services – e.g. the Aboriginal Medical Service and the Aboriginal Legal Service were established in various States in Australia.

At the time when the Commonwealth government launched its ‘self-determination-policy, the WA government established the Aboriginal Lands Trust (ALT) through the Aboriginal Affairs Planning Authority Act 1972 (AAPA). It also passed the Aboriginal heritage legislation, the AHA that would be linked to earlier legislation, the Museum Act 1969, enacted to advise and assist the Minister whose function was to ensure that places in WA that were ‘of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent’ were evaluated for their preservation and protection (s.10 of the Act). Understanding the interactive workings of Legislative Acts regarding mining in Western Australia is essential in analysing the dynamics of miner-Aboriginal-state relationship in regard to competition over land use from Aboriginal heritage and State industrial development perspectives. I contend that the establishment of the AAPA and the ALT was largely to do with land management. The ALT is a landholder, operating under the AAPA, with responsibility for managing 24 million hectares (10% of the State’s land mass) that have different tenures: reserves, leases and freehold properties mostly for ‘the use and benefit of Aboriginal inhabitants’ (Dept of Prime Minister & Cabinet, n.d. a, ‘COAG’). The AAPA legislation established the Aboriginal Affairs Planning Authority and the Aboriginal Affairs Advisory Council purportedly to provide a service for the economic, social and cultural advancement of people of Aboriginal descent in Western Australia (Aboriginal Affairs Planning Authority Act 1972). While the Authority consults with people of Aboriginal descent (members of the Aboriginal Advisory Council), the Authority, the Committee, and the Trust, decision-
making rests with the State Minister. The Aboriginal heritage legislation, the AHA (No 53), also enacted in 1972, makes provision for the preservation of places and objects that are traditional to, or customarily used by the ‘original inhabitants of Australia or their descendants’. The important section is s. 18 of the AHA that explains the process to be followed if other people such as ‘a lessee from the Crown, and the holder of any mining tenement or mining privilege’ want to use the land on which ‘an Aboriginal site is located’ for a purpose which is likely to damage the site. The lessees would need to provide a written notice to the (Museum) Trustees, who would then recommend that the site be declared as a protected area or give consent to the user for the use of the land for the purpose required.

One of the functions of the Trustees [s.9 (b)] of the Museum Act 1969 is:

to make and preserve on behalf of the community of the State collections representative of the Aborigines of the State, the history of the exploration, settlement and development of the State, the natural history of the State and such other collections which the Trustees think necessary for the wider understanding of those matters and for the educational function of the Museum.

Section 9 (ba) of the Museum Act 1969 outlines the function of preserving on behalf of the community any remains, wreck, archaeological or anthropological site, or other thing, whether in the place where it is discovered or elsewhere, which in the opinion of the Trustees is of special national or local interest.

On the other hand, s. 28 of the AHA refers to the function of the Aboriginal Cultural Material Committee (ACMC) that, on behalf of the community, evaluates the importance of sites associated with Aboriginal people. Destruction, alteration or damage to an Aboriginal site without permission from the Minister for Aboriginal Affairs is an offence under s. 17 of the AHA (No 53). The AHA was thus seen as an important and only lever for Aboriginal people to defend their land from unwanted intruders. The Museum Act 1969 has a functional outlook through the Trustees of preserving ‘State collections representative of the Aborigines of the State’ such as ‘remains, wreck, archaeological or anthropological site’ that is ‘of special national or local interest’.
interest’. Clearly AAPA, AHA, and the Museum Act 1969 are interacting WA Legislative Acts that have ramifications for the effective representation of Aboriginal land interests.

In 1973, the Whitlam Government endorsed an Aboriginal Land inquiry headed by Mr Justice Woodward, whose report in 1974 stated that ‘to deny Aborigines the right to prevent mining on their land is to deny the reality of their Land Rights’ (the Australian Museum b). The Whitlam Government made a grand reconciliation gesture when it took decisive action in response to the Gurindji people’s protest since 1966 against the agricultural business, Vestey, that occupied their traditional lands. The Whitlam government purchased lands on behalf of the Gurindji people (Whitlam 1985, p. 471). In December 1974, the Commonwealth government created the ‘Aboriginal Land Fund’, which provided the opportunity for Aboriginal people to obtain a lease and work their own lands (Aboriginal Land Fund Act 1974). The Outstation or Homelands Movement in parts of the Kimberley began around the time when government policy shifted from Assimilation to Self-determination from the 1960s to the 1970s. The homelands movement refers to Aboriginal people returning to their own homelands after experiences of dislocation as a consequence of the Protection policies of the past. Aboriginal people who moved to outstations had the opportunity to return to their traditional lands and be involved in small-scale business livelihoods compatible with their traditional lifestyle of fishing and hunting (see Hawke 2013, pp. 201–202). The lands for the return to the outstations in Western Australia were obtained from unallocated Crown Land or excised from large pastoral leases. Aborigines obtained a Special Purpose Lease for periods of 25–50 years. However, holders of a mining tenement on the same lands were guaranteed free entry to these lands (Glaskin 2007). The fact that holders of a mining tenement had rights to enter their lands and undertake mining exploration or development demonstrated the limits of ‘land rights’ or the ‘self-determination’ policy in relation to the idea of Aboriginal people’s governance of their own lands.
Based on the Aboriginal Land (Northern Territory) Bill that Mr Whitlam’s Government introduced to Parliament, the Fraser Government passed the Aboriginal Land Rights Act 1976 (ALRA) NT, making it possible for Indigenous people to ‘control mining exploration on Aboriginal lands’, protect sacred sites, and compel mining companies to consult with Aboriginal people before beginning their mining activity (Whitlam Institute, n.d. b). With the passage of ALRA, a significant amount of lands were returned to Aboriginal people in the Northern Territory. ALRA was comparatively a much stronger legislation that did not exist in WA in relation to Aboriginal land interests. What influenced Aboriginal land interests in WA was the Mining Act 1978 (amended 27 times since first enacted in 1904), a formidable legislation, which in s. 16 (1) (a) states that ‘The Governor may, by proclamation constitute any part of the State to be a mineral and in s. 21(1), states:

The Governor may from time to time, under and subject to the Public Works Act, 1902, resume on behalf of the Crown any land (not being land that is the subject of a mining tenement or land on which mining operations are lawfully being carried on under an agreement in writing with the owner of the land) that in his opinion ought to be resumed for the purposes of this Act, and for the purpose of any such proposed resumption may cause the land to be inspected, surveyed, explored, and reported upon by such officers and workmen as he directs, all of whom may thereupon enter upon the land and carry out all necessary operations.

The state thus can compulsorily acquire the land that is the subject of a mining tenement. The WA State’s hold on any land within the jurisdiction of the State is absolute. To settle disputes that occur over land use between Aboriginal outstations and mining claims, the Warden Court has civil jurisdiction [see s. 134 (6) of the Mining Act 1978]. I describe how events unfolded in the dispute between the Noonkanbah Pastoral Company, the outstation leased by the Yungngora Aboriginal community and the mining company, CRA in Chapter 2.

Another important legislation, the EP was passed in WA in 1986. The EP establishes an Environmental Protection Authority (EPA) for the ‘prevention,
control and abatement of environmental pollution, for the conservation, preservation, protection, enhancement and management of the environment.' It deals with the approval of development applications. Part IV Environmental Impact Assessment of the EP must be completed before the Minister's consent can be obtained regarding a ‘significant’ proposal. A ‘significant’ proposal refers to proposals that could have a significant effect on the environment if implemented. The EP forms part of the state approval processes for development proposals such as mining development proposal applications. Controversial development projects are subject to close scrutiny such as whether a project proposal that has been approved is deemed to be ‘significant’ or not as stipulated by the EP legislation or whether the approval process procedures undertaken by the EPA were lawful. In the Browse LNG Precinct case described in Chapter 6, the EP was employed in relation to litigation against the WA Government (The Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307), a case that questioned the procedure of assessment that led to the project's approval.

In 1987, the Hawke Government announced in Parliament its intention to establish the Aboriginal and Torres Strait Islander Commission (ATSIC) to provide a national representative voice for Aboriginal and Torres Strait peoples as a way of implementing ‘self-determination’ (Palmer, K. 2004, p. 5). After extensive consultations with Aboriginal organisations and communities, the ATSIC bill was introduced in 1989 and enacted in 1990. It experienced some tension in balancing its dual role of representing Aboriginal interests and administering its program. In its role of advocating the recognition of Aboriginal rights (i.e. the ATSIC’s Chair, Geoff Clark’s advocacy for a treaty in 1999), it is accountable to its Aboriginal constituency but in terms of its service-delivery role as overseer of Indigenous-specific government programs, it is accountable to the government (Pratt 2003). This dual role is parallel to the tension that the KLC also experiences in regard to representing its Aboriginal native title constituency and its performance for the state of its service-delivery role. The KLC’s balancing act involves both
the ‘governance’ of the Browse LNG Precinct proposal at James Price Point in representing traditional owners’ land interests and its performance of its Native Title Representative Body’s (NTRB) statutory obligation based on the Native Title Act 1993 (NTA). The KLC also has its own interests to protect as an organization that has wide experience in Kimberley Aboriginal coordination of environmental and cultural land interests beyond its main role of facilitating native title determination (see Chapter 4).

In 1993, the Keating Government passed the NTA to give legislative effect to the High Court of Australia decision in 1992 that confirmed the traditional land rights of Eddie Mabo of Murray Island in Torres Strait. The Court found that native title rights survived settlement, though subject to the sovereignty of the Crown. The NTA sought to provide balance in the representation of diverse land interests of:

Aboriginal and Torres Strait Islander peoples who need their property rights and cultural rights recognised and respected; land developers – miners, pastoralists, tourist operators and others – who need access to land and certainty of title; and State and Territory Governments that need to manage land resources (Year Book Australia 1995).

The NTA enables native title claimants or holders to negotiate with resource developers or mining companies that wish to use their traditional lands. An Aboriginal land council (with statutory obligation as a Native Title Representative Body) represents the traditional owners’ interests. For the Browse LNG Precinct project, the KLC was the representative body responsible for the Kimberley region. The KLC undertakes heritage assessment on behalf of the tenement grantee so that developers could undertake avoidance measures involving heritage sites that are affected by mining activity. Traditional owners do not have veto rights so land councils tend to focus on utilizing the Indigenous Land Use Agreement (ILUA) process vested in the NTA to negotiate with the mining companies and the State government in regard to the use of traditional lands.

In 1999, the Commonwealth Government passed the Environment Protection and Biodiversity Conservation Act 1999 (EPBC) with the aim of protecting
the environment, especially in matters of national environmental significance, conserving Australian biodiversity, and recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity. The EPBC is involved in providing a streamlined national environmental assessment and approvals process. Before the James Price Point site was identified as a suitable site for processing Browse natural gas, the Commonwealth and WA State governments signed a joint strategic assessment agreement (see Appendix B: Joint Commonwealth and WA State media release 2008) to apply their respective environmental legislation for assessing the environmental impact of the project as a condition for its final approval. The procedure involved was that the State, employing its environmental legislation, the EP in the first instance would evaluate the project proposal. Once approval was given, the Commonwealth would assess the project based on whether the project had significant impact on a matter of ‘national environmental significance’.

1.3 Conclusion

Pastoral colonialism in the Kimberley contributed to the economic development of Western Australia that was achieved through the dispossession of Aboriginal people. Settler-Aboriginal relationships evolved from frontier violence, segregation and protection, provision of rations in pastoral stations’ missions and reserves to the incorporation of Aboriginal people into Australia’s nation-state. The process of incorporation was gradually facilitated through providing Aboriginal people with access to welfare benefits and extending equal wages, citizenship rights and suffrage. Obtaining Aboriginal land rights, on the other hand, was enabled through the mechanism of a representative, incorporated body, an Aboriginal land council whose statutory functions are defined under the NTA. There is no provision of veto rights in the NTA in relation to mining development proposals. Consequently, the grounds by which heritage sites are afforded protection in the WA State heritage legislation, the AHA in relation to native title rights, are weakened. The focus of land councils like the KLC had turned to negotiation and ‘agreement-making’ with mining companies and the State
government to obtain compensation and benefits in exchange for surrendering native title.

This thesis examines the workings of interacting Legislative Acts as a political and legal mechanism that is used for the representation of Aboriginal voices and interests. The next chapter narrates the institutional apparatuses and techniques of ‘governance’ applied at Noonkanbah when the Yungngora Kimberley Aboriginal people, who were running their own cattle station obtained through the Aboriginal Land Fund, clashed with mining companies that pegged mining claims in their territory.
Chapter 2

Noonkanbah and Argyle Diamond Mine: resource development prior to Native Title Act 1993

This chapter traces the evolution of resource development politics prior to the passage of the NTA. It illustrates two different modes of corporate strategy at Noonkanbah and the Argyle Diamond Mine in dealing with resource development disputes involving Aboriginal people. The presence of oil and diamonds in the East Kimberley region drew the attention of mining companies that saw potential profits to be gained from the finds. Equally the WA Government’s anticipation of the revenue it would receive from the mining projects provided the political and economic conditions that made mining companies and the state natural allies in a sparsely populated area with little prospect of electoral backlash. The minerals were almost always located in traditional Aboriginal lands. This raised the issue: which party’s legal rights would determine where and how mining would proceed.

Lessees of the Crown – holders of tenement licences – have legal rights as the ‘owners of land’ so they have rights of entry and access to Aboriginal traditional land to conduct their operations. The Crown being the lessor also has a legitimate claim to ‘land ownership’. From this tripartite paradigm of ‘land ownership’, diverse techniques of governance and institutional apparatuses were employed to fulfil the interests of interacting parties: the state, the miners and the Aboriginal people. The local Aboriginal people’s claim to ‘ownership’ relates to Aboriginal ‘sites of significance’ or sacred heritage sites that they seek to protect from damage by mining activity. In both the Noonkanbah and Argyle cases, despite the existence of legislation ostensibly designed to protect Aboriginal heritage, the leverage of heritage proved inadequate, as we shall see later. From an Aboriginal perspective, the issue is whether the recognition of their heritage rights gives them an effective say over the use to which the land is put (see Ostrom 1999). This narrative focuses on the representation of Aboriginal people’s participation in decision-making processes, and on the benefits they would obtain from being involved in the mining company’s operations.
The Yungngora people at Noonkanbah sought protection through WA State law from what they saw as intrusive mining activity that would damage their ‘sites of significance’. We recall the mass walkout by Aboriginal workers at Noonkanbah when conditions at the cattle station at Noonkanbah turned sour after the award wage equality reform. The Yungngora people eventually returned to Noonkanbah to run the station assisted by the Commonwealth Aboriginal Land Fund Commission (ALFC) that bought the station from the ALT on behalf of the Yungngora Aboriginal people, as narrated in the next section. The local Aboriginal people in Noonkanbah began to gain confidence and to achieve relative economic, educational and cultural autonomy on their own homeland until they discovered in May 1978 that 497 mineral claims were pegged on their land. The Yungngora people found that the mineral claims affected their pastoral lease. Without any consultation with them, the WA Government granted exploration tenements (onshore oil exploration permit EP97) to miners on a site that included their pastoral lease. Conflict erupted between the WA government and the Yungngora people that lasted from 1978 to 1980 over mining development and Aboriginal heritage land interests. As Western Australia had no legislated land rights, the Yungngora people’s grievance could only be addressed through the State’s heritage legislation, the AHA. At Argyle, a mining company, Conzinc Riotinto of Australia Ltd (CRA) initiated dealing directly with local Aboriginal people rather than through the State by opening what it called a ‘good neighbour’ program – a new relationship building platform that did not exist at Noonkanbah – which CRA used as the basis for organizing financial arrangements with some Aboriginal communities as compensation for land use.

The following Noonkanbah and Argyle stories demonstrate the political dynamics in the application of institutional apparatuses and techniques of governance in the contest between Aboriginal heritage and mining/state interests.
2.1 Noonkanbah (1978–1980)

2.1.1 The Aboriginal people at Noonkanbah: a brief history

To recap from Chapter 1, pastoralism dominated the Kimberley region’s economy from the 1860s when European settlement of the Kimberley region began. The Western Australian government in time increasingly relied upon revenue from pastoral leases while pastoralists became dependent on unpaid Aboriginal labour (Howitt 2001, p. 225). The new settlers from England, the Emanuels began the first permanent settlement of non-Aboriginal people in the Kimberley establishing the Noonkanbah pastoral station in 1886. Twenty-two years later in 1908, the Noonkanbah pastoral station prospered as a 100,000 acre (40,469 hectares) sheep station. During the period of pastoral paternalism, as described by Kimberley drover, Eric Lawford, station owners and managers were issued with permits to keep ‘Blackfella workers’ on the station. The permits enabled station owners, managers and policemen to act as ‘Protectors’ for Aborigines (Marshall 2011, p. 34). The role of ‘Protector’ vested in the Aborigines Act of 1905 was delegated to station managers or policemen in remote areas where the local Aboriginal people provided free or inexpensive labour for white managers or owners while managing to live in their own country (see Jebb 2002, p. 78-79).

During this period of pastoral control, Aboriginal people did not have effective ‘agency’ or a ‘voice’ that looked after their interests. Around 85% of Nyungar families (Aboriginal people who lived in the south-west of Western Australia) still lived on reserves in 1957 for most of the year. Change was afoot in 1964 when the Native Welfare Act 1964 was passed aimed at integrating ‘natives into the general community’ and providing special welfare measures during the transitional period towards their acquisition of full citizenship. The extension of Social Security benefits to the Aboriginal people in 1959, and the ruling in 1967 that enshrined equal pay for equal work, resulted in changing the old relationship between station owners and Aboriginal workers on pastoral stations. Until that time, Aboriginal people provided free or inexpensive labour worked for minimal remuneration. But from late 1968, the Pastoral Industry Award was applied to Aboriginal
workers in the Kimberley (Jebb 2002, p. 249). The change meant Aboriginal people were able to access cash welfare benefits. They now had money to spend in town but they also had the responsibility of fending for themselves. They no longer received rations for their subsistence at the pastoral station at Noonkanbah. Their altered economic provisions and the change in their domicile – their experience of dislocation from Country – became a challenge for some Aboriginal people (Howitt 2001, p. 226).

The Aboriginal community also requested the station owner excise a portion of the lease for Aboriginal workers. If this request were to be granted, it would allow members of the community to return to their Country and work independently on a portion of the pastoral station. Even though the station owner needed labour, he refused that request. The relationship between Aboriginal residents and management of the station turned sour when conditions degenerated and became squalid under the management of the station owner. The withdrawal of Aboriginal workers from the pastoral station consequently turned some of them into fringe dwellers while others regrouped and reorganised their community.

With the aid of government community development programs, the Karjunna people formed the Karjunna Community Incorporated. This group’s advocacy for return of their land, obtain ownership and management of the pastoral station exemplified self-representation and the practice of self-governance by a remote Aboriginal community group. We recall that during the ‘self-determination’ era in 1974, the Whitlam Government established the Aboriginal Land Fund Commission (ALFC) in recognition of Aboriginal people’s problems with land security and therefore the need for the government to provide a mechanism for them to request the ALFC to repurchase land and hand the title back to them (see Petersen 1981, pp.258-9). The hand-back would enable Aboriginal people to ‘own’ and work their own lands. In 1976, the European owners of the Noonkanbah Pastoral Station advertised the station for sale. The Commonwealth’s Aboriginal Land Fund Commission (ALFC) bought the station. From the Karjunna Community Incorporated, that the Karjunna people formed, emerged the Yungngora
Community Association. The Yungngora people sought the Commonwealth government’s support to purchase, on their behalf, Quanbun and Noonkanbah Stations located in their traditional homelands (Howitt 2001, p. 226). Their vision was to return from their exile at Fitzroy Crossing and obtain ownership and management of the pastoral stations in their own Country. Aboriginal people could not access land outside the reserve system that had been transformed to private ownership. The only way the title could be transferred to Aboriginal people was with the approval of the WA Government. The WA government wanted the Noonkanbah station title to be transferred to Aboriginal people through the WA Government’s ALT. The ALT was established by legislation, the Aboriginal Affairs Planning Authority Act 1972, and was the predecessor of the WA Department of Aboriginal Affairs. It is a major landholder that looks after 10% of 24 million hectares that belongs to the WA Government’s estate with responsibility for undertaking land acquisitions and in general, for the administration of lands held previously by the Native Welfare Department (Department of Aboriginal Affairs, n. d. a, ‘Aboriginal Lands Trust’).

Through the transfer of ownership of the Noonkanbah Pastoral Station to the ALT, the Yungngora community was able to take over the lease. In September 1976, about 200 Aboriginal people returned to the station, by then very run down (Howitt & Douglas 1983, p. 62). They began repair work and took over the running of the cattle station. The station became a source of food and cash for the community. Cattle sales generated $51,456 in 1978 and $95,783 in 1979 (Howitt & Douglas 1983, p. 62). With the generous support of the Aboriginal Nomads Educational Foundation in the Pilbara region, south of Noonkanbah, the local Aboriginal people established a community controlled bi-lingual school (Howitt 2001, p. 228). Within a couple of years, the Yungngora community had demonstrated that they could be relatively self-sustaining. They did not experience any interference in the governance of their community interests.
2.1.2 The contest between Aboriginal heritage and mining interests

The Western Australia government, led by Premier, Sir Charles Court, was fixed upon encouraging the development of the state’s natural resources. The Yungngora people’s response and opposition to the mining claims at Noonkanbah could only be addressed within existing WA State government legislative processes and practices of governance. The WA State was responsible for the governance and management of the State’s mineral resources. Implicit in the operation of the AHA and the Mining Act 1978 was the State’s design of institutional ‘rule building’ to govern physical capital that involves land use. In the crafting of institutions, the WA State used legislative devices for rule-making to define choices and desired outcomes that involve ruling in and ruling out particular actions. The institutional apparatuses and techniques of ‘governance’ that the State Government applied were tested in the political power dynamics that took place at Noonkanbah in relation to the contest between heritage and mining interests.

The Yungngora people consulted the Aboriginal Legal Service (ALS) to represent them at the Warden’s Court over their dispute with American Metals Climax’s (Amax) activity on the Aboriginal cattle station. Representing the interests of the WA government were the Minister for Mines and the Minister for Cultural Affairs. The latter had the power to issue directives to the Museum Board of Trustees as this agency was under the Minister’s responsibility. A more distant interested party was the Commonwealth represented by the Federal Minister for Aboriginal Affairs, Fred Chaney. The Yungngora people also called for support from the unions – the Transport Workers Union (TWU) and the Australian Workers Union (AWU).

The Yungngora people found that their community land had got entangled with the rush for exploration and mining minerals. In the late 1970s, Noonkanbah drew the attention of mining companies because of its potential wealth in diamonds and oil (Howitt & Douglas 1983, p. 62). Pastoral activities were disrupted after diamond fever soared resulting in over 30 companies, such as BHP, CRA, Amax and MIM, lodging mining claims. In May 1978...
without the permission of the community, CRA bulldozed some ceremonial grounds and damaged fences to do its preparatory exploration work. CRA’s action at that time coincided with the KLC’s inaugural meeting held on Noonkanbah station. In November 1978, the Yungngora people lodged 95 objections to claims pegged by CRA for disturbing stock, damaging fences and equipment and desecrating sacred sites (Howitt & Douglas 1983, p. 63). The Yungngora people wanted to take legal action to stop Amax’s further exploration work. They found that the only legal channel to defend their land from mining intrusion and to conserve their heritage was through the Warden’s Court (Howitt & Douglas 1983, p. 63). Mr McCann was the Broome Mining Warden who presided over the Warden Court (Howitt & Douglas 1983, p. 63).

I now show the interaction between legislative acts such as the Mining Act 1978, the AHA, and Museum Act 1969 in relation to resolving conflicts between land interests. In relation to heritage protection through the AHA, the Board of Museum Trustees had the statutory obligation vested in the Museum Act 1969 to render protection of Aboriginal heritage through the Trustees’ recommendations to the government. The Trustees functioned therefore as the ‘protector’ of Aboriginal heritage interests as vested in the AHA. On behalf of WA Aboriginal people, the Trustees represented and governed Aboriginal heritage interests. Any disputes that involved mining, however, were subject to the jurisdiction of the Warden’s Court as stipulated in s. 13(1) of the Mining Act 1978:

Wardens of mines, mining registrar

(1) Any person holding office as a magistrate under the Magistrates Court Act 2004, may be appointed by the Governor to be a warden of mines and is thereby authorised and empowered to preside in a warden’s courts (Mining Act 1978, sec.13).

Two Legislative Acts were interacting in this case. The Mining Act 1978 s. 31[1], provides for the Governor to appoint a Magistrate as a warden of mines. The Mining Registrar or the Warden could have the dual role of granting a prospecting licence subject to conditions prescribed or imposed in
ss. 24, 24A or 25 of the Mining Act or as specified in the licence, and of adjudicating over any disputes that might arise over mining. The AHA s. 19 involved the Board of Museum Trustees making recommendations on the protection of an Aboriginal site.

The independence of the Warden’s Court could be called into question if the Warden of mines were to perform the duty of a Magistrate that arbitrates in disputes over which the Warden of mines exercised the role of registering and granting a prospecting licence. A contest of interests emerged in the Noonkanbah dispute because Aboriginal sacred sites existed on mining exploration leases. The Yungngora people had no other recourse but to seek assistance from the Aboriginal Legal Service of Western Australia (ALSWA) to represent them in the Warden’s Court. ALSWA was founded in Perth in 1973. It evolved from a Justice Committee of the New Era Aboriginal Fellowship Inc. in the late 1960s that was established as a voluntary advisory legal service for Aboriginal and Torres Strait Islander peoples (Aboriginal Legal Service of Western Australia, n.d.).

The Yungngora’s counsel argued that ‘mining and exploration on Noonkanbah would threaten the “lifestyle and culture” of Aboriginal people in the area and endanger sacred sites’ (Skyring 2011, p. 182). Graham McDonald, Principal Legal Officer and G. Kennedy, QC used Kingsley Palmer’s report as evidence. Palmer, at that time, a postgraduate anthropology student at the University of Western Australia, conducted a survey of the station and documented the sacred sites for ALSWA. The strongest legal defence that the Yungngora people could use rested on the authentication of the claim that sacred sites existed on the exploration leases. To substantiate the Yungngora people’s objections to the exploration leases based on supposed adverse effect on their sacred sites, the Museum’s Board of Trustees needed to examine this claim. From an institutional legal context, the Trustees’ role vested in s. 19 of the AHA involved making recommendations on the protection of an Aboriginal site.
19. (1) Where the Trustees recommend that any Protected Aboriginal site is of outstanding importance the Governor may, by Order in Council, declare that site to be a protected area.
(2) The declaration of a protected area shall specify the boundaries of that area in sufficient detail to enable them to be established but it shall not be necessary that the boundaries are surveyed or demarcated.
(3) An Aboriginal site may be declared to be a protected area whether or not it is on land that is in the ownership or possession of any person or is reserved for any public purpose.

By virtue of the recognition of the Museum’s authority and expertise in evaluating heritage, the Trustees were put in a position to represent Aboriginal heritage interests. Note that the Trustees within the provision of s. 19 of the Act were limited to making recommendations to the Governor who had the power to declare an Aboriginal site s. 19(3) ‘to be a protected area whether or not it is on land that is in the ownership or possession of any person or is reserved for any public purpose.’ Whether the Governor, on the Trustees’ recommendation, or the WA government, had the final say was a test of political strength in relation to the effective governance of heritage protection.

Rejecting the anthropological basis on which the Museum defined sacred sites, the WA government on 25 March 1979 instructed the Board of Trustees to approve drilling at Noonkanbah. The Trustees withdrew their objections. The Minister has the power to override independent anthropological advice about the existence or significance of heritage sites to help mining companies completely secure land access to the mining area.

The Museum Trustees’ position was ambivalent. The onus was for the Trustees to show cause why consent could not be granted. The Trustees could be liable to pay the complainant (the miner) for expenses incurred if the Court ruled that the Trustees had been unreasonable in the performance of their duty. They did not instantly follow the WA government’s directive to give consent to Amax’s exploration activity. Why this was so could be gleaned from the functions of the Museum described in s. 9(a)–(f) of the Museum Act 1969. It includes s. 9(a)–(ba) which reads:
(a) to encourage, and to provide facilities for, the wider education of the community of the State, through the display and other use of collections and through knowledge derived from collections;
(b) to make and preserve on behalf of the community of the State collections representative of the Aborigines of the State, the history of the exploration, settlement and development of the State, the natural history of the State and such other collections which the Trustees think necessary for the wider understanding of those matters and for the educational function of the Museum;
(ba) to preserve on behalf of the community any remains, wreck, archaeological or anthropological site, or other thing, whether in the place where it is discovered or elsewhere, which in the opinion of the Trustees is of special national or local interest;

Sections 9 (a) to (ba) show that the Museum's mission had an educational and heritage preservation function on behalf of the community. Appointed by the Governor, the members of the Trustees would have seen their operation as relatively independent of the WA government. It was within their statutory obligation, vested in the Museum Act 1969, that the Museum Trustees’ response to decline the WA Minister for Mines request to give Amax consent to the exploratory oil drill, and instead to recommend that the site be declared a ‘protected area’. In keeping with their role and function, the Museum Trustees conducted anthropological surveys in April and June 1979 to find evidence for ‘sites of significance’. They employed Peter Bindon, an archaeologist and anthropologist to conduct an ethnographic investigation of the sites within the mining project area that would serve as the basis for their recommendation that the site be protected. Bindon initiated an ethnographic investigation of the sites within the mining project area on the Noonkanbah lease. He toured the sites twice and reported that ‘the whole area within which any drill hole could be located by the company falls under the influence of the sacred sites.’

On 7 June 1979, ALSWA commissioned its own anthropological survey appointing Dr Kingsley Palmer to identify precisely the location of the ‘sites of significance’ (Howitt 2001, p. 229) as part of ALSWA’s preparation for the Mining Warden’s Court (Palmer 2012). Dr Palmer declared that the whole land was recognised as being ‘endowed with spiritual essence’ Umpampurruru (see Plate 1.1 and map 1.2) was known as a significant site that brings
fertility and wealth to the locality (Howitt 2001, p. 23). Now the Museum Trustees and counsel for the Yungngora people both attested the existence of the sacred sites on Amax’s exploration mining site.

The Broome Mining Warden, Mr McCann dismissed the Yungngora people’s objections ‘on legal technicalities’ – citing the limitation of the law in protecting Aborigines from the impact of mining operations (Howitt 2001, p. 23). The Magistrate and Mining Warden, David McCann’s first consideration was to determine whether the licence obtained by the miner was valid. While he acknowledged that some of CRA’s leases that the Yungngora community objected to, were within the ‘spheres of influence’ of recognised sacred sites (Howitt 2001, p. 229), he found that ‘there was no legally sustainable objection to the granting of CRA’s claims’ or tenement grants’. An argument based on ‘little points of sacredness on the landscape’ in AHA alone was not adequate ‘to address Aboriginal concerns about land’ (Skyring 2011, p. 183). The Warden’s decision was constrained by legal technicalities. The Warden only had to determine whether the mining licence was validly issued. If the tenement licence were valid, the tenement holders would have legal rights within the boundary of their tenement for the duration of their licence. He dismissed the Noonkanbah Pastoral Company’s objections on the condition that sacred sites are ‘protected under the AHA where necessary’ (my italics, Skyring 2011, p. 183).
When the WA Minister for Cultural Affairs overruled the WA Museum’s recommendations concerning sacred sites and directed the Trustees on 14 June 1979 to give their consent to the use of the land, the legal channels available for heritage protection at Noonkanbah virtually disintegrated. The relative impotence of AHA to effect conservation of Aboriginal sacred sites was demonstrated.
Although the Warden’s findings did not support the Yungngora’s case, he was not insensitive to the local Aboriginal people’s concerns, noting that:

It would be insensitive not to recognize the sincere and deep interest of these aboriginal people in the land they see as theirs. It is clear that they are worried and, to a degree, feel threatened by the mining development in the area. This concern and worry has manifested itself in the objections made to these claims. It is a matter of comfort that this manifestation has taken a lawful, as distinct from an illegal and hostile form. If only as a matter of self-interest, the Government, the Mining Companies and the community at large would do well to look at the issues raised in these proceedings and take positive steps to attempt to abate the concern expressed by the Aboriginal people. (cited from the judgment of Magistrate and Mining Warden, David McCann, in Hawke & Gallagher 1989, p. 23; Howitt & Douglas 1983, p. 63; Skyring 2011, p. 183)

To prevent Amax from proceeding with its exploration activity, the Yungngora people applied for an interim injunction, objecting that the AHA process had not been followed (Dillon 1983, p. 490; Skyring 2011, p. 184). Amax immediately applied for the injunction to be lifted. Brinsden J lifted the injunction. Although he acknowledged that the evidence suggested that the land in dispute did have ‘social, economic, sacred, ritual significance to the Aboriginal community’, he concluded that the Minister for Cultural Affairs did have power to control and direct the Trustees in all their functions by virtue of s. 11(2) of the AHA [No. 53 of 1972]. Thus Amax’s application was granted.

Section 11(2) of the AHA states:

The Minister, after consultation with the body concerned, may give to the Trustees, or to the Committee, directions of a general or specific character as to the exercise of any function under this Act and that body shall give effect to any such direction.

Governance of Aboriginal interests in regard to protection of sacred sites was determined by who had responsibility, authority and power over the work of the Trustees. The representation of Aboriginal voices was by proxy through the work of the Museum Trustees on behalf of Aboriginal people.
Amax’s contractors went to Noonkanbah to begin drilling operations. Mines Department personnel also went there. They found the gate at Noonkanbah station locked. About forty members of the Yungngora community barred their way. The contractors still could not enter the property the following day. The Aboriginal Legal Service succeeded in obtaining another injunction from the WA Supreme Court to prevent Amax from drilling at Noonkanbah. By the time the injunction was lifted, the wet season had begun and drilling was no longer viable for the rest of that year.

The WA Premier, Sir Charles Court faced a State election in February 1980. His government’s campaign was centred on freedom of access to resources for development, land rights and law and order. Although the Court Government was returned to office, election results for Aboriginal voters in the Kimberley indicated an overwhelmingly rejection of Sir Charles Court’s Liberal Party (Hawke & Gallagher 1989, pp. 169-70).

What the election results indicated was that the Aboriginal constituents in the Kimberley region based on the Court government’s campaign platform rejected the notion of ‘freedom of access to resources for development’ in relation to the issue of Aboriginal ‘land rights’. On the other hand, mainstream voters, from a general rather than from a local perspective, gave support to the WA government’s position on ‘development’ of resources. In relation to the Noonkanbah debacle, Howitt (2001, p. 224) described the WA Government as a “developmentalist state” or an unambiguous protagonist of resource-based development, even when there are no resources to be exploited!’

The Premier made plans to facilitate the commencement of drilling near Pea Hill during the 1980 dry season. He formed a new Ministerial team to deal with the Noonkanbah standoff. In March 1980, WA government ministers flew to Noonkanbah to talk to the Yungngora community (Ritter 2002). The Ministers questioned the community how ‘areas of influence’ were conceived as ‘sacred sites’ (ss. 5–6 of AHA). We see from the ss. 5–6 of the AHA cited below that nowhere in the provision could be found a definition of the ‘areas
of influence’. Rather, reference to ‘any place ... of special significance’ in [s.5 (b)] to Aboriginal people was too broad, and the force of definitions only related to ‘objects’ [in s. 5(d)] and in [s. 6(1)].

Section 5–6 of the AHA (assented on 2 October 1972) stipulate:

5. This Act applies to
(a) any place where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
(b) any place, including any sacred, ritual or ceremonial site, which is of importance or of special significance to persons of Aboriginal descent;
(c) any place which, in the opinion of the Trustees, is or was associated with the Aboriginal people and which may be of historical, anthropological, archaeological or ethnographical interest;
(d) any place where objects to which this Act applies are stored, or to which such objects have been taken or removed under the provisions of this Act, and which has not been excluded from the provisions of this Act by agreement with the Trustees in accordance with subsection (6) of section 18.

6. (1) This Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.
(2) This Act applies to objects so nearly resembling an object of sacred significance to persons of Aboriginal descent as to be likely to deceive or be capable of being mistaken for such an object.
(3) The provisions of Part VI of this Act do not apply to an object made for the purpose of sale and which
(a) is not an object that is or has been of sacred significance to persons of Aboriginal descent, or an object so nearly resembling such an object as to be likely to deceive or be capable of being mistaken for the same; or
(b) is an object of the kind referred to in paragraph (a) of this subsection that is disposed of or dealt with by or with the consent of the Trustees.

The Ministers also questioned why these sites were not registered. The Ministers insisted that, as the site did not appear on the WA Museum’s register of sacred sites as a sacred site, it was therefore not protected under
the AHA (Howitt 2001, p. 233). It is in fact the Minister's duty to record information concerning places of traditional or current sacred ritual or ceremonial significance to Aboriginal people. This has conventionally been interpreted to mean that the Aborigines should supply this information for recording and registration so that the place of significance could be preserved and protected. Section 10 of AHA (assented on 2 October 1972) states:

10. (1) It is the duty of the Minister to ensure that so far as is reasonably practicable all places in Western Australia that are of traditional or current sacred, ritual or ceremonial significance to persons of Aboriginal descent should be recorded on behalf of the community, and their relative importance evaluated so that the resources available from time to time for the preservation and protection of such places may be co-ordinated and made effective.

The dialogue between the Ministers and the Yungngora community put focus on the distinction between cultural Aboriginal Law and the AHA stricture that impacted the protection of Aboriginal heritage sites. The Ministers’ meeting with the Yungngora community did not result in an agreement (Ritter 2002).

At the height of the Noonkanbah dispute, the Minister for Cultural Affairs warned that land transfers of pastoral leases to Aboriginal groups would be frozen across the state pending the resolution of the dispute (Dillon 1983, p. 490; Howitt 2001, p. 233;). Clearly this was punishment for delays effected by Indigenous protest actions (Howitt 2001, p. 223). By the end of March 1980, Amax under police protection ‘entered the property without notice and began bulldozing a camping area’ (Ritter 2002). Another injunction was enforced but was lifted shortly after.

In using the threat of freezing land transfers of pastoral leases, the WA government had abandoned persuasive methods of resolving the conflict between the miner and the Yungngora people. Street protests in Perth wanted the Federal Government to intervene, some calling for a ‘Royal Commission into Aboriginal land rights in Western Australia’ (Howitt 2001, p. 233). The Transport Workers Union, AWU and other unions imposed bans
on drilling equipment. The Yungngora people conducted their law ceremony at a camp near the Amax site. For some inexplicable reason, Amax contractors withdrew from the site to a nearby town (Ritter 2002) taking their equipment with them. Amax’s withdrawal from Noonkanbah made national headlines and infuriated the WA Government (Howitt 2001, p. 233). An uneasy peace ensued until 30 May 1980 when the Premier himself went to Noonkanbah to talk to the Yungngora community (Ritter 2002). Seeking to broker a resolution, the Federal Minister for Aboriginal Affairs, Fred Chaney got involved but all talks failed to resolve the impasse.

The Yungngora people’s protest was supported by church groups and the union movement. The Under Secretary for Mines, Western Australia first gave permission to drill on June 13, 1979. According to Botsman (2012a), ‘the Western Australian Government took over the organisation of transport for the rig, and on August 29th, 1980 also assumed the role of Operator’.

In August 1980, forty-five trucks bearing drilling equipment left Perth bound for Noonkanbah. This convoy of Amax contractors under heavy police protection managed to break through protests and pickets. The union ban on drilling equipment delayed Amax’s operation but that ended when a non-union crew was assembled to do the drilling operations. The crew did the drilling on 30 August 1980 at the Fitzroy River Number One Well (Ritter 2002). The WA Government then transferred the Operator’s interest back to Amax three weeks later (Hawke & Gallagher 1989). The drill failed to find any commercial reserves of oil and the drill hole was subsequently plugged (Ritter 2002).

The Noonkanbah case showed the utility of the Legislative Acts, the AHA and the Mining Act in fulfilling the objectives of the WA Government but frustrating the representation of the objectives of the local Aboriginal people and their advocates. The next Section, beginning with a brief history of East Kimberley Aboriginal people, canvasses the Argyle Diamond Mine case, which shows a more active effort on the part of CRA, the mining company to establish a working relationship with those affected by their mining activity.
2.2 Argyle (1979–1983)

2.2.1 Overview

The narrative that follows traces the events that led to the division between Aboriginal groups, the lack of Indigenous consensus in agreement making with CRA over mining benefits, and the evolution of Aboriginal participation in ILUA. In this narrative, I identify the weakness in techniques of governance in relation to protecting Aboriginal heritage.

Development in the East Kimberley has had a major impact on Aboriginal people’s lives. The first phase began when pastoralists came to settle in the 1880s (Durack 1959). The second phase of development was the Ord River scheme in the 1960s marked by the damming of the Ord River. The third phase began in 1972 when Ashton Mining Ltd, an Australian company began diamond exploration in the Kimberley region (Argyle Diamond Mine). CRA had a 56.8% interest in the Ashton Joint Venture (AJV). After ten years of CRA exploration, a diamond deposit was discovered in the Kimberley region on the 28th of August 1979. CRA, a subsidiary of the British firm Rio Tinto-Zinc, discovered a tube of Kimberlite (a mineral deposit of crystalline tubes) near Smoke Creek on the Ord River. The Argyle mining project is in the East Kimberley region, about 80 km south of Kununurra. Kununurra, a relatively new town was set up to service the Ord River Irrigation system in the 1960s. Dillon (1991, p. 140) referred to the Ord River scheme in the 1960s as a project that ‘radically transformed the major portion of Miriwung land’. Lake Argyle, which borders the Argyle mining lease area in the northeast, was artificially created in 1972 through the damming of the Ord River and the subsequent inundation of the Argyle pastoral lease, the Miriwung Aboriginal people’s land. The Miriwung were dispossessed without compensation. Many were marginalized in camps on the outskirts of Kununurra. The Ord scheme attracted national debate in regard to the feasibility of ‘developing the north’. Hardly any attention was given to the impact of the scheme on the Miriwung Aboriginal people who lived around the river on the lower Ord Basin. Dillon (1991, p. 141) argued that the Aboriginal people’s concerns were not well articulated and so their views were rendered invisible or ignored. Early in
1978, the State Minister of Aboriginal Affairs took control of entry into Aboriginal reserves (Howitt & Douglas, 1983, p.47). Entry into Aboriginal reserves had been the responsibility of the Department of Aboriginal Affairs acting under the terms of the Aboriginal Affairs Planning Authority (AAPA) Act (ibid).

Tension between CRA and the local Aboriginal people in Argyle began when Aboriginal people observed helicopter musterers flying over their territory in 1979. Shortly after, they saw CRA excavating around one of their sacred sites, Devil Devil Spring (Howitt & Douglas 1983, p. 48). Concerned about CRA and the AJV’s activities, the Warmun Aboriginal community contacted the newly established land council, the KLC and the WA Museum to seek their support. The KLC cabled CRA on 7 November 1979 raising these concerns and asked the mining company to stop its work on account of the impact on Aboriginal sacred sites (Howitt & Douglas 1983, p. 48). CRA’s reply the following day was that it had asked the WA Museum for the location of any sacred sites that the KLC mentioned. Based on its preliminary survey, the Museum informed CRA on 5 December 1979 of 58 Aboriginal sites on or adjacent to the diamond deposit located on the pastoral lease (Dillon 1983, p. 491). One called Devil Devil Spring was just outside the boundary of the mining claims. Of three other sites, one was submerged in Lake Argyle; another had no religious significance; and the last, known as daiwul122 was located right on the Kimberlite pipe (Dillon 1983, p. 491).

CRA bulldozed a dam across the Devil Devil Spring to provide CRA mining camp with water, causing damage to that site. The Warmun Aboriginal Community Inc. at Turkey Creek where most Traditional Owners lived, were incensed when they became aware of the damage to the Devil Devil Spring site in late 1979. The Museum asked CRA to repair the damage and to stop further work until a proper evaluation of the sites was completed. The Museum recommended that CRA employ a member of the Warmun community to help identify the site boundaries and apply to the Minister if it wants to continue its work. CRA ignored the Museum’s report and carried on with its work. Defending itself, CRA argued that damage to Devil Devil Spring
occurred *before* it received a copy of the Initial Survey on 5 December 1979. Under s. 62 of the AHA:

In proceedings for an offence against this Act it is a defence for the person charged to prove that he did not know and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which this Act applies.\(^{16}\)

Using this provision, CRA would not be regarded as having committed an offence as it claimed that it could not have been aware of the existence of the Aboriginal site. On 15 January 1980, the Museum wrote to CRA drawing attention to its previous recommendations and reminding CRA that it needed to apply to the Trustees of the Museum if they wanted ‘to continue their exploration activities on the registered sacred site’. CRA then applied to the Museum in February 1980 under s. 18 of the Act ‘to use the daiwul site “for another purpose”’ (that is, mining likely to damage sites) (Dillon 1983, p. 492).

CRA’s newly appointed research officer on Aboriginal Affairs, Mike Bell did not meet with the Warmun people at Turkey Creek until 22 April 1980. Through Bell, the Warmun people advised CRA and its joint venture partners ‘to avoid working within two miles of the crest of the mountains at the Barramundi Gap (called tayiwul) to avoid infringing the terms of the Aboriginal Heritage Act’ (Howitt 2001, p. 240). At this time, the KLC anthropologist, Kim Akerman had just completed a survey of sacred sites. Bell promised the Warmun people that CRA’s work would keep two miles from sites. In May 1980, however, CRA decided that one kilometre was sufficient buffer. CRA changed its mind because ‘[t]hat boundary would have covered the whole of the best diamond area’ (Howitt 2001, p. 240). The WA Government did not want the Museum to be involved in the dispute and made it difficult for Museum staff to visit the site (Howitt & Douglas 1983, p. 49).

The Australian Institute of Aboriginal Studies (AIAS) also conducted a major anthropological evaluation survey of the sites threatened by mining on 5 June 1980. The AIAS survey, however, was confined to ‘physical description of
geographical features' without supplying a map that indicated the area of the sites.

As in the Noonkanbah case, a key obstacle to heritage protection and a major weakness in all the surveys done was the absence of an agreed methodology or of 'standardized procedures for site definition' even though all the surveys confirmed that both the Devil Devil Spring and daiwul sites were genuine (Dillon 1983, p. 491). The WA Museum Deputy Director conducted a field trip to delineate site boundaries. The difference for site definition employed between Noonkanbah and Argyle was: the Trustees at Noonkanbah would have given protection to a complex of sites referring to a 'sphere of influence'; at Argyle, the survey definition of the site referred to notional boundaries of 500 metre radius around a grid reference. Without standardized procedures, CRA could construct boundary definition parameters that favoured its own interest. Both Devil Devil Spring and daiwul areas extended well beyond previously drawn notional boundaries. The method employed for determining sites of significance proved advantageous for CRA.

When the Warmun Community found that daiwul had been extensively disturbed after CRA bulldozed a road 'up the watercourse to the gap' and made a large excavation (30m x 10m x 10m) at the top (Dillon 1983, p. 492). A Warmun leader, John Toby took legal action against CRA at the Kununurra Court in June 1980. The Museum also commenced its own prosecution but the Minister intervened and directed the Museum not to proceed (Dillon 1990, pp. 40-54, 155-68; Howitt 2001, p. 240). The Museum stopped its investigation of CRA's alleged breaches of the Act such as s. 17 of the AHA over the destruction of daiwul (Doohan, Langton & Mazel 2012, p. 233). The Legislative Act invoked during the dispute between the local Aboriginal people, the miners and the State government was the AHA (Howitt & Douglas 1983, p. 49). The amendment to the AHA in 1980 had ramifications for the representation of Aboriginal heritage interests, as is revealed in Section 17 of the AHA that states:
Offences relating to Aboriginal sites. Substituted by No. 8 of 1980, s. 6.
A person who-
(a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
(b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site, commits an offence unless he is acting with the authorization of the Trustees under section 16 or the consent of the Minister under section 18.

Clearly, the authorization of the Trustees or the Minister enabled Aboriginal sites to be legally damaged or destroyed. CRA’s legal defence invoked s. 62 of the AHA under the heading ‘Special defence of lack of knowledge’ that is, that ‘it could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which this Act applies’ (Aboriginal Heritage Act 1972) because when CRA carried out the work, it had not yet received the Museum’s report about the sacred sites.

When the Museum asked CRA to provide dates on its work on daiwul, CRA’s response was that all work on daiwul took place before 6 December 1979. In other words, CRA was asserting that it had not received a copy of the Museum’s survey that claimed the existence of 58 Aboriginal sites before CRA worked on the daiwul site. The Museum did inform CRA on 5 December 1979 of 58 Aboriginal sites on or adjacent to the diamond deposit located on the pastoral lease but the question was when CRA received a copy of the survey.

CRA refused to provide the Museum documentary evidence to prove its assertion (Dillon 1983, p. 493), so the Warmun community encountered a major problem in pursuing the case, as they had no way of identifying the exact date/s when the work that caused the damage to daiwul took place.

The contest between the local Aboriginal people and the miner was now entirely dependent on the force of the AHA legislation that CRA used as the legislative tool to support its destructive action. The Museum, as the government agency that was meant to be the custodian of Aboriginal heritage as Trustee, was now subject to the directive of the relevant WA government Minister under s. 11(2) of the 1980 amended AHA which states:
the Minister may (a) after consultation with the body concerned, give to the Trustees, or to the Committee; (b) give to the Director or to the Registrar, directions of a general or specific character as to the exercise of any function under this Act or the doing of any thing for the purposes of this Act and that body or person shall give effect to any such direction.

Clearly the Museum’s role as Trustees lacked independence to enable it to fulfill its role in protecting Aboriginal sites. Without the Museum’s support in consolidating evidence for the court case, the Warmun community did not feel confident of the success of their case, so on 6 July 1980, they dropped their case against CRA. After the Warmun people dropped their legal action against CRA, the Museum re-started its investigation of CRA’s alleged breaches but the WA Minister directed the Museum not to take the matter further. The Warmun community lost faith in the Museum’s ability to represent their interest, so on 29 July 1980, the Warmun community lodged a complaint to the WA Parliamentary Commissioner for Administrative Investigations that the WA Museum ‘failed to fulfil its statutory obligations to protect the registered sites of significance’ – Devil Devil Spring and daiwul – arguing that the delay in the Museum’s investigation had adversely affected rendering protection for the daiwul site. They pointed out that the Commissioner’s decision in considering CRA’s application to use the daiwul site under s. 18 of the AHA took over twelve months when it should have been made within six months of the complaint being lodged under s. 51 of the WA Justices Act 1902 (Dillon 1983, p. 494), which states:

Limitation of proceedings. Limitation.
51. In any case of a simple offence or breach of duty, unless some other time is limited for making complaint by the law relating to the particular case, complaint must be made within six months from the time when the matter of complaint arose.

Under pressure to find a legal basis to argue their case, the Warmun community's legal counsel employed the provision of WA Justices Act as the ground for their complaint. The conflicted relationship between the Ministers and the Museum Trustees led the WA government to amend the AHA in 1980. The effect of the amendment was to clarify the Minister’s power to give
consent to activities under s. 18 of the AHA to disturb a site and ensure that the Trustees would comply with the requirements. To illustrate, let us compare in part the AHA provision before the 1980 amendment and after the 1980 amendment in s. 19 of the AHA.

Section 19 of the original AHA 1972 states:

19. (1) Where the Trustees recommend that any Aboriginal site is of outstanding importance the Governor may, by Order in Council, declare that site to be a protected area.
(2) The declaration of a protected area shall specify the boundaries of that area in sufficient detail to enable them to be established but it shall not be necessary that the boundaries are surveyed or demarcated.
(3) An Aboriginal site may be declared to be a protected area whether or not it is on land that is in the ownership or possession of any person or is reserved for any public purpose.

Section 19 of the 1980 amendment states:

19. (1) Where the Trustees recommend to the Minister that an Aboriginal site is of outstanding importance and that it appears to them that the Aboriginal site should be declared a protected area the Minister shall give notice in writing of the recommendation a) to every person entitled to give notice under subsection (2) of section 18; and b) to any other person the Minister has reason to believe has an interest that might be specially affected if the declaration were made, specifying in each notice a time within which representations must be made if they are to be considered in accordance with this section ... (4) The Governor, on the recommendation of the Minister, may by Order in Council declare an Aboriginal site to be a protected area.

The role of the Minister was not specified in the original AHA whereas the amended version clearly highlighted the line of responsibility: ‘the Trustees recommend to the Minister’ (s. 19 (1)) and that it is the Minister who recommends to the Governor to ‘declare an Aboriginal site to be a protected area’ (s. 19 (4)). The original s. 18(1) of the AHA refers to Aboriginal sites required for other purposes and to ‘the holder of any mining tenement or mining privilege in relation to the land on which the Aboriginal site is located’.

The operation of Petroleum Act 1967 legislation weakens the protection of Aboriginal heritage interest. Mining privilege under s. 11(1) of that Act
allows the Minister and his agents to enter and occupy Crown land or any other land in relation to searching, obtaining, refining or disposing petroleum (Petroleum Act 1967-1981). The amended 1980 version of the AHA in s. 18(1) specifically refers to giving consent to the ‘owner of any land’ that includes a ‘lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the Petroleum Act 1967, in relation to the land’. The miners were given a right of representation to the Minister and a right of appeal to the Supreme Court against decisions by the Minister. The right of appeal did not extend to the Traditional Owners of heritage sites.

The 1980 amendment of the AHA was employed as a legislative device to enable WA Ministers to have the final say in giving consent to the ‘owner of the land’ (the miners) to destroy Aboriginal heritage sites. The WA government gave its consent to CRA’s application to use the site (effectively this meant the site would be destroyed) on 25 September 1980 or two days after the 1980 amendments came into force (Doohan, Langton & Mazel 2012, p. 234; Howitt 2001, p. 240). Section 18(4) of the AHA 1980 is about giving the Trustees a deadline to submit their recommendation to the Minister over the grant of consent to the landowner so that the Minister can ‘expedite the matter’. This section adds that ‘the Trustees shall comply with any such requirement’.

Another substantive amendment was the alteration of the definition of ‘Aboriginal sites’ from ‘sites of religious significance to Aborigines’ to ‘any place which in the opinion of the Trustees, is or was associated with the Aboriginal people and which may be of historical, anthropological, archaeological or ethnographical interest’ (Dillon 1983, p. 495). The emphasis in the definition of sites had shifted. Prior to the 1980 amendment, the definition stressed the ‘religious significance to Aborigines’. The amended version emphasized Aboriginal heritage preservation ‘because of its importance and significance to the cultural heritage of the State’. What this means is the State’s definition of ‘Aboriginal sites’ was privileged in relation to the Aboriginal people’s definition of ‘sites of religious significance’ to them.
Aboriginal participation in decision-making processes regarding ‘sites of significance’ was virtually non-existent.

CRA Chairman, Sir Roderick Carnegie admitted at CRA’s 1980 Annual General Meeting that company operations did ‘affect a sacred site’ but he downplayed this admission by stating that CRA had restored the site ‘as far as possible to its original state’ (Dillon (1983, p.492). When the Warmun community leader, Toby realized that a successful prosecution was not possible, he began to weigh up his family and his community’s options. He thought that obtaining CRA benefits would enable his own family to return to their own traditional lands at the Mandangala outstation (Howitt 2001, p. 240). Toby decided to make a pragmatic decision. Toby and George Gauci, CRA Mine Manager discussed opportunities for ‘a new multi-skilled work force’ that could include Aborigines and women and for CRA to develop neighbourly relations with Aboriginal communities (Doohan 2008, p. 86). The private agreement with CRA suited Toby’s family who, according to Howitt and Douglas (1983, p. 49), put enormous pressure on Toby to negotiate a settlement with CRA. The agreement reached which CRA called ‘the Good Neighbour Programme’ was a political manoeuvre (Dillon 1990, p. 133) that would secure a diamond mine for CRA while allaying criticisms from the wider public (Howitt 2001, pp. 240–241) at ‘a very modest annual expenditure on capital works’.

Toby’s private negotiation with the CRA Mine Manager only focused on the Mandangala outstation on the Glen Hill pastoral lease north of the exploration area. His family’s traditional lands were located at that outstation so they were identified as the beneficiaries of the agreement. The broader Aboriginal communities affected by CRA’s mining activity, not surprisingly, were highly critical of the agreement because it only involved ‘a select group of traditional owners for the Argyle area (Doohan, Langton & Mazel 2012, p. 234). Toby was only one of fifty traditional owners. Furthermore, not all affected Aboriginal people were given prior notice about the negotiation thus the representation of local Aboriginal people was limited. Only four signatories secured the Argyle Agreement on 26 July 1980 in return for financial payments during the life of the mine (Howitt & Douglas 1983, p. 49).
In other words, CRA excluded other mining-affected Indigenous communities that should have also been entitled to compensation (Dillon 1991, p. 148). Excluded also were independent third party groups such as the Warmun Community Council and the land council, which would have given a broader representation of Aboriginal community interests.

On account of the secrecy and haste with which the negotiations were conducted, Toby’s agreement yielded a poor outcome. Even the selected beneficiaries were not clear about how the funds were administered and what constraints applied regarding the use of the funds. A critical part of the negotiation should have considered a fair compensation for CRA’s damage to Indigenous sacred sites, and what was the agreed mechanism for distribution of compensation funds to all affected communities. In terms of Aboriginal cultural processes, ‘Aboriginal law’ required the consent and involvement in discussions of other Aboriginal people whose sites were affected by CRA’s mining development project (Howitt 2001, p. 241). CRA’s response to such criticism was that the agreement was a ‘good neighbour’ rather than a legal agreement.

Finally, the State’s techniques of governance of Aboriginal heritage were deficient in relation to the ADM case. The authority of the Museum Trustees lay in their expertise in the field of heritage; the authority of the Minister lay in its power to have the final say (Dillon 1983, p. 494). The rule of law was not always observed. CRA damaged the daiwul site yet avoided prosecution. The WA Government interfered with the Museum’s effort in performing its role as the Trustees of Aboriginal heritage sites. In delaying its decision on CRA’s application concerning the daiwul site until after the heritage legislation was amended, the State government reached a verdict that privileged the miner’s interest.

Sometime in June 1981, CRA launched the Good Neighbour Policy to:

achieve and maintain beneficial and harmonious relations with the Aboriginal people in our area of interest...; and [t]o ensure the adverse effects of our operations are minimised and the beneficial effects are
maximised in relation to our aboriginal neighbours (internal document, Argyle Community Relations Archive cited in Doohan 2008: 87).

The WA Premier, Sir Charles Court, was not happy with the Good Neighbour Agreement (GNA) because he claimed that the financial arrangements struck were so specific that they could be read externally as ‘compensation and payments in lieu of royalty’. If the financial arrangements with the local Aboriginal people were interpreted externally as compensation for CRA’s use of Aboriginal land, then this Agreement would appear, according to Sir Charles Court, as implicitly giving recognition for ‘the establishment of a land rights regime in Western Australia’ (Connell & Howitt 1991, p. 142; Howitt 2001, p. 241). In contrast, royalty was a mining company’s payment to the State for the lease of Crown land. Sir Charles was alluding to the notion of land ownership; that is, who had the right to receive payment from the mining company for the use of the land – the Aboriginal people or the state? The Premier did not want land rights to be given legal recognition in WA. From CRA’s perspective, the payment was not an issue because it regarded its outlay on the Good Neighbour Program (GNP) as ‘a very modest annual expenditure on capital works’ (Howitt 2001, pp. 240-241).

The Premier, Sir Charles Court’s dissatisfaction over the GNA demonstrates his values on mining development and on Aboriginal rights. He did not favour CRA’s financial arrangements to be interpreted as compensation because he disapproved of Aboriginal land rights. His reading of CRA’s financial arrangements is confined to payment of ‘royalty’ – a mining company’s payment as a lessee to the Crown – therefore he fundamentally assumes that the Crown is effectively the ‘owner of land’, certainly not the Aborigines. In spite of Sir Charles Court’s opposition to the Argyle agreement, he announced in October 1981 that his Government would introduce a special act – the Diamond (Ashton Joint Venture) Agreement Act 1981 (WA) – the effect of which was to block further legal challenges to the AJV Argyle diamond project. The government’s move to secure development agreement reached with Aboriginal people by legislation is a model that a future WA Coalition
government in relation to James Price Point would emulate, as we shall see later.¹⁷

When other members of the Warmun community questioned Toby's negotiation arrangement and pointed out to CRA that broader community representation in agreement making was a more appropriate approach, CRA decided in 1983 to include Warmun and Doon Doon communities in its financial arrangements (Doohan, Langton, & Mazel, 2012, p. 235; Howitt 2001, p. 241). When Aboriginal people asked how the financial benefit for each community was determined, CRA provided no explanation on how the figures were determined. They were simply told that the offer of financial assistance was ‘conditional on Argyle Diamonds Mine and the relevant Aboriginal community council’ agreeing to a budget for the expenditure of the funds (Doohan 2008, p. 88).

Aboriginal governance of the distribution of CRA benefits was not inclusive of all affected Aboriginal groups. CRA had the advantage of dealing only with a small group. Externally, it gave the impression that it represented the voice of all the relevant Aboriginal parties. Divisive approaches were used by both sides to the negotiation based on political expediency: Toby’s family group monopolized negotiation arrangements with CRA excluding other Aboriginal communities affected by mining while CRA initially dealt with only four signatories as it only had to earmark relatively small amount of funds.

To implement the GNA with a focus on developing a relationship with Aboriginal communities, George Gauci, CRA Mine Manager instructed the Community Relations Officer, Milton Newman to spend at least three days a week at Glen Hill to liaise with the Woolah community. These visits were aimed at working out how CRA could assist the community to become self-sufficient (Doohan 2008, p. 85). For many years, ADM’s Community Relations staff members visited the community every week. The file notes Doohan read showed a record of requests for assistance not only from the Mandangala community but also from other communities such as Warmun, Woolah and Guda Guda. The requests listed, according to the Community Relations file,
included fencing, housing, power and water supply, the upkeep and improvement of Dunham River Station, drilling a bore to supply the Guda Guda Aboriginal community with water and providing a tank (Doohan 2008, pp. 96-98).

Argyle officers provided services that included cashing social welfare cheques, providing education facilities, and opening and operating the community store. This list of services indicates that remote East Kimberley Aboriginal communities lacked basic infrastructure requirements that were normally expected as government provisions. Doohan (2006a, p. 268) pointed out that ‘Community Relations officers often found themselves in situations where Aboriginal people were in dire straights (sic) due to lack of essential service delivery and the failure of the relevant service agencies to act.’ The backlog in the provision of basic infrastructure, such as water, housing and health, ‘limited the effectiveness of the GNP’s contributions to the community’ in assisting them to become self-sufficient (Howitt 2001, p. 241). Direct experience with Aboriginal people’s basic needs in remote communities would have been an eye-opener for CRA staff in terms of their initial presumption that they could help Aboriginal people achieve ‘self-sufficiency’.

2.3 Conclusion

2.3.1 Noonkanbah

The Yungngora people’s business endeavour at the Noonkanbah Pastoral Station became a source of food and cash for the community. They were on a pathway towards the goal of relative sustainability for their community. However, in regard to how the local Yungngora Aboriginal people were placed within the formal institutional apparatuses concerning mining and heritage at Noonkanbah, their position was precarious. They had no power of veto over industrial development projects on their land. Their only hope of stopping Amax’s oil drill plan was to invoke the provisions of the AHA. The representation of their heritage interests based on the AHA was in the hands of the Board of Museum Trustees. The Trustees had the statutory role of
recommending protection of a site that, from the Trustees’ expert evaluation, constituted ‘sites of significance’. The Yungngora people had no direct participation in the institutional processes that determined whether Amax ought to be allowed to undertake an exploration oil drill on their land. Their representation, should the Trustees’ assistance prove ineffective, was through their legal counsel.

Ultimately the effectiveness of legal processes in safeguarding Aboriginal interests largely depended on the content and design of the relevant laws: the AHA and the Mining Act 1978. In regard to the AHA, the critical question was how ‘sphere of influence’ and ‘sites of significance’ fit into the definition of ‘sacred sites’ to warrant heritage protection. The AHA did not provide a clear definition of what constitutes ‘sites of significance’. Section 5 of the AHA simply refers to the Act that applies to ‘any place, including any sacred, ritual or ceremonial site, which is of importance or of special significance to persons of Aboriginal descent’. As for ‘site registration’, the provision deals with compliance with the law (s.10 of the AHA) rather than substantively addressing ‘sites of significance’ from Aboriginal perspectives. Compliance with registration did not necessarily guarantee heritage protection. The AHA proved to be weak as a legislative basis for heritage protection. The design of the AHA legislation privileged the miners over Aboriginal peoples heritage concerns.

The Warden Court in determining the question of the legality of the mining tenements based on the Mining Act 1978 obscured the possibility of fully addressing Aboriginal concerns over the impact of mining on Aboriginal sites of significance. From a political perspective, Amax clearly had the support of the WA government. The WA government granted miners ‘onshore oil exploration permit EP97’ that included the pastoral lease site. The contest of rights from an ownership perspective involved the rights of the pastoral leaseholder versus the rights of the mining leaseholder. The WA government had the power and authority to grant mining leases and pastoral leases that provided legal recognition to a lessee from the Crown subject to the conditions of the lease.
The contesting parties had conflicting development values. The kind of development valued by the Yungngora people in running the cattle station related to sustainability and cultural heritage connection to Country. Mining development threatened the early effort of the Yungngora people for community self-management and governance at the cattle station. The Yungngora community was not amongst the beneficiaries of the Amax mining activity. During that period, agreement-making practices between Indigenous people and miners had not yet occurred. In conducting their law ceremony at a camp near the Amax site, the Yungngora people performed a public symbolic act that represented their connection to Country. While the Yungngora people’s symbolic act had no power to stop the company from drilling oil on their heritage sites, it raised awareness of Aboriginal outlook on belonging to Country.

2.3.2 Argyle Diamond Mine

Trusting the AHA’s potential to render protection of their heritage sites, traditional owners themselves took charge of approaching and advising CRA about the location of their sacred sites and how specifically CRA could avoid infringing the AHA. While heritage surveys were conducted to substantiate the presence of heritage sites within the boundary of the mining area, the major weakness was the absence of standardized procedures for site definition. Hence, heritage surveys had no influence. Although the Museum Trustees had the responsibility to represent Aboriginal peoples heritage interests, the AHA 1980 amendments in reinforcing Ministerial power, demonstrated that while the Museum Trustees had the authority to make recommendations in relation to heritage protection, the Trustees lacked real power. Even if heritage sites were proven to exist, the State Minister was vested with the authority to decide whether or not development should go ahead. As a consequence, CRA was able to damage Aboriginal sites and avoid prosecution.

The GNA was divisive as CRA chose to have an agreement only with Toby and his Warmun community. The dissatisfaction expressed by other affected
Aboriginal communities, who were excluded in the neighbourly agreement, resulted in CRA having to retrospectively include other affected communities in CRA’s financial arrangements. As the GNA had no legal sanction and was not inclusive in its approach, the outcome of the process was poor. For example, the question of what is a fair compensation was not dealt with nor was there a fair and comprehensive system for the distribution of compensation funds to all affected communities. Toby, having lost confidence in pursuing his people’s case through the mainstream legal system, decided to approach the agreement-making process with CRA exclusively. The result was a ‘divide and rule’ process that undermined CRA’s so-called ‘neighbourly’ relationship building. Hence both CRA and Toby’s approaches to governance were divisive and not inclusive of all relevant parties.

The Argyle case demonstrated the emergence of two new developments that were not present in Noonkanbah: the Sir Charles Court government initiative of legislating agreements struck between Aboriginal people and the miners, and the CRA’s move to incorporate Aboriginal interests in mining projects through provision of job opportunities for Aborigines and women.
In the last chapter we saw that the WA State heritage legislation, the AHA, had not facilitated the Yungngora people’s efforts in protecting their heritage and land interests from mining intrusion on their lands at Noonkanbah. Subsequent amendment to AHA in 1980 made clear that the Minister had the final authority to give directions in regard to the ‘exercise of any function’ under the AHA s. 11(2). The Museum Trustees’ independent stance in determining ‘sites of significance’ that was assumed to render protection of local Aboriginal peoples heritage sites such as the Devil Devil Spring proved harder to sustain under the amended legislation.

This chapter picks up the strands of this narrative but also traces how institutional practices in agreement making between miners and Aboriginal people such as in Argyle were influenced by other developments such as the rise of the KLC and the findings of the WA Aboriginal Land Inquiry in 1984 headed by Commissioner Paul Seaman QC. The KLC, the Aboriginal land council established during the Noonkanbah crisis, developed from its grassroots beginning to represent Kimberley Aboriginal people in crisis mode to an organization that operated within WA government processes. This chapter canvasses the evolution of the KLC as a bridge between two cultural systems that needed to accommodate and balance all other land interests while endeavouring to be faithful to its Aboriginal constituency. The KLC found that at stake was its own survival and sustainability as an organization representing the Kimberley Aboriginal people’s interests. The KLC found itself positioned in an ambiguous place that induced it to develop sharper negotiation skills while at the same time meeting its statutory obligations associated with government processes.

This chapter also identifies the insights obtained by the Seaman Commission in the Aboriginal Land Inquiry 1984 that foreshadowed many of the subsequent challenges faced in the contest between heritage protection and mining development projects in Western Australia. In this chapter, we
continue the story of Argyle Diamond Mine under a new management regime at CRA. In this story, the old practice of the Community Relations division was reviewed leading to innovations in agreement making that would incorporate provisions from the then new NTA legislation that had an impact on agreement making. The new practice involved a more authentic participation of local Aboriginal people and a more comprehensive and equitable approach to agreement making with a mining company.

3.1 The KLC’s representation of Aboriginal landowners

The early 1970s marked the rise in Aboriginal political consciousness and their efforts in voicing their own interests (see Sullivan 1996, p. 106). When miners pegged mining claims on the cattle station grounds at Noonkanbah Pastoral Co in 1978, the local Aboriginal people recognized the need to find a way for their own voices to be heard. The desecration of sacred sites was one of the grounds Noonkanbah people gave for their objection to the mining claims. During 1977–78, workers in the East Kimberley, disaffected by the Aboriginal policies of Sir Charles Court’s Government, discussed the need to form a Kimberley-wide representative organization. At that time, some mixed-descent Aborigines were already employed by the Departments of Aboriginal Affairs and Community welfare and the Aboriginal Legal Service (Sullivan 1996, p. 106). Amongst them were Aboriginal people with potential for leadership.

The initial pressure for a Kimberley land council came from an anthropologist, Kim Akerman who thought that local Aboriginal people needed an organization that could represent Aboriginal landowners’ interests (Sullivan 1996, p. 125). Working jointly with Akerman at the time of the Noonkanbah crisis was Tom Stephens who, with Akerman, conceived the idea of a regional land council at a general Kimberley meeting in May 1978.18 Stephens became the first Executive Director of the KLC. Other non-Aboriginal supporters who worked with Aboriginal organisations likewise saw the need for regional representation for Kimberley Aboriginal people that would counter the Aboriginal policies of the WA Government. In this
sense, concerned whites served as the catalyst in the establishment of the KLC (Kimberley Society 2007).

Supporters of Aboriginal communities organized an exploratory meeting in February 1978 at Halls Creek to canvass the formation of an Aboriginal land council. It was decided at that meeting that the place for the formal establishment of the KLC would be at Noonkanbah, where a political struggle for land rights was taking place. More than thirty representatives of the different communities articulated their experiences from their own situations and discussed the ‘benefits they would get from joining together’, sharing their common experience and having ‘one voice’. They then decided to set up a land council (see KLC Newsletter 1978). The land council, the KLC, was established in May 1978 at Noonkanbah. Noonkanbah became a politically symbolic event for Kimberley Aboriginal people. This initial gathering set a pattern for producing what Sullivan (1996, p. 113) called a ‘significant Aboriginal cultural activity’ initiated by the KLC – the use of the ‘large-scale bush meeting’ so that the ‘meeting’ phenomenon began to rival the ‘ceremony as the most common group activity of Aborigines’ (Sullivan 1996, p. 106). The KLC’s use of different types of ‘meetings’ for different purposes as an instrument of governance and control would later be seen in subsequent narratives. The KLC subsequently raised the Noonkanbah dispute at a national and international level through public information dissemination to the media. For its part, the Yungngora community and its Aboriginal supporters were able to provide ‘a cohesive response ... rooted in traditional values knowledge and law’ (Howitt 2001, p. 237).

The Noonkanbah crisis stamped a political and cultural birthmark that identified the nature of the KLC’s organizational makeup. On its website today, we see the KLC drawing its inspiration from its foundation years at Noonkanbah with the clash between the police and protesters that reinforced rising political awareness of Aboriginal land rights. On their website, the KLC painted a picture of an Aboriginal participant’s recollection of the clashes that occurred there at that time:
Well we made a point; the mining company can’t do these sort of things, walking into places drilling holes and that’s what they did. At that time Charlie Court was Premier of WA so he got a lot of police involved and a lot of scab drivers; truck drivers to drive out there and they nearly took us. We was sitting in the river near Noonkanbah and there must have been 300 to 400 people sitting in the river singing trying to stop the trucks going in and the police dragged all our vehicles away and chucked us in the back of the van and took us to Fitzroy, and that was the first time in my life I got chucked in jail and I was really terrified. They had us there about 2–3 hours to keep us away from the truckies while they had their way, and the mining company had their way and where they drilled at the time is today destroyed (KLC, n.d., ‘Our story’).

When the KLC first started its operation, it did not apply for state funding as it wanted to secure an independent Aboriginal voice. Although Aboriginal people had virtually no funding, they travelled across the Kimberley to their meetings and helped one another for petrol and food (KLC, n.d., ‘Our story’). The KLC shared resources with other community groups and received help from ‘sympathetic Welfare officials’ (Sullivan 1996, p. 113). The initial funding it received was from a World Council of Churches grant that enabled the KLC to establish an office and employ one full-time staff member. Members of the Executive Council were elected with equal representation from the east and west Kimberley. In west Kimberley, the KLC Chair was also the regional member of the National Aboriginal Conference (NAC). The two organizations shared resources until 1983 when NAC, established by the Federal Government in 1977 to provide a forum for Aboriginal views, was abolished (AIATSIS, n.d.).

The KLC’s association with non-Aboriginal group supporters some of whom had Communist Party or Marxist affiliations made it vulnerable to criticism that whites manipulated its members and that the KLC was not truly ‘Aboriginal’ because ‘they had the services of whites’ (Sullivan 1996, p. 115). Aboriginal protest and resistance were blamed on white manipulators of Aborigines. During the term of the Court Government, the official policy was not to recognize the KLC’s legitimacy. The WA Government’s preference was to administer its Aboriginal policies through the AAPA wherein the representation of Aboriginal interests was voiced through its own ALT and the Aboriginal Council.
From the beginning, the KLC was confronted with the tension between the need to be independent in serving as the voice and representative for Aboriginal people, and the need to ensure that the organization had a stable funding base to maintain its operation. When eventually the KLC received funding from the Commonwealth Department of Aboriginal Affairs (DAA) in 1983, the KLC gained material status working within government processes. Receiving funding from DAA in 1983 gave the KLC and Aboriginal people recognition as ‘subjects with rights’. The KLC’s strength was the recognition of its knowledge and experience of its subject in relation to land.

The pay-off with the KLC’s absorption into the governmental system was its ability to carry out more functions that would not have been possible without the certainty of funding for its various activities on behalf of Aboriginal landowners. It had the opportunity to do ethnographic survey work prior to mineral exploration. The KLC was able to obtain a house as its Derby office, two administrative positions were created servicing the east and the west, and a transportable office was established in Kununurra. Still, compared to other resource agencies, the funding it received was not adequate to meet the demand of its constituents on its services. The KLC in effect had to perform a balancing act functioning as a cultural bridge between Aboriginal and Western cultural systems. It found itself in a position where it was accountable and vulnerable to both (see Sullivan 1996, p. 117). Its position of ambiguity would always be both a hallmark and a challenge for the KLC – fulfilling its representation of Aboriginal landowners, and providing a service to its funders. Occasionally the KLC had to challenge the state, aware that its challenge could jeopardize some of its public funding. In its subsequent evolution, the KLC’s quest for survival and continuity propelled it to build its own institution of governance that would offer provision of KLC services independent of government, as we shall see later.

3.2 Seaman’s WA Aboriginal land inquiry 1984

In February 1983, the Labor Party became the new State Government. Since the early 1970s, there had been high interest in mineral resource
development in WA that coincided with the increased media interest in Aboriginal land rights. This social climate motivated the Labor WA Minister with Special Responsibility for Aboriginal Affairs, the Hon Keith Wilson to appoint Paul Seaman, QC to head the Aboriginal Land Inquiry of 1984.

In his WA Aboriginal land inquiry, Commissioner Seaman expressed his understanding of his task as: finding a balance between Aboriginal people’s claims with the benefits to be obtained by the broader community. The Commissioner put development values on his agenda, differentiating localized needs from broader societal needs and highlighting potentially competing aspirations. The Inquiry observed that in their desire to explore and exploit natural resources for a viable livelihood, settlers began to intrude on Aboriginal territory. It considered that some balance needed to be found between the ‘justness of Aboriginal claims’ – the need to provide Aboriginal people, as a dispossessed section of the community, with some security by way of land tenure with the benefits to society as a whole within the broader community (Seaman 1984, p. 10).

The Seaman inquiry sought an even-handed approach for deliberation and negotiation from diverse perspectives over land use. Its report identified particular values concerning ‘development’ that would likely strengthen Aboriginal representation and capacity for governance. These values and principles included: recognition of Aboriginal heritage, the right of veto subject to a national interest provision, and the application of free and informed consent. On protection of Aboriginal heritage, the Seaman Inquiry’s position was that only Aboriginal people can ultimately define Aboriginal heritage and therefore heritage matter was entirely an internal decision amongst them (Seaman 1984, p. 58). In this sense, the Commissioner linked the issue of development with a culture-specific and self-determined approach to Aboriginal heritage.

The Seaman report proposed that Indigenous groups and organizations be given the opportunity to negotiate with mining companies. To strengthen Indigenous people's negotiation ability when representing Indigenous
interests, it recommended capacity building and the adoption of corporate structures to sharpen Aboriginal self-management and support their communities in negotiating with resource developers (Seaman 1984 s. 3.31, p. 20). This proposal, of course, involved training and development of Aboriginal leadership in governance.

Commissioner Seaman wrestled with the issue of representation. The only proviso in the Commissioner’s idea of Indigenous groups being given the opportunity to negotiate with mining companies was that the groups should ensure a united and cohesive negotiation approach. The Seaman Report’s advice was for Indigenous people to first negotiate amongst themselves to resolve competing internal interests. If they were divided, the Seaman Report indicated, mining companies could easily pick and choose to negotiate with groups more willing to align themselves with the companies’ interests.

A question that the Inquiry posed but left unresolved, involved where the level of real control and decision-making power might lie in regard to Aboriginal leadership: ‘at local community level, at regional level, or at some other level’ (Seaman 1984, p. 25). The Commission was perceptive in raising this question in relation to the representation of Indigenous interests. While the actual location of mining exploration or development would have a significant impact on the lives of local Aboriginal communities living at or in the vicinity of the industrial site, the effect on other Aboriginal communities in the region also needed to be considered. Social impact at the local and regional level could be differentiated in terms of urban and remote communities’ needs, values and priorities amongst Aboriginal stakeholders, who could have differing views about the impact of large-scale industrial development. In this case, the Seaman Commission was sensitive but judicious in its approach to the development of Indigenous leadership involving Indigenous representation.

The Seaman Commission’s even-handed approach was evident in the suggestion for development proposals to specify the advantages to the community, together with the disadvantages of a refusal, of a permit for development, on the owner of the land, occupiers of the land, or the
developer (Seaman 1984, p. 56). Should it be decided to accommodate the proposed development, the Commissioner pointed out the need for information regarding the likely impact on the lives of individual Aborigines and on the Aboriginal community of the desecration of the site, and of the importance of the site to Aboriginal tradition. Anticipating conflicts arising, the report recommended that a dispute resolution process be established to determine whether there are reasonable means of preserving the site.

The Commission recognized that without access to traditional lands or sites and without security of land tenure, Aboriginal people would find it hard to fight to preserve their cultural tradition inscribed in sites of religious and traditional significance, traditional languages, rituals and ceremonies (Williams cited in Coombs et al. 1989, p. 48). The Seaman report did not see that Aboriginal people could have a voice unless they obtain ‘secure land tenure’ and were not barred from accessing their traditional land (Seaman 1984, p. 49). Controversially the Seaman Report recommended allowing Aboriginal veto over the desecration of sacred sites and proposed a legislative scheme that would give ‘Aboriginal holders of inalienable freehold title the power to veto a mine development, subject to a national interest provision’ (Seaman 1984, p.42). What encompassed ‘national interest’ was not entirely made clear. However, considering Aboriginal people’s dispossession, the Commission argued that they should at least be accorded the right of veto.

The Seaman Commission’s position could be seen in relation to the two relevant pieces of legislation. The ALRA 1976, the legislation mentioned in Chapter 1, provides Traditional Owners with veto rights over exploration or mining proposals (McKenna 1995, p. 301) through a land council. The land under the ALRA was vested in a land trust under a land council’s direction. In contrast, the NTA does not provide veto rights for Indigenous people but only the right to negotiate over mining development proposals (McKenna 1995, p. 302).
In regard to negotiation with mining companies, mining company submissions suggested that they should deal directly with Aboriginal communities. Aboriginal submissions indicated that Aboriginal communities would need help when dealing with mining companies (Seaman 1984, p. 45). The Commissioner thought that Aboriginal people could be vulnerable if they dealt directly with mining companies. The Commission’s advice was that any agreement reached should be enforceable only if it was in writing and if it was derived from ‘a full and informed consent based on proper independent advice and free from pressure’ (Seaman 1984, p. 46). The Inquiry was prescient in perceiving that the main concern for Indigenous people in relation to mining development was the likely damage to their heritage sites and tradition. The Seaman Commission’s recommendation that Indigenous people affected be allowed ‘free and informed consent’ was also prescient and ahead of the United Nations Declaration on the Rights of Indigenous Peoples’ (UNDRIP) and the passing of the Free Prior and Informed Consent (FPIC) provision in 2007.22

On the question of compulsory acquisition of the land by the state, the Commission sought to adopt a balanced approach that took into account public interest. It suggested that ‘every grant of Aboriginal land should be subject to an obligation to permit reasonable access across it for the benefit of the occupiers of other Aboriginal land’ (Seaman 1984, p. 24). The ground for compulsory acquisition was not whether minerals existed on Aboriginal land but whether other purposes for land use such as essential public services – public roads, quarantine reserves and stock routes – might be considered.

In summary, the 1984 Aboriginal Land Inquiry paid respect to Indigenous people’s land and heritage as well as their right to have a say on mining development projects. The Seaman Commission argued that they be allowed veto rights subject to national interest provisions. ALRA through the land council enabled the exercise of veto rights but NTA only allowed ‘the right to negotiate’.
The Seaman Inquiry dealt with the question of the capacity of Aboriginal groups and organizations to deal with mining companies and recommended that they adopt corporate structures to sharpen their skills, broaden their experience and strengthen their representation of Indigenous interests. It foresaw the challenge of representing divided perspectives of Indigenous people on development proposals (Seaman, 1984, p. 25). Representing remote and regional, town and urban Indigenous localities that have differing development values, needs and priorities could be problematic if their voices lacked unity over development proposals. Internal discord could undermine their negotiation position with miners.

We could see the application of the Seaman Commission’s insights to the complexity of the task of the KLC’s representation on behalf of Aboriginal communities’ land and heritage interests. The Seaman report recommended the need to strengthen Aboriginal representation and capacity for governance through adopting corporate structures to sharpen their skills at negotiating with resource developers especially on matters of development that affect the recognition of Aboriginal heritage. Commissioner Seaman saw from his inquiry that without Aboriginal people obtaining capacity building, the right of veto subject to a national interest provision, and free and informed consent, the representation of Aboriginal people’s interests would be a challenge.

The WA Labor government did not receive Commissioner Seaman’s 1984 Aboriginal Land Inquiry report favourably (Libby 1989, p. 64). In particular, it was hostile to the recommendation of giving Aboriginal people veto rights in relation to development proposals.

### 3.3 Argyle Diamond Mine (ADM): a new agreement-making culture

In 1998, Brendan Hammond who became the new General Manager Operations of ADM conducted a major review of the mine’s operations and decided to extend the life of the mine until 2018. Part of the review was a survey of the Community Relations division that CRA set up at ADM that involved Community Relations Officers to visit Glen Hill to assist the Woolah
community to become self-sufficient (see Chapter 2). Under new management, CRA showed that it was open to innovative management ‘agreement-making’, departing from the old ‘good neighbour program’, previously used as the basis for its financial arrangements with Aboriginal communities affected by mining. By 1998, the Commonwealth native title legislation, the NTA, had been in place for five years. This section describes CRA’s new ‘agreement-making’, developed with the help of consultants in the context of the NTA.

Anxious about changes that were afoot with Hammond’s review of the Community Relations division, the Warmun community demanded a mediated conference with senior management and Hammond. The conference held in March 1999 was called the ‘Future Relations Meetings’. This particular meeting dealt with how to reconfigure the company’s relationships with local Aboriginal people. ADM eventually sought independent advice. Consultant anthropologists, Marcia Langton and Kim Doohan were employed on contract to review Argyle’s Community Relations policy and practice and provide CRA with advice on the way forward (Langton and Longbottom 2012, p. 240).

The local Aboriginal people told Langton and Doohan that the opportunities for young Aboriginal people to work in the mines were inadequate and that they needed more tangible demonstrations of the company’s commitment to help them achieve greater economic autonomy. They needed ‘more formal, secure and clearly articulated relationships to be established between Argyle and all of the relevant local Aboriginal people.’ They wanted outstanding issues of the 1980 GNA resolved. On the part of the Community Relations staff, they were unsure about ‘how to establish appropriate boundaries’ and were unaware of ‘the cultural and historical context of their formal and informal agreements and interactions with communities and individuals’ (Doohan 2008, p. 112).

Langton and Doohan recommended that Argyle reconceptualise GNA in the context of the NTA and apply best practice in contemporary agreement
making to negotiations (Doohan, Langton & Mazel 2012, p. 240). The result of the formal process of reconciliation adopted was a partnership approach and the signing in 2004 of an Indigenous Land Use Agreement (ILUA) (Langton, Mazel & Doohan, n.d.). ILUA, a voluntary agreement about the use and management of land and waters between Aboriginal groups and others laid the foundation for the Argyle Participation Agreement 2005. ILUA can deal with issues of access to sites, compensation, extinguishment of native title, and coexistence. It can be made separately from the formal native title process or be part of that process. The approach in the NTA amendment was to ‘regulate the procedural aspects of finalising and registering an ILUA’ but leaving the content of the agreement as contracts between the parties (Godden & Dorsett, 1999, p.1). On 27 September 2001, a memorandum of understanding was signed that renegotiated the old GNA with a timetable and process. The new regime provided an opportunity, according to Doohan (2006a, pp. 300-301), to ‘reconcile unresolved conflicts amongst themselves’.

From 2001 to 2004, the KLC coordinated meetings with traditional owners held at the mine site, in local Aboriginal communities, in bush locations, locations near Kununurra and occasionally in Perth where Aboriginal parties received assistance and advice from experts – anthropologists, lawyers, economists and translators. Appropriate media were used to disseminate technical and other information such as printed visual materials, diagrams and video recordings in both English and Kriol. The new negotiations complied with the NTA and involved National Native Title Tribunal (NNTT) members who acted as impartial observers and witnesses at various meetings (Langton & Mazel 2012, pp. 241-242).

The agreement between Argyle and the local Aboriginal people recorded the Traditional Owners’ consent and ‘binds them not to object to future mining activities, including open pit mining exploration; exploratory decline; underground mining; and the grantor renewal of ADM interests, in accordance with the law, the ILUA and the Management Plans’ (Doohan, Langton & Mazel 2012, p. 244).
Some of the key features of the 2004 agreement included support and financial assistance extended to all the relevant communities and the provision of individual payments to the named senior traditional owners involved with the GNA (in the event of the deaths of their children or heirs) until mine closure. This provision replaced the Signatory Funds. A proportion (unstated) of the mine profits would be deposited annually into two trust accounts – 80% into a charitable trust to be invested in law and culture, education and training and community development partnerships of future generations of Aboriginal people in the East Kimberley region and 20% paid annually to the Gelganyem Discretionary Trust, a special purposes trust that distributes the funds between the seven traditional owner groups of the mine area. The allocation was earmarked for health improvement, indigenous education and business development (McLeish 2007, p. 3).

To overcome the rigidity of the ILUA process that did not allow the amendment of agreements without onerous cost, the negotiators set up the Management Plant Agreement (MPA). The MPA enabled negotiators to review agreements and incorporate amendments if required. A Traditional Owner Relationship Committee funded by Argyle was also established to meet every three months to reach targets and monitor the implementation of agreements. The Relationship committee consisted of four Argyle employees and 26 traditional owners. The composition of the traditional owners was structured by partnering an elder with a younger person from each of the identified Aboriginal customary land-owning groups. The idea behind this structure was:

> to acknowledge the authority of the very traditional elders who spoke their own languages, “Aboriginal English” and had little comprehension of formal standard English and allowed the better educated younger leaders the role of pursuing development issues and ensuring propriety in the company’s dealing with the elders. (Doohan, Langton & Mazel 2012, p. 241).

The outcome of the ILUA, as stipulated in the 2004 Argyle Participation Agreement, set new standards in formalizing relationships between resource companies and local indigenous groups. It was based on informed
consent and partnerships. There was an awareness of conducting negotiations that more clearly articulated a ‘human rights based policy framework’ (Doohan 2006a, p. 258).

In spite of the progress in agreement making and substantial financial benefit packages obtained, achieving economic self-sufficiency for the majority of Aboriginal people remained elusive. Taylor and Scambary (2005) outlined a complex set of reasons for this trend: the ‘limited capacity of Indigenous community organisations both to cope with the impacts of, and take advantage of, large-scale operations’ (Altman 2001a, 2001b); the ‘ambivalent responses’ of organisations and the people they represent ‘to the potential cultural assimilation implied by their increasing integration into a market economy’; the inability of mining companies and governments to ‘comprehend the extent of historic Aboriginal disadvantage and strain on the social fabric of societies so radically affected by colonisation’.

3.4 Conclusion

CRA’s effort at relationship building with the local Aboriginal people affected by mining activity was a far cry from the situation at Noonkanbah where Aboriginal people’s voices were virtually muted. The lesson learnt from Noonkanbah as we saw in the last chapter was how totally ineffectual the heritage legislation was in protecting Aboriginal heritage sites and how provisions in AHA and in other mining laws privileged the interest of miners. In this chapter, the account of the evolution of the KLC, the Seaman Commission’s recommendations and insights, and the agreement that CRA struck with the local Aboriginal people after the passage of the native title legislation, provided the building blocks that would serve as the foundation for the development of subsequent institutional practices.

The KLC evolved from grassroots representation to an incorporated organization that also considered the land interests of developers. It wrestled with the question of independence from government on the one hand, and on the other, the need for adequate funding to sustain the organization’s operations. State funding provided stability and continuity of its
representational functions and sharpened its capacity building, putting it in a position to find a balance between diverse land interests. The Seaman Commission voiced the dilemma of the level of representation that might be required of a land council. The social and economic impact of development at the local and regional levels might differ and if so, representation of distinct needs and priorities could be a delicate and sensitive undertaking. On the other hand, the justification expressed for the establishment of the KLC in Noonkanbah was the need for regional representation that would render cohesion and strength in projecting ‘one voice’ to counter the Court Government’s Aboriginal policies.

The Seaman Commission posed the question of where the level of ‘real control’ and ‘decision-making power’ might lie in terms of representation. This question is significant if differences emerge in values and orientation between Aboriginal local and regional interests concerning development proposals that affect traditional lands. The Seaman Inquiry’s position on the protection of Aboriginal heritage was that only Aboriginal people can ultimately define Aboriginal heritage and therefore heritage matters were entirely an internal decision amongst them. The Seaman report factored in the need to consider values and principles that include the recognition of Aboriginal heritage, the right of veto subject to a national interest provision, and the application of free and informed consent. The Commission suggested identifying the advantages to the community of the development proposed and the disadvantages of a refusal to permit it.

The issues the Seaman Commission raised in regard to representation were indeed worthy of consideration, such as the impact of development at a local and regional level, the vulnerability of Aboriginal people in relation to the desecration of sites, the lack of security of their land tenure, access to their traditional lands once development is underway, denial of veto rights and informed consent based on proper independent advice that is free from pressure.
Related to the question of representation, is whether negotiation with mining-affected parties is inclusive or exclusive to particular Aboriginal groups. The GNA, as we saw, was problematic with CRA’s agreement practice that was exclusive to one group. In contrast, its partnership approach that led to the 2005 Argyle Participation Agreement was inclusive and set new standards in agreement making. It employed the Howard Government’s 1998 amendment to the NTA, the ILUA – a voluntary agreement between contracting parties that can deal with issues of access to sites, compensation, extinguishment of native title, and coexistence. The KLC had a significant role to play in coordinating this process with consultants Langton and Doohan in the Argyle Participation Agreement holding meetings with traditional owners at various local sites whilst receiving support and advice from anthropologists, lawyers, economists and translators in Perth. Here we see in practice the KLC’s performance of cultural bridging between and within cultural systems. The partnership approach utilized a relationship committee that included four Argyle employees and 26 traditional owners with a formula that partnered an elder with a younger Aboriginal person. This approach would provide input from elders and from better educated, younger leaders in considering development issues.

At the governance level, the legacy left by the 2004 Argyle Participation Agreement process was the ILUA system of agreement that left the content of the agreement and subsequent relationship of the parties to be decided by the contracting parties themselves. Through rigorous representation and with support and expert advice, the KLC saw the opportunity of participating more fully in the protection and management of affected mining areas including the management of land and water in the region. The change in focus in the Argyle agreement had the effect of inducing Aboriginal landowners to participate in the mining industry venture rather than to draw attention to damage to heritage sites and compensation for the damage. Negotiating ‘benefits’ from the mining venture that funded health improvement, indigenous education and business development, also addressed social disadvantage. Others might see addressing these issues,
however, as evidence of government neglect of infrastructure conditions in remote areas. Dealing with social infrastructure as part of ‘benefits’ to be negotiated seemed to build the foundation of the miners’ acceptance of ‘social licence’ as part of the State government’s conditions for granting miners tenement leases. The constitution of a Traditional Owners committee was a valuable mechanism for a more fine-tuned representation of Aboriginal interests. Another significant legacy of the Argyle agreement was the registration of ILUA and legislating the terms of the agreement that would give certainty to contracting parties.

If the overall goal were to achieve economic self-sufficiency for the majority of Aboriginal people based on high quality agreement making processes with resource developers, this goal would remain a challenge for some Aboriginal people. Some Aboriginal people resist processes that, in their view, represent cultural assimilation and loss of their identification with their traditional land that for them spells the foundation of their traditional legacy.
Chapter 4
Browse LNG Precinct Agreement Processes:
Representation of Aboriginal 'voices' (2008–2013)

Chapters 2 and 3 narrated the governance of exploration and mining resource development at Noonkanbah and Argyle before and after the passage of the NTA. Before the NTA, the representation of Aboriginal voices was virtually ineffectual. The Museum Trustees’ representation of Aboriginal heritage interests both at Noonkanbah and at Argyle had not been effective due mainly to Ministerial intervention that obstructed the performance of the Museum’s efforts in representing Aboriginal heritage interests. After the enactment of NTA, CRA’s land use negotiation method with Aboriginal communities altered, employing a new ‘partnership’ approach that included the participation of older Traditional Owners and younger, educated Aboriginal representatives in decision making. The formalization of the agreement process between Aboriginal Traditional Owners and mining companies in relation to land use through ILUA was an innovation of the NTA. The significance of the KLC’s use of ILUA at Argyle based on NTA provisions enabled the development of agreements as contracts between two independent negotiating parties. Whilst the NTA had no provision for Aboriginal people’s right to veto resource development, it enshrined their ‘right to negotiate’. Consequently, mining leaseholders legally have to negotiate with Aboriginal communities affected by their activity. Sir Charles Court’s move to legislate agreements that had been reached between Aboriginal parties and mining companies, with the aim of securing the agreement so that Traditional Owners would not object to future mining activity, started a practice later emulated by the WA Premier, Colin Barnett, at James Price Point.

Commissioner Seaman’s Aboriginal Land Inquiry foreshadowed the complexity of representing Aboriginal communities’ needs that are differentiated by remote, regional or town interests or, even between traditional and modern perspectives. The KLC, tasked with representing native title claimants, would face the challenge of cultivating an inclusive and
cohesive representation of varying perspectives and interests particularly when claims intersected with mining development proposals on traditional lands. A novel practice that evolved in Argyle from the ‘Good Neighbour Agreement’ was the company's involvement in funding social infrastructure paving the way to the practice of ‘social licence’. The original idea behind the use of ‘social licence’ stemmed from the desire by some mining companies’ to adopt ‘Corporate Social Responsibility’ (CSR) as a voluntary undertaking to improve the economic, social and environmental living conditions of host communities affected by mining projects. It was ‘voluntary’ in the sense that it went ‘beyond legal obligations, contracts, and licence agreements’; that is, it was an undertaking between mining companies and the host communities (Mining Facts, n.d.).

‘Social licence’ thus enables mining companies to play a role in funding education, training or employment programs or in building infrastructure to compensate for the use of Indigenous lands. This practice was employed at James Price Point, as we shall see later.

This chapter focuses on the representation of Aboriginal voices in the governance of the proposed Browse LNG Precinct development project. The representation of Aboriginal voices began with the KLC’s involvement in the search for a suitable gas processing plant in the Kimberley on land that was subject to native title claims. The KLC, representing the native title claimants (Jabirr Jabirr and Goolarabooloo), coordinated the negotiation with Woodside Energy Ltd and the WA government on behalf of the claimants. The governance of this project involved the competing interests of the WA and Commonwealth governments, Woodside and its Joint Venture Partners, and the KLC representing the native title claimants at James Price Point. The techniques of governance each party had employed required an understanding of the historical and institutional context to provide a frame for interpreting the dynamic interplay of advancing vested interests in an uneven playing field, as Howlett (2010a, p. 460) explains:

All political action takes place within a pre-existing structured context that is a result of historical and institutional circumstances, and this
context is strategically selective – it favours certain strategies (and actors) over others (Hay 1999, 170). Thus, these structured contexts, both past and present, are not level playing fields and advantage certain players while simultaneously disadvantaging others.

We recall in Chapter 1 an historical narrative of the evolution of settler-Aboriginal relationships from pastoral colonization through to the incorporation of Aboriginal voices in settler society from the ‘Protection’, ‘Assimilation’ and ‘Self-Determination’ phases of state governance. Aboriginal communities emerged from a position of powerlessness to one that has some voice vested in institutional roles as part of state processes. From a Realpolitik perspective, the political landscape for the governance of mining development ventures is dynamic and political agents such as the state, Aboriginal land councils, mining companies, and environmental groups, all employ strategies based on their assessment of any advantages their position may hold within the political power structure.

In exploring the representation of Aboriginal voices, section 4.1 of this chapter first examines the theoretical application of neoliberal thinking as part of global market liberalization forces implementing state deregulation in the context of mining development proposals occurring on Indigenous lands. The use of ‘social licence’ by mining corporations in the role of building social infrastructure in mining-affected Aboriginal communities is discussed as an input into various notions of ‘development’. I argue that a fluid and dynamic relationship exists between neoliberal values, the underlying global economic forces that uphold these values, the state’s development goals and the demand for the use of mineral resources found in Indigenous lands. In section 4.2, the stake of the key players in the Browse LNG Precinct is described. Finally, in section 4.3, the chronological narration of the Browse LNG Precinct Project includes interpretive comments.

4.1 Theoretical underpinnings: neoliberalism, social licence, development

The legal institution and the bureaucracy combine as the state’s instruments of control for governance. The state bureaucracy’s authoritative and binding
rules maintain legitimacy while juridical institutions and agents such as the courts become the ‘coordinating points for normalizing powers and governmental regulations’ (Dean 2010, p. 145). The ‘juridical field’, Bourdieu (1987, pp. 805-53) argues, is the site of struggle for control. Poulantzas (1978, p. 66), on the other hand, sees the state as a ‘factor of cohesion between the levels of social formation’, acting in ‘the long term interests of capital’.

The state's governance is expressed through various land rights statutes and other enacted legislation such as heritage, environmental protection, mining, and development application and planning approvals. Through legislation, the framework for agreement-making processes involving the state, Indigenous people and transnational interests is established. The Commonwealth and the WA State’s control over exploration or mining leases, including the conditions imposed for the licence grant, indicates that governments have the authority to govern Australia's natural and mineral resources, or as WA Premier Barnett put it, ‘they are the landlord’. And yet, state governance occurs within a particular political system – the capitalist system. Following Block (1987), Howlett maintains that, without state intervention under the free market capitalist ideology, capitalism will not be sustainable. In terms of mutuality of interests, Howlett (2010) argues that state elites are motivated to sustain the capitalist system because their power and position rely on it (see also Block 1987, p. 16; O'Sullivan 2003, pp. 40–41). The free market capitalist ideology operates under the influence of neoliberal global economic forces that influence state values regarding development. Neoliberalism is grounded on liberalism, a set of beliefs that upholds individual liberty through open competition and a market driven force of demand and supply with minimal government intervention. Its influence is manifested in the state’s implementation of a deregulation policy, so that government regulation or intervention in the market is lessened. On 18 September 2013, Australia established the Office of Deregulation under the Federal Department of the Prime Minister and Cabinet. The Office of Deregulation assists the Prime Minister in formulating a deregulation agenda.
with the states and territories through the Council of Australian Governments (Department of Prime Minister & Cabinet, n.d, b). COAG is the peak intergovernmental forum in Australia consisting of the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Local Government Association (ALGA). State deregulation policy therefore is articulated as a ‘whole-of-government’ approach, indicating the Australian government’s ideological value orientation and operation within the global capitalist system (see Department of the Prime Minister and Cabinet, n.d).

Howlett et al. (2011, p. 313) point to two dominant theoretical approaches to understanding neoliberalism. One is the Marxist political economy approach that tends to portray neoliberalism as a ‘hegemonic unified entity’ (Larner 2003, p. 510) and another is the post-structuralist or governmentality approach that sees neoliberalism as a process that is contextual and contingent rather than a monolithic and hegemonic force (Ward & England 2007, p. 250). I am empathetic to an analytical approach to understanding neoliberalism as a process that does not close off analysis and that enables empirical inquiry into how trans-local governmentality interpenetrates. Larner (2003, p. 510) argues that reifying neoliberalism as a hegemonic unified entity can exaggerate its power and render a position of ‘inevitability’, thus discursively creating the hegemonic projects ‘we are seeking to critically analyze.’

Transnational mining companies usually have control of hegemonic projects. Mining corporations in Australia are typically transnational operations that have the ability to move capital outlay with relative ease across sovereign states. Mining corporations’ authority comes from their economic power, that is, the massive investment capital and the revenue it can provide governments and employment implications if projects materialize. Block (1987) argues that a dynamic strategic partnership relationship thus exists between the state and the system that it seeks to perpetuate. Most mining companies with transnational interests also need the state to play a vital role in initiating legislative reforms, amending old laws, enacting new laws, and constructing institutional arrangements conducive to a competitive market
environment such as the implementation of a policy of deregulation. Resource extraction and development in theory need high stake capital-intensive development requiring conversion of state power into an agent or as a fiscal manager that will drive resource extraction under complex regimes of governance in order to facilitate ‘transnational capital accumulation’ (Sawyer & Gomez 2008b, p. 18). In practice, neoliberalism does not seek to eliminate government but to transform the sites of governance. Decentralization of state authority has the paradoxical effect of enmeshing ‘Indigenous groups within structures of power’, while ‘simultaneously allowing for political openings’ (Sawyer & Gomez 2008, p. 19). Indeed new forms of political-economic governance under neoliberalism seek the strengthening of trade liberalization, advocating governments to implement a free trade policy with minimal government interference. Minimal government interference would affect typical state governance role and responsibility to its constituents. Government service gaps need to be filled and replaced, so the question arises as to which institutional form would look after the well-being needs of citizens.

Under this political economic climate, the notion of social licence emerged (Owen and Kemp 2012, p. 1). Under social licence, mining companies are enabled to offer provision of public or community service benefits to Aboriginal communities affected by exploration or mining activity. This provision could be packaged as part of negotiated agreements with an Aboriginal native title party. In practice, however, the implementation of mining companies’ social licence would depend on conditions that prevail on the ground such as the pre-existing relationship and trust between the host communities (e.g. Aboriginal landowners) and the WA government. In general, the advantages for mining companies' incorporation of social licence include the potential for improving corporate reputation, cultivating the community’s trust, minimizing conflicts, and ultimately facilitating access to new markets. With the passage of NTA in Australia, the host communities in places where native title exists are defined within NTA provisions. The legal
framework of NTA thus provides the vehicle for the representation and recognition of Aboriginal interests achieved through land use agreements.

Broadly speaking, however, host communities could include other interest-bearing groups in mining-affected areas such as non-Aboriginal business enterprises, residents and employees, as well as the local government. The participation of these interest groups is peripheral to ILUA negotiations. In this sense, social licence in the context of NTA, excludes non-Aboriginal interests that may also be affected by mining projects. These interest groups have no institutional representation, so if they feel strongly enough to voice their concerns, they have to use other channels for their voices to be heard – petitions, public gatherings, letters to the press or the social media, for example.

Dr Anne Poelina, Deputy Shire President of Kimberley Shire Council, was amongst those who opposed the LNG project and voiced her concerns with other Aboriginal families through public forums and other channels. She argues that social licence benefits from mining companies represent an abrogation of the state’s responsibility to its citizens. She identifies Indigenous people’s education and health as citizen rights that were being ‘traded off’ by mining companies under the rubric of social licence (Pers. Comm., 13 December 2011 ). Dr Poelina’s analysis of trade-offs highlights state-corporate power sharing strategy in the form of social licence. The state directs mining companies to draw up a direct broad-based social contract with the host Aboriginal community as part of the mining lease. By accepting the state’s conditions under the social licence, mining companies agree to invest in social infrastructure. Mining companies’ acceptance of social licence gives them the right, under specified conditions, to legally access the land sites that they need for resource development. The argument advanced is that through the state’s social licence grant, state responsibility for citizenship rights is transferred to transnational corporations. Consequently, the mining company’s social investment in the community reverses Aboriginal-mining transaction, that is, the ‘benefits’ or ‘compensation’ provided translate into ‘Indigenous people paying for their own social
infrastructure’ including capacity building (Pers. Comm., 13 December 2011) as part of what the miners negotiate with Indigenous parties. This strategy enables the state to withdraw from public funding and from its citizen responsibility in the region.

The former Minister for Families, Community Services and Indigenous Affairs, Jenny Macklin pointed to the challenge in regard to agreements between resource developers and indigenous groups (Macklin 2008). Payments to Indigenous landowners are largely left to the companies involved and Aboriginal groups may not have the assistance they need in dealing with complex operations of major development. Those who framed the Native Title Act, she noted, “have not left the system with the best possible representation for native title claimants” groups (Macklin 2008). She hoped that the financial benefits received from mining agreements would provide for employment and educational opportunities and last for generations. She praised the agreement reached at Argyle in the East Kimberley as a win/win for both the mining industry and the local Aboriginal people (Macklin 2008), involving the payment of monies into two trusts: one dealing with their longer term aspirations; another, providing a short term income stream. She remarked that unfortunately, not all agreements are of this standard (Macklin 2008).

From another perspective focusing on mining agreements, Langton argues in her Boyer Lecture 2012 that Indigenous participation in the modern economy is essential and that Aboriginal communities are ready to embrace the modern economic life and benefit from mining industry agreements (Langton 2012a). In her evaluation of mining agreements, O’Neil, lawyer and PhD candidate, points out that the agreements struck by the KLC at James Price Point were far better than those most Traditional Owners negotiated after years of discussions (Independent Media Centre Australia, 23 December 2012). Botsman, on the other hand, directs his focus of analysis not on the huge benefits derived by Aboriginal people from mining agreements but on the underlying premise upon which the KLC conducts its business. Botsman (2012a: 30) asserts that, because the KLC was influenced by the ‘doctrine of
economic self-reliance and independence’, the KLC’s core role of native title claim representation got entangled with the pursuit of Aboriginal ‘economic and social development’. If indeed the KLC sees its mandate as Aboriginal economic development, Botsman argues that these two different functions – undertaking native title claim representation and facilitating Aboriginal economic development – could potentially result in ‘conflicting obligations and fiduciary duties’. Hence, the question of the representation of native title detracts from the notion of the legitimacy of native title ownership and is shifted to the notion of facilitating economic development of marginalized or underprivileged Aboriginal communities. For analytical clarity, Broome resident, Ian Perdrisat (*National Indigenous* Times columnist) sought to detach Aboriginal development from industrial development using the LNG Precinct proposal as an example:

> [t]his development [James Price Point proposal] has got nothing to do with local people. It has got only to do with corporate wealth and governments getting taxes so they can shore up all of these developments whether it’s the LNG plant or the coal plant or iron ore, people are pressured into taking these things at the risk of not having the same rights as other Australians. So we need to detach these two issues of Aboriginal development and industrial development because they are thrown together to justify the resource development (Pers. Comm, 13 December 2011).

Various perspectives on development was canvassed by Aboriginal community groups in the Kimberley in the early 2000s when a series of community forums, one of which was organized by the Northern Australia Environment Alliance (NAEA), brought together ten non-government environment organisations to a Cape York Peninsula Roundtable to think through the practical application of ‘appropriate economics’. While the WA State government had already conceived planning strategy for the Kimberley region fourteen years earlier with the establishment of the Kimberley Region Planning Study in 1986 to address economic, social and environmental issues, the strategy was ‘not actively supported’ (*Environment NGOs Response to the WA Government’s Kimberley Science Synthesis/Science and Conservation Strategy, 2009, p. 12*). In the mid 1980s, Indigenous people had initiated projects focusing on managing country such as the establishment of
the Land and Sea management Units (LSMUs) within regional organisations such as the KLC (Hill et al., 2008, p. 14). The KLC and Environs Kimberley, both having attended the NAEA forum, saw that the idea had merit for the Kimberley region. The KLC, Environs Kimberley and the Australia Conservation Foundation (ACF) then organized a roundtable discussion at Fitzroy Crossing in October 2005 to investigate options, principles and actions that would promote sustainable development in the Fitzroy Valley and Canning Basin, and in the wider Kimberley region. At the 2005 forum, the KLC and Kimberley conservation groups stated their shared development values centring on sustainability to secure the social and economic wellbeing of the region without compromising natural ecosystems and Indigenous rights and responsibilities (Hill et al. 2005). Their idea of appropriate economics incorporated development values that included protection of culture and nature, the generation of jobs and income, and the uplifting of social conditions (Hill et al. 2005). As events unfolded, environmental groups such as the Australian Conservation Foundation, Save the Kimberley, Wilderness Society, and Environs Kimberley launched a vigorous campaign against the Browse LNG project. The KLC and environmental groups then parted ways about the LNG project. Differences in approaches to notions of development as voiced by Kimberley community groups and individuals are narrated in Chapter 7.

Botsman (2012a) argues that coupling ‘development goals’ with the representation of Traditional Owners’ wishes may result in a conflict in the land council’s ability to perform these two functions. In the case of Goolarabooloo and Jabirr Jabirr joint native title claimants, there was originally no conflict with the idea of LNG development, except that Goolarabooloo objected to the selected LNG plant location at James Price Point on the grounds of damaging sacred and heritage sites. Goolarabooloo’s suggestion to pick another site that he identified onshore was rejected on technical grounds. We see a divergence of views about LNG development demonstrating the challenge of obtaining a ‘cohesive’ representation of Aboriginal voices. From a political pragmatic outlook that acknowledges that
veto rights for resource development projects proposed in Aboriginals lands are non-existent, we see the KLC thus focusing its effort and energy on negotiating the best terms available for its Indigenous constituency.

The next section briefly canvasses the stakes of key players involved in the Browse LNG project proposal: the mining companies, the WA Government and the native title party, to obtain some understanding of their motivation in advancing their particular interests

4.2 Key players in the Browse LNG Precinct development proposal at James Price Point

4.2.1 The WA State Government

The WA State Government is a key player in mineral resource development. The total value of resources commodities in the Kimberley region alone was $1.02 billion in 2010–11 based mainly on the contributions of iron ore ($430 million), diamonds and crude oil ($305 million), nickel, copper and cobalt ($222 million) and gold ($58 million) (Kimberley Development Commission, n. d., ‘Resources’). The region has large reserves of petroleum and gas at offshore locations in the Browse and Bonaparte basins. The state employs Legislative Acts that deal with property rights, allocation of exploration and mining titles, and agreement making (Bell 2002, p. 2; Hay & Lister 2006, p. 11; Howitt 2001, p. 143; Howitt, Connell & Hirsh 1996, p. 14; Howlett 2010a, p. 458). It attaches conditions to mining licence grants to prospective developers, generally sets the framework for governmental interventions, and controls the negotiating environment between contesting parties. Opportunities that facilitate the implementation of proposed industrial development projects are provided by the state. Mining companies seek access to land or waters that are under some form of Indigenous tenure to conduct their activity. Seeking commercialization of mineral resources within WA State territory, the WA Government commissioned a report, *Regional Minerals Program: Developing the West Kimberley’s Resource* (Department of Industry and Resources 2005). The report recommended that the government consider building a gas plant for the Browse Basin on the
northern or on the western side of the Dampier Peninsula. Both the Commonwealth and State governments recognized that it was time for the gas reserves to be commercialized.

4.2.2 Mining corporations

The companies that had exploration leases for the Browse LNG gas fields were Woodside Energy Ltd and its Joint Venture Partners (JV) – BP, BHP Billiton, Chevron and Shell – all of which are transnational corporations. The proportion of shareholdings for the LNG venture was: Woodside (the proposed foundation proponent) – 48%, Chevron – 17%, BP – 17%, BHP Billiton – 9%, and Shell – 9% (Murphy 2009). The JV Partners would need to commit their share of the total cost of the project, estimated to be at least $30–45 billion if the LNG precinct proposal were to go ahead (Collins, B. 2012). If Woodside’s JV partners were to decide that the investment required for the LNG Precinct project was too huge a risk in relation to profit returns, then that would be the end of the project proposal. The JV’s immediate goal was to find a suitable site that met technical requirements for a processing plant to liquefy natural gas from the Browse Basin gas reserves for ease of export. Whilst aligned over the potential of developing the James Price Point LNG facility, individual members of the venture capital had rival interests, so each member would be evaluating other gas processing investment options that might better serve individual corporation’s investment interests.

4.2.3 The KLC and the native title party

In WA, Indigenous landholdings constitute 15% of WA’s land area covering a total of 37.3 million hectares, excluding freehold and native title determinations (Department of Aboriginal Affairs, n. d. b, p. 226). These lands consist of land tenures operating under various enabling legislation that provide grants of interests in land under government ministerial and executive control. They are available ‘for the use, benefit and residence by Aboriginal and Torres Strait Islander people’ and ‘may be owned or controlled by Indigenous corporations representing Indigenous people or by government agencies on behalf of Indigenous people’ (Department of
Aboriginal Affairs, n. d, p. b 227). The Aboriginal Lands Trust (ALT) holds about 27 million hectares. ALT holds six of the 58 pastoral leases that are Indigenous owned or ALT controlled (Department of Land Information, n.d. a). ALT is a statutory body created under the Aboriginal Affairs Planning Authority Act 1972 (AAPA) that holds former Aboriginal reserves that were previously held by the Native Welfare Department and various other state agencies. ALT holds 171 properties classed as Crown reserve (or Aboriginal Reserve) vested under the Land Administration Act 1997. Under this Act, the ALT has Management Orders that provides it with the authority to control and manage the land for the use and benefit of Indigenous people and the power to lease the reserve.

We can see through this statistical profile that the state, while acting on behalf of Indigenous people, still has substantial control over the operation of Indigenous landholdings. Indigenous interests are enmeshed in the state’s governance of resource development. To engage in resource extraction and development in Australia, mining companies need to access resources that lie on either Crown land or on Indigenous land, so they need to deal with both Indigenous people and the state. The KLC has the statutory responsibility to represent native title claimants having officially become the Native Title Representative body (NTRB) for the Kimberley in 2000 as provided for in the NTA. The Howard Government’s 1998 amendments to the NTA added certification of applications for native title so that a task added to the native title representative body’s statutory obligations is becoming a party to the ILUA. The 1998 amendments to NTA (Part 2, Division 3 and s. 233) provided native title claimants with the right to be informed and be consulted about a Future Act such as the LNG Precinct, under which they have the right to negotiate (RTN). Two examples of Future Acts are: the government’s grant to mining companies of exploration or mining rights, and the compulsory acquisitions of native title (NTA 1993 s. 24AMD (6B)). It is important to note that without adherence to the RTN, Future Acts cannot be validly executed. Hence, the state has to ensure that the native title party complies with the law and goes through the ILUA process.
The next section describes the first phase of the Browse LNG Precinct narrative with a focus on whether the representation of the native title claimants was ‘cohesive’ or divisive. It probes whether some of the voices of the native title claimants were excluded from the performance of its representational role. The KLC’s facilitation of the claimants’ decision-making processes in relation to the LNG project reflects the quality of its representation role of the claimants’ intentions. The KLC’s performance as a ‘service provider’ to State and Commonwealth governments as part of its statutory obligation as a Native Title Representative Body is also evaluated. These two KLC roles intersect. The application of FPIC is examined in the narrative during the KLC’s facilitation of identifying the LNG site. In this narrative, the Wikileaks exposé demonstrated rivalry within the JV investors and the power dynamics between transnational mining companies and the state that gave food for thought about the limits of state power under a neoliberal global regime. Lastly, the narrative analyses the merits of social licence that applied to some extent even after the LNG project was abandoned.

4.3 The Browse LNG Precinct Project story

In the same year when the Regional Minerals Program: Developing the West Kimberley's Resource (2005) report was released recommending the building of a gas plant for the Browse gas reserves on the Dampier Peninsula, Woodside made an informal approach to Kimberley Law Bosses or Elders about the possibility of locating a gas hub site on the Dampier Peninsula. The ABC’s 4 Corners (21 June 2010) retraced what happened on that day when Don Voelte, the then CEO of Woodside Energy Ltd approached the Traditional Owners:

DEBBIE WHITMONT [ABC interviewer]: And Woodside, the company wanting to run the gas plant, knows the song cycle well. Woodside first met Joseph Roe and other law bosses back in 2005, at a meeting organised by the Kimberley Land Council [Joseph Roe was identified as one of the ‘Law Bosses’].

DON VOELTE, CEO WOODSIDE ENERGY: And we sat down and we actually had little models that we, that we used where the gas plant
would be, where the song line was on the coast, how we could come across technology to not disturb things and we laid it all out for them.

JOSEPH ROE: Ah, so we told ah, we told Kimberley Land council Mr Bergmann [the KLC CEO] and Don Voelte to remove themself away from this discussion of law bosses and we sat there and had a good look and we sat there probably half of the day looking.

DEBBIE WHITMONT: Looking for a place?

JOSEPH ROE: Looking for a place on the song cycle. And we spent half of the day there, I think, but we called them back in there and we said sorry we can’t find you a spot.

DEBBIE WHITMONT: You said there’s nowhere we can put this?

JOSEPH ROE: No where we can put this, even the other all law bosses agreed on that.

DEBBIE WHITMONT: Because it would break the song cycle?

JOSEPH ROE: Yeah.

DON VOELTE: At that time it was fairly new to them. They asked us no we don’t really want a gas plant so we, they said oh we’re worried you’ll go do compulsory acquisition etcetera and we said no, we’ll just go away.

Based on this *ABC 4 Corners*’ interview transcript, it appears that the KLC proactively organized the meeting in 2005 when Woodside consulted with the traditional owners to locate a suitable place for a gas plant. Joseph Roe stated that they could not find a place on the ‘song cycle’. The song cycle on the coast of the Dampier Peninsula serves as an oral heritage map with songs that ‘contain codes of behaviour’ for sustaining the well-being of the land and its people from north of One Arm Point to the south of Bidyadanga (Goolarabooloo ‘the Song cycle’). We see at this point of the story the intersection of cultural and development interests.

In 2006, the WA Labor Premier, Alan Carpenter gave the Traditional Owners an undertaking that the Labor government would not proceed with the LNG development without their consent and unless the project provides Aboriginal people with significant economic and social benefits (Kimberley Land Council 2010a, p 21). The Carpenter Government was applying tenets of
the IFPIC as well as emphasizing the economic and social benefits to be gained from the LNG project.

To begin the process of finding a site, the WA State Labor Government formed the Northern Development Taskforce (NDT) in June 2007 consisting of the Directors General of the Department of Industry and Resources (Chair), the Department of Environment and Conservation, the Department of Indigenous Affairs, the Department for Planning and Infrastructure, the Office of Native Title, and the CEO of the Kimberley Development Commission, and the CEO of Tourism Western Australia (Department of State Development 2008). The Browse JV group and their consulting engineers developed technical selection criteria such as land area requirements that would hold ten trains, a construction work camp, terrestrial and marine site characteristics, and proximity to gas fields (Department of State Development 2008). The NDT focused on the industry’s technical criteria within WA’s jurisdiction thus excluding the Browse Basin-to-Darwin option that was part of the broader mining companies’ considered options (Department of State Development 2008). The State Labor government engaged the KLC’s participation in the LNG site selection governance process providing the KLC funding in 2007 to broker an agreement with traditional owners, assuring the KLC that, should the traditional owners decide to veto the LNG hub proposal, their veto rights would be respected (WA Senate Debates 12 Nov 2008). The inclusion of the KLC would meet the requirement for obtaining ‘Indigenous informed consent’ (Kimberley Land Council, 2010a). The funding provided by the State Labor government represents a ‘service provider role’ to be undertaken by the KLC commissioned to consult with Aboriginal communities and broker an agreement with them about the LNG project. Senior cultural and organization leaders met in December 2007 to work on a ‘fair, transparent and culturally acceptable process for delivery of gas consultations to affected traditional owners’ (Department of State Development, 2008). Around mid-December 2007, the KLC approached Woodside to return to the negotiating table. Victoria Laurie wrote in *The Australian* (15 December 2007) that:
Bergmann introduced a rival player this month by returning to the negotiating table with Woodside, which was emphatically told by traditional owners two years ago that it could not locate a plant on the remote Dampier Peninsula.

Woodside would have been the ‘rival player’ The Australian article was referring to competition with Inpex, a Japanese gas company that at that time was also actively looking into the possibility of establishing a processing plant on the remote Maret Islands off the Kimberley coast (ABC News, 7 February 2007). The WA government’s multi-hub user plant plan involving Woodside would have competed with another gas company’s single user plan. These two rival plans had implications for anticipated infrastructure costs for the gas plant such as port facilities and roads that would need to involve cooperation from the State Government. Laurie further cited the KLC CEO, Wayne Bergmann, saying that ‘[t]he meeting was significant because the same senior leaders who told Woodside to go last time were at last week's meeting’. The KLC was also independently liaising with Inpex at the time. The article alludes to the KLC appearing to favour the LNG multi-hub user development plant of Woodside [which is favourable to the State Government] over Inpex’s single user plan.

When the KLC approached Woodside, the traditional owners who were present were from One Arm Point, north of Broome, ‘one of several sites suggested as possible locations for an onshore plant to process the Browse Basin Resources’ (the Australian, 10 December 2007; Petroleum News Net, 10 December 2007). When the ABC 4Corners asked Bergmann “who asked the KLC to invite Woodside back”, he said that it was the “senior cultural leaders”. Pressed further, he replied, ‘it was more than those people’ who were at that meeting. Goolarabooloo leader, Joseph Roe, Song Cycle Custodian who was not included in the delegation that approached Woodside, had claimed that the decision was reserved for the Law Bosses in charge of the song cycle (ABC 4Corners, 21 June 2010). The KLC’s overture was, for Botsman (2012a), a direct intervention by the KLC to reopen talks about bringing an LNG hub back to the Dampier Peninsula. Botsman thus questioned the KLC’s approach in its representation of the native title party’s
intentions, that is, whether it was partisan. At this time, the exact location of the gas plant on the Peninsula was not yet established. Whilst Joseph Roe was only one of the cultural leaders on the Peninsula, he had a significant role on the Peninsula as custodian of the Song Cycle.

Meanwhile, in December 2007, the KLC, Environs Kimberley, the Australian Conservation Foundation, WWF-Australia, the Conservation Council of WA and the Wilderness Society released a joint position statement on the Kimberley LNG Development that stressed a collaborative LNG development approach to protect ‘cultural and environmental values’:

> if Liquefied Natural Gas (LNG) and associated development occurs in the Kimberley, it must provide opportunities and mechanisms for Kimberley Traditional Owners, the KLC, key environmental groups, Governments, and commercial proponents to work together to protect the Kimberley’s unique cultural and environmental values (Appendix G).

The KLC and the environmental groups appeared to be united in their advocacy for the Kimberley’s unique cultural and environmental values if LNG and associated development occurs in the Kimberley.

The KLC’s service provider role for the State government was formalized in a Financial Assistance Agreement (FAA) in January 2008 that gave the KLC the task of consulting with Kimberley traditional owners about hydrocarbon processing on the Kimberley coast (Kimberley Land Council 2010a, p. 25). The State Government would shoulder the cost of consultation with coastal native title-holders and claimants. Meanwhile, on 5 February 2008, the Commonwealth and the WA State Government issued a joint media release (see Appendix B) announcing the agreement to undertake a strategic assessment of the Kimberley to identify a site for a single common-user LNG hub for the Browse Basin. The area to be studied stretched from the south of Broome up to Cape Londonderry on the Timor Sea, and considered locations outside the West Kimberley region. Note that the Federal government’s territorial jurisdiction went beyond the West Kimberley region, and that means the LNG site need not be confined to WA territorial jurisdiction based
on the agreement reached. The two governments signed the Browse Basin Liquefied Natural Gas Precinct Strategic Assessment Agreement on 6 February 2008 seeking to develop an industrial plan that would incorporate protection and conservation of the environment. This agreement was focused on the protection and conservation of the environment, not on the project’s impact on heritage sites. The identification of the gas plant site was later confined to West Kimberley because that fitted into WA State’s territorial jurisdiction, consequently other site options open for consideration by both the gas industry and the Federal government were eliminated.

The KLC’s service provision to the State government began in mid-February 2008 when the KLC called senior cultural and organisation leaders for a meeting in Broome to refine and endorse the process discussed in December 2007 and to elect a Senior Leadership Group. At this meeting, appropriate cultural practices were employed such as ‘separate men’s and women’s meetings and consensus decision making’. The Senior Leadership Group was given the task of attending meetings with coastal native title claim groups during the consultation process to explain the site selection process and encourage their participation, and then provide advice to the KLC. At the outset, these groups included fifteen different native title claim groups: Balanggarra, Miriuwung Gajerrong, Wanjina Wunggurr Uunguu, Wanjina Wunggurr Dambimangari, Wanjina Wunggurr Wilinggin, Mayala, Bardi Jawi, Nyul Nyul, Goolarabooloo & Jabirr Jabirr, Djabera Djabera, Yawuru, Nykina Mangala, Karajarri, Warawa and Nimunburr (Kimberley Land Council 2010a, p. 26). Map 1.4 shows the native title claimants or holders in the West Kimberley.
Map 1.4: West Kimberley Native Title Applications and Determinations
(Western Australian Land Information Authority 2014)
From March 2008, ten native title claim group meetings of these Cultural Bloc groups were held throughout the Kimberley. These meetings included the KLC Chair, CEO and Deputy CEO and senior KLC staff. Information about the planned development was provided at these meetings held at Kalumburu, Wyndham, Broome, Beagle Bay, One Arm Point, Mowanjum, Derby and Bidyadanga. Traditional owners were asked to consider 'big picture' development issues and implications that crossed over claim group boundaries. They were encouraged to offer suggestions, ask questions, and establish what 'was important for them'.

In May 2008, each claim group from the cultural blocs was asked to elect four representatives to constitute the membership of the TOTF. The TOTF’s responsibilities included: receiving, discussing and analysing the range of complex information related to gas development in the Kimberley coastline; providing feedback to the wider claim group; and representing the views of their wider claim group to the TOTF. The TOTF’s role was not to make decisions about the location of the LNG site on behalf of their native title groups but to make decisions about consultation processes related to the LNG development (Kimberley Land Council 2010a, p. 30). We saw in the process described, the employment of an Aboriginal cultural consensus approach that appeared to incorporate principles of Indigenous Free Prior and Informed Consent (IFPIC). However, O’Faircheallaigh & Twomey’s [the KLC consultants] statement in their Traditional Owner Consent and Indigenous Community Consultation: Final Report, Kimberley LNG Precinct Strategic Assessment: Indigenous Impacts Report indicates that the Aboriginal communities were simply to be consulted but had no mandate in identifying the LNG site. In other words, cultural consideration was not a criterion for the final decision on where on the Dampier Peninsula the site was to be located. The TOTF’s function was to give the appearance of legitimacy of the representation of the voice for Kimberley Aboriginal people, side by side with the technical criterion applied by the State’s NDT.

TOTF held consultation meetings during June–September 2008 resulting in identifying forty potential sites, later reduced to eleven. In early September
2008 before the WA State election was held, the traditional owners elected four potential sites from the eleven NDT-selected site options. TOTF member participation was now reduced to the representation of the following four sites: Anjo Peninsula, North Head, Quondong to James Price Point, and Gourdon Bay. The process was complementary. The NDT took care of selecting the technical site criteria based on the technical criteria whilst the TOTF elected four options from the NDT list based on the traditional owners’ selection coordinated by the KLC. According to O’Faircheallaigh and Twomey (Kimberley Land Council 2010a), the performance of the TOTF was in accord with the principle of IFPIC giving Traditional Owner groups the opportunity to consider whether they wished their land and sea country to be considered as potential LNG sites. However, this verdict is doubtful when at the same time the lack of information and feedback to questions TOTF raised with Woodside and State agencies and consultants was noted in the report. In my conversation with the Goolarabooloo traditional owner, Joseph Roe, he told me that the information provided was ‘not enough to take to my people’ (Pers. Comm. 22 April 2009). For example, he didn’t get a response as to whether Quandong Point (10 km south of James Price Point) and Flat Rock (15 km north of James Price Point) were being considered as potential choices for the LNG site. He found distressing the inadequacy of government information about the intended use for the site.

The WA State election on 6 September 2008 saw a change in Government and a radical shift in policy. The newly elected Liberal/National Party Premier, Colin Barnett assumed leadership on 10 September 2008 and on 15 September 2008, he announced that out of the four possible LNG sites under consideration, North Head near Beagle Bay was his preferred option. The Premier provided the KLC with $9.15 million to speed up the process in obtaining consent from the registered Native Title Claim Group (NTCG) (Botsman a, 2012, p. 31). The KLC had now received a total of $16.2 million consolidated from the Labor and Liberal governments’ funding that was intended for the KLC to secure Kimberley Traditional Owners’ consent for establishing the LNG facility onshore.
TOTF expressed concern over the new Premier’s announcement that North Head was his preferred option and called on the Premier to allow the process to continue ‘without interference’. The Premier disbanded the TOTF and cancelled its further involvement in the process. On 15 October 2008, the Premier reversed former Labor Premier Carpenter’s promise to allow Kimberley Aboriginal people a right of veto. A right of veto, the new Premier said, was unacceptable (Department of State Development, Browse Strategic Assessment Report, _Appendix E-2.pdf_, p. 37). Under the previous Labor Carpenter government, the site selected would have to meet ‘engineering, technical and environmental requirements’ and it also should have ‘the support of the Traditional Owners for the area concerned’. The Barnett government, in contrast, stated that he would consult with Traditional Owners only about impact mitigation and community benefits (Department of State Development, Browse Strategic Assessment Report, _Appendix E-2.pdf_, p. 38). The change in policy affected the relationship between the KLC and the WA government after September 2008. According to O’Faircheallaigh and Twomey (Kimberley Land Council 2010a, p. 30), the KLC assumed that the site selection process would be governed under the principle of IFPIC during the life of the Carpenter government. They noted that:

For many Aboriginal people these assumptions provided a sense of empowerment, recognition and respect, a long fought for space from which Kimberley Aboriginal people were prepared to reconsider their initial ‘No’ to a proposal by Woodside in 2005 to establish an LNG processing plant, and re-open the question of having LNG processing somewhere on the Kimberley coast (Department of State Development, Browse Strategic Assessment Report, _Appendix E-2, p. 23_).

Two particular issues that the KLC raised after the change of government were: 1) state provision of adequate information, so that it could ‘complete an assessment of all issues relevant to LNG development’ to enable it to negotiate ‘fair and reasonable commercial and native title agreements’; and 2) sufficient allocation of time and resources to undertake a thorough social impact study of the LNG facility on Aboriginal people. The Premier gave the native title party, Jabirr Jabirr and Goolarabooloo until March 2009 to agree to a suitable site or else, he warned his government would compulsorily
acquire the site. He indicated, though, that his preference was for the claim group to enter into negotiation with Woodside. In effect, these two issues indicated a breach of the IFPIC principles in regard to ‘informed consent’ and ‘free consent’ as time pressure was not only inordinately applied but the Premier used intimidation with his threat of compulsory acquisition.

In December 2008, Woodside made an offer of $500 million to Traditional Owners in return for allowing the establishment of an LNG facility on the Dampier Peninsula (Botsman 2012a, p. 39). The KLC rejected this provisional offer. In the same month, the NDT formally presented its report on the four options for a site location to the WA Government. Table 1.2 below graphically shows how the four options met the requirements based on technical, economic, environment, heritage, Indigenous impact, and socio-economic standards.
Table 1.2: NDT Criteria applied to the four shortlisted LNG Precinct sites

<table>
<thead>
<tr>
<th>Location</th>
<th>Technical</th>
<th>Economic</th>
<th>Environment</th>
<th>Heritage</th>
<th>Indigenous Impact</th>
<th>Socio-Economic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argo Peninsula</td>
<td>Marine</td>
<td>Terrestrial</td>
<td>Marine</td>
<td>Terrestrial</td>
<td>Natural</td>
<td>Indigenous</td>
</tr>
<tr>
<td>North Head</td>
<td>Orange</td>
<td>Green</td>
<td>Green</td>
<td>Orange</td>
<td>Green</td>
<td>Yellow</td>
</tr>
<tr>
<td>James Price Port</td>
<td>Orange</td>
<td>green</td>
<td>Green</td>
<td>Orange</td>
<td>Green</td>
<td>Yellow</td>
</tr>
<tr>
<td>Gourdon Bay</td>
<td>Orange</td>
<td>Green</td>
<td>Green</td>
<td>Orange</td>
<td>Green</td>
<td>Yellow</td>
</tr>
</tbody>
</table>

**Legend**
- **RED**: Significant constraints
- **GREEN**: Limited constraints
- **ORANGE**: Constrained but manageable
Table 1.2 shows that North Head had significant constraints in terms of Indigenous impact. James Price Point did not show any significant constraints compared with other site options. After receiving advice that North Head had technical problems, the Premier selected James Price Point, stating that it was a suitable choice because no settlement, homes or businesses existed within 20 km of the site (Kimberley Land Council, 2010b). The State Government’s intention was to build a ‘very large natural gas processing facility at James Price Point beginning with 2–3 trains that can produce between 8–15 million tonnes per annum (mtpa) of LNG.’ (Department of State Development, Strategic Assessment Report, Appendix E-3). Gas processing plants are referred to as ‘trains’ that can produce LNG, LPG and a type of oil called condensate. The Darwin LNG plant completed in 2006 had an initial capacity of 3.5mtpa compared with 4.1 1mtpa for a plant completed in Norway in 2007.

On 19–20 February 2009, the KLC convened a combined meeting of the Goolarabooloo, Jabirr Jabirr, and Djaberra Djaberra Claim Group. What was now required was for Traditional Owners to form a negotiating committee (Department of State Development, Strategic Assessment Report, Appendix E-2, p. 38). At this meeting, members of the Traditional Owners Negotiating Committee (TONC) were elected. Twenty-six members representing ten family groups were selected as members of TONC. A resolution at this meeting instructed the KLC to ‘enter into negotiations with Woodside and the state’ and reach a Heads of Agreement (HOA) in relation to the James Price Point Precinct site. Traditional Owners, Woodside, and the State Government had meetings from February to April 2009 covering various subjects such as environmental and cultural heritage protection, land management, native title and economic opportunities for Kimberley Aboriginal people, and financial compensation for Traditional Owners. This phase of the KLC’s representation involves its service provider role for the Commonwealth Government as an NTRB that represents the intentions of the native title claimants.
At the meetings held prior to the signing of the HOA, culturally appropriate approaches were used at meetings whenever possible, including ‘allowing meeting breaks for material to be discussed and absorbed, and use of graphics to interpret complex negotiation issues.’ An example of graphics was the use 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’ (Department of State Development, Strategic Assessment Report, Appendix E-2). TONC presentation at these meetings followed Traditional Owner Rules for agreement processes or guidelines developed by Kimberley Traditional Owners and endorsed by the TOTF. These rules included ensuring Traditional Owners’ consent and inclusion in agreements of all affected Traditional Owners, provision of detailed requirements in relation to the structure of financial payments, and setting specific goals for employment and training programs Department of State Development, Strategic Assessment Report, Appendix E-2). While the State and Woodside presented positions on a number of issues, they had not presented fully-developed proposals until the end of the seven-week negotiation period. Both TONC and the KLC made counter-proposals and representations for the State and Woodside not to resort to compulsory acquisition. We see the KLC’s effort at employing culturally appropriate approaches at Traditional Owners’ meetings on the Peninsula in its brokering role of consulting with them during the LNG site-identification phase process whilst operating under the cloud of the WA government’s threat of resorting to compulsory acquisition.

On 30 March 2009, the KLC placed a notice of a forthcoming meeting scheduled for 14–15 April 2009 through an advertisement in the local paper, The Broome Advertiser. This meeting was aimed at making an in-principle decision for the NTCG to enter into a HOA with Woodside and the State Government to allow an LNG facility at James Price Point. At this stage, the native title claim party was divided into support for, on the one side, and on the other, rejection of the proposed LNG Precinct. We recall the Seaman Commission’s advice that the foundation for a cohesive Indigenous approach
in agreement-making with miners and the WA State government should begin with resolving internal Indigenous conflicts, to ensure that the Indigenous negotiating approach with resource developers was not fractured.\textsuperscript{29} The meeting notice was headed, ‘Update on Negotiations about the Premier’s Nomination for a Gas Precinct around James Price Point’. The KLC gave notices for the meeting by hand or email to family representatives and to NTCG members who had attended previous meetings. Extra copies of the notice were given to pass on to family members.

On the days of the 14–15 April 2009, the atmosphere was tense and electric. Senior Law Bosses or cultural leaders, both men and women who were not members of the NTCG, were present (Department of State Development, Strategic Assessment Report, E-2, p. 42). This was ostensibly a practice established in the TOTF site-selection process. Whilst they did not participate in decision making, their presence was intended to give support to the NTCG, given the climate of ‘enormous political pressure and public scrutiny’ (Department of State Development, Strategic Assessment Report, E-2, p. 42). All the TONC members were in attendance. Some uninvited environmental groups arrived at the meeting to lobby Traditional Owners, telling elderly members of the claim group not to ‘sell out’ (Kimberley Land Council 2010a).

During the meeting, the KLC CEO, Mr Bergmann, rang up the Premier to ask him about his compulsory acquisition plan. He told the Premier, ‘traditional owners want to know whether you will withdraw the threat of compulsory acquisition. The Premier said, according to Mr Bergmann, “if you said yes, I’ll withdraw it but I can’t guarantee that I won’t ever re-instigate it”. I went back and told everyone that’s what he said.’ (ABC \textit{4 Corners}, 21 June 2010). The Premier issued a warning that if the KLC failed to enter into a HOA, his government would not hesitate to compulsorily acquire the land under the provisions of Public Works Act 1902. Section 11 of this Act stipulates that:

\begin{quote}
The Governor, by Order in Council, may authorise the Minister to undertake, construct, or provide any public work except as to railways, in which case the authorisation may be given to the Public Transport Authority and is subject to section 96, and such authorisation shall be
\end{quote}
deemed an authority given by and under this Act (Public Works Act 1902).

The Premier’s threat of compulsory acquisition prior to a vote presented an intimidating election climate, and so was the presence of Senior Law Bosses or cultural leaders, both men and women who were not members of the NTCG.

It was well known locally that families and close friends had had serious relationship fallouts on account of their opposing views about the LNG facility development. At the meeting, the decision-making system agreed upon was a ‘majority rule’ process. Some NTCG members such as the Goolarabooloo Family walked out before the vote was taken. Clearly this meeting was highly politically charged and the walkout of the Goolarabooloo indicated that one of the partners of the GJJ claim groups would not be represented in the Traditional Owners’ vote to enter into the HOA. Two Jabirr Jabirr women informants provided me with a description of what occurred on the day of the meeting. One a businesswoman in her 50s, and the other, a youth leader aged 30, who happened to be a TONC member.

The older woman, who I shall call Sylvia, described the atmosphere at the meeting:

Our old people were (placed) in the back ... the KLC executive sat in the front ... particular family groups on different sides ... a younger group ... were quite vocal. ... sometimes the older people were shouted down ... were shut up, and they were quite emotional in what they were saying about their connection to Country. That didn’t sit very well with me, and all of a sudden because of my attendance there, a whole lot of stuff was being exposed to me, so I was in a state of shock, so when things happened that it came down to the vote, I decided not to vote either way. My reason for that, and I wanted it registered ... was that not enough information was given for me to access, to make a proper decision to vote. I wasn’t going to vote either way. I had not sufficient deliberation (Pers. comm, 20 July, 2010).

I asked the younger woman, Rosalyn, what she thought about the traditional consensus process compared with the majority rule method that was used at the meeting. Had the traditional voting system been used, she argued,
'traditionally, the people you get will make the decisions with all the old men', and ‘that’s excluding the women’s voice ... So what we did was have a raise of hands, and like, you know, we all say “yes” to this, or we all say “no” to this, so that’s inclusive of everybody within the group (Pers. comm, 6 August 2010).’ Rosalyn felt that her vote as a young female leader was counted through the majority vote method. In contrast, the consensus traditional approach, she maintained, would have restricted the vote to old male elders and would not be representative. The result of the vote in the end was a significant majority vote for the native title claim party to enter into a HOA with the WA State and Woodside.

In hindsight, members of the NTCG opposed to the LNG facility complained that the notice for the forthcoming meeting was described simply as an ‘Update on Negotiations’ (McPherson 2010). Former Federal Judge Murray Wilcox, who supported the environmental groups’ criticism of the LNG Precinct development, argued that ‘many Goolarabooloo and Jabirr Jabirr people did not attend’ because they did not realize that ‘a vote on whether to offer in-principle support to the gas project would take place’ at that meeting (McPherson 2010). Joseph Roe representing Goolarabooloo native title claimants told me that ‘different tribes [Goolarabooloo, Jabirr Jabirr, Djabera Djabera and Nyul Nyul] were not given voting rights’ (Pers. comm, 22 April 2009). He didn’t think that full agreement was reached with the claimants. He felt misrepresented by the KLC. He subsequently took legal action claiming that the KLC misrepresented the native title party’s intentions. When Woodside asked Joseph Roe what he wanted, he told them to ‘Stay away from my country, leave my Law and culture alone. I have no problem with gas development but not in my Country. Why don’t you float it offshore?’ (Pers. comm, 22 April 2009).

Some of my informants in Broome criticized the April 2009 meeting process based on standard formal meeting procedures. Using the kartiya (non-Aboriginal) standard, the meeting was flawed because it did not produce minutes, so the process had no facility for ‘reporting back’ and therefore would have no ‘corporate history’ (Dr Anne Poelina, Pers. comm, 13
The content of discussions at the 14–15 April 2009 meeting was confidential and might be subject to legal privilege, so a detailed account could not be provided without the consent of the NTCG (Department of State Development, Appendix E-2, p. 43). Five years later, I sought an answer from the current CEO of the KLC, Nolan Hunter, as to whether consensus was the customary decision-making method that Traditional Owners under Kimberley law and culture normally use (Pers comm, 15 September 2014). Hunter said that the KLC’s role is to find a mechanism for decision making in relation to governance processes. Methods other than consensus are used depending on the level of decision making and the mechanism required. Later, the NTCG accused the Premier of using ‘dirty tactics’ when they learnt that the Premier had lodged a document with the National Native title Tribunal to compulsorily acquire the land for the project (Businoska & Feeney 2011, p.1). The WA Government’s response, when asked, was that two processes were running concurrently: ‘one was a negotiation by agreement with Traditional Landowners and two, a formal process through the native title tribunal’ (Businoska & Feeney 2011).

I digress in the context of the decision-making process to consider Sullivan’s (2006a) assertion that ‘Aboriginal culture is not constituted in such a way that it can be reflected in effective modern organisations in any deep sense’ such as the relationship between the approach of modern decision making (e.g. majority rule) and that of Aboriginal culture (e.g. consensus method). Sullivan stresses that political structures and processes are distinct from local cultural authoritative processes, and that processing native title claims is ‘complex.’ Ritter (2009, p. 40) suggests that ‘process managerialism’ and ‘information management’ influence the processing of native title claims so that institutions overseeing native title would tend to look upon agreements as ‘outputs’. The ‘ism’ in managerialism is clarified in Klikauer’s (2013) work, _Managerialism: A Critique of an Ideology_. Klikauer argues that ‘the liberal prospects of freedom from toil’ and the use of a ‘one-dimensional, anti-democratic, and authoritarian ideology’ when combined with the decline of pluralism, caused the ideology of managerialism to weaken labour protest
and ‘infected private lives, public and educational institutions, society, the arts, the economy, and even democracy’. In this context, the term ‘managerialism’ alludes to the tendency by a particular governing party or authority to focus on its intended outcomes or ‘outputs’. If managerial influence is output oriented, the implication is that output determines the process that is employed. The method the KLC employed at the April 2009 vote on whether the native title claim groups should enter into a Heads of Agreement (HOA) could arguably be aligned with the output or outcome desired; that is, obtaining in-principle support for the project rather than beginning with process – determining which parties are vested with a ‘voice’ (GJJ apical representatives eligible to vote) and then, ascertaining their decision that the KLC was bound to represent.

The KLC’s meeting facilitation to represent Aboriginal native title claim groups’ voices was flawed both from Aboriginal and non-Aboriginal meeting standards. The meeting notice that was used did not indicate a vote on the HOA was going to be held. The presence of cultural leaders who were not members of the claim group and of environmental opposition groups induced an intimidating atmosphere prior to a vote of such significance. The walkout of Goolarabooloo implying in the cultural way that its vote was likely negative showed that the native title party’s vote was anything but representative. The absence of a meeting record indicates lack of transparency in the process for evaluating the process after the event. Finally, the KLC’s representation was consistently constrained by the Premier’s threat of compulsory acquisition. The WA Government’s two processes running concurrently, namely ‘one was a negotiation by agreement with Traditional Landowners and two, a formal process through the native title tribunal’, as earlier cited, shows that the State Government was not ‘negotiating in good faith’. The right to negotiate requires that parties must negotiate with ‘an open mind and a genuine desire to reach agreement’ [National Native Title Tribunal (NNTT)n.d. a].

The result of the KLC’s meeting facilitation was a majority rule support for the James Price Point project giving the KLC the authority to enter into an
HOA, which it did on 21 April 2009 (Waardi Ltd, n.d.). The aim of the HOA was to establish a framework of key principles for negotiation towards a final agreement between the NTCG, Woodside and the State Government (AIATSIS 2011). The HOA framework outlined the expectations of each party to the agreement.

The WA State would look after tenure, land titles transfer, cultural heritage protection and environmental management. The total area of land and water required was estimated to be about 3,500 ha with an additional area for the statutory buffer zone. The WA Government’s commitments would include provision of an Economic Development Fund, Housing Fund, Education Fund, Cultural Preservation Fund and Kimberley Enhancement Scheme. The WA State would be in charge of Conservation and Heritage Reserves, Administration Payments, Indigenous Employment and conditions that would apply to Future Proponents. As the original proponent, the WA State would initially have management and control of the LNG Precinct project (Browse LNG Precinct Project Agreement, June 2011, p. 2).

Woodside, the Operator of the Browse JV, would be the foundation proponent of the LNG Precinct. All parties would enter into an agreement to facilitate the preservation of Aboriginal heritage through the protection of Aboriginal Sites and Aboriginal Objects – the Heritage Protection Agreement (Agreements, Treaties and Negotiated Settlements Project). Woodside would be involved in land tenure, cultural heritage protection, environmental management and management arrangements for the Precinct. It would also have financial commitments for education, training and administration as well as for ‘Regional Benefits’, ‘Indigenous Employment’, and implementation of the Indigenous Land Use Agreement (ILUA). ILUA, as we recall in the Argyle case, is a voluntary agreement between Aboriginal groups and others that can deal with issues of access to sites, compensation, extinguishment of native title, and co-existence.

The native title party would undertake an ILUA as soon as practicable. It would not be able to object to the grant of mining tenements. Traditional
Owner benefits from Woodside would include: business contracts, business development, cross cultural awareness training for Woodside staff, a continuing right to access the Precinct for traditional owners, and a review of Agreement.

In terms of social infrastructure, the intentions outlined in the HOA framework indicate that both the State Government and the mining companies would share responsibility for provision of social benefits. In this sense, Woodside’s social licence provision that included financial commitments for education, training and administration, was not exclusive. The question that could be raised was why the WA Government’s commitments, that included the provision of an Economic Development Fund, Housing Fund and Education Fund ‘benefits’, were being traded in the Browse LNG negotiation transaction, if these were typically expected as citizenship provisions.

At the beginning of this chapter, we canvassed the application of neoliberal thinking as applied to the Browse LNG Precinct project. The Wikileaks exposé provided insights into the thinking of the JV partners and the power dynamics between the state and the transnational mining companies that might indicate which institutional power had more clout in relation to resource development decisions. The ‘behind-the-scenes’ relationship between the state and the miners was disclosed in a Wikileaks security break-in that exposed the content of a cable sent to the US from the US Embassy in Canberra on 11 December 2009 (News.com, September 2011). The cable was from the Director for Exploration and Access, Ranga Parimala, Australian Petroleum Producers and Explorers Association (APPEA), informing the US that the Australian Government’s condition for extending their retention leases for three years was for the project partners to develop a plan to produce LNG within 120 days. The cable stated that the Commonwealth government’s action was an ‘unprecedented interference by the government in a project intended to force Browse partners to choose Woodside’s preferred development pathway’ (Burton-Bradley 2011).
The cable referred to the directive from the Commonwealth Minister for Resources, Martin Ferguson, to the Browse Basin LNG project partners Woodside, BHP, BP, Chevron and Shell on 4 December 2009. The condition the Federal government imposed was for the JV Partners to spend $1.25 billion at James Price Point for undertaking a Basis of Design in 2010 and Front End Engineering and Design in 2011 to commercialize the Browse resources more rapidly (the Wilderness Society, December 2010). Wikileaks disclosed that the Commonwealth Government was concerned that major international oil companies were taking advantage of the ‘relatively lenient reservation lease policy to sit on reserves rather than bring the resource into the market’ (Collins 2012). Chevron’s External Affairs Manager for Wheatstone, Mike Edmondson, told the US Consul General in Perth that the Commonwealth Government’s decisions were intended to put pressure on the JV partners, that is, as BHP Billiton Vice President for Government Relations, Bernie Delaney, stated, to use existing Woodside infrastructure in the Northwest Shelf, and to develop the new James Price Point complex’ (News.com, 1 September 2011).

The JV Partners viewed the Government’s directive as advantageous to Woodside. From Woodside’s perspective, Kimberley Browse Operations Vice-President, Niegel Grazia explained that Woodside held the offshore gas reserves under retention leases with the condition that the company ‘study James Price Point and determine its viability’ (Collins 2012). The Wikileaks exposé was revelatory. It showed that the JV partners of Woodside were uncertain about their investment in the James Price Point project while Woodside’s Vice-President admitted that its offshore gas reserves leases came with the condition focused on James Price Point. In other words, both the Commonwealth Government and the State Government had actually been interventionist in their approach to the Browse LNG project. The Commonwealth had attempted to force the Joint Venturers to hasten their investment decision, linking the pressure with the possibility that their retention licences might not be extended should they fail to adhere to the
condition being imposed, whilst Woodside’s retention lease was constrained by exclusion of other LNG sites other than James Price Point.

Bernie Delaney of BHP Billiton stated that his firm was ‘strongly opposed to the changes in retention leases. Other options the JV partners such as Shell were considering at the time were use Floating LNG (FLNG) facility offshore near the Browse gas fields to process Browse gas or to use the existing facility at Karratha. A JP Morgan analysis stated that the Karratha option was more beneficial to Shell and BHP, and that Chevron and BP could potentially have a higher internal net of return whereas the capital expenditure required for commercializing the James Price Point option would be higher (Murphy 2009; Burrell 2012). Wikileaks thus revealed that Woodside’s JV partners were still uncertain about committing their FID on the proposed LNG project. If the project were to go ahead, Woodside had to convince the JV partners to commit their share of the total cost of the project, estimated to be at least 30 billion dollars. If pre-orders for most of the proposed production were guaranteed, the James Price Point LNG facility would have been a certainty, according to Grazia. But by May 2012, ‘far little more than a tenth of initial planned production from a James Price Point LNG facility had been pre-sold’ (Collins 2012).

Woodside did not confirm whether the JV partners had committed their support for the James Price Point facility (Kelly 2009). By 26 December 2009, Woodside and its JV partners had agreed (in the interim) to the Federal and WA State’s terms and conditions for their gas reserve retention leases which were due to expire in mid-2012 when the FID was due (Annual Investor Update, Woodside, 30 November 2010). At the level of macro-economic investment decision, the final decision of the JV Partners would be based on their evaluation of the LNG market and where best to put in their individual capital outlay. As for the Commonwealth and State Governments, the pressure that they had applied could be evaded by the miners that had the facility to move their capital outlay based on their assessment of returns to investment. Traditional owners’ voices at this level of decision making had no relevance. The significance of the Wikileaks narrative concerns Howlett et
al’s contention, following Peck (2004, p. 396), that ‘there is a significant role for theoretically informed empirical research that can track the actual patterns and practices of neoliberal restructuring that may occur in Indigenous domains as a result of mineral developments’ (Howlett et al. 2011, p. 310). Practices of neoliberal restructuring would impact on varying positions adopted by Indigenous communities.

As an example, the KLC’s governance of the representation of the native title party was contentious because of differences in the position taken by the joint native title claimants over consent to the project. Hence, the representation of Indigenous voices would be a challenge for an Indigenous native title representative body such as the KLC, which itself held a strong position in support of the James Price Point project (see Hansson 2012). We recall Botsman’s assertion that the KLC was influenced by the ‘doctrine of economic self-reliance and independence’ so that the projection of its representation role was focused on the economic benefits it could obtain on behalf of the Kimberley regional Aboriginal community. The KLC’s thinking is reflected in the statement voiced by the then Executive Director, Wayne Bergmann, who led the native title claimants to reach agreements with Woodside and the WA State government:

The James Price Point project, and the deal that traditional owners have signed, represents a once-in-a-lifetime chance to move beyond welfare and create real jobs and facilities for indigenous people. Indigenous communities are struggling in the Kimberley, and without integrating our people into the modern economy and the world of work we risk losing a priceless cultural heritage. We should not be abused for trying to create opportunities and provide a future for our children. We can do better than a life as victims, living in poverty on the fringes of great wealth. The dilemma of how to adapt to the modern world without sacrificing our identity as indigenous people is one we grapple with every day (Bergmann 2011).

The KLC’s discourse shows the convergence of its views with the WA Government’s discourse that links Aboriginal development (i.e. addressing Indigenous disadvantage) with industrial development. Here is how Premier Barnett linked development as a pathway to addressing Indigenous disadvantage:
Look, I think everyone is aware of high rates of not only unemployment but of youth suicide, of domestic violence, of abuse of children. I mean all of those social issues are there to a high degree in the Kimberley and other parts of the State. The State spends an enormous amount of money on education and health, particularly into remote communities in that area. The spending, if you like, per student in a school would be three or four times the amount that is spent on a similar student in a school in Perth, so there's no lack of effort but the reality, the social and economic problems are immense and, you know, I think so many Aboriginal leaders, and there's some wonderful young Aboriginal leaders that are coming forward in recent times, but so many of them say, “We want to get away from welfare dependency.” This is a real opportunity for self-determination and economic independence and that drives me as much as the economics of the gas project. (Q & A 2012).

The KLC and the Premier’s discursive approaches seemed to validate Perdrisat’s critique cited earlier that the ‘two issues of Aboriginal development and industrial development’ were ‘thrown together to justify the resource development’. In other words, the substantive native title determination issue was obscured by the focus on linking Aboriginal marginalization with the opportunity to obtain economic benefits from the resource development.

In any case, the joint native title party gave consent for the land at James Price Point to be used for the Browse LNG precinct on 30 June 2011. In return for surrendering native title, the KLC signed a three-part agreement with Woodside on behalf of the native title claim group. This agreement involving Goolarabooloo Jabirr Jabirr claim group, Woodside, the State government, the Broome Port Authority, and the Land Authority of Western Australia consisted of the three part-agreement: the Browse LNG Precinct Project Agreement (PPA), the Browse LNG Precinct Regional Benefits, and the Browse Land Agreement (Kimberley Land Council Annual Report 2012, p. 28). I argue that TONC and the KLC adopted the approach of maximizing negotiation terms with Woodside and the State Government that were advantageous to Indigenous economic and social interests considering the absence of veto rights. The land agreements were worth at least $1.5 billion, including land packages and funds for health, education and training. Discussions between the parties had cost at least $40 million with the KLC
receiving funding to employ lawyers, media advisors, scientists and LNG industry consultants. O’Neil, lawyer and PhD candidate points out in her evaluation of mining agreements that the agreements that the KLC struck were far better than most traditional owners negotiated after years of discussions. This ‘good deal’ that Aboriginal communities received, she believes, was derived from the WA government compelling companies to ‘obtain a social licence to operate’ that brought in ‘very substantial regional benefits for all Kimberley Aboriginal people in areas such as education, health and housing,’ and, in addition, bound the State through an Act of Parliament ‘not to process LNG anywhere else on the Kimberley coast’ (Georgatos, G. 2012).

An example of Woodside’s social licence provision was the Reading Recovery Program aimed at Literacy Acquisition for Pre-Primary Students (LAPS). Other assistance programs that benefited the host communities through the work of TONC’s agreement-making are shown in Table 1.3:
Table 1.3
TONC/KLC negotiated Assistance Programs: an Example of Social Licence  
(Waardi News July 2014, p. 4)

<table>
<thead>
<tr>
<th>Category</th>
<th>Category Details</th>
<th>Beneficiary</th>
<th>Funding spent A$</th>
<th>Funding Committed A$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Education</td>
<td>Pre-school</td>
<td>7</td>
<td>1,669</td>
<td>3,500</td>
</tr>
<tr>
<td></td>
<td>Primary</td>
<td>76</td>
<td>18,348</td>
<td>45,500</td>
</tr>
<tr>
<td></td>
<td>High School</td>
<td>64</td>
<td>59,615</td>
<td>130,000</td>
</tr>
<tr>
<td></td>
<td>University</td>
<td>7</td>
<td>43,094</td>
<td>87,450</td>
</tr>
<tr>
<td></td>
<td>Additional support</td>
<td>4</td>
<td>Included above</td>
<td>Included above</td>
</tr>
<tr>
<td>Sporting and Arts</td>
<td>Sporting and Arts</td>
<td>103</td>
<td>45,274</td>
<td>60,400</td>
</tr>
<tr>
<td></td>
<td>Gifted/Talented</td>
<td>3</td>
<td>Included above</td>
<td>Included above</td>
</tr>
<tr>
<td>Funeral</td>
<td>Funeral</td>
<td>7</td>
<td>27,825</td>
<td>37,800</td>
</tr>
<tr>
<td>Elders</td>
<td>Elders</td>
<td>24</td>
<td>118,116</td>
<td>120,000</td>
</tr>
<tr>
<td>Health Care</td>
<td>Health Care</td>
<td>38</td>
<td>24108</td>
<td>38,000</td>
</tr>
<tr>
<td>Cultural Activities</td>
<td>Cultural Activities</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Training</td>
<td>Training</td>
<td>20</td>
<td>24,685</td>
<td>38,000</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>353</td>
<td>362,734</td>
<td>555,650</td>
</tr>
</tbody>
</table>

Business development and capacity building were other by-products of the proposed LNG project. Waardi Ltd was formed to manage GJJ’s future benefits as negotiated under PPA. To assist Waardi’s work, two trusts were established: Nyimarr Ltd and Guumbarr Ltd. Nyimarr’s role was to help identify commercial opportunities (Waardi Ltd Fact sheet 2). Guumbarr’s role was to ensure that the Browse LNG benefits were ‘used fairly’. The establishment of Waardi Ltd, Nyinmarr Ltd and Guumbarr Ltd is a way by which Indigenous owners provide for agency in negotiating directly with miners for access to their lands. Multinational companies such as Front End Engineering and Design (FEED), associated with the Browse project, engaged Nyimarr during the Browse technical and assessment period to assist with capacity building for Kimberley Aboriginal people in the region. Nyimarr’s Chair, Tarran, mentioned to me that some members of Nyimarr, as the Environmental Cultural Heritage Team (ECHT), were formed to negotiate...
Future Acts and to carry out Work Program clearances on Goolarabooloo Jabirr Jabirr Traditional Country, and the KLC’s negotiating team, TONC under its new name, the Traditional Owners Technical Group (TOTG). For her part, she conducted a Cross Cultural Awareness Training Course that provided business people with some background about Indigenous language, culture, and family relationships in the area (Pers. Comm., 15 September 2014). A move forward was putting together an Aboriginal Business Directory WA for the first ‘free, all industry and searchable online resource that was designed to open up new markets for Aboriginal businesses’. A neoliberal counter argument is that the exercise of Indigenous agency is pulled within a capitalist framework that is ‘not linked to universal positive rights’ (Howlett et al, 2011, p. 318). An example of ‘universal positive rights’ is the expectation that the state provide social services to remote Indigenous communities. Howlett et al (2011, p. 318) observe the trend of state retreat from the provision of public investments in remote regions and of the view that ‘profitable mining corporations have a responsibility to provide social services’ within their area of operation, ‘including Indigenous communities’. Indigenous beneficiaries of mining agreements are expected to commit payments provided to them as compensation or benefit sharing to ‘community purposes’ (Howlett et al., 2011, p. 318).

When Woodside and its Joint Venture Partners abandoned the Browse LNG Precinct Project in 2013, Nyimarr had no choice but to deregister their operations. The KLC, however, was still able to secure part of the compensation from the agreements reached with Woodside (Waardi News, November 2013). In this sense, O’Neil’s praise for the agreements that the KLC struck on behalf of traditional owners had some merit considering that agreed payment benefits from Woodside were not totally lost when the project was abandoned. The record of payments received from Woodside Energy Ltd is outlined in Table 1.4.
Table 1.4:
Payments from Woodside Energy Ltd (Waardi News, August 2013)

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Amount in $A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proponents Benefits Fund (PBF)</td>
<td>13 million</td>
</tr>
<tr>
<td>Business Development Organisation (BDO)</td>
<td>4.2 million</td>
</tr>
<tr>
<td>Reading Recovery program</td>
<td>2.6 million</td>
</tr>
<tr>
<td>Administrative Funding</td>
<td>400,000</td>
</tr>
</tbody>
</table>

The WA State Government froze the $30 million benefits agreed under the PPA (consisting of $20 million for the Indigenous Housing Fund and $10 million for the Economic Development Fund) while awaiting native title determination (Waardi News, November 2013). The Joint Native Title claimants, Goolarabooloo and Jabirr Jabirr no longer wanted to continue with their joint native title claim at James Price Point so they filed separate native title claims for determination. The WA government compulsorily acquired the proposed LNG Precinct site at James Price Point with the view to encouraging development of the Browse and Canning Basin gas fields Waardi News, (August 2013, p.1).

The state’s strategic control is expressed through various statutory land rights Acts and other enacted legislation such as heritage, environmental protection, mining, and development application and planning approvals. Through legislation, the state establishes the framework for agreement-making processes involving Indigenous people and transnational interests such as Woodside, the anticipated operator of the Browse LNG Precinct proposal in the Kimberley and its Joint Venture Partners. The involvement of transnational companies in social licence does diminish the responsibility of governments in looking after the well-being of citizens, resulting in the transfer of responsibility to market forces but it also facilitates relationship building with Aboriginal host communities. Ultimately, Aboriginal communities’ social infrastructure conditions are substantially determined by decisions undertaken within power structures. Whether social licence alleviates Aboriginal marginalization or divides Aboriginal communities is a judgment to be made by the communities themselves.
4.4 Conclusion

The subject of governance was the establishment of an LNG plant for the Browse gas reserves. The institutional apparatus involved in the first instance was the bilateral ‘Strategic Assessment Agreement’ between the Commonwealth and the WA State Governments for an industrial plan that would employ their respective environmental legislation as part of the approval process for the chosen LNG site. The operational management plan was undertaken mainly by the State Government with the establishment of the Northern Development Taskforce to identify a suitable site that would fit the industry’s LNG processing requirements. The State Government also engaged the services of the KLC to obtain the consent of the relevant native title party. Having entered into a financial agreement with the State Government, the KLC played the role of brokering an agreement with the Traditional Owners.

In the narrative covered in this chapter, the relevant Legislative Acts included the Mining Act 1978, the AHA and the environmental legislation of the two governments, EP and EPBC. These pieces of legislation were utilized for the governance of the LNG Precinct proposal. While the two governments shared the view that the Browse gas reserves were ready for commercialization, the scope for the location of the gas plant site considered by the gas industry and the Federal Government was not initially confined to West Kimberley. The Wikileaks exposé showed that the reason for the hesitation amongst Woodside’s Joint Venture partners in committing their investment to James Price Point was their conviction that this investment proposition was advantageous to Woodside and the WA State Government but not necessarily to each of their investment plans. Woodside was committed to James Price Point because its own retention licence was conditional on studying the viability of James Price Point and it also had the biggest shareholding stake in the venture.

Power structure dynamics between the Commonwealth Government and Woodside’s Joint Venture partners were tested when the Federal Minister for
Resources and Energy, Martin Ferguson (effectively the lessor of the gasfields) had tried to force the tenement leaseholders to commit $1.25 billion at James Price Point at an earlier time as a condition for extending their retention leases which were due to expire. In this high stake industrial economic power struggle, the voice of Aboriginal people had no input nor relevance.

The relevance of the Aboriginal voice is derived from the NTA that enabled Traditional Owners to negotiate terms with the miners over the use of traditional lands. The NTA does not provide Aboriginal people with veto rights and so the only option the KLC felt they had was to maximize the potential for compensation and benefits in exchange for native title claimants surrendering their native title rights. In spite of the absence of veto rights in the NTA, the WA Carpenter Government gave the KLC an undertaking that it would respect the traditional owners’ decision should they veto the LNG hub proposal. Since the Carpenter Government lost office in the September 2008 WA election, it was not possible to know what the outcome of a possible veto of some potential LNG sites might have been had it occurred. The incoming Barnett government reversed the ‘veto rights’ promised by his predecessor, and it was consistently intimidating with its threats of instigating compulsory acquisition of the site if agreements were not finalized within the timeframe. Fundamentally, the Carpenter and the Barnett governments shared the same goal: the establishment of a processing plant. A component of that plan was securing agreement with the traditional owners.

The KLC from its standpoint and experience recognized the limits of its governance mandate. It recognized that it was accountable to both the traditional owners it was representing and to its funders. The KLC’s brokering effort began in 2005 when it facilitated Woodside’s informal approach to the Kimberley Law Bosses about locating a gas hub site on the Dampier Peninsula. At this stage, the KLC had not yet been provided with State funding for traditional owners’ involvement in identifying a suitable LNG processing site onshore. The KLC’s approach to Woodside to reconsider the Dampier Peninsula for the gas hub site in 2007 excluded cultural leaders
who were opposed to the project (such as Goolarabooloo Custodian, Joseph Roe). The KLC’s action to fly the senior cultural leaders to Perth for this meeting indicated its support for the Browse LNG plant to be located in the Kimberley and, therefore, it did not include the participation of traditional owners who were opposed to the project.

Detailed reporting of the KLC’s management of the TOTF indicates that the KLC indeed endeavoured to employ appropriate cultural consultation processes. However, the withdrawal of veto rights in relation to the James Price Point project by the Barnett government meant that Kimberley Indigenous communities lost the mandate for playing a significant role in the selection of the LNG site. Originally, the Northern Development Task force Interim Report (2008, p. 25) stated that the WA state government made a commitment that it would not ‘proceed without the informed consent and substantial economic participation’ of the traditional owners. Subsequently, site selection was mainly framed in terms of the technical viability of the location.

The KLC complained that they were not given adequate information during the consultation period regarding details of the project, which limited their ability to negotiate fair and reasonable commercial and native title agreements, and that they were not allocated sufficient time and resources for carrying out the social impact study – indicating that ‘prior’ and ‘informed’ consent did not exist. The representation of Aboriginal voices in the main was enabled through the mechanism of legislative processes and state policies, but social licence allowed Aboriginal people some independence in negotiating their terms with mining companies. The KLC’s establishment of agencies and trusts enabled the creation of a structure enabling it to be partly independent from government funding in running its operations as a business in its own right. Eventually the WA Government made good its threat to compulsorily acquire the proposed LNG site. Traditional owners, who opposed the LNG site on account of compromising heritage sites, still lost the site to the State. The State Government had demonstrated that it had the power to do what it liked even if it faced
opposition from Aboriginal communities. The abandonment of the project, however, was a victory for traditional owners who were concerned about the impact of industrialization on the Dampier Peninsula.
Chapter 5
Encounter between Aboriginal and Western cosmologies:
the Browse LNG Precinct Development Proposal

After the Commonwealth native title legislation was introduced in 1993, Goolarabooloo and Jabirr Jabir (GJJ) filed a joint native title claim in 1998, affirming recognition of each other's connection to Country. The claim was for a place called Walmadany or James Price Point located in the Dampier Peninsula in the Kimberley. The name Walmadany is derived from the name of the old Jabirr Jabirr elder, Walmamany, whose remains are buried in Walmamany Country. Determination of native title requires evidence of apical connection. When a living group is able to demonstrate its genealogical link with the original (apical), ancestor anthropologists call that group a lineage (Moore 1998, p. 212).

With support from archaeologists and anthropologists, claimants may be able to gather sufficient evidence to satisfy Western law's standard for recognition and determination of native title claim. As narrated in Chapter 1, colonial encounter with Kimberley Aboriginal people resulted in dispersion from their traditional territories, and relocation to other places. In their effort to obtain their native title and heritage rights, Aboriginal people increasingly look to 'legal definitions of indigeneity and of Indigenous laws and customs' for validation (Weiner & Glaskin 2006, p. 1). For some, their connection to Country had been in disarray for a number of reasons: the loss of the Aboriginal estate to pastoral station owners, the colonial 'Protection' policy, and the violence that occurred at the frontiers. Consequently, the reconfiguration of old territories means that they experience challenges in their pursuit of native title in establishing apical connection as well as in dealing with internal disputes and rivalry between themselves. Internal disputes may arise in situations where parties disagree about an industrial development proposal that occurs on traditional lands. All contending groups employ legislative tools in an effort to achieve their respective goals. In the case of Walmadany or James Price Point, the contention was whether to
agree to the WA State government and Woodside’s plan to establish a gas precinct on the land on which GJJ had filed a joint native title claim.\textsuperscript{32}

To develop a deeper understanding of the process involved in obtaining institutional recognition for the protection of heritage sites of significance, this chapter explores Aboriginal cosmology’s encounter with Western law. I argue that exploring the encounter between Aboriginal and Western cosmologies is essential when Aboriginal ‘heritage rights’ compete with the ‘development rights’ of mining companies, and the rights of the Crown responsible for land administration. In legal terms, it is the WA Department of Indigenous Affairs (DIA) that assesses any potential impact on Aboriginal heritage values as a result of industrial development under s. 18 ‘applications and approvals’ of the AHA. Quite often, customary tradition only becomes visible in the bicultural context of the modern nation-state that requires proof of traditional connection to Country so that it would synchronize with the legislative requirements of native title.

The Browse LNG Precinct site had become a site of struggle for ‘recognition’ of the many voices representing competing interests of economic development, cultural heritage protection and environmental conservation. Implicit in this struggle was the notion of ‘ownership’ of the site in terms of the legal recognition of the rights of native title claimants/holders and resource developers, not excluding the rights of the State that administers Crown land. The rights of Aboriginal people may be invoked through the Aboriginal heritage legislation. That is why it is important to understand the process of ‘recognition’, the impact of historical forces on ‘heritage’ claims, and the conceptualization of heritage, so that one can see the potency of legislative protection for heritage.

The evidence Indigenous people can provide, with the support of anthropologists and archaeologists may satisfy Western law’s ‘recognition space’ for Aboriginal heritage. Indigenous dialogue with the modern nation-state represented by the WA government’s juridical recognition space requires discernment of Western cultural legal roots. In other words,
Aboriginal people need to grasp how agencies of the WA government think and function. In vesting Western cosmology with Western legislative culture, my purpose is to observe the process and outcome of Aboriginal people’s cultural encounter with Western cosmology using the language of Western law, which cannot be isolated from its own cultural emergence and evolution.

In considering Aboriginal heritage interests, I choose to examine the experience of Goolarabooloo to develop an understanding of the implications of the reconfiguration of Traditional Owners’ connection to Country in connection with heritage claims that interact with native title claims. Goolarabooloo faced the challenge of how to defend its heritage claim under a recognition space that assumes that Aboriginal and Western laws are separate domains (Weiner & Glaskin 2006, p. 4), overlapping only within the context of native title. Conceptually Aboriginal people do not separate objects that refer to heritage sites from the metaphysical elements of their heritage expressed in the Dreaming (see O’Faircheallaigh 2008). However, specialist assessors differentiate archaeological from cultural sites in value assessment and exclude those classified as ‘archaeological’ from being listed as ‘Aboriginal cultural heritage’.

I examine how heritage is conceptualized and defined from Western cultural specialist perspectives and then employ Mautner’s (2011) theoretical framework. Mautner provides an exposition of three Western approaches to law and culture: an ‘historical’ approach, a ‘culture of the state’ approach, and a ‘constitutive’ approach. Employing Mautner’s approach enables us to view different ‘cultural modes’ that apply to Aboriginal people’s dialogue with Western ‘legislative culture’ in their effort to affirm Aboriginal cultural rights.

In summary, this chapter explores Aboriginal Law, and the reconfiguration of Traditional Owners’ connection to Country. It examines how Aboriginal heritage is conceptualized and defined in relation to the process of obtaining recognition of Aboriginal heritage. Finally, it examines, using Mautner’s theoretical approach, how Western cosmology through Legislative Acts encounters Aboriginal heritage.
5.1 Aboriginal Law and the reconfiguration of Traditional Owners’ connection to Country

The founder of Goolarabooloo, Paddy Roe and his followers’ narratives of, and connection to, Country, was central to the opposition case against the Browse LNG Precinct development proposal. In the course of the interactions that occurred between Goolarabooloo, the State and Woodside, practices of inclusion and exclusion of ‘social agents’ became part of political strategies. The political interactions that occurred over the Browse LNG Precinct development proposal pointed to the limits of co-existence between heritage and development. In relation to the question of industrial development on Aboriginal heritage sites, decision makers would have wrestled with how to balance differing cultural value orientations and interests. As registered members of joint native title claimants with the National Native Title Tribunal (NNTT), Goolarabooloo and Jabirr Jabirr (GJJ) were recognized as the relevant social agents in relation to the development site that Woodside and its Joint Venture Partners sought to use.

James Price Point (Walmadany) was originally identified in Tindale’s map within Wumbal [Ngumbarl] territory (see Map 1.5).
With the decline in the number of Wumbal [Ngumbarl] and Djugun people, DjaberaDjaber [Jabirr Jabirr] people ostensibly took over custodianship of the land. The lands of the Wumbal [Ngumbarl] and Djugun clans were overlain by station leases and by the beginning of the 20th century, they were ‘virtually wiped out’ (Goolarabooloo, n.d.). The first white settlers arrived on the Dampier Peninsula in 1865. Until then, Aboriginal Law, language and culture on the Peninsula were intact. When children from Jabirr Jabirr Country were taken away to Beagle Bay mission, Jabirr Jabirr ‘king’, Walmadany, and the old law-keepers, Narbi and Kardilakan were confronted with the problem of finding someone they could entrust for the custodianship of their cultural knowledge and tradition. Oral historical tradition indicated that the elders chose young Paddy Roe from Nyikina Country to pass on their knowledge of Jabirr Jabirr Country (Goolarabooloo, n.d.).33 Paddy Roe subsequently settled his extended Goolarabooloo family on the Jabirr Jabirr estate. On Paddy Roe’s death, the elders had given custodianship to Joseph Roe, one of Paddy Roe’s grandsons. Joseph Roe’s custodianship didn't raise any problem with Wumbal people, DjaberaDjaber,
and Jabirr Jabirr until disagreements in relation to the Browse LNG Precinct development proposal drove a wedge between the groups.34 ‘Whether one community may claim native title rights and interests over the country of another group’ was a native title question that Merkel J dealt with in the Federal court concerning Yawuru people’s Country in Rubibi community v State of Western Australia (No 6). This particular case referred to the founder of Goolarabooloo, Paddy Roe. I refer to the Rubibi case because it demonstrates the complexity of the process involved in native title determination and it facilitates insights into the conflict that subsequently emerged between Jabirr Jabirr and Goolarabooloo native title claimants in relation to the James Price Point case.

Yawuru’s Rubibi case in Broome demonstrates how legitimacy is determined both from the Australian government’s perspective and from within the Indigenous communities. The Yawuru community in the Rubibi case alleged that Yawuru ‘absorbed’ the Djugun in the twentieth century purportedly because the colonization (of Djugun people’s land) resulted in the Djugun people’s struggle to survive as an identifiable group by the early 1900s. Yawuru thus claimed that their people absorbed, succeeded and incorporated Djugun people into Yawuru culture simply because Djugun had been ‘unable to sustain their own legal and cultural tradition’. Yawuru thus asserted that ‘succession’ occurred. Succession is defined as a gradual process of ‘accession of the successors to the land’. Merkel J held that the extensive connections and commonalities between the Djugun and the Yawuru post-sovereignty led him to conclude that these two cultural groups formed one native title holding community. According to Merkel J., while the Djugun and the Yawuru understood themselves as culturally distinct or, as belonging to two distinct tribes, the fact that some Yawuru men went through both southern (Yawuru’s) and northern law (Djugun’s) implied that participation in both traditions was not viewed as involving incompatibility or conflict with ‘the traditional laws and customs of that community’ (Rubibi Community v State of Western Australia (No 6), [2006] FCA 82, no. 48).
The implication was that cultural accommodation was employed between different tribal groups to ensure that the ‘cultural maintenance’ of the land continued. Dispersion that took place due to children being taken away to missions or reserves resulted in modifying Kimberley Aboriginal people’s traditional connection to country. Different tribal groups decided to put the ‘right’ of country’s interest to guarantee cultural maintenance rather than to insist upon individual tribal groups’ identity rights. In contention in recent times in relation to value orientation is the competing argument between the rights of country (cultural maintenance argument) versus development rights (e.g. the ‘Project rights’ of the Browse LNG Precinct).

Paddy Roe’s example was used in the Rubibi case by Merkel J who stated that there was ‘little doubt that Lulu [referring to Paddy Roe, the founder of Goolarabooloo] was venerated for having assumed the role of a senior law man in order to protect the southern and northern traditions in the Broome area’ and for having ‘played a major role in protecting sacred sites in Yawuru country’. He accepted that community members might have regarded a man such as Paddy Roe, who is not of Yawuru descent but had assumed that role, as having been incorporated into the Yawuru community. What he questioned was whether Paddy Roe would be accepted as a member of the native title holding community under the community’s traditional laws and customs if he had not self-identified as a member of that community. There was no doubt that Paddy Roe was accepted by that community, however, there was no evidence that Paddy Roe himself self-identified as Yawuru. Consequently, Goolarabooloo’s membership of the Yawuru native title rights and interests in the Yawuru claim area was not legally established in the Rubibi case.

For Joseph Roe who was part of the Yawuru claim, the question of his membership of the Yawuru community would be based on a criterion that differs from that of his grandfather, Paddy Roe. Joseph Roe’s father was Yawuru. In the Yawuru community, Yawuru people are allowed a choice to follow the genealogical line of their mother or their father. Joseph Roe (see plate 1.2) could theoretically choose to belong to the Yawuru community on
account of his patrilineal line but not on account of his identification as a Goolarabooloo man (matrilineal line). As regards the joint Goolarabooloo Jabirr Jabirr (GJJ) native title claim, he could argue that he belongs to Jabirr Jabirr Country on the grounds that his mother, according to the Aboriginal spiritual belief system, was a daughter of the ‘rai’ spirit (see narrative below) in that Country.

Plate 1.3: The late Joseph Roe, Goolarabooloo Law Boss speaking in Redfern (Photo: Deborah Ruiz Wall, 2010)

He could also argue that he has a direct succession from the point of view of custodianship of country through his grandfather, Paddy Roe. Joseph Roe could theoretically choose between any of his Jabirr Jabirr, Yawuru, and Goolarabooloo affiliation to fit into the state’s native title recognition space. Individual Aboriginal self-identification, unarguably complex and multifaceted, is one thing; recognition from the land-holding community based on NTA is another. The argument that uses bestowal by the ‘rai’ spirit as evidence for connection to Jabirr Jabirr country might not be easy to sustain support from younger descendants of Jabirr Jabirr people who were taken away to missions or reserves. Neither would a likely rigidly legislative bound Western culture find the invocation of ‘rai’ spirit argument adequate evidence for a native title claim. On the other hand, Joseph Roe’s deep
cultural knowledge of country (acknowledged by anthropologists and archaeologists) could potentially provide substantive evidence for cultural heritage protection at the Walmadany-James Price Point site provided AHA is a strong legislative device that effectively renders heritage protection. The question is whether anthropologically validated cultural knowledge of Country would be adequate evidence for granting recognition within the Western legislative framework.

My Jabirr Jabirr informant in Broome, Sylvia, an Aboriginal business proprietor, remarked that to enable Traditional Owners to access their native title, they ‘have to satisfy government criteria that are not true’ when generations of history of ‘change and turmoil’ with children who were ‘taken away from their proper areas’ were accounted for. Born in Broome and brought up in Perth, Sylvia herself relocated to different places in her youth. She completed a university degree in Perth and upon reaching middle age, decided to resettle permanently in Broome, and reconnect with her Aboriginal culture. She observed that the goal post moved towards the legislative rather than the cultural criteria. She said that she felt very sad ‘in this day and age, that government makes decisions about who we are’. When high stakes industrial development proposals such as the Browse LNG Precinct project intersect with native title determination processes, the perception of Aboriginal communities’ economic interest from a modern cultural perspective collides with traditional cultural perception of cultural heritage maintenance and identification. This collision was demonstrated at the launch of the book, *Kimberley at the Crossroads* (2010) compiled by former Federal Court Judge, Murray Wilcox, and published by the local environmental group, ‘Save the Kimberley’, when Aboriginal supporters of the James Price Point project positioned themselves outside the venue holding protest placards (see plate 1.4) marked: ‘We don’t talk for someone else’s country’. Another stated, ‘Jabirr Jabirr people will not be the world’s next conservation’. The first text questioned the cultural legitimacy of Goolarabooloo’s connection to country and the right to speak for Jabirr Jabirr Country. The right to speak for country has traditional roots in Aboriginal
Law that determines the right to speak based on which country an Aboriginal person belongs to; for example, a Yawuru Aboriginal person cannot speak for another country's business such as Jabirr Jabirr Country, and vice-versa. The second placard text asserts that Jabirr Jabirr people need to embrace modernization or vanish as marginalized people that become a target for the 'world's next conservation'. Cultural modernization penetrated traditional values, so that Aboriginal and Western cosmologies collided and overlapped, both needing to be accommodated within the legal space of recognition. Citing an analyst with extensive experience at the interface between Aboriginal groups and mining companies, political analyst, O'Faircheallaigh (2006, p. 4) suggests that Aboriginal people engage in a balancing act:

in our experience Aboriginal people in Australia are not romantic figures standing in the way of development but neither are they intent on peddling their heritage in return for material benefits provided by developers. They are driven by needs and ambitions that are part material, part cultural and spiritual.

Plate 1.4: Mary Tarran, Jabirr Jabirr TONC member Redfern
(Photo: Deborah Ruiz Wall, 2010)
Consequently, questions of ‘identity’ or ‘identification’ arise in internal Aboriginal deliberation associated with contending values on what is perceived to be in the ‘interest’ of the Aboriginal native title party. Jeanné Brown, (formerly a non-Aboriginal arts high school teacher who helped document Goolarabooloo’s Lurujarri Heritage Dreaming sites and who was inducted into Goolarabooloo culture by Paddy Roe) told me that some Jabirr Jabirr people had said to her that it’s time for Paddy Roe’s Goolarabooloo family to give country back to Jabirr Jabirr people: ‘You know, it’s not theirs, they’re just looking after it for a while, and it’s actually our property.’ Brown lamented that the ‘cold concept of property – a whitefella notion’ of ‘owning things and owning land is kicking in’ (Pers.comm, 8 October 2010).

The Browse LNG Precinct development proposal interpellated clarification on the meaning of ownership, cultural recognition, and custodianship in the context of the overlapping interests of the Walmadany (cultural heritage and native title claim site) and James Price Point (development site). The internal cultural accommodation reached on belonging to Country between Goolarabooloo and Jabirr Jabirr when they filed a joint native title claim fell apart when consensus broke down in regard to the Browse LNG Precinct development proposal. Goolarabooloo conceived that the Browse project would cause severe damage to registered heritage sites and destroy the Lurujarri Heritage Trail (see Appendix C) that Paddy Roe, the founder of Goolarabooloo established while Jabirr Jabirr members in the main were in support of the project. In the next section, I explore the process involved in obtaining recognition of cultural heritage when Aboriginal cosmology encounters Western law.

5.2 Aboriginal cosmology’s encounter with Western law in relation to Aboriginal heritage

To obtain recognition for Aboriginal heritage, the WA Department of Indigenous Affairs (DIA) assesses any potential impact on Aboriginal heritage values as a result of industrial development (see s. 18 applications and approvals, AHA). In s. 38 of the AHA, the Registrar maintains a register of all protected areas employing the Aboriginal Heritage Management System
(AHMS) developed in 2003. The register records ‘assessments undertaken, Aboriginal Cultural Material Committee (ACMC) determinations, s. 18 applications and s. 16 applications associated with a particular site’ (Department of Industry and Resources 2008a). Industry can access the register to determine if there are Aboriginal heritage sites within the development site it wants to use. The register number for Walmadany (James Price Point) is:

13076 WALMADAN (K02164 James Price Point)
Closed Permanent.
Skeletal material/Burial, Fish Trap, Artefacts/Scatter, Midden/Scatter
Camp, Hunting Place, Water Source,
[Other: Pad of Failed PA 139.]
55 a & 39.2 a, b, c

In 1988, Traditional Custodian of Law and Culture, Paddy Roe, established the Lurujarri Heritage Trail to share culture and the stories of the land with the wider community. With funding assistance from the Western Australian 1988 Bicentennial Heritage Trails Program, the Lurujarri Heritage Trail Committee established the heritage trail on Paddy Roe’s suggestion. The Lurujarri Heritage Trail (see map 1.6 below) became the people’s 1988 reconciliation project. In recognition of his reconciliation effort, Paddy Roe was awarded an Order of Australia medal (OAM) in 1990. His legacy of sharing culture through the Lurujarri Heritage Trail had involved the participation of the RMIT Landscape Architecture and Social Science curriculum for students in Melbourne since 1991 (RMIT University, n.d.). Other students who also use the trail as part of their study are Latrobe University Outdoor Education students at Bendigo Campus in N.E. Victoria and the Université d’Agronomie, Montpellier, France.
The WA Department of Indigenous Affairs (DIA) recognizes the Lurujarri Heritage Trail site and keeps a record of the documentation of the Lurujarri Heritage Trail Management Plan (Bradshaw & Fry 1989), and A Report of the Ethnographic Survey of Exploration Licence Applications 04/645, EO4/656 and EO4/676 in the West Kimberley by Nicholas Green, then Senior Heritage Officer for the WA Museum (Green 1991).

In 2010, I joined the Lurujarri Heritage Trail walk (see plates 1.5 and 1.6) to experience how heritage is explained by people with cultural knowledge as we walked the land. Hoogland and others explained the vegetation around and pointed out the implements used by ancestors at campsites, including associated stories of the land.
Goolarabooloo people point to further evidence of recognition for their heritage site by a decision of the Mining Warden’s Court, presided over by Dr J.A. Howard SM, about Terex Resources NL. This mining company submitted an exploration
licensure application in the early 1990s to mine the rich black mineral sand on the coastal strip north of Walmadany at the foot of the Yarrinyarri red cliffs. At that time, the Bidyadanga Aboriginal community, Kimberley Conservation Group, Broome Botanical Society, the KLC on behalf of Joseph Roe, the Goolarabooloo Aboriginal community, and Boonaroo Pastoral Pty Ltd registered their objection to the proposed Browse LNG Precinct development. The KLC did not have the resources to undertake an assessment of the area, so it applied for a special dispensation to the Department of Indigenous Affairs (DIA) to conduct an ethnographic and archaeological survey of the area. At that time, the KLC worked with the DIA. The ACMC, in a letter dated 18 July 1991, stated that ‘no exploration activity should occur in the areas defined as the Song Cycle path’ (ACMC 1991). The Mining Warden’s Court accepted the expert’s advice on 20 August 1991 including the ACMC’s findings that ‘the entire coastal strip affected by the Applications has a high density of Aboriginal Archaeological Sites ... of great cultural significance’.

Over a decade later, the local government, the Shire of Broome formed a planning committee to accommodate a range of land uses in planning decisions and growth (Report of the Broome Planning Steering Committee 2005). It sought assistance from the WA Minister for Planning and infrastructure to help manage growth and development over the next 10-15 year. Part of its urban planning identified areas that would meet the specific needs of the Aboriginal population (p. iii). Broome had outgrown infrastructure and transport networks and was ‘experiencing issues with the availability of land’. The final report of the planning steering committee referred to the recommendation of developing a heritage management plan involving the ‘high density of Aboriginal cultural sites’ along the coastal strip. The planning steering committee report identified the Lurujarri Heritage Trail as a ‘culturally significant song cycle that extends 80 km along the coast from Coulomb Point to Gantheaume Point’. The creation of the trail was aimed at educating ‘non-indigenous people about Aboriginal sites and relationships with the land’. Consistent with the planning recommendation of Bradshaw & Fry (1989), the planning steering committee report recommended the creation of a number of reserves that would correlate with the northern
section of the heritage trail. It envisioned the participation of the Department of Indigenous Affairs to work with Rubibi, a registered native title body and the KLC in local heritage management.

Although the Lurujarri Heritage Trail site and correlated reserves north of Broome had obtained state recognition for heritage protection, the AHA had not been strong enough to guarantee heritage protection, as we had seen in the Noonkanbah and Argyle cases. Ritter’s (2003, p. 199) criticism of AHA is that, while the Act establishes a regime for heritage protection, it is largely ‘not enforceable by Aboriginal people themselves’. Even the registration of Aboriginal sites does not guarantee protection, according to Ritter. Rather, the value of registration is in accommodating the developers’ defence of ignorance if they are faced with prosecution for damaging a site, as narrated in Chapter 2, when CRA defended itself in relation to the damage it caused to Devil Devil Spring employing s. 62 of the AHA. This is why Ritter described the Act as providing a ‘Chimera of Protection’ (Ritter 2003, p. 198).

The next section explores differences in the conceptualization of heritage such as material and non-material approaches in assessments of cultural values of landscapes to demonstrate definition challenges in effectively implementing heritage protection.

5.3 Conceptualizing and defining heritage

Depending on the assessment method used for heritage listing, some heritage sites might be excluded from being classified for heritage protection. This is why it is important to review Australian cultural heritage management practice that has an impact on protection of Aboriginal heritage sites. Lilley and Williams (2005, p.229) suggest that the separation of assessment of archaeological from Aboriginal significance of sites developed in the 1980s. Archaeologists were concerned with archaeological value while Indigenous people were concerned with ‘the particular values of places to particular Aboriginal communities and to Aboriginal people generally’ (Sullivan, S. 2008, p. 107). Expert testimony heard by magistrates in regard to an archaeologist’s view of Indigenous significance and vice versa, is generally not considered to be admissible (Lilley and Williams
The move towards bridging this gap in heritage assessment is partly attributed to the work of Bowdler (1983) who argues for a living archaeology that emphasises continuity of past and present and that sees archaeological work as providing a basis for the explanation of the recent and present history of Aboriginal people. Sullivan, S. (2008, p. 109) contends that the acknowledgement of a ‘range of heritage values’ and closer integration of both archaeology and Indigenous cultural management practice are enriching both practices.

The separation of values mentioned above, however, lingers in heritage management practice. Inclusion of sacred or spiritual perspectives by non-Aboriginal people could meet with disapproval from science-based heritage assessors. As an example, Peter Botsman, Principal Fellow from the School of Social and Political Sciences at the University of Melbourne who completed his research report for Goolarabooloo, ‘Law Below the Top Soil’ about the LNG Precinct dispute, writes that he learnt, only after re-reading Gularabulu: Stories from the West Kimberley (Roe 1983), that Nyikina man, Paddy Roe gained custodianship of the Goolarabaroo Law of the Walmadany/James Point area after spearing a fat stingray at Walmadany, and that Paddy Roe’s daughters, according to Aboriginal belief, were ‘the children of the stingray’ or the ‘rai’ spirit.39 As an example of challenge to this non-material representation was a geologist’s reaction to Botsman’s (2012b) reference to ‘the children of the stingray’: ‘Appealing to notions of “sacredness” is a distant second to sound scientific arguments. Suggest arguing from a more scientific and less passionate standpoint without all the emotive guff may produce the intended conservation outcome.’40 Bowdler (1983) points out that Aboriginal people themselves must determine the significance of sites in relation to Aboriginal significance, and argues that it was ridiculous to suggest objective ways for non-Aboriginal people to determine them. Prosper (2007) argues that the materiality focus of landscape as the basis for a heritage designation may miss recognizing the cultural landscape heritage of non-material cultures. Prosper describes a materialist approach as locating heritage value ‘in discrete physical entities rather than the landscape as a whole (Prosper 2007 p. 117.)’ Conceptually Aboriginal people do
not separate objects that refer to heritage sites from the metaphysical elements of their heritage, as expressed in the Dreaming (see O’Faircheallaigh 2008). The materialist approach to cultural landscape, she adds, tends to adopt a European preoccupation with artefacts, architecture and ruins so that the conception of the cultural is divorced from the natural. Prosper equates cultural with tangible cultural artefacts or relics, and the natural with the intangible. She maintains that there is a tendency to overlook social actors whose relationship to the landscape is ‘not materially evident’ (Prosper 2007, p. 119). In contrast, Aboriginal landscapes reflect enduring relationships between culture and place sustained by ‘spatial practices and performances’ such as: ‘the seasonal use of traditional hunting and fishing grounds, the transmission of traditional knowledge, the telling of stories and oral narratives embedded in place, annual gatherings and celebrations, and the daily inhabitation and negotiation of culturally significant spaces’ (Prosper 2007, p. 119).

Failing the continuation of such practice and inhabitation, the landscapes cease to be invested with cultural meaning. In other words, the translation of heritage from one culture (archaeological practice) to another (Indigenous cultural practice) could be flawed. For Aboriginal people, heritage value comes from ‘the continuity of a relationship between culture and place that is integral to cultural identity’ (Prosper 2007, p. 120). An approach that is not integrated exacerbates differences in ways of thinking and highlights the clash between Aboriginal and secular or Western cosmologies. Typically the heritage significance of ‘sustained interactions between culture and place’ is not visible in material or morphological forms. Prosper points out that a materialist construction of heritage does not adequately accommodate the ‘social heterogeneity and plurality’ of cultural landscapes, perhaps because conventional Western translation of Aboriginal conceptualization of Aboriginal heritage stems from a lack of recognition of intercultural dialogue, cultural co-production and knowledge sharing, that already occur in some remote parts of the Kimberley.

However, even an integral designation can be a challenge if the designation of heritage reflects the values of diverse Aboriginal groups (Prosper 2007, p. 122), so the social plurality of cultural landscapes that reflect the values of diverse
groups should be accounted for. One Aboriginal approach to designating heritage depicts how the landscapes are inhabited in distinct ways based on ‘social positions’ (Prosper 2007, p. 122). I see Prosper’s statement about social plurality of Aboriginal cultural landscapes as salient. Diversity of representation of Aboriginal cultural landscapes therefore requires an intensive assessment of heritage value. A practice of intercultural dialogue and knowledge sharing therefore would facilitate the incorporation of traditional and current Aboriginal presuppositions as well as scientific knowledge about cultural landscape to assist in protecting Aboriginal heritage sites of significance under Western law. As an example, Sullivan (2008), an archaeologist, points to an alternative best practice study that melds the scientific with the social value of the sites. The Gooreng Gooreng Cultural Heritage Project in northeast Australia pursued issues of mutual interest that sought to capture an ‘uninterrupted and continuing story of country in its broadest sense’. The project included investigations of the language, contemporary social landscapes, and linguistic, social historical and archaeological components of the enterprise (Sullivan, p. 109), enriching the management of both archaeology and Indigenous cultural heritage. An integrated approach shown in the Gooreng Gooreng Cultural Heritage Project exemplifies the kind of recognition Goolarabooloo seeks to obtain in order to protect Country and preserve their culture. Such practices acknowledge that diversity of cultures already co-exist considering the evidence of distinct cultural imprints on the land.

Listing heritage values is supposed to have political potency through a legislative provision that enables the policing of sites. However, in order to qualify for listing, the site needs to be assessed by specialists such as archaeologists and anthropologists. Specialist assessors differentiate archaeological from cultural sites in value assessment and exclude those classified as archaeological from being listed as Aboriginal cultural heritage. In theory, a place in the National Heritage would be eligible for legal protection, but with the caveat that it qualifies only for the values for which it is listed. This is why it is important to recognize which values attract state protection. To have a common approach to defining Aboriginal heritage sites is one thing; however, it is another thing to
have an effective governance process in place for the implementation of heritage protection.

If this deficiency was not addressed, any recommended conservation for the area of ‘compliance by both land-users and manager’ would be put at risk. My informant, Goolarabooloo Lurujarri guide, Frans Hoogland, stressed the importance of having a management plan for the heritage sites at Walmadany to put in place a mechanism for protection (Pers. Comm., 6 December 2011). In fact, the Broome Planning Steering Committee report in 1988 referred to a plan to create a number of reserves associated with the Lurujarri Heritage Trail; however, subsequent industrial development proposals might have derailed the original plan.

The next section explores how Western cosmology articulates with Aboriginal cosmology through Legislative Acts.

5.4 Aboriginal cosmology’s encounter with Western cosmology through the agency of Legislative Acts

Goolarabooloo’s campaign against the Browse LNG Precinct proposal included a representation of heritage that tried to disentangle Walmadany from Western classificatory modes through articulating a universalizing law aligned with their spiritual connection to Country. Goolarabooloo argues that DIA already validated their heritage sites beginning with the listing of the sites on the heritage register. The late Paddy Roe recognized, in his encounter with resource developers’ interest in mineral extraction activities in his Country, that if Indigenous culture was to survive, Indigenous people would need to engage in conversation with non-Indigenous people, teach their customary tradition through the Lurujarri Heritage Cultural Trail walk, and work with the legal structure of the modern nation-state. Western law, however, cannot be isolated from its own cultural emergence and evolution. Mautner’s (2011, p. 841) exposition of three Western approaches to law and culture – the historical school, the constitutive approach, and the Anglo-American jurisprudence or the culture of the state approach – throws some light on the legislative face of Western cosmology.
An historical approach to law views law as a product of the nation’s culture that reflects people’s day-to-day practices. Acknowledging social change, the historical school ‘assumes a transition from the ‘law of a people, embedded in social practices and culture, to the law of the state’ (Mautner, 2011, p.850). In this context, Goolarabooloo’s law of a people (everyday practices) could be seen by Western tradition to be in a state of transition to the law of the state.

Another approach, the culture of the state, views law as a distinct cultural system that the courts create and apply. It stems from 20th century Anglo-American jurisprudence aiming to preserve human values that allow people to create viable institutions for cooperative action so its trajectory is oriented towards establishing a balance between preservation and stability (of the evolving cultural system of the state) and flexibility, openness to change, and further development. The NTA and the AHA can be viewed as a legislative mechanism that the state uses as an instrument of control (to provide stability) and flexibility (openness to change). To provide the state with a measure of control in the state’s governance of resource development and heritage protection, it equips itself with relevant Legislative Acts. The third category, a constitutive approach views law as ‘participating in the constitution of culture’ (p. 852) so that ‘the law not only constitutes social relations, but that social relations also constitute the law’ (p.856). This tenet is demonstrated in Australia’s Race Discrimination Commissioner’s view of law expressed in his article about bigotry that ‘[t]he law ... expresses our social values’ and ‘shapes our social norms (my italics)’. The constitutive approach assumes a transition from the law of the state to culture and daily social interactions. Participation in the constitution of culture involves the creation of mind categories with the effect that individuals and groups get to see their status, their level of power and entitlements in comparison with others within the sphere of social relations. Creation of mind categories is not the same as Foucault’s notion of colonization of modes of thought (mentalité) in governmentality. From the perspective of the constitutive approach, it is not ‘colonization’ but a natural absorption process that occurs. The social world of participating groups is seen as something ‘natural and self-evident’ (Mautner (2011, p. 853) so that suggesting any other world would be
unthinkable. Because social structure is ‘constructive of social realities’, law is viewed as a system of meaning constitutive of culture (Clifford Geertz 1983 cited in Mautner 2011, p. 849) that serves to maintain social hierarchies of class, gender, race, and ethnicity. In other words, following Gramsci’s notion of hegemony, the constitutive control views inequality as the way things are, allowing the internalization of ranking in social hierarchies (Gramsci cited in Mautner 2011, p. 852). If law serves to create and preserve inequality, it is not necessarily in connection with the interests of any particular group. Rather, inequality is simply embedded in the social relations that it constitutes.

The application of a group within society internalizing acceptance of its low rank in social hierarchies has implications on the strategies employed by those with lesser power to defend or protect their material interests. The former Executive Director of the KLC, Wayne Bergmann’s rationale for the KLC’s support for the Browse LNG project, for example, indicates Aboriginal positioning in the social hierarchy, inducing its decision to improve Aboriginal people’s standing by seizing the chance to ‘create real jobs and facilities for indigenous people’ and to ‘move beyond welfare’ as the KLC’s discourse reveals in relation to the LNG proposal:

The James Price Point project, and the deal that traditional owners have signed, represents a once-in-a-lifetime chance to move beyond welfare and create real jobs and facilities for indigenous people … The dilemma of how to adapt to the modern world without sacrificing our identity as indigenous people is one we grapple with every day (Bergmann, the Australian, 24 September 2011).

Mautner (2011, pp. 850-851) sketches the implications of the constitutive approach based on a period of history in American law (mid-19th century to the 1920s) that gave rise to legal formalism. Legal formalism organized ‘law’s norms into a system that has its own internal vertical and horizontal logic’. The idea was to ‘classify every problem brought to their resolution into the one legal category that contains the solution to it’, aiming to ‘turn legal decision-making into a technical-mechanistic process.’
A typical example is the vertical and horizontal logic of the Commonwealth EPBC and the EP. Once the Environmental Protection Authority (EPA) completed its assessment of the Browse LNG Precinct project (EP Act – state legislation) and gave its approval, the EPBC (Commonwealth legislation) would provide final environmental clearance for the project. Commonwealth approval is required where a proposal is likely to have a significant impact on a matter of national environmental significance. The norm embedded in these two pieces of legislation is protection of the environment (vertical logic) that satisfies community norms and values (horizontal logic). The theoretical foundation of this approach is the effort of synchronizing legal formalism with community norms and values.

The second period that Mautner canvasses (from the 1920s) involves the legal realists who offer their critique of legal formalism. The critique is two-fold: normative and descriptive. A normative view is critical of a method where lawyers try to find solutions based on the content of the law – doctrines, concepts, rules, and precedents. This view asserts that the focus of the method employed ought to be a deliberation on ‘the normative meaning of possible legal solutions’, that is, the ‘values’ that will prevail in people’s lives. This normative perspective gives birth to the ‘instrumental conception of law’ (1960s–1970s) that perceives ‘law and society as two distinct entities’. Law is seen as acting on society from the outside (Mautner (2011, p. 855) with the aim of effecting change in society. Hence, if what the law requires does not match with the way people behave, a gap will appear between law in the books and practice on the ground. The ideal goal is to synchronize these two cultures.

In the Browse LNG Precinct case, it can be argued that a gap in values appeared on the ground between a ‘horizontal logic’ representing particular community values and the ‘vertical logic’ of the government’s enforcement of its instrument of control – the action of laws upon society. If the causal link between the way law is enforced and the values that prevail in the lives of people’s daily interactions loses credible grounding, the gap mentioned above will become visible.
Put another way, if community concern over heritage and environmental protection was not satisfactorily addressed by pieces of legislation such as the AHA, EPBC and EP or, should notions of development clash between those held by remote community groups and those held by the government of the day, the gap will become a source of community dissatisfaction or disillusionment. In other words, if the communities perceive the enforcement of the law to be unfairly skewed towards values held by the prevailing power structure, they will be disappointed. Community public protest and public petitions would indicate the extent of the mismatch or the gap between the horizontal and vertical logic mentioned above.

Legal realists put forward a descriptive argument that legal formalism does not accurately portray legal decision-making processes; that is, adjudication is not based on the application of a procedure. Rather, adjudication is based on interpretation or on the unique personality of the judge that ultimately shapes the contours of the judicial decision. An example already narrated from the Browse LNG precinct case was the legal action that Goolarabooloo and Jabirr Jabirr took against the KLC alleging that the KLC misrepresented the native title claimants’ intentions. The plaintiff was Joseph Roe (Goolarabooloo) and Cyril Shaw (Jabirr Jabirr). Counsel for the KLC used Shaw’s withdrawal from the proceedings to argue that Roe as sole party to those proceedings (Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809) did not have the standing to sue because on his own, he could no longer represent the entire NTCCG applicant. A former Federal Court Judge, Murray Wilcox observed that the court’s acceptance of the KLC’s argument involved judicial ‘interpretation’ of the meaning of the word ‘applicant’ in terms of the NTA.43 The legal formalism the judge applied stemmed from ‘subjectivism’ based on his interpretation of the application of a procedure — the standing of a plaintiff to represent the applicant within the legal framework of the NTA. In terms of the representation of traditional owners as traditional owners outside the framework of native title law, the legal application of a procedure cancels out their representation.

Western cosmology in its articulation in law presents itself in the mode of law as a culture best described in Karl Llewellyn’s (the intellectual leader of the
realists) argument that refutes legal formalism. Llewellyn (cited in Mautner 2011, p 859) argues that: 1) lawyers internalize ‘the contents of the law and the modes of thinking and arguments prevalent in the law’ that in turn structure and limit the way they conduct themselves in court; and 2) the practice of law is like a ‘craft’ with a ‘repertoire’ of rules that becomes the customary conduct of all those associated with the legal profession. Judges, lawyers, law professors, and law students review judges’ opinions and tend to abide by the prevailing legal norms and customs.

5.5 Conclusion

In this chapter, I have demonstrated that a reconfiguration of traditional owners’ connection to country is taking place in alignment with the construct of the native title legislative requirements of eligibility for the grant of native title. Even though Indigenous cultural identity was confronted by challenges of modernization and dominant economic and state processes including the high bar established by the law for cultural identification, Indigenous identification with country and culture did not wither away. As former Federal Court Judge Wilcox remarked in the Nulyarimma v Thompson – [1999] FCA 1192 case, they ‘have been deprived of their land, but ... nevertheless have managed to survive.’

Indigenous dispersion from traditional habitation was a consequence of past State colonial policies and so Aboriginal culture could not be regarded as bounded and static. The reconfiguration of traditional owners’ connection to Country narrated in this chapter in the Yawuru native title claim litigation can be applied to the tension between GJJ regarding connection to Country. As Sullivan (2005 pp. 183-194) argues, differentiation within and between cultures and intergenerational transitions between cultures is not acknowledged with a view of Aboriginal cultures as ‘bounded’. In this sense, politicians and public servants must take heed not to indulge in cultural essentialism of Aboriginal people in the crafting and implementation of social policy.

Still, materialist and non-materialist conceptions of culture in legal statutes are likely to clash in the contestation over land use. Watering down the notion of what constitutes Aboriginal culture, however, could result in undermining the
efforts of enlightened Australian legislators in finding a more authentic translation of the spiritual core of Aboriginal law for recognition in legal statutes. Recognition of Aboriginal cosmology draws attention within the political settings of the WA state and legal system only through translation into that system. It would be a challenge to integrate heritage values anchored on non-materialist properties such as ‘song cycle’, ‘rai’ spirits, landscape (country) that Indigenous people regard as sentient into an archaeological classificatory system of heritage typically tied to tangible cultural artefacts. What adds to complexity concerns cultural landscapes inhabited by different groups of people that generate diversity in the representation of cultural heritage values.

Co-existence between Aboriginal and Western cosmology constitutes dynamic processes in the interplay of mutual recognition. In practice, the dominant system of control filters Indigenous voices by translation of these voices within the institutional practices of the Australian state and legal system. Particularly conspicuous in remote and regional Aboriginal communities is Aboriginal cosmology’s encounter with Western Australian law in the contest over land use. Indigenous voices are re-constituted through adversarial political positions that play out a cultural deficit as an essential characteristic of Aboriginal people. The message projected for public consumption is the argument that this deficit needs to be addressed and that industrial development is a way of rectifying the deficit or of closing the gap.

I have represented Western cosmology in terms of Mautner’s (2011, p. 841) three approaches to law: the historical school, the constitutive approach, and the Anglo-American jurisprudence or the culture of the state approach. Each approach has particular cultural emphasis and trajectory. Translating Western cosmology into legislative mode enables discernment of collision points of facts, including values that foreground facts that may occur in interactions with Indigenous cosmology. Understanding distinct philosophical and cosmological approaches provides clues as to the rationalities that shape legal practices in dispute resolutions.
Chapter 6
Practices of governance within the juridical social field:
the Browse LNG Precinct Development Proposal

The last chapter sought to identify the results of the encounter between Aboriginal and Western cosmologies within the recognition space of the juridical social field. The protection of Aboriginal heritage sites had not been effective because the representation of heritage values between the two cosmologies do not match. Assessment of heritage values in relation to defining heritage values tends to overlook social actors whose relationship to the landscape is not materially evident. In contrast, Aboriginal landscapes reflect enduring relationship between culture and place that at times constitute intangible characteristics. The principle that Aboriginal people must themselves determine the significance of Aboriginal heritage sites is undermined by the imposition of other standards to determine the significance of Aboriginal sites. If the approach typically employed is through translation into the Western classificatory system (e.g. archaeological or legal), conflicting materialist and non-materialist cosmologies are likely to clash with the result that materialist conceptions of Aboriginal heritage sites are applied in legal statutes. While the AHA establishes a regime for heritage protection, it is largely not enforceable by Aboriginal people. Not even registration of Aboriginal sites guarantees protection. When applied to contestation over land use, provision in the AHA enables developers to use the defence of ignorance when confronted with potential prosecution for damaging sites (Ritter 2003, p. 199).

This chapter shifts its focus on the representation of Aboriginal voices from differences in cosmologies to performances in the contest of interests within the juridical social field. The conflict of interests had arisen from the Browse LNG Precinct proposal at James Price Point. The performances of contending parties serve as indicators of practices of governance involving Hunt and Smith (2008, p. 9) notion of dynamic processes enabling the achievement of things that matter to contesting parties. The ‘use of legislative devices’, I argue, reflects practices of governance that facilitate the achievement of goals either in support of or in opposition to the Browse LNG Precinct development project proposal.
Performances in this contestation occur on stage where the rules that govern the contest of interests are inscribed in Legislative Acts. The strategic manoeuvres employed in the form of legislative devices are subject to juridical interpretation, tested and played out to surmount obstacles in order to obtain the desired effect. As Raymond Williams (1958, p. 295) argues, culture is not just a shared signifying system of meaning but is also a process where meaning is ‘produced, performed, contested, or transformed’. The juridical social field induces contenders to employ legislative devices as the instrument of control for the articulation of legal and cultural meanings (Mezey 2001, p. 38). Whilst rules are inscribed in Legislative Acts that govern the contest of interests, how these rules are employed depends on persuasion, interpretation, and cultural capital in the form of juridical know-how and skills designed to advance a political agent’s interest. This chapter seeks to capture the representation of Aboriginal voices through the use of legislative devices, and discern the underlying values and end goals associated with the respective performances of contesting parties. Their action (i.e. the use of legislative devices) reveals the political agents’ positioning and interest in relation to the LNG project proposal.

Five cases involving the contest of interest between key players in the Browse LNG development proposal are examined. The chronology of events provided in Table 1.1 *Highlights of Events: Browse LNG Precinct story (2009–2013)* situates the historical context of the cases presented. The structure of this chapter is three-fold: first, the subject of the conflict between the contending parties is identified; second, the legislative devices applied to advance the interest of the key players and surmount obstacles they face are examined; third, the results of the performances on the juridical social stage are provided.

The subject of the conflict in the five cases is as follows: 1) an allegation that the KLC misrepresented the intention of the native title party; 2) a claim that the appropriate party of interest was not notified prior to a clearing permit grant to Woodside; 3) the State government’s insertion of warranties in the ILUA with unintended consequences for the native title party; 4) a claim that Woodside committed an offence by carrying out works without approval; 5) a claim that
the EPA’s approval of the James Price Point Precinct project was invalid and unlawful.

The key players are the following: 1) the native title claimants, Joseph Roe (Goolarabooloo Senior Law Man) and Cyril Shaw (Jabirr Jabirr) v the Native Title Representative Body, the KLC; 2) Joseph Roe v the Director General, Department of Environment and Conservation; 3) the KLC and the WA State Government in relation to the warranties inserted in the Browse LNG Precinct Project Agreement (PPA); 4) Richard Hunter (Goolarabooloo Senior Law Man) v Woodside and the Minister for Planning; and 5) the Wilderness Society of WA (Inc) v the Minister for Environment [2013].


On 14 May 2010, Joseph Roe and Cyril Shaw commenced legal proceedings – Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809 – alleging that the KLC did not have the permission of the entire native titleholders to enter into a Heads of Agreement (HOA) with Woodside. They claimed that the KLC misrepresented NTCG’s intention during the 15 February and 15 April 2009 meetings that led to the signing of the HOA. When Cyril Shaw pulled out of the proceedings, Joseph Roe filed an amended application as sole party to those proceedings (Amended Notice of Motions dated 13 July 2010).

The KLC’s counsel questioned the Court whether Roe had the standing to sue because suing by himself, the KLC argued, Roe did not have the standing to represent all the members of the Goolarabooloo Jabirr Jabirr (G/JJ) claim group.45 From the KLC’s understanding, the party suing the KLC was the applicant representing the joint native title claim in the context of the NTA legislation. The applicant for native title determination consisted of Traditional Owners, Joseph Roe (Goolarabooloo) and Cyril Shaw (Jabirr Jabirr) who were the joint signatories for the native title claim. Justice John Gilmour accepted the KLC’s argument and dismissed Goolarabooloo’s amended application.
The KLC’s counsel used the law of standing as the legislative device to block the legal action against it based on the interpretation of the word, applicant. The legislative device that the KLC employed was aimed at restricting the Court’s recognition of traditional owners as ‘political agents’ in their own right. A different way of understanding the plaintiff’s representation would simply be the applicant as a ‘traditional owner’ (McPherson 2010). In accepting the KLC’s argument in court, Justice John Gilmour’s ruling in effect denies a traditional landowner the legal authority to challenge the KLC. Former Federal Court Judge, Murray Wilcox’s comment on this case in hindsight was that the Court’s decision involved an interpretation of the meaning of the word applicant in the NTA legislation (McPherson 2010). In a native title claim, Mr Wilcox argues, there could be ‘scores of applicants’. It would be unlikely that each individual applicant would support a motion. The question for the Court, he states was: ‘whether Parliament intended, in using the word applicant, that each and every person who had joined in a native title claim had to be a party to an application to the Court in respect of the conduct of that claim’. If this were the case, he points out that ‘one of the applicants could subvert the claim and the others would be powerless to do anything about it. To that extent, the decision operates as a precedent, an unfortunate one in my opinion.’

Joseph Roe alleged that the KLC misrepresented the native title party’s intention. Rather than respond to Roe’s allegation, the KLC’s counsel referred to the withdrawal from the legal proceedings by Cyril Shaw, Roe’s co-signatory in the native title claim application, to undermine Joseph Roe’s standing to sue.

The KLC’s manoeuvre involved a diversion from the allegation of misrepresentation to the definition of the term, applicant within the framework of the NTA. In effect, the symbolic power of naming ‘creates the things named’, as Mautner (2011, p. 850) describes the practice of ‘law as culture’ in the quintessential ‘form of “active” discourse – able by its own operation to produce its effects.’ Practitioners in the juridical field locate and identify the issues that the court may recognize as legally and socially meaningful, thus defining the elements that can be controlled to meet desired goals. Drawing upon the relevance of a definition of a term embodies the process of controlling the terms
of the proceedings. A normative view of the application of the law can be approached in one of two ways: where lawyers try to find solutions based on the contents of the law – doctrines, concepts, rules, and precedents – or where legal deliberation accounts for the values that prevail in the lives of people (see Mautner 2011, p. 855).

The Court’s acceptance of the KLC’s argument resulted in strengthening the KLC’s political voice of representation and at the same time diminishing the potential for the land council to present a more cohesive representation of its clientele’s requirements. Consequently, Goolarabooloo’s representation of its interest as Traditional Owners that the KLC were in part meant to receive instructions from, suffered a major blow.

6.2 Case 2 (2011) — the claim that the appropriate party of interest was not notified prior to a clearing permit grant to Woodside in the Roe v Director General, Dept of Environment and Conservation (WA) [2011] WASCA 57

Joseph Roe challenged the clearing permit granted to the WA Department of Main Roads. Joseph Roe claimed that as the Law Boss for the Northern Tradition, the CEO of the Main Roads Department was obliged to invite him to comment on Woodside’s application for a clearing permit within the period of the notification. The argument that, as the Law Boss for the Northern Tradition, he should have been notified to comment on Woodside's clearing permit application proved to be ineffective in comparison with the Minister’s argument that Mr Roe was in fact notified through the representation of his land council.

The Court found that the CEO had invited Mr Roe's duly appointed agent, the KLC as one with a direct interest in the subject matter. Section 51E (4) (B) of the EP Act in particular states that:

If the application complies with subsection (1) and (2), the CEO shall –

invite any public authority or person which or who has, in the opinion of the CEO, a direct interest in the subject matter of the application, to comment on it within such period as the CEO specifies.
It is clear in s. 51E (4) (B) that it is up to the CEO to determine which public authority has a direct interest in the subject matter of the application. The Court ruled there was no breach of s. 51E (4). The KLC, a Native Title Representative Body (NTRB) has a statutory status to act on behalf of the entire NTCG (s. 203B of NTA) that includes Joseph Roe as a member of the claim group. Mr Roe’s invocation of his authority in relation to Aboriginal cultural tradition that has a ‘direct interest in the subject matter of the application’ (for a clearing permit) had no clout. The legal device that the counsel for the Minister employed substituted the KLC as Roe’s ‘duly appointed agent’ to represent his interest. The standing of a Law boss was no match pitted against the standing of the KLC’s statutory representation of the native title party. Drawing from Mautner’s (2011, p. 841) ‘historical approach to law’, law is regarded as ‘a product of the nation’s culture’ that responds to social change assuming a transition from the law of a people, embedded in social practices and culture, to ‘the law of the state’ that constitutes the ‘culture of the state’ (p. 848). In applying this approach, (Goolarabooloo’s) law of a people could be regarded to be in a state of transition to the law of the state so in this sense, Roe’s invocation of customary cultural authority, as a legal device, did not provide him currency in the juridical field. Roe’s authority based on Aboriginal cultural tradition was not given recognition by the law. Mezey’s (2001, p. 36) reference to political ‘culture wars’ being waged by proxy on the legal terrain might be associated with a case such as this where jurisdictions of sovereign power are tested within the juridical field. The KLC’s interest was enrolled by proxy, not on the side of the Indigenous native title party, but on the side of one of the parties’ adversary. The objection to the clearance grant came directly from the native title party affected. However, institutional recognition by the state was vested in the representative body that performs its statutory role of representing the native title party.

The result of the case then was that it gave legal authority for Woodside’s action to disturb the land that Goolarabooloo valued as a site of significance on the grounds that the CEO, the Minister, had notified Roe (Goolarabooloo) through its representative body.
6.3 Case 3 (2011) – the State government’s insertion of warranties in the ILUA

Upon completion of the ILUA, the KLC on behalf of the NTCG, signed three separate agreements on 30 June 2011: the Browse LNG Precinct Project Agreement (PPA), the Browse LNG Precinct Regional Benefits Agreement, and the Browse (Land) Agreement on 30 June 2011 with the WA State Government and Woodside Energy Ltd (AIATSIS 2011). The PPA was the primary native title agreement that provided all the native title consents and approvals necessary for the establishment and operation of the precinct. It set out the benefits for the NTCG to be obtained from the State Government, Woodside and any additional proponents. The second agreement, the Browse LNG Precinct Regional Benefits Agreement, provided regional benefits earmarked for Indigenous people of the Dampier Peninsula and broader Kimberley region. The third agreement, the Browse (Land) Agreement, established the Browse LNG Precinct as the site for all LNG developments on the Kimberley coastline. This agreement was enshrined in legislation [the Browse (Land) Agreement Act 2012]. In return for consent to future acts (i.e. the LNG precinct development), the NTCG would receive benefits estimated to be over $1.5 billion during the life of the project (See Kimberley Land Council Annual Report 2010-11).

The insertion of warranties in the PPA was aimed at ensuring that the KLC’s representation of those who hold or may hold native title is water-tight. Clause 3 of the warranties stipulated that the native title group had authorized those who signed the PPA to have the authority to enter into and perform the obligations of the native title party under the PPA.

Another warranty was Clause 5.2(b) and (c) of the PPA signed by the GJJ group on 11 June 2011 which states that:

b) Subject to certain exceptions which are not relevant to the Second Replacement Section 29 Notice (WA Land Administration Act 1997), “the Native Title Party will not do anything to challenge or adversely affect the Takings, Precinct Notices or the Project Rights under the Principal Acts or otherwise at Law...”: cl 5.2(c).
(c) “The Native Title Party will use its reasonable endeavours to remove or procure to be removed any objections made in relation to the s. 29 Notice ... at any time by any member of the Native Title Party”: cl 5.2(e).

Section 29 relates to the Minister applying to the Registrar for the creation and registration of a certificate of Crown land title. The reference to Section 29 constitutes the WA government’s acquisition of the project site so that it will become registered as Crown land. Project Rights refers to the rights of the Browse LNG Precinct project (in contrast with the rights of Indigenous landowners). Any breach of this warranty means that the native title party would not be able to access the benefits to be obtained from the agreements that the KLC had signed on behalf of the claimants.

The problem that confronted the KLC was that, because its representation of the Native Title Party was flawed, it could not stop Goolarabooloo from taking legal action to stop the establishment of the project. All attempts of the KLC to register a new NTCG group were in vain. Despite members of the original NTCG subsequently filing separate determination applications, neither party could satisfy registration requirements from the National Native Title Tribunal because of duplication of membership of claim groups. The original NTCG application for determination had not been withdrawn from the register so the new application could not be legally registered. Perhaps the KLC was hedging its bet either way. It did not want to risk de-registering the original NTCG application in case the agreements signed under the joint name became void. If the agreements were void, no financial benefits could be accessed. If the WA State and Woodside were to negotiate with new native title claimants, new agreements had to be struck with validly registered native title claimants. Time constraint was a major problem with the miners’ retention lease due to expire. The announcement of the final investment decision was also due at the expiry of the lease.

The KLC’s motivation in pushing along NTCG’s approval of the HOA was not to lose Traditional Owners’ entitlement to procedural rights such as the ‘right to negotiate’ in terms of the future act (the future establishment of the LNG Precinct project). Justice Gilmour’s statement in the *Rita Augustine v State of Western*
Australia [2013] FCA 338) case that Goolarabooloo’s motivation in becoming a registered native title claimant was to ‘oppose that future act being done’ (i.e. the establishment of the LNG Precinct) laid bare the court’s view that might indicate empathy with the KLC’s cause for the project to go ahead.

The PPA warranties, however, backfired on both the proponent (the State Government) and the KLC. The irreconcilable dispute within the joint Native Title Party meant that the agreements that the KLC signed on behalf of the original claim group could not be implemented because Goolarabooloo would not ever consent to the project but opposition to the agreements would constitute a breach of the KLC-signed agreements.

This narrative demonstrates the coherence and logic of the WA government’s insertion of warranties. The KLC’s representation of the native title party was a gamble on the land council’s part to ensure that it would not lose the entitlement of the right to negotiate. The Premier, Mr Barnett’s compulsory acquisition threat and imposition of tight deadlines to induce the KLC to rush the native title party to agree to a HOA would have contributed to the pressure that the KLC was put under. The fluidity of systems-practices ‘check-mated’ the political game played by both the State government and the KLC. Neither one of them anticipated the consequences of the lack of authenticity of the KLC’s representation. Filing separate native title claim applications would not change the fact that the joint native title claim party signed the agreements. Goolarabooloo would consistently resist the establishment of the LNG Precinct. Therefore, a breach of the Browse agreements would be a certainty. The State’s warranties had the unintended consequence of nullifying the result desired by the State government and the KLC – the establishment of the LNG Precinct. The warranties were meant to uphold the dominance of the ‘power of law over culture’ in the sense of establishing legitimacy that projects the ‘sign of the law’s impartiality and neutrality’ (Terdiman 1987, p. 4, citing Bourdieu).

Raymond William’s claim of a cultural concept that emerges as ‘a process, not a conclusion’ (Mezey 2001, p. 42) is supported by the unintended consequence of the cultural interplay between law and culture narrated in this case. It is fitting
to recall William Sewell’s proposition that culture is both a ‘semiotic system with its own logic and coherence and the practices that reproduce and contest that system—practices which are ‘contradictory and always in flux’ (cited in Mezey 2001, p. 42). The cultural interplay between the power of law over culture and the power of culture over law depicted a dynamic relationship that was played out in a process that, in this case, had an unpredictable end.

The WA government’s stipulation of warranties was intended to provide assurance that that there would not be any obstacle to the implementation of the agreements signed – a logical step that had set a bar against the fulfilment of its own goal. The entanglement of the KLC’s flawed representation of the native title claim group with the WA State agreement warranties was ultimately confronted with warranties that could not be met. The warranties could not be met because the claim group’s intention in relation to the James Price Point project was not cohesive. Each party in the joint claim group took action to dissolve their original claim by separately lodging new native title applications.

6.4 Case 4 (2012) – the claim that Woodside committed an offence by carrying out works without approval (Hunter v Woodside and the Minister for Planning)

Goolarabooloo Law Boss, Richard Hunter brought a civil case in the Supreme Court against the WA government arguing that Woodside carried out illegal development without planning approval for four weeks between 21 May and 25 June 2012 and in the previous dry season in 2011 (Environmental Defender’s Office 2012). In response, Woodside claimed that it received the Kimberley Joint Development Assessment Panel (KJDAP) approval. Counsel for Mr Hunter stated that the KJDAP process missed a couple of legal steps: KJDAP made its decision without having received the Shire of Broome’s report on the proposal, and without properly notifying the public.

When the WA Minister for Planning, the Hon John Day received advice before the Court was to hear the matter, that amending the Interim Development Order (IDO) would mean that Woodside’s works would not need planning approval, the Minister altered the local planning scheme seven days prior to the court hearing.
The Minister signed the Shire of Broome Interim Development Order (IDO) No 4 Amendment Order on 25 June 2012 under s. 102 of the Planning and Development Act.

A key change was s. 76, which stated that:

the Minister may order local government to prepare or adopt scheme or amendment
(1) If the Minister is satisfied on any representation that a local government –
(a) has failed to take the requisite steps for having a satisfactory local planning scheme or an amendment to a local planning scheme prepared and approved in a case where a local planning scheme or an amendment to a local planning scheme ought to be made; or
(b) has failed to adopt a local planning scheme or an amendment to a local planning scheme proposed by owners of any land, in a case where a local planning scheme or an amendment to a local planning scheme ought to be adopted; or
(c) has refused to consent to any modifications or conditions imposed by the Minister.
[Section 76 amended by No. 28 of 2010 s. 56(1)–(3); No. 45 of 2011 s. 141(6).]

The effect of the amendment was to ensure that the Browse LNG Preliminary Works could go ahead even if the approval given to Woodside by the Kimberley Joint Development Assessment Panel (KJDAP) on 17 February 2012 were found to be invalid (Day 2012).

Counsel for Mr Hunter said that the Minister's action 'prevented the public from finding out whether Woodside's works between 21 May and 25 June were legal' (Environmental Defender’s Office 2012). The Environmental Defender’s Office (EDO) argued in court that 'it’s an abuse of power to be changing planning instruments to affect court proceedings' (Environmental Defender’s Office 2012).

The Supreme Court dismissed the case 'because the change to the planning instrument would enable Woodside to legally continue its works even if Mr Hunter succeeded on all grounds (Spooner 2012). Importantly is the value that the Court held in reaching its decision, namely:

In the context of the [Planning and Development Act 2005 (WA)] the purpose for which the power is conferred is to enable the Minister to
advance the public interest by “regulating, restricting or prohibiting the development of any land” (using the language of s. 102(1)) …

The fact that the Amendment Order would have an impact on the utility of the litigation which was pending does not detract from its characterisation as an order regulating the development of land …

The value the Court held involved an orderly system of planning the development of land in the public interest as conferred by legislation. The Supreme Court’s decision was not a verdict on whether Woodside committed an offence. Rather, the decision related more to the consequence of the WA planning and development legislation: whether or not Woodside could legally continue its work. The Supreme Court argued that if Woodside was found to have committed an offence by carrying out works without approval, the case should be tested in a criminal court rather than in a civil court. The Supreme Court’s suggestion that the plaintiff’s case should be tested in a criminal court rather than in a civil court, implies a deficit in cultural capital, that is, a political agency’s lack of proficiency in determining which court would have better served the plaintiff’s goal of obtaining redress for its cause.

The legal device Hunter’s counsel employed was simply an examination of what constitutes a ‘valid approval process’, according to the law. To counter impending litigation against the WA government, the Minister for Planning amended the legislation before the case could be heard in Court. Amendment to the legislation before the case was to be heard was the legal device that the WA government employed. In dismissing the plaintiff’s case, the Supreme Court used a normative decision that had to do more with the logic of legal processes stemming from the validity of the legislative amendment than with the question of whether Woodside’s works between 21 May and 25 June were legal. The Supreme Court’s findings call to mind Mautner’s description of the ‘culture of the state’ approach (a Western approach to law and culture) that views law as a distinct cultural system that ‘the courts create and apply’.
6.5 Case 5 (2013) – the claim that EPA’s approvals of the James Price Point Precinct project was invalid and unlawful

The *Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307* declared that EPA approvals of the James Price Point Precinct project were unlawful and invalid (Wallace, C. & McGlue, A. 2013).

Goolarabooloo Traditional Custodian, Richard Hunter and the Wilderness Society, a not-for-profit conservation organization took legal action in the Supreme Court on 4 April 2013 to challenge *the validity of the EPA’s decision-making processes*. Traditional Custodian, Richard Hunter and the Wilderness Society’s counsel detected the technical deficiency in the EPA’s application of decision-making processes. The respondents were the EPA and the WA Environment Minister.

The Court found major financial conflicts of interest during the various stages of assessing the development project. Sections 11–12 of the EP Act required following particular meeting procedures in its operations such as disqualifying members from voting if they had a pecuniary interest in the subject matter of a proposal. Some members of the EPA were found to hold significant shares in the proponent oil and gas company, and therefore, they should not have been allowed to participate in the assessment process.

The WA Supreme Court decision in August 2013 was that the EPA’s assessment of the Browse LNG Precinct proposal was not valid because those who participated in decision-making were disqualified by their pecuniary interest in the proposal. The Court ruled that the decision by the EPA to submit its assessment report to the Minister for approval was invalid. Consequently, the Minister’s decision to give approval to the project was also invalid. What ultimately invalidated the EPA’s approval was not based on the environmental evidence presented in the EPA’s report but on the rules pertaining to decision-making processes that the EPA had implemented. The plaintiff’s identification of the fatal error in the EPA’s own rules rendered the EPA’s approval process vulnerable to a legal challenge.
By using the rules of the EPA’s governance as a legal device, Hunter and the Wilderness Society’s counsel demonstrated the practice of interpreting relevant legal texts in a juridical social field where legal practitioners compete. A view of law as culture in the way a legislative device is used involves legal cultural practice – the practice of interpreting relevant legal texts in a juridical social field where legal practitioners compete. Interpreting legal texts requires the use of cultural capital that demonstrates legal capability and know-how, a practice not an end in itself but aimed at obtaining a practical effect to achieve a political agency’s goal. The juridical field exemplifies Bourdieu’s conception of a ‘social field’ that performs as ‘the site of struggle, of competition for control ‘where the field itself defines ‘what is to be controlled’ (see Terdiman (1987, p. 3). In other words, the juridical field has its own cultural practice or structure of behaviour, and participants entering that field have to be equipped with the skills aligned with this practice to enhance their chance of achieving their own objectives.

In the legal case brought against the EPA, the plaintiff drew attention to the EPA’s flawed practice of governance by subjecting the EPA’s decision-making process under its own rules. In questioning the validity of the EPA’s approval process, the plaintiff was able to derail or delay the plan of establishing the LNG Precinct. This case demonstrated that counsel for the plaintiff was familiar with the contest that involves juridical cultural practice. In effect, the EPA’s environmental approval of the Browse LNG proposal was challenged, not from the substantive content of its report but from the assessment practice that the EPA undertook to reach its verdict.

6.6 Conclusion

My thesis seeks to address the question of how Indigenous people make their voices manifest in resource development discussions through their own internal governance system as well as through their interactions with institutions of Government and transnational companies. This chapter focused on the use of legislative devices to represent Aboriginal voices.

The KLC successfully used the law of standing to exclude the voice of Indigenous groups who were opposed to the Browse LNG Precinct development project. The
Court accepted the argument that the NTCG's representation was based on the constitution of the applicant as understood in the NTA. Counsel for the plaintiff challenged the validity of development planning approval process based on the existing legislation. However, the legislative device concerning the validity of the approval process lost its potency when the WA government amended the relevant legislation with the effect of retrospectively legitimating actions that could have been declared invalid had the legislation not been amended. The WA government's legislative amendment obtained the Court's assent and recognition.

The inclusion of warranties in the agreements signed by the KLC on behalf of the native title claimants was a legislative device that hindered the practical effect it sought to achieve – that is, removing obstacles that might arise from the native title party opposition to the Browse LNG Precinct's Project rights.

The way in which legislative devices were employed puts cultural capital in focus within the juridical social field where capability and performance are demanded in the representation of Aboriginal voices within the recognition space of juridical practice. As Bourdieu (cited in Mautner, p. 865) observes, the 'juridical field' has 'its own practice of structure of behaviour'. Legislative practice has its own method such as defining and locating the issues to be controlled that can attract currency within the juridical recognition space. Aboriginal voices, as the narratives show, are diverse, and in this sense, the representation of Aboriginal interests can be multi-dimensional. One cannot simply attribute the lack of juridical competence to a failure in the representation of Aboriginal interests because the constitution of what is in the interest of Aborigines is itself in dispute within Aboriginal polity.

The dynamic interplay depicted in the cases presented highlighted the power of legislative devices chosen as instruments of control. What were subsumed on the stage of contending parties' performances though were the underlying values or norms that underpinned their actions. The question of which device is ultimately included or excluded in court proceedings is a mechanism employed to achieve desired political goals, not necessarily to address the issues presented by
aggrieved parties. To this extent, the representation of Aboriginal voices within the juridical social arena would only be as good as the quality of the legal representation it is able to recruit.

The KLC’s use of the law of standing to remove the obstacle to the establishment of the Browse LNG project provides evidence that its interests and values were aligned with the WA Government’s goal of facilitating industrial or mining development projects. The WA State’s legislative amendment, Interim Development Order No 4 in s. 102 of the Planning and Development Act 2005 shows that it was prepared to impose its administrative power to block attempts at questioning the legitimacy or validity of its development planning approval process in the Browse LNG project (Shire of Broome Local Interim Development Order No 4).

The representation of interests through the use of legislative devices within the juridical recognition space simply highlights the effectiveness or ineffectiveness of the strategic manoeuvres used to achieve political goals. In the next chapter, I explore alternative development models proposed by local interest groups and individuals in Broome.
Chapter 7

Alternative Development Proposals to the Browse LNG Precinct Proposal

The story of the doomed Browse LNG Precinct proposal would not be complete without including the voices of Aboriginal people who were opposed to the project. This chapter examines alternative development models proposed by Kimberley Aboriginal interest groups and individuals. By the time the Browse LNG Precinct proposal was formally announced to Kimberley residents during 2007–2008, intensive conversations and discussions on development models appropriate for Northern Australia and the Kimberley had been canvassed amongst community groups, including the KLC, since the early 2000s in the context of developing community responses to industrial development projects that were being planned in these regions. These projects were deemed to attract interest for potential mineral exploration or resource development. The Browse LNG Precinct proposal was only one among other resource development projects identified by community groups to have social and economic impact on employment and that have environmental consequences on communities. A sharp difference in notions of development values became obvious between the WA Government’s thinking and policy preference compared to Kimberley community advocates’ perceptions of the development models deemed appropriate to the region. These ideas about development models stemmed from discussions in local and regional forums, the results of which were documented. As mentioned in Chapter 4, the KLC and environmental groups had been involved in these discussions (Griffiths & Kinnane 2010; Hill et al. 2005; Hill et al. 2008).

This chapter positions my informants’ contributions about alternative development proposals within the framework of earlier community discussions about development models that were in progress even before the Browse LNG Precinct proposal was announced. Their contributions could best be understood in the context of this broader picture as some of them made me aware of discussions that involved them. The problems identified from the forums included the impoverished state of infrastructure for services; the trend towards shifting part of infrastructure cost to the resource industry; land tenure that did
not enable Aboriginal people to have sustainable livelihoods from Country; and the government’s imposition of particular development values seen as incompatible with conditions that were applicable to remote and regional communities. The WA Government had ostensibly allowed infrastructure for services to decay and disintegrate in remote communities and that it had been shifting part of the cost of infrastructure building and maintenance to the resource industry. The shift in Government policy termed as ‘normalisation’ implements the mainstreaming of Aboriginal services shaped by neoliberal economics thinking characterized by minimal government intervention. To justify this shift of approach, the State Government’s discursive approach was purportedly aimed at portraying Aboriginal people essentially as a disadvantaged and marginalized people who would need to match the lifestyle standards of mainstream communities, that is, to close the gap of social and economic conditions between them. The solution advocated to address Aboriginal disadvantage was Aboriginal participation in economic development activities such as mining resource projects that might occur on Crown land or on native title land. I begin this chapter by exploring the big picture in section 7.1 – perspectives on the governance of development and the impact on Aboriginal people. In section 7.2., I narrate Kimberley Aboriginal people’s perspectives on alternative development options. The development options described that were antithetical to the huge industrial Browse LNG Precinct Project, depicted small-scale ‘cultural conservation economic’ activities that are distinguishable from high-scale development such as – ranger strategy, pastoral management, agriculture, permaculture, aquaculture industries, natural resource management, and specialist type of tourism such as whale coast tourism, eco-tourism, and Indigenous tourism.

7.1 Perspectives on the governance of development and the impact on Aboriginal people

For some Kimberley Aboriginal communities, the Western Agricultural Industries’ (WAI) cotton production development proposal in 2005 triggered motivation in exploring appropriate development models. The concern about the WAI proposal involved land clearing, the chemicals associated with the cotton,
and the plan to build three dams on the Fitzroy River that would use water extracted from the Canning Basin (Hill et al. 2005). Senior Yawuru Indigenous elders (from Broome) and Karajarri (from south of Broome) were anxious about the impact of this proposal. The ‘Kimberley Appropriate Economies Roundtable Forum’ was called in 2005 in view of this concern so that the forum could identify the community’s vision on ‘appropriate economies’ or ‘appropriate development’ for the region. This forum issued a Statement of principles, one of which was an affirmation that, for Aboriginal people, ‘culture guides economic activity’. A number of community forums were subsequently organized in Broome, East Kimberley, and North Kimberley aimed at identifying development models based on the kind of values and norms for development that local community groups felt were in harmony with their social, cultural and geophysical environment – the kind of development suitable for the Kimberley region.

The ‘Kimberley Appropriate Economies Roundtable Forum’ in 2005 issued a Statement of principles, one of which included Aboriginal access to land (Hill et al 2005). One of the recommended actions in that forum was “to develop and implement a process to efficiently and quickly deliver land title or access to land where appropriate”(Hill et al 2005, p. 166). To implement this recommendation, Aboriginal people with native title wanted recognition of traditional owners such as control over access to land. They wanted access by non-Indigenous enterprises or individuals to go through a ‘permissions process’ [with them] (p. 166). They would like to quickly negotiate agreements with pastoralists for access to pastoral land, for enterprises and for cultural activities” (p. 166). I find this Statement of principles revelatory in terms of the perception of Aboriginal people with native title that they do not have control over who gets access to their land. It gives the impression that non-Aboriginal individuals and enterprises are able to access [their] land without difficulty.

The Australia Conservation Foundation (ACF) identified economic, social, cultural and environmental drivers for sustainability in an economic system that it describes as a ‘cultural and conservation economy’ (Hill 2008). The study's findings provided compatible ground that links the views of conservation,
environmental, and Aboriginal groups. Sustainability of development, the report argued, did not only refer to sustainability of the natural environment but also to sustainability of culture. For Aboriginal people, natural resources and cultural heritage are not separate but interwoven social realities. A Western economic paradigm in contrast would tend to segregate nature from humans in ways that translates nature as predominantly an economic resource to be used by humans (Burgess et al. 2005, p. 120; Weir 2009, pp. 71-73). Some of the values and norms of development identified in these forums were not in-line with the WA government’s own outlook which, at the time, was focused on the potential establishment of a Browse LNG gas hub onshore.

At the ‘Barrgana’ lecture talks I attended at the University of Notre Dame in Broome in July 2009, the key speaker, Howard Pedersen (Senior Policy Officer with the Kimberley Institute, historian, author and Broome resident) expounded on a vision of a new development paradigm that is appropriate for the Kimberley and foundational for any criteria for development projects planned within the region. This was a paradigm that ‘links wealth creation, Indigenous culture, environmental protection and social cohesion as indivisible components’ (Pedersen 2009).

Although Aboriginal people already deal with many forms of land tenure such as unallocated Crown land, Aboriginal Lands Trust (ALT) estate, pastoral leases, heritage sites, Defence lands, marine tenure, and marine reserves and protected areas, they would like government agencies to consider and develop other forms of land tenure that would enable their people to have sustainable livelihoods from Country (Griffiths & Kinnane 2010). Many Aboriginal pastoral leases are struggling financially and people need to diversify for ‘Caring for Country’ (Rose 1992) work. Under unallocated Crown land, the WA Government has some responsibility in managing feral animals and weeds, monitoring pests and engaging in border protection – the kind of work that is compatible with Aboriginal people’s customary economy and would suit a mode of work locally known as Caring for Country.
Caring for country refers to the Aboriginal people’s approaches to land and water management in the context of lands to which they have a traditional relationship. Thirty-one leases are under the management of Aboriginal pastoral leaseholders (a third of the Kimberley). Aboriginal leaseholders of pastoral leases found that they could not access resources for conservation and heritage management. The Department of Indigenous Affairs (DIA) has responsibility for access to heritage sites. Many sites are unprotected because the DIA itself is not adequately resourced to manage and support its work (Griffiths & Kinnane 2010). The land tenure managed by the ALT is vast but ALT is also under-resourced. Although Aboriginal leaseholders can sell leases, ALT ownership is vested in the Crown. The Crown can revoke any lease it grants. In short, Aboriginal people find it hard to attract funding for infrastructure and community development under the ALT land tenure, and Kimberley Traditional Owners had not been engaged in local management decisions (Griffiths & Kinnane 2010). This picture depicts the lack of government infrastructure resourcing in remote regions. The ‘government’s limited view of productive activity as occurring only within the monetary or commercial sectors’ might have led to its neglect of the importance of subsistence economy such as fishing, hunting, bush harvesting, bush medicine, housing (Buchanan & May 2012, p. 69; Young et al. 1991).

Livelihoods and sustainable enterprises that have the capacity to conserve and restore an environment are compatible with the Caring for Country ethos (see Hill et al. 2008) that is committed to mutual sustainability of culture and Country. This customary economic approach to development still prevails in discrete Indigenous remote communities, according to the National Aboriginal and Torres Strait Islander Survey (NATSISS) in 2002. The notion of ‘working on Country’, Kerins said, promotes ‘new sets of ideas and world views’. He points out that the stand-alone environmental employment program called ‘Working on Country’ had become part of a much wider Indigenous policy framework that can be discerned from the Australian Government’s *Caring for our Country Business Plan (2012–13)* (see Kerins 2012, p.42).47
In contrast to the notion of Caring for Country is a state development model, the ‘Closing the Gap’ policy and ‘Stronger Futures package’, that seeks to mainstream Indigenous services in state development programs through incorporating Indigenous peoples living in remote locations into mainstream education and training and the market economy (Kerins 2012. p. 43). The Caring for Country movement, Kerins points out, is a community-based development pathway that renders itself to Indigenous decision-making control. The values associated with Closing the gap, in contrast, is built on the premise of development that promotes personal responsibility (individualism) and that can be achieved by moving from ancestral lands to townships (Kerins, ibid). This policy thus subtly shifts value orientation from the notion of caring for country to working on country, or as Kerins bluntly puts it, it is a policy that represents the ‘dominant political view that Indigenous “development” can only be achieved by rejecting “traditional” culture’ (Kerins, ibid). Kerins further argues that Indigenous reliance on state funding programs based on state development models mentioned above runs the risk of the incremental capture of Indigenous values and world views through involvement in state processes (Kerins, ibid).

Professor Mick Dodson and Diane Smith (2003, pp. 6-7) outlined obstacles to Indigenous economic development and livelihoods based on the literature. One example is the high variability of property or resource rights amongst Indigenous Australians, that is, some communities “have statutory property rights but extremely limited or non-existent revenue-raising jurisdiction.” Either Indigenous inalienable freehold and native title land are said to restrict development or, lands returned to Indigenous ownership have been badly degraded and require substantial financial and rehabilitation input (p. 7). Dodson and Smith suggest that a more positive approach relates to local control rather than whether Australian governments, the private sector, or national representative organisations should ‘exercise predominant control’ (p. 10). Kerins (2012, p. 44), on the other hand, puts the alternative view of development aligned to a form of economy that “recognises the environmental and economic values of ecosystem services and builds on the benefits inherent in Indigenous
residence on country, Indigenous common property land tenure regimes, Indigenous knowledge and languages, and Indigenous worldviews.”

The theme in one of the local forums held in Broome in 2009, ‘the Kimberley Conversation’ (Kimberley Institute 2009) was on how best to reform the relationship between government and Aboriginal people based on a regional approach. At this forum represented by peak Kimberley organisations – the KLC, Kimberley Language Resource Centre, Kimberley Institute, and Goolari Media Enterprises – ideas about development and governance that were specific to the communities’ experience were explored. The forum called for a major change within Government and within Indigenous communities based on rigorously analysed evaluation of existing policy and on practical approaches to service delivery. The critique of government at that forum was that political expediency dictated Indigenous policy and service delivery.

My informant, Paul Lane of the Lingiari Foundation Inc (Kimberley Institute, n.d.) based in Broome explained to me the political barrier that stands in the way of capacity building investment:

... the nature of communities funding and their access to resources is very much dependent on an old style political approach. They [Aboriginal people] go along, cap in hand to get an application for a house, a shop, a store, a woman’s centre or whatever it is, so they have to play that game. It is very difficult for communities to withdraw out of those processes and develop up the integrity of a long-term sustainable position (Pers. Comms, 5 December 2011).

As a result of negotiations over the LNG, Lane claimed that the State Government created a tripartite forum – the Federal Government, the State Government and the KLC. The KLC has become a ‘filter for the resources that are coming into the region’ (Pers. Comm., 5 December 2011). By creating a tripartite forum the Council of Australian Government (COAG) had excluded all other Indigenous people in conversations in the Kimberley. Local peak bodies that had previously been set up as independent organisations such as Magabala Books, Kimberley Law and Culture Centre, Language Resource Centre, Aboriginal Medical Service, Interpreter Service as a consequence of the creation of the tripartite forum, would now have to rely on the KLC, according to another informant, Dr Poelina,
as “the spokesperson for all issues because it suits the government to have a one-stop shop and portray the KLC as the governance model” (Pers. Comms, 15 December 2011). COAG, given responsibility for dealing with Indigenous issues had been unsuccessful, she said, because it had not engaged people on the ground nor used a democratic approach [to developing policy] such as “a consultative process where Aboriginal people can sit down and evaluate the opportunity cost and community benefits from any project proposal so that the people themselves are able to make an informed decision.”

An example of consultative processes experienced by Indigenous people with government in relation to infrastructure development planning was at a meeting of the Senate Select Committee that called for submissions on Regional and Remote Indigenous Communities. Joe Ross, a member of the Fitzroy Futures Governing committee at the Fitzroy Crossing hearing sought an explanation of the process used by the Departments of Planning and Infrastructure and Housing and Works to determine in which communities refurbishments and construction of new housing would occur (Senate Select Committee into Regional and Remote Indigenous Communities 2009). The response in relation to the housing construction program managed by the Department of Housing was that decisions would consider the following factors:

Land tenure – to be eligible for capital funding provided by the Commonwealth under the National Partnership Agreement on, communities must have suitable land tenure arrangements that enable access to land control of the housing assets by the State; housing management – the community must have agreed to a suitable housing management arrangement with the Department of Housing; Native title issues need to have been resolved to be capable of a resolution in a timely manner; the community must have demonstrated housing need; the Commonwealth and State Government have agreed to target the priority locations agreed by COAG under the National Partnership Agreement on Remote Service Delivery.

The WA Government pointed out that the DIA was finalizing a remote Aboriginal communities policy framework that would determine investment priorities based on the consolidation of existing government policies and investments that would include consultation with Aboriginal people.
Community housing needs had been documented in many independent reports but having to deal with other potentially conflicting obstacles such as land tenure, native title issues, and new Commonwealth and State Government policies is a challenge for local governance. Housing and education are basic infrastructure needs by all communities if Aboriginal people are expected to live up to the standard of living at the national norm.

While living and working for three years in the desert, one of my informants, Wade Freeman, saw first-hand the condition of housing and general well-being of Indigenous people in remote areas. Freeman currently works as the Kimberley Project Officer for the Australian Conservation Foundation in Broome and has many years of experience as a Ranger in the Kimberley desert. Freeman saw severe problems of basic housing, nutrition and health in Balgo, a small Aboriginal community linked with the Great Sandy Desert and the Tanami Desert. He told me that he didn’t see one house repaired during the time he was there. Instead, he saw health programs close down and lose funding (Pers. Comm., 8 December 2011). Freeman’s experience points to institutional governance allowing infrastructure for services to decay and disintegrate in remote communities. With the state strategy of shifting part of the cost of infrastructure building and maintenance to the resource industry, the impact of that policy shift would be a further degradation of basic services.

The WA government department, DIA itself admits in its submission to the Senate inquiry that “the current allocation of funding for community governance and administration is inadequate”. It also notes the difficulty in “recruiting and retaining staff in remote and regional areas”. Citing Dillon and Westbury (2007, pp. 185-9), Sullivan (2011a, p. 113) stresses that the Commonwealth Grants Commission allocations to remote areas do not take into account the lack of infrastructure to obtain equalization of services.

‘Indigenous disadvantage’ is a by-product of a ‘complex array of institutions, policies and programs that govern public policy outcomes’ (Westbury &Dillon, 2006, p. 3).
Some examples are: ‘financial arrangements that disadvantage remote regions, duplication of mainstream and indigenous specific funding systems, and the reticence of governments to acknowledge indigenous cultural perspectives in policy implementation’ (Langton & Mazel 2008, p. 58). Hence, an alternative explanation for Indigenous disadvantage is the state’s purposeful withdrawal of funds for Aboriginal infrastructure and capacity building to induce a more rapid assimilation of Aboriginal people into the state’s political economic policy.

Freeman’s past experience as coordinator of Indigenous ranger programs with the KLC gave him direct experience of infrastructure development and funding in relation to environmental management in the Kimberley. He is critical of the state funding service delivery method that tends to be sporadic and specific within individual projects. In his view, funding should be directed from a regional perspective:

You can’t manage a regional project on weeds and feral animals by saying, “now we’ve got money for this specific area and so let’s just can knock out the horses there but the horses are around everywhere else. It needs to be outwardly spread throughout the whole region and spread over along continuous timeframe period” (Pers. comm., 8 December 2011).

Altman (2012b, p. 225) is critical of the state’s obsession with the poverty of Indigenous Australians rather than focusing on the role they can play ‘in the delivery of environmental services that may improve their well-being’. Altman considers the empowerment of, and recognition given to people on Country as a more positive approach. The prognosis of the root of Indigenous disadvantage in these areas is two-fold: that it is either a by-product of state defunding of basic infrastructure needs such as housing in remote regions, or it is a problem that stems from the persistence of Indigenous people to stay on Country in remote habitation that does not enable them to embrace change and modernization.

The state solution for rectifying Indigenous disadvantage is to enforce a policy of normalisation (Sullivan (2011a, p. 1). A shift in Indigenous political policy occurred at the tail end of the twentieth century from Aboriginal self-determination to normalisation, according to Sullivan. Self-determination, was a state policy that put emphasis on Aboriginal rights, and under this policy, the
Commonwealth Government gave recognition to Aboriginal and Torres Strait Islander peoples’ right to exercise a sphere of authority and responsibility. Government provided support for the communities’ exercise of that right (Reconciliation Australia, n.d.). The policy of normalisation, on the other hand, refers to the notion that Aboriginal people must work towards reaching a standard of living at the national norm. The public face of normalisation is ‘Closing the gap’, enabling the monitoring of the progress of policy outcomes, in health, education and life expectancy between Indigenous and mainstream standards. Sullivan (2011a, p. 105) points outs that Closing the gap targets such as ‘closing the life expectancy gap within a generation’ and ‘halving the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade’ (Sullivan (2011b, pp. 7-8) ignore the qualitative factors that shaped Indigenous disadvantage. Not meeting these targets would perpetuate the discourse of Aboriginal deficit that is then associated with chronic pathology.

An historical perspective provides a broader understanding of shifts in government policy that shaped the relationship that evolved between governments and Aboriginal communities. Sullivan (2011a, p. 3) argues that the forced removal of children for assimilation resulted in ‘social and emotional deprivation’ leading in some cases for those who had difficulty in adapting, to ‘poor educational and employment outcomes and involvement in the criminal justice system’. The assimilation policy resulted in many Indigenous people leaving their traditional lands, ending up in squalor in camps on the edge of towns and succumbing to the problem of alcoholism. The consequence of past government policies led to later efforts at ushering in Aboriginal self-determination policies in the 1970s through capacity building.

The Commonwealth began to fund Aboriginal self-help organisations and encouraged Aboriginal homeland settlements. It established the Aboriginal Land Commission in the early 1970s purchasing pastoral leases for adjacent Aboriginal groups. The Aboriginal Land Rights (NT) Act 1976 saw more Aboriginal land claimed from reserve lands. The Commonwealth Government envisioned the development of Aboriginal people in the context of Indigenous self-governance. The Aboriginal Councils and Associations Act (ACAA) 1976 was
introduced enabling the creation of land councils as a mechanism to represent and advise Traditional Owners. The Minister at the time, Ian Viner, commended ACAA for facilitating the development of ‘Aboriginal communities [as] legally recognisable bodies which reflect their own culture and do not require them to subjugate this culture to overriding western legal concepts’ (Rowse 2002, p. 181). In 1987, the Commonwealth established the Aboriginal and Torres Strait Islander Commission (ATSIC) to be run by a national board and elected through regional councils (Parliamentary Library 2005). The Commonwealth Native title Act, enacted in 1993, made it possible for Indigenous people to negotiate native title agreements with developers. A change in policy during 2004–5 took place when the Howard Government abolished ATSIC, convinced that economic indicators had not demonstrated improved conditions amongst Aboriginal populations. The self-determination policy era that began in the 1970s, motivated by the move towards decolonization, had been abandoned.

The transformation in state thinking might have fallen under the ideological influence of New Public Management (NPM) approaches to public sector administration that began in the 1980s. Sullivan (2011a, p. 68) saw NPM focusing on accountability. In practice, accountability was rigidly applied to procedures for accounting tied to the disbursement of public money and to strict reporting requirements to the government. Managerialism and an auditing culture began to permeate Australian public administration with the effect of reducing government’s accountability while at the same time, demanding ‘oppressive accountability’ from Aboriginal recipients of grants (Sullivan 2011a, p. 68).

The so-called persistence of Indigenous disadvantage became the fulcrum for initiating a new policy regime. Indigenous disadvantage was associated with welfare dependency or with a dysfunctional lifestyle manifested by alcoholism, abuse of children, or simply by the refusal of a minority group to fit into contemporary Australian modern living. Langton (2012b, p. 8) pins the problem of social and economic disadvantage experienced by Indigenous people in resource-rich states to the impact of colonisation and to structural causes. Langton considers past assimilation policies that involved the forced removal of
children resulted in social and emotional deprivation that has material effects on Indigenous people. The structural causes are attributed to the state’s regulatory regimes that had not entirely been conducive to developing a right relationship with Indigenous people over the use of land resources based on authentic consent (Langton 2012b, pp. 2–3). The twinning stereotype of cultural difference/pathology attributed to Aboriginal people in general underpins the state’s normalisation strategy that seeks to rectify Indigenous disadvantage.

Normalisation could be viewed in two ways. A positive perspective views Indigenous people in the process of actually or in the process of reaching the same standard of living as the national norm (Sullivan 2011a, p. 100). A negative perspective blames Indigenous people for not living a lifestyle that matches the idealised, normalised profile of other Australians socially, culturally and individually (Dillon & Westbury 2007; Sutton 2009). If the standards don’t match, the negative view calls this a deficit (an economic metaphor) that needs to be addressed. Indigenous people thus have to exert effort to show cause why they are not able to match education, employment, health and habitation mainstream standards. The onus of capacity building is placed upon the Indigenous domain. The contested norm in the public arena is sourcing the root of Indigenous disadvantage in order to successfully close the gap between Indigenous and mainstream lifestyle standards.

A closer look at the normalisation strategy at the implementation level shows that state funding allocation arrangements make it difficult to achieve Closing the gap targets in remote Aboriginal communities. The Commonwealth policy of normalisation is implemented through shifting Commonwealth responsibility to the state and territory governments (Sullivan 2011a, pp. 110–11). However, State governments are ‘under no obligation to spend their allocations’ (Sullivan 2011a, p. 114) to address Indigenous disadvantage. One potential source of funds is through Commonwealth funding of local governments as stipulated in the Local Government (financial Assistance) Act 1995 (Cth). Recognising the needs of Aboriginal and Torres Strait Islanders within their boundaries, the States allocate part of the funds received from the Commonwealth to local governments. Each local government council, however, has to decide how the
grant is spent and what services to be provided for its Indigenous residents. This mechanism of service provision to remote Aboriginal communities through the Act is failing because

under local government, the needs of Aboriginal people in remote parts of Australia, are not a function of their proportions in the population but their distance from services, lack of infrastructure, low educational and employment levels, ill health, inadequate housing (Sullivan 2011a, p. 115).

Local governments are a subsidiary of state governments but they are not part of the Australian Constitution so direct funding is problematic (see Sullivan 2011a, p. 116). Local governments in WA do not have the municipal governance of Aboriginal settlements that Queensland has introduced (Sullivan 2011a, pp. 119-120). The other source of funds is through the National Partnerships (NPs) that implement the National Indigenous Reform Agreement (NIRA) established by the Council of Australian Governments (COAG) in 2007 (Dept of Prime Minister & the Cabinet, n.d. a). In using this mechanism, the Commonwealth enforces state and territory co-contributions under contractual conditions that the states will not receive money ‘unless they put up agreed amounts of their own’ (Sullivan 2011a, p. 115). As regards the Commonwealth Grants Commission allocations (Commonwealth funds collected and passed on to the States via the Goods and Services Tax), these allocations do not take into account the lack of infrastructure in remote areas to achieve equalisation of services (Sullivan 2011a, p. 113). Normalisation as a policy to be implemented through Closing the gap thus is not achievable if the mechanism for achieving targets through local governance is flawed. Meanwhile, the state employs ‘hegemonic discourses’ or public discussions that potentially have a dominating influence on the political terrain. While Australian Aboriginal needs are quite distinct, the governance of these needs is required to fit into the methods of the modern state that use the idiom of ‘ethnic nationalism’ (Sullivan 2011a, p. 9) under the policy umbrella of normalisation. Normalisation de-emphasises cultural diversity and seeks to mainstream the mechanisms for the delivery of citizenship obligations.

From an analytical perspective, normalisation could either be seen as a natural course of development such as the way culture evolves or absorbs distinct
elements into an integrated whole (giving emphasis to ethnic nationalism) or, it could be seen as a purposeful and conscious institution of a discursive policy strategy that intends to assimilate minority voices into the norm. Howlett (2010, p. 461) points out that hegemonic discourses influence what is knowable because knowledge is contingent and the behaviour of (political) actors are subject to their knowledge of the ‘strategically selective terrain’ and the constraints posed for them. An example of the use of the ‘strategically selective terrain’ is the state’s construction of a minority rights public discourse that gives emphasis to the benefits that Indigenous people can obtain from mining development projects. In a neo-liberal policy environment, the mining industry is seen ‘to provide a unique employment opportunity for Indigenous people in remote areas’ (Howlett et al 2011, p. 310).

Political agents like Aboriginal land councils interpret the context of the state’s policy and options available to them, and examine whose interest is favoured and whose, not. Then from their understanding of the power dynamics, they develop their own operational and discursive strategy. The state is empowered from its hegemonic positioning to distinguish between who are deserving (and undeserving) rights-bearing indigenous subjects (Bryan 2007; Povinelli 2002). The state then decides which indigenous groups may be recruited into ‘structures of power’ while allowing for some ‘political openings’. As I noted in Chapter 4, the Premier, Colin Barnett’s discourse exemplified the state’s construction of a hegemonic minority rights discourse by first pointing to high rates of unemployment, youth suicide, domestic violence, abuse of children; second, referring to the enormous amount of money that the state spends on education and health; third, praising young Aboriginal leaders that want economic independence (the deserving rights-bearing indigenous subjects) and who want to move away from welfare and dependency (Q&A 2012).

Part of the discourse strategy was to highlight the Browse LNG development as a potential solution to addressing Indigenous disadvantage. The discursive use of ethnic (Aboriginal) homogeneity linked with Indigenous disadvantage enables the state to present Indigenous people as culturally different from other Australians by associating Aboriginal culture with welfare dependency,
alcoholism, and abuse of children. Discourse thus serves as a strategic tool that highlights the flow-on benefits of gas development for Aborigines: capacity building (education), sustainability (health), self-determination (away from welfare dependency), and economic independence. Not only is Indigenous disadvantage linked to cultural distinctiveness, it is also projected as a pathological condition that would render Indigenous people incapable of meeting the expectation of rights. This discursive construction enables the state through the strategic use of hegemonic discourse to represent Indigenous involvement in resource development as a state affirmative measure intended to liberate Aboriginal people from a position of disadvantage.

Reflecting on the Premier’s statement cited above, Dr Poelina, told me in an interview that the state is withdrawing from its ‘citizen responsibility’ (e.g. education and health) by ‘trading off’ Indigenous people’s citizen rights with resource developers or mining companies (Pers. Comm., 13 December 2011). Dr Poelina’s point exemplifies the neoliberal policy trend towards ‘de-governmentalization’ indicating the diminution of the state’s social responsibility to its citizens in the process of deregulating the economy and privatizing the public sector. Australia has implemented a deregulation policy when it established the Office of Deregulation on 18 September 2013, under the Federal Department of the Prime Minister and Cabinet. The Office of Deregulation assists the Prime Minister in formulating a deregulation agenda with the states and territories through COAG (Department of the Prime Minister and Cabinet, n.d. a). COAG is the peak intergovernmental forum in Australia comprising of the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Local Government Association. What this means is that the deregulation policy is articulated strategically as a whole-of-government approach.

At the local and regional level, Sullivan (2011a, p. 13–14) distinguishes culture from the functional management of Aboriginal organisations and refers to subsidiarity. The principle of cultural subsidiarity requires leadership to be expressed at the local level is communally recognized and rights at the local level as distinct from functional organisations (Sullivan 2011a, p. 13). Applying this analysis, statutory umbrella organisations such as the KLC have interests of their
own that are distinct from place-centred communities with identified local interests. The KLC, as an Aboriginal political agent, thus deploys its own discursive strategy (Howlett 2010, p. 461) based on its evaluation of the political terrain of discourses. In Chapter 4, I noted the KLC’s discourse that demonstrates the land council’s convergence with state goals linking Aboriginal development with industrial development. The KLC wants to take the chance through the James Price Point Project to ‘move beyond welfare and create real jobs and facilities for indigenous people’ (Bergmann 2011). In theoretical terms, the state might have regarded the KLC as ‘deserving rights-bearing indigenous subjects’ that could be accommodated within structures of power.

Dean (2010, p. 145) saw law evolving as the ‘coordinating points for normalising powers and governmental regulations’. The state’s strategic control is expressed through various statutory land rights Acts and other enacted legislation such as heritage, environmental protection, mining, and development application and planning approvals. Through legislation, the state establishes the framework for agreement making involving Indigenous people and transnational interests such as Woodside, the anticipated Operator of the Browse LNG Precinct proposal in the Kimberley and its Joint Venture Partners. In the Kimberley, some of the agreements struck between Indigenous landowners and miners are legislated. They include the Good Neighbour Agreement 1980, Diamond (Ashton Joint Venture) Agreement Act 1981 (WA), and the Argyle Participation Agreement 2004. For the Browse LNG Precinct, three separate agreements with native title claimants through the KLC’s representation were reached with the WA State Government and Woodside Energy Ltd on 30 June 2011: the Browse LNG Precinct Project Agreement (PPA), the Browse LNG Precinct Regional Benefits Agreement, and the Browse (Land) Agreement. Kerins (2012, p. 43) warns of the risk of an incremental institutional capture of Indigenous people’s values and worldviews through state processes in Indigenous people’s participation in state-funded programs.

Altman (2012, p. 216) regards the 2007 Northern Territory National Emergency Response (the Intervention policy) as the hegemonic state’s attempt to replace Indigenous customary norms and values with Western norms and values ‘as
rapidly as possible’ (normalisation). The practical ramification of this policy is to transfer more responsibility of the program for Aboriginal development to the states and territories (Sullivan 2011a, p. 102). One way of transferring funding obligations to address Indigenous disadvantage can be seen in the governance practice of the WA State government. The WA State government consolidated government policies and investments incorporate 25% of mining and petroleum royalty revenue to fund services in regional and remote areas of Western Australia. (Department of Indigenous Affairs Submission to the Senate Select Committee on Regional and Remote Indigenous Communities, May 2009). In other words, mining investment in social services fills in for the state’s withdrawal of infrastructure investment in these communities.

In summary, appropriate development for Indigenous people in the Kimberley cannot be divorced from their position of lack of ownership, power, control and access to land. The 2009 ‘Kimberley Conversation’ participants believe that a model should be developed for Indigenous economic development and Indigenous engagement so that ‘Indigenous people can take ownership of the processes’ and determine a role in ‘economic development and environmental sustainability’ (the Kimberley Institute 2009, pp. 27-28). They do not believe that remote Australia should be forced into a mainstream model. Caring for Country customary livelihoods in the reports mentioned were deemed to suit conditions in the Kimberley region. The principles highlighted in the community-led forums included recognition of culture as the driver for economic activity, adequate government resourcing for pastoral leases and ALT; adequate funding for infrastructure and community development; evidence-based approaches for service delivery; and linking of cultural, environmental and social goals with wealth-creation.

The location of the doomed LNG Precinct proposal in the Kimberley is home to remote and regional communities. Seventy two per cent of Indigenous people who live in these communities from age 15 and above are involved in customary harvest (Buchanan & May 2012, p. 73). Such a profile paints a picture of the relevance of development features associated with particular types of economic livelihoods. Living in homeland and participating in customary harvest showed ‘a
positive correlation associated with ‘a higher level of self-reported good health and happiness’ (Buchanan & May 2012, p. 73).

7.2 Kimberley Aboriginal people's perspectives on alternative development options

I now focus on alternative development options put forward by Kimberley Aboriginal people including the values and norms they feel are appropriate to the region. The economic profile of remote Australia is markedly different from the economic profile of urban Australia. Bush harvesting, fire management, water management, land and sea resources management, cultural conservation economy, whale-coast tourism, eco-tourism and Indigenous tourism are examples of economic livelihoods mentioned as wealth-creating activities that are both culturally and environmentally sustainable in the Kimberley region. Two other issues, housing and the notion of capacity building have also been raised as relevant to remote and regional development. Each of these options is examined below.

My informants, Bruno Dann and Marion Manson own and manage Twin Lakes Cultural Park on the Dampier Peninsula. They are involved in bush farming, fire management and culture tours. Their work is an example of a small-scale business enterprise at a local level that has huge potential for providing meaningful employment for local Aboriginal people. They also grow bush tea and a bush plant called gubinge known as kakadu plum or Billygoat plum that grows in remote areas across the Kimberley. They sell gubinge to companies that use it as ‘a key ingredient in food products and skincare/beauty products’. This bush plant that grows in remote areas across the Kimberley has medicinal and nutritional qualities (Twin Lakes Cultural Park, n.d.). A company in Melbourne that produces gubinge ‘chocolate’ uses the raw material that they harvest (Pers. comm., 18 June 2010). Martin Pritchard, Director of Environs Kimberley in Broome said that monsoon vine thickets, like rainforests, are one of the eco systems with the highest concentration of bush food in the country, with major cultural sites within the monsoon vine thickets (Pers. Comm., 8 December 2011). He said that Environs Kimberley works in conjunction with traditional owners to
create a management plan with ecologists, get an understanding of the threats to the vine thickets, and assess the health of the ecosystem.

Fire management is an activity where western land management techniques can draw from Indigenous cultural knowledge, according to my informant, Wade Freeman, Kimberley Project Officer of the Australian Conservation Foundation based in Broome. Freeman said that the main problem in conservation values throughout the Kimberley relates to ‘the broad issues of land management that involves fire, feral, weeds, and water’. Fire management is an area ‘where traditional and cultural practice marry so perfectly with western land management techniques’. Effective fire management, he points out, is an economic saving for the government. Pritchard relates how Environs Kimberley’s work involves a mixture of science and culture. Traditional owners have their fire skills ‘integrated with the science’. They collect ant samples using a methodology that uses data to correlate with the ecosystem and integrate with NAILSMA’s eye-tracker system. Science and culture work well together in a project funded by both the State and the Federal Government (Pers. comm, 8 December 2011).

When I cited press reports about prescribed fires in Perth that were pronounced uncontrollable, Freeman’s response was that such practices just perpetuate the problem:

| A lot of prescribed burns in the south-west are done in the cooler times of summer and the start in the early spring, trying to get as much done before the hot season fires spread. The problem with that is a lot of tree species during that period of time are just starting to set seed so you’re actually burning the next generation of tree species out, so the more frequently you do that, you’re actually just getting this one remaining single generation of trees. (Pers. comm, 8 December 2011). |

He points out that traditional people do fire burning in small practices throughout the year at appropriate times of the year depending on the ecosystem. Bruno Dann and Marion Manson are also involved in fire management as part of running their enterprise. Dann explains:
Fire was a seasonal tool and not used for hunting most of the year. In the Kimberley, it's done traditionally in the cool, dry, dewy season on windless early mornings or late afternoons. We start burning mid-May when the lower storey is still green and the grass and leaves burn cool (Pers. Comm., 18 June 2010).

In Dann's brief description, we see the application of Indigenous knowledge of fire management in the context of place, season, and the ecosystem. Given the centrality of water and wetlands to customary use of country and associated major contributions to customary livelihoods, developments that alter water availability or quality and access to water-dependent features, and the possible tradeoffs from water use must be well understood and properly weighted in decision making on development projects (see Altman and Branchut 2008).

Freeman said that traditional knowledge is prior knowledge as traditional people had managed waterholes for their country without any scientific training in water flows and geographical mapping. People involved in water management are happy to marry and mix the two types of knowledge, he said. I asked him whether traditional and scientific knowledge synchronize when environmental management is undertaken. Freeman responded by giving me a ground water example:

People would come along and lay down a topographic map of a vegetation type or of ground water and underground aquifers, and then, Indigenous people would, on top of that paint a cultural cycle strong line of a dreaming. That story pretty much follows up a geographical feature demonstrating an aquifer. Basically both cultures, scientific and traditional have an understanding of how water moves underground, and what was connected, from different but parallel perspectives, and both had been and can be used as land management tools (Pers. comm, 8 December 2011).

Another informant, Mike Hulme, a Broome resident and a sustainable housing developer said that Indigenous people have managed, looked after and respected their water sources. His forebears, he said, brought cattle into the country, destroying their water holes that had existed for thousands of years and eventually forcing them to move into towns. He was critical of the requirement for fresh water to run the LNG Precinct at Walmadany-James Price Point (Pers. comm., 3 December 2011). He said that Woodside ought not to take the water
from anywhere near the Peninsula. If it had to come from the ground water, he said, it would have to come from the Canning Basin further east of town or from desalination.

A visionary picture of freshwater management in 2030 in Northern Australia was outlined by a report to Government from the Northern Australia Land and Water Taskforce:

In 2030, northern Australia is demonstrating world best practice in the use and management of its tropical freshwater systems. Reflecting their social, cultural and economic values, these freshwater systems are declared assets of national significance. All river basins and their associated aquifers have implemented water management plans that comply with the objectives of the National Water Initiative. This would have not been possible had it not been for the substantial investment by Australian governments in addressing critical knowledge gaps and building analytical and community capacity... (Department of Infrastructure, Transport, Regional Development and Local Government 2009).

The condition of waterways and wetlands would indeed determine the quality of management of both Indigenous and non-Indigenous livelihoods. In developing and implementing livelihood strategies, potential impacts of the condition of waterways and wetlands should be among the tradeoffs to be seriously considered. In a Kimberley Institute submission on water management, Yawuru elder and national Aboriginal leader, Professor Patrick Dodson (2009) from Broome begins with the proposition that northern Australia must not repeat the large-scale, non-Indigenous settlement that shaped southern Australia. His proposal was to have a water reserve within the consumptive pool of water allocations for Indigenous economic development. With this proposal, he highlights the failure of state policy to deal effectively with the property rights of Indigenous interests in providing Aboriginal people with the ability to control the resources needed to encourage enterprise and other engagement with the mainstream economy.

My informant, Paul Lane of the Kimberley Institute and Lingiari Foundation, identifies the Northern Australian Indigenous Land and Sea Management Alliance (NAILSMA) model as ‘accommodating the interest of its constituency rather than the funders’ (Pers. Comm., 5 December 2011) in a way that has
outcomes for both the government and industry. NAILSMA is a not-for-profit company involved in delivering programs to support Indigenous people in managing their land and sea resources (NAILSMA, n.d.). The typical government development model, he argues, is driven by a policy for which they allocate project dollars to sell projects that has in-built resources for the client. The difference is that the NAILSMA model identifies a product from the cultural economy and demonstrates how it can be ‘beneficial for society’ and this is presented as a ‘real lure for government.’ The ‘product projects’ that NAILSMA chooses are ‘culturally sustainable, owned by the community and can deliver for governments in a greater way than government projects are able to do for them.’ (Pers. Comm., 5 December 2011). Examples of NAILSMA products that Lane mentioned are ‘carbon abatement projects, Indigenous sharing of land and sea management knowledge, and a water resource management program’ in the Kimberley (Pers. Comm., 5 December 2011).

The economic development paradigm that is advanced in a cultural conservation economy model is one that recognizes Indigenous people’s strengths, builds on assets that are already in existence within the cultural economy, focuses on projects that are sustainable, and encourages Indigenous and Western knowledge-sharing. A cultural match utilizing Indigenous and Western knowledge already exists in environmental management practice in some remote areas. Science and culture have been shown to work well together such as in water management plans and geographical mapping.

In remote communities [such as the Kimberley], the real ‘real’ economy, according to Altman (2005) is a ‘hybrid economy’ consisting of interacting private, public (state) and customary sectors. Altman drew attention to the National Aboriginal and Torres Strait Islander Survey (NATSISS) in 2002 that shows that customary non-market activity such as fishing and hunting is undertaken in discrete Indigenous remote communities. In legal terms, Section 211 of NTA provides recognition of ‘common law rights in customary resources such as wildlife’. The old CDEP programs enabled adults to obtain income support for particular customary activity that at the same time met their cultural responsibilities (Altman 2005, p. 4). Employing a ‘cultural economy approach’ is
associated with high motivation, builds high self-esteem and provides huge social returns for the community. In Freeman’s view, Indigenous motivation is high when work activity is associated with looking after Country – a ‘money-saver’ likely to have ‘huge returns for the community’ (Pers. Comm., 8 December 2011). He argues that remaining on Country enables Indigenous people to fulfill their cultural responsibility and at the same time build self-esteem, motivation and health in other areas. The ‘Caring for Country’ approach is concerned with the economic impact of environmental policies, and citizens are called upon to play a role in protecting the well-being of the community and the biosphere as a whole (Hill et al. 2005). Ecological economics or conservation economy underpins such an approach that values a market consisting of both consumers and producers. In contrast, mining and irrigated agriculture continues to ‘damage both the North’s environment and its local culture’. In the hybrid economies of dispersed Kimberley settlements, Sullivan (2005, p. 128) asserts that the most sustainable economic activity for Indigenous people is in environmental management where:

\[\text{environmetrical monitoring, management and rehabilitation are activities that can be carried out by local teams with culturally congenial forms of governance. These activities employ local knowledge and they assist in the transmission of knowledge through the generations. They have the potential to involve men and women, youth and elders. They can be combined with income substitution (bush foods), income generation (bush foods, art materials, fee-for-service management) and cultural activities, which have an economic dimension since they protect against the waste associated with social break down.}\]

Ranger strategy, pastoral management and Natural Resource Management (NRM) along with building the human capacity of the local workforce are examples that Dr Anne Poelina gave as activities that fit into an holistic cultural conservation economy model appropriate for the Kimberley (Pers. comm., 6 December 2011). Different land uses – agriculture, permaculture and aquaculture are other examples of industries that do not have a negative environmental impact in the Kimberley and on the cultural health of Indigenous people. Freeman mentioned other livelihoods in remote regions as fire
management, feral animal control, and weed control, which he argues, represent an economic saving for the state.

Sullivan says that wages can be introduced into these small settlement communities if the State Government agrees to pay for municipal services upkeep such as power, water, sewerage and rubbish removal. Another method is through Payment for Ecosystem Services (PES) markets. The incorporation of PES market participation of Indigenous people engaged in environmental management has the potential for improving the social and welfare conditions of Indigenous people in remote communities. The ‘lack of government funding and of Indigenous involvement in the design and implementation of natural resource management (NRM)’ (Winer, Murphy & Ludwick 2012, p. iii) resulting in environmental risks is the rationale given for introducing PES in the Cape York Peninsula. The concept of PES has relevance for the Kimberley because the region shares similar PES opportunities such as feral animal and weed control, tree planting and fire management for carbon credits. Bush farming industry also has huge potential for providing meaningful employment for local Aboriginal people. These examples highlight Sullivan (2006) and Altman’s (Altman et al, 2006) view that the vitality of the customary economy is often undervalued by the state.

Although Freeman now works for the ACF in Broome, his past experience as coordinator of Indigenous ranger programs with the KLC gave him direct experience of infrastructure development and funding in relation to environmental management in the Kimberley. He views land management that involves fire, feral animals, weeds, and water as the main problem in conservation values throughout the Kimberley. He criticizes the state’s funding service delivery method that tends to be sporadic and specific within individual projects. He thinks that funding should be directed from a regional perspective:

You can’t manage a regional project on weeds and feral animals by saying, “now we’ve got money for this specific area and so let’s just knock out the horses there but the horses are around everywhere else. It needs to be outwardly spread throughout the whole region and spread over along continuous timeframe period” (Pers, comm, 8 December 2011).
Consistently recommended in locally organized planning forums is the development of the arts, tourism and land management industries.

Pritchard of Environs Kimberley contrasts the employment potential between mining and tourism. He said that less than 1% of the Shire of Broome population is employed in mining while 20% are employed in the tourist industry. An example of ‘appropriate economy’ that he cites is the Kimberley Whale coast tourism based on the natural environment of the community (Curtin Sustainable Tourism Centre 2010). He juxtaposes this example against the potential for the mining industry:

> investing in tourism in sustainable enterprises gives you a much higher flow-on effect into the economy than oil and gas. There is a strong leakage out of the country when you have a huge mining operation ... Profits from mining companies based outside of Australia leave the region or leave the country. Fly-in-fly out workers (FIFO) spend their wages elsewhere (Pers. comm, 8 December 2011).

The late Peter Matsumoto, an Aboriginal Shire of Broome councillor, considers Indigenous tourism as the best development model to employ (Pers. comm, 6 December 2011). Former Shire Councillor, Broome businessman Chris Maher, concurs that tourists’ experience of Broome is ‘missing out on Indigenous experience’ (Pers. comm, 7 December 2011). Having just returned from a holiday in Africa, spending five weeks touring Kenya and Tanzania paying a lot of money to live comfortably in the middle of Serongeti when I interviewed him, he says he can vouch for people he met on various safaris saying to him that ‘they wanted to come here to see the vastness, to experience the outback. Currently there is a lot of “mid-range” (tours in the Kimberley) going on but the "high-end" is not catered for. People will spend a lot of money.’ He points out that although we don’t have lions and tigers, our region is just as appealing (Pers. comm, 7 December 2011). Former Shire Councillor and business proprietor, Nic Wevers, argues that economic opportunities and the economic value in tourism have not been assessed properly. As an example, she names successful eco-tourism ventures that provide equity for Aboriginal people. Like Maher, she says that most tourists, especially international tourists [who visit the Kimberley] are looking for wilderness, natural environment and Indigenous culture. In her view,
‘the business case for preservation and the sale of what we already have to build on should be seriously considered when evaluating the business case for the Browse LNG Precinct proposal (Pers.comm. 8 December 2011). I was surprised to find that most Indigenous tour operators’ ventures were not listed on the Broome Visitors Centre where tourists normally go for tour information. Some of the locals told me that Indigenous tour operators would be struggling to pay the membership fees between $500 and $1000 for listing and so information about Indigenous tour provision is usually only transmitted by word of mouth.

7.3 Conclusion

If culture is the measure of economic activity, then most would find Caring for country types of livelihood meaningful, beginning with subsistence economy – fishing, hunting, bush harvesting, and bush medicine. Small-scale cultural conservation economy activities are also considered compatible with sustaining both Country and culture. Development planners thus need to recognize the distinctive economic requirements of remote and regional Australia in contrast with urban Australia. That is why the list of appropriate livelihoods mentioned – bush harvesting, fire management, water management, land and sea resources management, cultural conservation economy, and whale coast tourism, ecotourism, Indigenous tourism – depicts an economic profile distinguishable from development in more urbanised southern states. Ranger strategy, pastoral management, agriculture, permaculture, aquaculture industries, and Natural Resource Management generally fit this profile.

Gross under-resourcing of vital services leading to the poverty of infrastructure allocation to remote regions results in massive disadvantage to these regions, and worst of all affected is the service delivery to Indigenous communities. As noted in the 2009 ‘Kimberley Conversation’, Indigenous people want to take ownership of the processes and determine a role in economic development and environmental sustainability. Instead the process for funding allocation, Dr Poelina claims, installed a tripartite forum – the Federal Government, the State Government and the KLC via COAG made the KLC as a
filter for the resources that are coming into the region, excluding the voice of local peak Indigenous bodies that had previously been set up as independent organisations. As a result, COAG had not engaged people on the ground nor used a democratic approach such as a consultative process where Aboriginal people can sit down and evaluate the opportunity cost and community benefits from any project proposal (Poelina, A., Pers. Comm., 15 December 2011).

The big picture in relation to state policy shift is the influence of neoliberal economics that seeks to assimilate minority voices into the norm preferred by structures of power that focus on the market economy as the driver for culture. This is why Kerins (2012, pp. 42–3) warns about the risk of participating in state-funded programs that may result in an incremental institutional capture of Indigenous people’s values and worldviews through state processes.

The cultural conservation economy model preferred by the Kimberley people whose views I have canvassed, is one that builds on assets that are already in place within the cultural economy; focuses on projects that are sustainable; and encourages Indigenous and Western knowledge sharing. Governments can provide support to municipal services upkeep – power, water, sewerage and rubbish removal and funding infrastructure requirements – in remote regions instead of withdrawing funding. They can encourage livelihoods to do with natural resource management and preventive measures such as feral control and fire management – activities that could thrive through PES markets. Integrated wealth-creating livelihood activities operating on a smaller scale can be recognized as a model of sustainable, hybrid economy that fits the needs of regional and remote communities.
Chapter 8
Conclusion

The focus of my thesis is on how Indigenous views were represented in the evaluation period of the Browse LNG development proposal during 2008–2013. The proposed LNG Precinct site was a struggle for recognition of the many voices representing potentially competing interests – development, heritage, and environmental protection. I have found that Indigenous people’s voices in resource development negotiations with the WA government and mining companies were represented through the recognition space provided by state institutional apparatuses and techniques of governance. Legislative Acts in particular served as instruments of control for the governance of mining and Aboriginal heritage interests. Various Legislative Acts stipulated legal recognition of rights to land involving the state, lessees of Crown land and native title claimants or holders. It is within the recognition space of the juridical field, with operational support from the state bureaucracy, where representation and recognition of interests bring about material consequences. Undoubtedly, power relations go hand-in-hand with governance. Indeed the design and operation of legislative acts enable a system of control on how Aboriginal interests are to be governed within the framework of the governance of Australia’s mineral and natural resources.

The design of the heritage legislation and its implementation by the WA State government showed that when mining interests came into conflict with Indigenous heritage interests, the WA State government asserted its power to impose its policy preference that privileged mining interests. All Indigenous representation for protection of cultural heritage sites in the face of industrial development activities at Noonkanbah, Argyle and James Price, failed. The representation of Indigenous voice, narrated in the Noonkanbah and Argyle case studies, was executed by proxy – through the official function of the Museum Board of Trustees that had responsibility for heritage protection. While the Trustees performed their work professionally, they had to endure much political interference from the government of the day. At Noonkanbah and Argyle, the Trustees’ mission under the Museum Act 1969 (s. 9a–ba) had an education and
heritage preservation function on behalf of the community, and in this sense, the Museum Board of Trustees represented Indigenous heritage interests. The strength of this representation role crumbled when mining interests came into conflict with Indigenous heritage interests. The WA State government asserted its power to impose its policy preference by employing legislative and bureaucratic instruments of control. The government’s use of these instruments of control illustrates the structural and agential aspects of hegemony. At Noonkanbah, Argyle and James Price Point, governance practice by the WA government indicated how government Ministers used their power, which had the effect of undermining Indigenous heritage interests in relation to mining interests. In the Noonkanbah case, the WA Minister for Cultural Affairs overruled the WA Museum’s recommendations concerning sacred sites and directed the Trustees on 14 June 1979 to give their consent to the use of the land. Onus was placed upon the Museum Trustees to show cause why consent for developers (to destroy a sacred site) could not be granted. The Trustees could be liable to pay the complainant (the miner) for expenses incurred if the Court were to rule that the Trustees had been unreasonable in the performance of their duty. Thus the WA government imposed its authority that determined who had responsibility, authority and power in the governance of Aboriginal interests. In other words, the Trustees’ functions were ultimately under the administrative control of the WA Minister for Cultural Affairs. The ministers’ use of their power represents the agential aspect of hegemony whereas the underpinning structural element relates to ‘capital as a social relation’ driven by the state as ‘a regime of accumulation’.

Brinsden J, deciding on an injunction filed by the Yungnora people to stop Amax’s oil drill, determined that the Minister for Cultural Affairs did have the power to control and direct the Trustees in all their functions by virtue of s. 11(2) of the AHA. From the perspective of governance, ‘[s]ite registration’ was expected to give institutional recognition of Indigenous heritage sites. In practice, however, compliance with registration did not necessarily guarantee heritage protection.
The use of AHA as a legislative device failed to protect Indigenous interests against mining development projects that were likely to damage heritage sites. The way in which dispute resolution was structured, ensured that Indigenous cultural heritage interests could not obtain equitable representation with mining interests. Any conflict between these two interests had to be resolved by the Warden Court. It was for this court to determine whether the mining tenements (leases) grant was lawful based on the Mining Act 1978. The Warden had a conflict of interest because he also acted as the mining registrar with the dual responsibility for granting a prospecting licence to miners and arbitrating over disputes that might emerge between miners and Aborigines.

The WA government, in the main, had the power to use a legislative device to assert and reinforce its rule. In the Argyle Diamond Mines case, the Museum Trustees' governance of Aboriginal heritage was frustrated by State Ministerial interference. The Minister stopped the Trustees from directing CRA to comply with the AHA legislation and from prosecuting CRA for infringing the Act.

When mining interests came into conflict with Indigenous heritage interests, the State government had the option to choose its policy preference. Its choice often privileged the mining industry over heritage protection. The 1980 amendments of the AHA further reinforced the Minister's control over decisions on heritage matters by shifting the Trustees' line of reporting so that, instead of having a direct line to the Governor in recommending an Aboriginal site be declared as a protected area, the Trustees now had to report directly to the Minister. The 1980 amendments also changed the emphasis in the definition of Aboriginal sites from 'sites of religious significance to Aborigines' to one that may have 'historical, anthropological, archaeological or ethnographical interest of significance to the cultural heritage of the State'. The legislative amendments undoubtedly favoured mining interests. CRA even invoked s. 62 of the AHA to avoid prosecution for inflicting damage on the heritage sites. A key AHA provision, s. 18 of AHA includes holders of mining tenement under the category of the 'owner of any land' as defined by the Petroleum and Geothermal Energy Resources Act 1967, the Dampier to Bunbury Pipeline Act 1997, the Energy Coordination Act 1994, and the Water Services Act 2012. Section 18 (2) of the AHA states:
Where the owner of any land gives to the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land, the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as to whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which and the conditions upon which his consent should be given.

Under this provision, the WA government is able to give consent to the owners of the land to use the land for their purpose such as mining exploration or operation that may incidentally result in damaging Aboriginal sites.

The WA State government in the 1980s, under the leadership of the Premier, Sir Charles Court, was unsympathetic to opening the State to an Aboriginal land rights regime and favoured mining development that brought in royalty payments to the Crown. At Argyle, the State Government used intimidation tactics when the Minister for Cultural Affairs warned that land transfers of pastoral leases to Aboriginal groups would be frozen across the state until the dispute with CRA was resolved.

Representation and governance, while intricately connected, are two different spheres of operation. The face of representation of Indigenous interests was almost always by proxy. At Noonkanbah, the Yungngora people had no direct participation in the institutional processes that determined whether the miner, Amax, should be allowed to make an exploratory oil drill on their land. The institutional advocate that represented their interests was the Board of Museum Trustees, while their legal representation in the Warden's Court was through the Aboriginal Legal Service. Indigenous people's lack of power rendered them vulnerable in negotiations with mining interests. The contest of power at Argyle saw Warmun Indigenous leader, John Toby excluding other affected Indigenous people in the agreement that he struck with CRA basically representing only his own community.
To summarise, WA State institutional apparatuses and techniques of governance instituted a recognition space that severely limited Indigenous participation. Within the recognition space, the Museum Trustees and the Aboriginal Legal Service represented Indigenous voices. The lack of power of Indigenous communities resulted in dividing their interests – some groups agreeing to negotiate with miners at the exclusion of other groups. Under the political conditions that prevailed in the 1980s, a more equitable say for Aboriginal communities in agreement-making was not possible. Legislative Acts served as instruments of control that State governments used to implement their political policy preferences in governing mining resource development and Aboriginal heritage interests. Even with the existence of legislation enacted to protect Aboriginal heritage interests, the rule of law was not always observed and political interference took hold. The AHA did not provide a clear definition of what constitutes ‘sites of significance’ or how ‘sphere of influence’ fitted into the understanding of ‘sacred sites’.

With the passage of the NTA, the representation of Indigenous interests improved. At Argyle, consultants, anthropologists, Marcia Langton and Kim Doohan, contracted to review Argyle's Community Relations policy and practice, led Indigenous communities to engage in more authentic and more equitable agreement making with the miners. Granted that Indigenous participation broadened in resource management negotiations that improved benefit packages received, the criterion of achieving economic self-sufficiency for the majority of Aboriginal people remained elusive. As Taylor and Scambary (2005) and Altman (2001b) point out, skills required in large-scale operations are yet unable to be filled by the limited capacity available in Indigenous communities. Ambivalence in remote communities with regard to fully integrating into the market economy is another reason put forward as well as the depth of historic Aboriginal disadvantage that mining companies and governments seem unable to comprehend.

In relation to the criteria of Yamamori et al. (1996), namely, whether beneficiaries such as communities are enabled to participate in decision-making processes, whether the community’s lives are enhanced, and whether they
achieve sustainability, the local Aboriginal people's participation, enhancement of their lives and achievement of sustainability, hardly made an acceptable mark. The impact of the institutional power structure managed to weaken the cohesiveness of Aboriginal communities’ resolve to gain a foothold in authentic participation in decision-making processes.

The legacy of the Argyle Participation Agreement was the reinforcement of the notion of development in favour of economic growth and Indigenous participation in agreement making with developers, conceptualized in terms of job opportunities in mining development projects. The communities’ focus on government’s adequate resourcing of basic infrastructure in their remote outstations faded into the background. However, engagement in agreement-making in Argyle did broaden the distribution of benefits to Aboriginal communities. From the perspective of economic development value, engaging in agreement-making with mining companies strengthened Aboriginal agency.

Based on UNDP’s (1990) criteria of development, that is, whether people's choices are enlarged, and whether human beings, not incomes, are put at centre stage in assessing development values, choices were enlarged for some, if Aboriginal communities chose to fit into the economic system that prevails. Using the criterion of ‘whether human beings, not incomes, are put at centre stage’ (Yamamori 1996), Noonkanbah, Argyle and James Price Point would not rate well if the preservation of Aboriginal cultural and spiritual heritage was to go hand-in-hand with a development project proposal, that is, considering that culture for Aboriginal people is indivisible from country.

As stated in Chapter 7, under the influence of neoliberal economics, the state sought to assimilate minority voices into the norm preferred by structures of power that focused on the market economy as the driver for culture through discursive strategies and through withdrawal of spending on infrastructure allocation to remote regions. Hence, the cultural conservation development economy model, preferred by some Kimberley Aboriginal people and environmental advocates, that stressed sustainable economic projects were not favoured in comparison with high stakes resource development proposals. The state tended to undervalue the vitality of the customary economy.
The representation of Western cosmology through Legislative Acts brought to the surface the terrain on which Aboriginal and Western systems of thought either collided or coexisted. It is on that terrain that Indigenous of interest could be represented to obtain legitimacy at a level where results were sanctioned.

I pointed out that no common assessment criteria were at hand to define Aboriginal heritage sites. A Western cultural landscape heritage assessment approach is partial to a material description of discrete physical entities such as artefacts, architecture, and ruins. Aboriginal cosmology, in contrast, adopts an enduring intimate relationship between Aboriginal culture and place. ‘David’, one of my Indigenous informants, said that if land were to be destroyed by industrial activity, there would be no point in telling the stories. The stories would only make sense, he said, if country were intact (Pers. Comm., 10 September 2010). In Aboriginal cosmology, Indigenous people would regard any damage or destruction of their country's sites of significance to result in either weakening or destroying their culture. The late Senior Custodian, Joseph Roe indicated that Woodside’s LNG selected site at Walmadany-James Price Point would cut halfway into the Lurujarri heritage trail. Hence, he saw the Browse LNG Precinct development proposal as signifying the potential death of a culture. Negotiation with Woodside therefore was not an option for him and for his people to undertake because the location chosen for the development project would threaten their survival.

At James Price Point, the narrative of Country (Walmadany) includes the song cycle system of the Northern Tradition in the Dampier Peninsula, norms of behaviour and knowledge hidden in song codes. This knowledge is regarded to be fundamental in sustaining the balance and wellbeing of the land. Paddy Roe’s establishment of the Lurujarri Heritage Trail was a translation of landscape heritage for non-Indigenous people to teach them the features and stories of the land as they walk the trail so that they will learn to respect and protect country. From a conservation and cultural heritage perspective, governance and development that take into account Indigenous cosmology would need to establish a heritage management and implementation plan.
However, other interests at stake in the same location involve industrial development plans that interrupted the development and implementation of such proposals. Other Indigenous people such as the umbrella organisation, the KLC and the established negotiating committee conceived the survival of Indigenous culture under the current global economic condition to be premised upon Indigenous participation in mining development. They saw that cooperation with miners would enable them to negotiate benefits that would rectify or alleviate Indigenous disadvantage and provide them a capital base.

Indigenous voice at the community level arose from differing perceptions of Indigenous ‘interest’ – one putting emphasis on protecting country; the other, on obtaining material or financial benefits from economic development. Indigenous voice thus came across to the broader community as splintered and thus vulnerable to the force of other discourse. To obtain some leverage to protect their native title and heritage rights (country), some Indigenous people turned to cultural accommodation. From a practical perspective over the pursuit of native title and heritage rights, they increasingly looked to ‘legal definitions of indigeneity and of Indigenous laws and customs’ (Weiner & Glaskin 2010, p. 1) to validate legal recognition of their heritage rights. In the process, traditional owners experienced the reconfiguration of their cultural heritage in ways that fitted into the requirements of the native title legislation in order to obtain validation and recognition.

The construct of the native title legislation incorporated two potentially conflicting processes — heritage assessment of Indigenous sites of significance and Indigenous ‘right to negotiate’ with the miners and the State. If co-existence of interests were the goal of agreement-making, the KLC’s survey of heritage sites would aim for harm minimisation of sites likely to be affected by mining activity. The WA State’s encouragement for traditional owners to engage in ILUA, on the other hand, was a way by which the State could address co-existence of interests that, from a broad governance perspective, incorporated addressing Indigenous disadvantage, economic development, normalisation (new form of assimilation), and handing over some of its governance social and public infrastructure responsibility to the relevant mining tenement holders via ‘social
licensure’. In addition, it sought to obtain compliance with heritage, environmental, mining and heritage laws.

The KLC’s governance approach dealt with two potentially conflicting interests under its responsibility: one was to secure a cohesive representation of native title interests and another, from its own outlook, was to obtain from the ILUA the best negotiation results it could secure for the (economic development) benefit of Kimberley Aboriginal regional interests. The KLC’s action in excluding Goolarabooloo from its initial approach to Woodside to return to the negotiating table foreshadowed the KLC’s fractured and conflicted representation of the entire Native Title Claim Group’s (NTCG) interests during the four and a half years of assessment that awaited state environmental clearance and the developers’ final investment decision.

Parties opposed to the industrial development project proposals saw huge scale development as destructive of environmental and Aboriginal cultural heritage, as well as of Aboriginal people’s wellbeing. They advocated instead for a smaller-scale type of economic development. A ‘Caring for Country’ model such as customary livelihood pursuits like bush farming, harvesting bush medicine and bush food, cultural conservation economy practices that are categorized as ecosystem services such as feral control, fire and water management, and ranger work was suggested. In addition, people in Broome involved in Indigenous cultural tours, nature-based tourism and the arts – visual, crafts and film – suggested such types of small-scale livelihoods that are already in place.

Community forums held in the Kimberley about development options drew a distinction between urban development and regional and remote development that depict economies in places such as the Kimberley in Western Australia. Ownership of decision making, equitable participation in decision-making processes, the opportunity to make choices about the kind of development preferred that enhances lives, were issues captured by the practice and discourses that emerged in the Browse LNG Precinct proposal at Walmadany-James Price Point. Resolution of these issues seems to depend on the political agency that effectively has material control of resources in relation to land.
Aboriginal leaders such as Patrick Dodson point to the failure of policy to deal effectively with property rights of Indigenous interests in the control of resources needed to encourage enterprise and other engagement with the mainstream economy.

The discursive use of ‘Indigenous disadvantage’ anchored to policy development, emerged as part of the contestation between land use interests. Local community advocates observe that the trend of government defunding of infrastructure requirements in remote regions is intended to push inhabitants into relocating to growth centres where services are concentrated or supported. They argue that the source of Indigenous disadvantage partly results from the defunding of infrastructure services in remote regions. If Indigenous mobilization to growth centres is the state’s unstated political policy for addressing Indigenous disadvantage, they argue that it would pose a threat not only to the sustainability of Indigenous cultures but also to the survival and development of identified local livelihoods that include ecosystem service provision. From a neoliberal analytical perspective, access to Country (that includes the issue of heritage sites protection) is pulled into a market framework that did not previously exist so that Indigenous agency is recruited to operate within a framework that is governed by state Western legal institutions (see Howlett et. al. 2011, pp. 317-8).

To justify the Browse LNG Precinct project proposal, the state employed discursive ideological strategies such as ‘Closing the gap’ and ‘Indigenous disadvantage’. Both the Commonwealth and WA State used these terms to highlight a value orientation that Indigenous people should take ownership of the roots of their disadvantage (self-determination). The cure that the state proposes was for Indigenous people to embrace modernization, not in terms of ‘Caring for Country’ but for ‘Caring for our Country’ (the nation-state). If Indigenous people were to follow the state’s lead to participate in economic mainstream development, they would be recognised as willing to embark on a self-determination path to escape welfare dependency. These terms are politically loaded and need deconstruction to see which political goals are being served.
Discursive ideological strategies employed to justify the Browse LNG Precinct project proposal obscured the difference in ‘development’ values between the KLC and Goolarabooloo. The economic measure of ‘disadvantage’ defined by survey results standards such as Biddle’s (2009) measuring standard of advantage – ‘people’s access to material and social resources, and thus ability to participate in society’ – was employed politically in both WA state and the KLC’s discourse to rally support for the Browse LNG mining proposal. For example, the KLC sought to justify approval for the Browse LNG Precinct as a way of providing Aboriginal people with the economic leverage to improve their living conditions. The KLC supported the State government’s presentation of ‘Indigenous disadvantage’ that economic modernization would rectify. The question is which Indigenous political ‘agency’ amongst some traditional owners in communities or their representative body, the KLC would act effectively to protect and safeguard their social, cultural and economic wellbeing. Indigenous positioning of ‘choice’ under the NTA was, in a sense, ‘forced’ into negotiation with mining companies through a 'right to negotiate' legislative provision. Mining companies, likewise, would have to employ ILUA to facilitate Future Acts such as their proposed development projects. Indigenous people in effect have no legal power of veto against mining tenement holders that have acquired rights as ‘owner of land’ [Section 18 (2) of NTA] to enter, access and pursue their activities on Indigenous lands.

Howlett et. al. (2011, p. 316) suggest that in the absence of a treaty or constitutional recognition of Indigenous rights, the representation of Indigenous interests is structurally constrained. The KLC, having been enrolled into state processes, would find it a struggle to represent voices outside a neoliberal policy market driven framework that the Federal government through its adoption of a policy of deregulation through the COAG machinery supports. Commissioner Seaman indicated that Indigenous communities would be vulnerable if they do not first adopt a cohesive and united voice before entering into negotiation with mining companies. Hence, the first step to take in terms of KLC’s representation obligation was to determine GJJ’s response to the external industrial
development proposal that would have an impact on their traditional lands. Critical in this first step was the governance of internal Indigenous decision-making processes free from external intimidation. The description of participants of the 15 April 2009 meeting that decided whether or not to enter into a Heads of Agreement with the State government and Woodside was a case in point. The notification process regarding the agenda of the meeting was unclear. The walkout of groups before the vote was conducted indicated a lack of trust in the process by one of the parties in the native title claim group, thereby excluding voices opposed to the siting of the Browse LNG precinct. The effectiveness of the KLC’s representation of the native title party was meant to rely on the instruction of the entire native title claim party’s intention. However, the lack of an authentic choice by the native title party was likely to render void the agreement signed because the joint party that signed it subsequently decided to disband their joint native title application.

The KLC as a statutory Native title Representative Body for the Kimberley was conflicted in its representational role. The KLC’s performance as a service provider was subject to the State government’s policy focus: to implement the Browse LNG development proposal. The KLC received funding resources from the WA Government to broker an agreement with the native title party in relation to the Browse LNG project proposal. It also received funding from the Commonwealth Government for its role as a NTRB to represent native title claimants. The KLC was aware that engagement in a power struggle in the contest of interests had resource implications for the viability of its operations. That was why during the evaluation period of the financial viability of the gas joint venturers, the KLC embarked on establishing independent foundations so that it could break away from ‘reliance on Government and business hand-outs’ (KLC Newsletter 2011).

The other platform for Indigenous representation of Indigenous voices is located within the juridical social field. This platform involves all contesting groups over land use employing legislative tools to meet their respective goals. How legislative devices are employed in the juridical social field laid bare capability of performance in the representation of Aboriginal voice within the recognition
space of legislative practice. The representation of interests through the use of legislative devices within the juridical recognition space highlights the effectiveness or ineffectiveness of the strategic manoeuvres used to achieve political goals. Within this legal space of recognition, Aboriginal and Western cosmologies both collide and overlap. The practice of the technology of the law and bureaucratic procedures illustrates power dynamics and power relations between Indigenous political agency and the state’s political agency. While Legislative Acts set the parameters of the playing field that enable conformity or opposition to state policy or edicts, the example of the *Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307* narrated in Chapter 6 showed that the courts (as a third party) are able to act as independent arbitrators of disputes between governments and aggrieved Indigenous parties despite the fact that subjectivism to procedural interpretation of legislative intent could occur.

In evaluating the representation of Indigenous interests, two of the criteria under FPIC (free consent) are demonstrated by which voices are included, and which excluded, and whose interests are served. The KLC was provided some agency by the structural and agential aspects of hegemony, enabling it to exercise a voice in negotiation arrangements with the state and the resource developer. However, Aboriginal voice focused on heritage interests had no effective agency of representation.

From a final investment decision outlook, whether or not the Browse LNG Precinct project went ahead was ultimately determined at the institutional macro-economic level and not by the result of deliberation of economic and cultural development perspectives at the regional and local development governance level. Indigenous access to structures of power that determined these decisions was constrained by the legislative structure and the practice of governance of the WA State government. The dilemma that confronts Indigenous governance is that it is accorded institutional representation and recognition only through the exercise of political agency within this system.
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Appendices

Appendix A: Background profile of Broome informants

(Note: Pseudonyms are used for some of my informants to protect confidentiality and respect cultural sensitivity.)

1. Jeanné Brown was a former High School teacher of Art in Melbourne, who received cultural training from Paddy Roe. She participated in the site documentation work at Walmadany-James Price Point.

2. Dann, Bruno was born in Beagle Bay in 1951 and grew up in Beagle Bay Mission. He worked as a ringer on stations. He is now a successful business proprietor of Twin Lake Cultural Park in Nyul Nyul Country, producing gubinge, a local bush plant that has food and medicinal qualities.

3. ‘David’ is an Aboriginal interpreter in his late-30s who works for the Kimberley Interpreting Services (KIS) and speaks six Kimberley traditional languages and English.

4. Freeman, Wade is the Kimberley Project Officer for the Australian Conservation Foundation in Broome and has many years of experience as a Ranger in the Kimberley desert.

5. Hoogland, Frans, originally from the Netherlands, is a long term resident of Broome. Paddy Roe, OAM (founder of Goolrabooloo) taught him many aspects of Goolarabooood culture. He is one of the senior guides for Lurujari Heritage trail walkers.

6. Hunter, Richard is one of Paddy Roe’s grandchildren. He was born in Broome in 1957 and he says he lives as a ‘cultural man’.

7. Hulme, Mike, entrepreneur, lives ‘half-time’ in Broome and ‘half-time’ in Margaret River. He is an ‘ecovillage’ developer in Margaret River.

8. Lane, Paul is one of the Directors of the Kimberley Institute Ltd, a non-profit, non-government, social innovation organisation based in Broome.

9. Lightfoot, Deanne was the coordinator of the Kimberley Interpreting Service (KIS) based in Broome at the time of the interview.

10. Manson, Marion – She is a non-Indigenous woman who runs the Twin Lake Cultural Park with her partner, Buno Dann.

11. Masuda, Evelyn (deceased) and her sister, Ellen Puertollano recalled their early days with their Aboriginal grandmother when they were evacuated to Beagle Bay during the Second World War. The sisters spoke of their European, Filipino and Aboriginal heritage.

12. Matsumoto, Peter (deceased) was as a Councillor with the Shire of Broome Council.

13. ‘Michaela’ was born in Derby in 1979. She is a Djugan woman active in local oral history.

14. Pedersen, Howard, co-author of *Jandamarra and the Bunuba Resistance* (1995) with Banjo Woorunmurra. His work was later made into an award-winning TV documentary by local filmmaker, Mitch Torres. He is a Senior Policy Officer with the Kimberley Institute, a non-profit, non-government social innovation establishment’.
15. Perdrisat, Ian, columnist for the National Indigenous Times lives in Broome. He is a Director of the Kimberley Institute.
16. Poelina, Anne serves as the Deputy President of the Shire of Broome Council. She is also a Director of the Kimberley Institute.
17. Pritchard, Martin is the Director of the local environment group, Environs Kimberley. His group campaigned against the James Price Point proposal.
18. Puertollano, Ellen, a Bardi woman, was 78 years old in 2012. She recalled her childhood mainly involved in camping, fishing and gathering bush fruit around the LNG Precinct site. She said Joseph Roe’s family held the Country together.
19. 'Rebecca' was born in Broome Native Hospital in 1954 and was put in the Broome Orphanage in 1956. In 1957, she was taken to Beagle Bay Mission and exposed to the cultural life in Nyul Nyul Country with the 'old people' in the camp. At age 7-8 years old, she lived in the dormitories. She has a wide range of knowledge about bush tucker and traditional medicine.
20. 'Rosalyn', a young Nyikina-Jabirr Jabirr leader and a former KLC employee who wanted to encourage young Aboriginal people from Broome to ‘step up' and get involved in leadership training.
21. 'Sharon' is a Ngumbarl woman in her mid-50s whose ancestors originally held the current Walmadany-James Price Point site. She said that ‘native title divides’ Aboriginal communities.
22. 'Sylvia', Bardi and Jabirr Jabirr woman, spent most of her life in Perth where she obtained a university degree. She returned to live in Broome in 1998. She ran a successful retail business operation in Broome with her husband, 'Mark'. She died in December 2010.
23. Mary Tarran worked as a member of the Traditional Owners Negotiating Committee (TONC).
24. Wevers, Nic, former Shire of Broome Councillor, was a spokesperson for the 'Broome No Gas Campaign'.
25. 'Yoly', a non-Indigenous woman from Melbourne, lived in the Kimberley for 32 years. She once worked in the interpreting services for the diamond mine in Argyle.

Other informants whose contributions were not cited in the thesis:

1. 'Ada, a former non-Indigenous KLC staff member, found that her experience of the Lurujarri Heritage trail deepened her attachment to Broome.
2. 'Bert', an Aboriginal man, works in social science research at the local university in Broome.
3. 'Edward', a tour operator based in Broome, supported the LNG Precinct project. He said that his wife took the opposite view.
4. 'Gary', a Yawuru and Jabirr Jabirr man, is highly regarded amongst Asian-Aborigines in Broome. He is proud of his mixed heritage and of his grandfather’s enterprising achievements in the early twentieth century in Broome.
5. 'Mark' (deceased), a Bardi man, had a work background in tourism and oil rigs. His mother and aunts grew up in Beagle Bay mission. At the time of the interview, he was operating a successful retail enterprise in Broome. He was
critical of the meeting and consultation process conducted by the KLC over the gas project and was unhappy with the removal of the rock carvings at the Burrup Peninsula.

6. ‘Oscar’ is a Beagle Bay Aboriginal youth leader and an active spokesperson for the local environmental group, ‘Save the Kimberley’.

7. Galvin, Darren is an Aboriginal man in his early-40s who grew up in Port Hedland. He was unhappy with the destructive impact of mining in the Pilbara.

8. 'Isabel' is a non-Indigenous woman whose uncle once ran a station in the Pilbara. Born in 1957, she was 16 when she first visited Broome. She assisted Joseph Roe in his campaign against the LNG hub.

9. ‘Madeleine’, a local Aboriginal artist, wrote an autobiography. She said, ‘Many of the people at Beagle Bay had not only been dispossessed from their country, but they had to carry the pain of being separated from their families.’ In 1942, she and her siblings were evacuated from Broome to Beagle Bay. She recalled ‘old Paddy Roe’ teaching the children Law and Culture in the 1970s.

10. ‘Mary’, a Djugan, Yawuru and Jabirr Jabirr woman, had been active in undertaking oral history work to ensure the maintenance and protection of the women’s cultural heritage.

11. Petersen, Maryanne, Executive Officer of the Broome Chamber of Commerce, had been involved in the hospitality industry for 20 years.

12. Pigram, Alan, a member of the Pigram Brothers — the local musical icon in Broome was a founding member of the ‘Families of Broome’ who with Dr Anne Poelina and Mitch Torres presented an anti-gas petition with thousands of signatures to Parliament in Canberra.

13. Roe, Joseph (deceased), Goolarabooloo custodian and traditional owner, represented the Goolarabooloo native title claimants.

14. Roe, Theresa, the daughter of the founder of Goolarabooloo, Paddy Roe was the mother of Joseph Roe.

15. ‘Sarah’, former Councillor with the Shire of Broome Council actively opposed the gas project.

16. ‘Sebastian’, a non-Indigenous proprietor of a real estate agency in Broome, said that he was not happy with the LNG project proposal. He plays football with an Aboriginal team.

17. ‘Sergio’ operates a photography business in Broome and is an active member of ‘Environs Kimberley’. For many years, he fished and camped at the Walmadany-James Price Point area.

18. ‘Shirlita’ – She was born in Derby and grew up in Beagle Bay, which is Nyul Nyul Country. She promotes the notion of Aboriginal ‘sovereignty’ during her concert tours.

19. ‘Tony’ (deceased), a Jabirr Jabirr and Bardi man was against the gas project. His early schooling was with the St John of God nuns in Broome. He said he saw the damage created by iron ore mining at Mount Newman where he previously worked completing the railway line before mining started.

20. Tucker, Peter, a non-Indigenous man served as co-chair with Jabirr Jabirr man, Neil McKenzie in the ‘Save the Kimberley’ organization. He is a Kimberley tour operator.
Appendix B: Joint Commonwealth and WA State media release (2008)

JOINT MEDIA RELEASE

Australian Government Minister for
the Environment, Heritage and the
Arts
Peter Garrett
Acting Minister for State Development
John Kobelke
BIG PICTURE STUDY OF AUSTRALIA’S KIMBERLEY

The Australian and Western Australian Governments will embark on a ‘big picture’ strategic assessment of the Kimberley to ensure that future development does not spoil the area’s rich natural and cultural heritage.

The Australian Minister for the Environment, Heritage and the Arts, Peter Garrett and WA’s Acting Minister for State Development John Kobelke said the joint strategic assessment was a major leap forward in resolving the tension between development and conservation.

“For the first time, a federal and state government have agreed to undertake a strategic assessment under the Environment Protection and Biodiversity Conservation Act,” Mr Garrett said. “We are making sure we understand in advance the region we wish to protect, before choosing a site for future industrial development.

“The Kimberley has outstanding landscapes and wildlife, glorious coastal stretches, and invaluable Indigenous and historic heritage.

“It also contains massive reserves of oil and liquefied natural gas, of huge economic value to the nation and offering financial benefits to local Indigenous communities. “Neither government wants piecemeal project development, with multiple ports and processing plants along the Kimberley coast.

“So rather than dealing with a growing number of development proposals in an ad hoc way and risking the slow destruction of our environment and heritage, we will proactively use federal environment law to ensure that any future development has a minimal impact on the things we love and value.”

WA’s Acting Minister for State Development John Kobelke said the first part of the assessment would identify a site for a single common-user LNG hub for the Browse Basin. The area to be studied stretches from south of Broome to Cape Londonderry on the Timor Sea.

“We are trying to minimise the impact of development on the natural and cultural environment by finding the most appropriate location for a common-user processing hub. We will also consider locations outside the West Kimberley region,” Mr Kobelke said.

“The identification of a hub will be followed by a wider strategic assessment of the Kimberley, in consultation with conservation groups, industry and Indigenous landholders. This will give us a detailed picture of all the region’s environmental assets including national and international heritage values.

“It will be the most comprehensive study of the region’s values ever undertaken. We will know what we need to protect, which will in turn provide greater certainty to industry, governments and the community.”

Mr Garrett said the historic agreement between the two governments marked a new
phase in Federal/State cooperation.

“This is truly a milestone for development planning in Western Australia and Australia generally,” Mr Garrett said.

**Media Contacts:**
(Minister Garrett) Margot Marshall: 02 6277 7640 or 0418 624 847
(Minister Kobelke) Trevor Robb: 08 9222 8788 or 0438 952 475
Appendix C: Joseph Roe’s letter to Department of Indigenous Affairs in relation to cultural heritage sites

Joseph Roe
Goolarabooloo
Senior Law Man
For the Northern and Southern Law
Goolarabooloo Millibinyarri Community
Coconut Wells
PO Box 1369
Broome
9th June 2011

Jo Fran
Heritage
Department of Indigenous Affairs
Perth
WA
CC: Jenny Macklin
CEO
Department of Indigenous Affairs

Dear Madam,

Re: Urgent request for investigation into serious and ongoing destruction of Registered and Unregistered Cultural Heritage Sites on Goolarabooloo Country.

Since the first week of May 2011, Goolarabooloo has witnessed and recorded Woodside and their contractors consistently engage in reckless and often targeted destruction of more than 8 registered heritage sites, including at least three sites that are registered as “closed sites”. These Sites are so sacred that their exact GPS position remains “Not available for closed Sites.”

The sites that have been impacted include;

- Inballal Karnbor Status RR
- Kulmukarakun Juno 2 Status RR
- Ngarrimarran Juno Quarry Status RR
- Murrdudun Status RR
- Kundandu Status R
- Murrajal Status R
- Kulmukarakun Juno 1 Status R
- Walmadan (James Price Point) Status R

A preliminary site inspection of three of the sites has been conducted by Barry Louvele and Fiona of DIA, Broome on the afternoon of Thursday 9th July, 2011; accompanied by Senior Law Man; Philip Roe.

The type of damage inflicted includes;
Driving over sacred ground, including burial sites and middens
- Removing artefacts and other objects
- Digging up and carelessly scattering artefacts and other objects
- Removal of vehicle barriers and “No Vehicles Past this Point” signs erected
Goolarabooloo in partnership with the Shire, Coastwest and Coastcare to protect
heritage and environmentally significant sites.

Previous advice received:

Advice was received by Goolarabooloo from the Kimberley Land Council on the
18th April 2011 and included “The work program clearance notice under the Heritage
Protection Agreement for the Browse LNG Precinct” prepared by Woodside.
A Section 16 permit referred to as being attached to the advice received from KLC
on 18th April has yet to be received or sighted by Goolarabooloo. This is a disturbing
omission of communication and consultation.

Woodside Methodologies and Activities not consistent with the original proposal
and advice:
May 2011 Activity Update
The May 2011 Activity Update provided to the public by Woodside about the
Onshore Geophysical surveys works now appears to either deceptive or highly
inaccurate. Works, vehicle activity and reckless damage have and are continuing to
occur in areas outside of the mapped areas. This includes Kundandu, which is
located north and outside of the intended activity area.
In conflict with the actual work practices being employed by the Onshore
Geophysical surveys and Archaeological surveys;

Woodside’s Activity Update specifically describes the following methodologies and
activities:

<table>
<thead>
<tr>
<th>Activity Update</th>
<th>Actual practices observed and evidenced</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The survey will occur along the Manari Road, the beach area between James Price Point and Quandong Point”</td>
<td>Works, vehicle activity and reckless damage have and are continuing to occur outside of the mapped areas.</td>
</tr>
<tr>
<td>“……existing access tracks by foot in the coastal area”</td>
<td>Vehicles including dune buggies continue to operate across burial sites, middens and intact dune systems. Vehicles have made lasting and destructive roadways through tracks that have only ever previously been walked. Worn vehicle tracks now remain as an open and obvious encouragement for tourist traffic.</td>
</tr>
<tr>
<td>“the project will run until late May 2011”</td>
<td>The project is continuing through June 2011</td>
</tr>
</tbody>
</table>
The Works Program Clearance Notice received as an attachment to the Kimberley Land Council April 2011 advice includes the following critical statement “Woodside intends to seek Programme of Works advice from DIA in relation to the proposed surveys to assist in determining whether the works may have any impact on the registered Aboriginal site” (Pg 30). This is specifically in relation to sites 13076 Walmadan and 12902 Kundandu. We have serious questions about whether Woodside has sought advice from Department of Indigenous Affairs (DIA) about the programme of works and what restrictions have been placed upon the implementation of these works. We ask DIA to update us regarding this matter. We accompany this letter with digital evidence including; photographs, videos and maps of the damaging activity before, during and after the damaging activities have been undertaken.

We need an urgent, cooperative and thorough investigation into the extent of the damage that has occurred. We seek to have those responsible penalised and restricted in any further activities to be conducted on Goolarabooloo country. Most urgently, we request that DIA step in and impose an order for the parties responsible for the damage to immediately cease all works in the area while the investigation is being conducted.

It is imperative that we receive advice from the DIA as to what avenues we have under the Act to protect registered and unregistered heritage sites. We need to know which persons are going to be responsible for ensuring that heritage sites do not continue to be destroyed. We request direct involvement in this process. We have grave concerns that the ongoing geotechnical and archaeological surveys will continue to cause irrevocable damage to the registered and unregistered sacred Sites. Additionally, works that are currently subject to DEC permit no: CPS 3771/1 are known to incorporate at least one registered site and a number of unregistered sites. It is critical that the DIA work with us to cease all works by Woodside and their contractors to prevent further reckless, yet avoidable damage and desecration to these sacred Sites.

Can you please contact me as soon as possible regarding this matter.

Yours sincerely,
Joseph Roe
Appendix D: Browse LNG Precint Agreements

There are three agreements, a **Native Title Agreement** (with the Goolarabooloo Jabirr Jabirr Native Title group), a **Regional Benefits Agreement** (potentially with the Kimberley Land Council) and a **State Agreement** (with the Goolarabooloo Jabirr Jabirr Native Title group).

**Background**

**Native Title in the Agreement Area**

The Goolarabooloo Jabirr Jabirr People have registered an application for a determination of native title with respect to land and waters in Western Australia. Their application, which is titled Goolarabooloo - Jabirr Jabirr Peoples, was filed with the Federal Court of Australia on 8 October 1999 as proceeding WAD 6002 of 1998. It covers approximately 2322.38 square kilometres of land in north-west Western Australia. The Browse LNG Precinct covers 1.5 percent of the Goolarabooloo Jabirr Jabirr People’s native title claim area.

**History of the Agreement**

This is one of three agreements entered into by the State of Western Australia, the Goolarabooloo Jabirr Jabirr People and Woodside Energy Ltd. All of these agreements are in connection with the Browse LNG Precint. The Precint is ‘intended to commercialise gas and condensate fields in the Browse Basin. The Precint will include offshore extraction and production facilities, pipelines to shore, onshore LNG and condensate production facilities, and associated export infrastructure’ (Sydney Morning Herald, 2011). Before the project can commence, Woodside Energy Ltd must obtain environmental approvals from the State of Western Australia and the Commonwealth. A final investment decision from Woodside Energy Ltd is expected in 2012 and it is anticipated that LNG processing may commence at the site in 2016-17. In total, the agreements will provide a $1.5 billion compensation package, which is to be delivered over 30 years to the Goolarabooloo Jabirr Jabirr People. Commitments have also been made to secure 300 jobs for Aboriginal people during construction of the project.

The parties commenced negotiating the agreement in 2008. In April 2009, they reached an in-principle agreement on the framework for negotiations, as well as key principles for the final agreement. A Heritage Protection Agreement was also signed in November 2009. This agreement provided guidance on the conduct of heritage surveys and the minimisation of impacts on sites of cultural importance.

Many controversies have arisen throughout the negotiation process for this agreement. The original deadline for completion of negotiations was September 2009. However, after the grant of two extensions, a final deadline of 20 June 2010 was set. In June 2010, the State of Western Australia and Woodside Energy Ltd were advised that divisions within the Goolarabooloo Jabirr Jabirr claimant group meant that the group would be unable to authorise an Indigenous Land
Use Agreement providing consent to the establishment and operation of the Precinct. As a consequence, the State sought to compulsorily acquire the land that is the subject of this agreement. It is in this context that the State reached the present agreement with the native title parties.


Details from the KLC
Viewed 2 May 2012

$20 million towards a regional economic development fund; $30 million towards a regional Indigenous housing fund; $20 million towards a regional education fund; $8 million towards a regional cultural preservation fund.
At least $108 million towards the Kimberley Enhancement Scheme to supplement existing social programs and enhance Indigenous service delivery in the Kimberley; annual payments by Woodside of $4 million to the Kimberley Enhancement Scheme to supplement existing social programs and enhance Indigenous service delivery in the Kimberley.

$30 million towards an economic development fund and an Indigenous housing fund;

- $28 million in milestone payments with an additional $5 million for any LNG trains in excess of the notional three-train development (ie 11.1Mtpa);
- annual payments of $4 million with an additional annual payment of $2 million for any LNG trains in excess of the notional three-train development (ie 11.1 Mtpa);
- annual payments of approximately $3 million for business development and employment and training;
- commitments of $5 million a year, in contracts and job preference to meet Indigenous employment targets;
- $8 million for the rollout of the Reading Recovery Program throughout the Kimberley;
- $10 million for the Goolarabooloo Jabirr Jabirr Rangers;
- 2900 hectares of freehold land on country, with land taken for the LNG precinct to be handed back as freehold land at end of the life of the precinct. This includes options on facilities including the port;
- housing and residential land in Broome as allocated by Landcorp. This includes one block for an office, six house and land packages, 25 developed blocks and 15 hectares of undeveloped land.

In addition to the Goolarabooloo Jabirr Jabirr benefits package, there are significant benefits to Indigenous people of the wider Kimberley region including:

- $20 million towards a regional economic development fund;
• $30 million towards a regional Indigenous housing fund;
• $20 million towards a regional education fund;
• $8 million towards a regional cultural preservation fund;
• at least $108 million towards the Kimberley Enhancement Scheme to supplement existing social programs and enhance Indigenous service delivery in the Kimberley;
• annual payments by Woodside of $4 million to the Kimberley Enhancement Scheme to supplement existing social programs and enhance Indigenous service delivery in the Kimberley;
• 300 Indigenous jobs in the construction phase and at least 15 per cent of the workforce to be Indigenous, when the project is in operation;
• at least 600 hectares of freehold land to Dampier Peninsula Traditional Owners and a commitment to reform land.

Details from Woodside


Viewed 2 May 2012

Woodside is the major equity holder and operator of the proposed Browse LNG Development, which is an important part of Woodside’s LNG production growth plans. Browse also represents substantial opportunities for economic and social development in the Kimberley region of Western Australia.

The Browse LNG Development concept is to commercialise the Browse Joint Venture’s three gas and condensate fields, Brecknock, Calliance and Torosa, 425 km north of Broome off the Kimberley coast. Gas and liquids from these fields will be brought to an onshore LNG plant at the Western Australian Government’s Browse LNG Precinct, near James Price Point, 60 km north of Broome.

In February 2010, the Joint Venture participants unanimously selected the development concept for Browse, which included the Western Australian Government’s Browse LNG Precinct as the preferred location of the onshore processing facilities, complying with the retention lease conditions accepted in December 2009.

In April 2012, the Commonwealth Minister for Resources and Energy and the WA Minister for Mines and Petroleum approved amendments to the Browse Basin retention leases. The amendments include extending the condition relating to readiness for a final investment decision on the proposed Browse LNG Development from mid-2012 to the first half of 2013.

On 30 June 2011, a Native Title Agreement was executed to enable the establishment of the Browse LNG Precinct near James Price Point, 60 km north of Broome in Western Australia.

The Agreement, between Woodside, the State of Western Australia and the Goolarabooloo Jabirr Jabirr native title claim group, secures the land required for the State Government’s LNG Precinct and provides a significant package of benefits and initiatives for Indigenous people in the Kimberley.
The initiatives in the Agreement are worth an estimated A$1 billion over the life of the precinct and have the potential to enact meaningful and positive change to the economic and social circumstances of Indigenous people in the Kimberley.

Woodside’s commitments include the implementation of ongoing education, training and employment initiatives, Indigenous job targets, support for Indigenous businesses, cultural initiatives and payments upon project milestones being met.

The completion of front end engineering and design studies during early 2012 means Browse is now in the assurance and commercial evaluation phase.

Further information from the WA Department of State Development
Project Agreement
Regional Benefits Agreement
Native Title Agreements
Viewed 22 November 2014
Appendix E: Paddy Roe began Lurujarri Heritage Trail

Lurujarri:
Is an area of land, which runs from MINJER (Charters Towers Point), to MINARING, being an essential part of an overall cycle. This cycle extends from ONE ARM POINT to SOUTH OF LA GRANGE, to KING SONDE, returning to ONE ARM POINT.
LURUJARRI is also part of the overall LAW and SONG CYCLE. This Law belongs to BULULU, MARJUK, GUARDIAN/KEEPER, KIMARU, MUNJULU, DUDUN, YAMUR, GUARDIAN, PADDY ROE, and MINJER people.
Each area has its own GUARDIAN and LAW KEPPERS. The GUARDIAN and LAW KEEPER of LURUJARRI is PADDY ROE. Paddy’s function as Guardian and Law Keeper is to maintain and keep the LAW and SONG CYCLE in motion and ensure that the learning is passed on.

Today, the Law continues, and the land is sung. Each song represents a part of LURUJARRI.

"To keep the Law and Song Cycle in motion", means that in no way can there by any interference to SONG CYCLE AND DREAMTIME SITES, nor with TRADITIONAL CAMPING GROUNDS.

Within the LURUJARRI area there is a stretch of land from DJIBULUNGU to MINARING, which is of vital importance to Aboriginal People to keep in motion their LAW AND SONG CYCLE; (see map).

We therefore feel this area would be protected to ensure the continued survival of Aboriginal Law and Song Cycle. We do not say that tourism should be totally restricted from this area, only that the tourist should respect the Aboriginal law of that area, and the existing State laws.

We have come to the conclusion that by keeping this land in its NATURAL state, will enhance the lives and culture of the Aboriginal People and ensure their survival, and also become an example and a bridge to European culture, and 40,000 years of Aboriginal learning.

AREA AND SITE NAMES MENTIONED ON MAP

A - LURUJARRI

1. DJIBULUNGU - Camping Ground
2. MINJER - Law Ground - Coconut Wells
3. MINJER - Camping Ground - Wallum yours
4. DJIBULUNGU - Camping Ground - Burial Site
5. IVHIMALUNA - Song Cycle Site
6. GADALAGAN - Song Cycle Site
7. WAYRINDU - Long Camp Ground
8. MUNJULU - Large Camp Ground
9. MINJER - Large Camp Ground
10. KIMARU - Large Camp Ground

These are the main camping grounds open for everyone.
Two of many Song Cycle sites are shown. The men’s and women’s places are not shown nor are the Dreamtime Sites - which are all Law Grounds and sacred sites. All these Places are concentrated in this area.

We see the protection of this area as follows:

- NON DEVELOPMENT ZONE - see then high watermark intend - see map.

This area to be used as an example for learning, research, and recreation, so all can experience the Aboriginal lifestyle.

We are aware that future development is inevitable and see no objections to any development taking place outside the Zone, as long as it is complimentary to the existing environment and blends European and Aboriginal Culture.

For further information contact Paddy Roe.
Appendix F: Notices of Intention to Take (compulsory acquisition)

Notices of Intention to Take (NOITTs)

The Western Australian Government has issued Notices of Intention To Take (NOITTs) for an area totalling 3414.01ha on the Dampier Peninsula approximately 60 kilometres north of Broome.

This includes land for an LNG processing area, a port, and related workforce accommodation and light industrial areas (2489.51ha), along with reservations for pipelines and roads (see map).

**Q: What does the land mean?**

**A:** This refers to a legal process that enables the Government to acquire land for the benefit of the public – for example as roads, parks, industrial and residential estates and projects and community facilities.

The land required for the Browse LNG Precinct is currently unallocated Crown land, which is subject to the Goolarabooloo Jabirr Jabirr native title claim.

For land on which there is a native title claim, acquisition occurs under the Western Australian Land Administration Act 1997 and the Commonwealth Native Title Act 1993.

**Q: How will this process assist in the creation of the Browse LNG Precinct?**

**A:** Certain on access to, and use of the land, required for the Browse LNG Precinct, is necessary for the State Government and the proponents to complete studies and decision-making on the Precinct.

Under the Browse LNG Precinct Project Agreement signed with the Goolarabooloo Jabirr Jabirr native title claimants in June 2011 the claimants consented to the precinct being established.

**Q: Haven't Notices of Intention To Take already been issued?**

**A:** In September 2010 the Government issued NOITTs covering a much larger area, to allow for flexibility in accommodating Aboriginal heritage requirements, but the WA Supreme Court ruled that these were invalid as they did not adequately describe the area of land required.

A potential requirement to reissue the NOITTs was contemplated and provided for in the Browse LNG Precinct Project Agreement signed with the Goolarabooloo Jabirr Jabirr Native Title claimants in June 2011.

**Q: What happens next?**

**A:** There is a three month notification to make sure all interested parties are aware that the new notices have been issued.

Currently the Goolarabooloo Jabirr Jabirr Native Title Group is the only registered native title claim over the area of the new NOITTs.

Under the Browse LNG Precinct Project Agreement signed with the Goolarabooloo Jabirr Jabirr native title claimants in June 2011 the claimants consented to the precinct being established.

If no new claims are registered by the National Native Title Tribunal (NNIT) in this time, the precinct development will proceed, consistent with this agreement.

If new claims are registered by the tribunal there will be a minimum six-month period for the State Government to negotiate in good faith with the claimants to seek approval for State Government to acquire the land.

If an agreement cannot be reached within the six-month period, the State will refer the matter to the NNIT for arbitration which can take up to another six months.

**Q: Can the LNG Precinct be set up without the agreement of the native title claimants?**

**A:** An agreement is in place with the registered native title claimants for the area of the Precinct.

However, if a new claimant is registered and an agreement cannot be negotiated, the NNIT could determine, that for the purposes of the Native Title Act 1993, the Precinct may be established. The State will then be able to validly create the appropriate land titles for this purpose.

The establishment of the Precinct is subject to Federal and State environmental and heritage approvals.

For further information please visit: [www.dsd.wa.gov.au/BrowseLNG](http://www.dsd.wa.gov.au/BrowseLNG)
Browse LNG Precinct
Land to be acquired
(indicative map only)

Browse LNG Precinct – land areas to be acquired
- LNG processing area (1960ha) and port land (109.7ha)
- Workers accommodation (199.88ha)
- Light Industrial area for 3rd party contractors (199.87ha)

Total Precinct Area = 2469.51ha

Ancillary areas (unfenced)
- Buried pipelines
- Roads and services
- Buffer zones

Total Ancillary Areas (unfenced) = 924.5ha
Appendix G: Joint Position Statement on Kimberley Liquefied Natural Gas Development

Joint Position Statement on Kimberley Liquefied Natural Gas Development

The Kimberley Land Council, Business Kimberley, the Australian Conservation Foundation, WWF-Australia, the Conservation Council of WA, and The Wilderness Society (Australia) jointly make the following resolution:

The Signatories acknowledge the outstanding, globally significant, and largely unexploited natural and cultural values of the Kimberley marine and coastal environment.

The Signatories consider that the project (Kimberley LNG) will add significant and irreversible damage to the Kimberley’s marine and coastal environment.

The Signatories acknowledge the significant potential for beneficial outcomes for Kimberley’s Indigenous owners from LNG-associated development, subject to the principles espoused in this resolution.

Ends of theSignatories believe that a compensation, accommodating and environmentally sustainable approach to the Kimberley marine and coastal environment must be negotiated and agreed before the project proceeds.

In light of these principles, the Signatories hereby jointly recommend the following:

1. Advancing the development of a range of standards to be applied to responsible resource development in the Kimberley, which will look to ensure that both economic and environmental objectives are achieved.
2. Working with Government and commercial proponents to properly and effectively develop and implement a comprehensive impact assessment of the project in the Kimberley, which includes an independent assessment of the project’s environmental and social impact, and to ensure that the assessment adequately and transparently communicates the project’s environmental and social impact.
3. Advancing the development of effective environmental and social management plans, which in take practical actions and will be based on good practice for the Kimberley’s environmental and cultural values, and working to ensure that all development in the Kimberley is consistent with these plans.
4. Advising to avoid, mitigate, and limit the detrimental impacts of any LNG-related development in the Kimberley on its environmental, social and cultural values, including No Go areas, and other important areas, and the impacts of development on fish and other marine, marine and coastal habitats, and plant and animal species.
5. Ensuring that Kimberley’s Indigenous Owners are the original owners of the land and sea, and that they are involved in all land management processes in the Kimberley in order to achieve an indigenous and cultural management balance.
6. Resolving any environmental agreements to call for a single plan, while ensuring that Government and commercial proponents provide Kimberley’s Indigenous Owners through the MacArthur Environmental Agreement, regarding any proposed LNG-related development, including a single pipeline, for inclusion in their environmental assessment and will continue to negotiate, in good faith, any development impacts and offsets.
7. Ensuring that all LNG-related development is managed in a way that minimizes the sharing of infrastructure and minimizes the environmental impact of development.
8. Avoiding, mitigating, and limiting the detrimental impact of LNG-related development in the Kimberley on Indigenous Owners.
9. Ensuring that the environmental impacts of LNG-related development in the Kimberley are monitored, that Kimberley’s Indigenous Owners have a significant positive impact on Aboriginal peoples’ lives, including with respect to the allocation of local benefits, such as employment, education and training, health, and housing, and that the project is delivered in a manner that is consistent with these goals, and provides Kimberley-wide benefits.

Yvonne Margarson
Kimberley Land Council

Graham H用户名
Business Kimberley

Australian Conservation Foundation

Paul Galbraith

Len Riddell
The Wilderness Society

Christina Coffee

6 December 2017
## Appendix H: Application of Native title Act 1993 to the Browse LNG Precinct project

### References to Native Title Act (NTA) 1993


### Application of NTA to James Price Point case study

<table>
<thead>
<tr>
<th>Description</th>
<th>Details</th>
</tr>
</thead>
</table>
| 1) Right to Negotiate | NTA 24AA (5) Right to negotiate

(5) In the case of certain acts covered by section 24IC (permissible lease etc. renewals) or section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a "right to negotiate").

Right to Negotiate

The ‘right to negotiate’ [NTA 24AA (5)] in terms of the future act — the anticipated establishment of the Browse LNG Precinct — is a procedural right. The Traditional Owners Negotiating Committee (TONC) was established as the negotiating party to represent the native title claim group, Goolarabooloo and Jabirr Jabirr.

On 19-20 February 2009, 26 members representing ten family groups were selected as members of TONC [NTA 24AA (5)].

<table>
<thead>
<tr>
<th>2) Indigenous Land Use Agreement in relation to a future act</th>
<th>Indigenous Land Use Agreement in relation to a future act</th>
</tr>
</thead>
</table>
| NTA 24AA (3) - | Upon completion of the ILUA [NTA 1993 s.24AA (3)], the KLC on behalf of the NTCG signed 3 separate agreements on 30 June 2011 — the Browse LNG PNG Precinct Project Agreement (PPA), the Browse LNG Precinct Regional Benefits Agreement, and the Browse (Land Agreement with the State government.

<table>
<thead>
<tr>
<th>Negotiation in good faith</th>
<th>Negotiation in good faith</th>
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</thead>
<tbody>
<tr>
<td>NTA – S. 31</td>
<td>Whether two of the parties involved</td>
</tr>
</tbody>
</table>
Normal negotiation procedure

(1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
   
   (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
   
   (b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
      
      (i) the doing of the act; or
      
      (ii) the doing of the act subject to conditions to be complied with by any of the parties.

Note:
The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned: see subsection 41(2).

Negotiation in good faith

(2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.

Arbitral body to assist in negotiations

(3) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement.

Information obtained in providing assistance not to be used or disclosed in other contexts

(4) If the NNTT is the arbitral body in negotiations were engaged in 'Negotiation in good faith' [NTA s.31 (2)] could be called into question.

One: Goolarabooloo based on the comment of Justice Gilmour in the Rita Augustine v State of Western Australia [2013] FCA 338) that Goolarabooloo’s motivation in becoming a registered native title claimant was to ‘oppose that future act being done’ (i.e. the establishment of the LNG Precinct)...

Two: the WA government

The KLC’s representation was consistently constrained by the WA Premier’s threat of compulsory acquisition.

The WA government had two processes running concurrently: 1) one was a negotiation by agreement with traditional landowners; and 2) compulsory acquisition through the National Native Title Tribunal.
**body**, it must not use or disclose information to which it has had access only because it provided assistance under subsection (3) for any purpose other than:

(a) providing that assistance; or

(b) establishing whether a **negotiation party** has negotiated in good faith as mentioned in paragraph (1)(b); without the prior consent of the person who provided the NNTT with the information.

Comment from the National Native Title Tribunal (NNTT): The right to negotiate [(NTA 24AA (5)] requires that parties must negotiate with an open mind and a genuine desire to reach agreement.

<table>
<thead>
<tr>
<th>3) Representation of a registered native title claimant</th>
<th>Representation of a registered native title claimant</th>
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</table>
| Sec 84D (4) (b) of NTA 1993  
(b) a person who has dealt with a matter, or is dealing with a matter, arising in relation to such an application, to produce evidence to the court that he or she is **authorised** to do so.  
"authorise":  
(a) in relation to the making of indigenous land area agreements---has the meaning given by [section 251A](#); and  
(b) in relation to the making of native title determination applications or compensation applications, and dealing with matters arising in relation to such applications---has the meaning given by [section 251B](#). | In Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809, Goolarabooloo claimed that the Kimberley Land Council misrepresented their intention (see Chapter 6, legal case 1  
Mr Roe and Mr Shaw were the joint native title claimants representing Goolarabooloo and Jabirr Jabirr people. They were also the joint 'applicant' in this proceeding. When Mr Shaw withdrew from the proceeding, Mr Roe applied for leave to file an amended application in which he would be the sole applicant and Mr Shaw would cease to be a party to the proceeding.  
Mr Shaw opposed the bringing of this proceeding and did not support the proposed amendments.  
Mr Roe suggested that s 84D of the Native Title Act 1993 (Cth) could be applied in this instance; allowing the |
Court to use its discretion to make such orders as it considered appropriate (s 84D(4)(b)).

Justice Gilmour was not persuaded that s 84D could be used in these circumstances - he suggested that the provision is used to hear and determine native title applications notwithstanding a defect in the applicant's authorisation.

He found that the present application was not such an application and that therefore, Mr Roe had no standing in the proceeding. The Court ordered that both Mr Roe’s motions be dismissed and that the application be dismissed. Mr Roe was ordered to pay the costs of the respondents and the other applicant.

<table>
<thead>
<tr>
<th>4) Filing determination applications</th>
<th>Filing determination applications</th>
</tr>
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<tbody>
<tr>
<td>NTA s. 29</td>
<td>All attempts of the KLC to register a new NT CG were in vain. The two claim groups filed separate determination applications but neither party could satisfy registration requirements (NTA s. 29) because of duplication of membership of claim groups.</td>
</tr>
</tbody>
</table>

**Notification of parties affected**
Notice in accordance with section
(1) Before the act is done, the Government party must give notice of the act in accordance with this section. Persons to be given notice
(2) The Government party must give notice to:
   (a) any registered native title body corporate (a native title party) in relation to any of the land or waters that will be affected by the act; and
   (b) unless there are one or more registered native title bodies corporate in relation to all of the land or waters that will be affected by the act:
      (i) any registered native title claimant (also a native title party);
   Note: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the
definition of **registered native title claimant** in **section 253.**

(ii) any representative Aboriginal/Torres Strait Islander body; in relation to any land or waters that will be affected by the act; and

(c) if the doing of the act has been requested or applied for by a person (for example, where it is the issue of a licence or the grant of a lease for which the person has applied)--that person (a **grantee party**); and

(d) the registrar or other proper officer of the arbitral body in relation to the act

5) Failure to notify party of interest

NTA. s. 203B

Functions of representative bodies General

(1) A **representative body** has the following **functions:**

(a) the **facilitation and assistance functions** referred to in **section 203BB**;

(b) the **certification functions** referred to in **section 203BE**;

(c) the **dispute resolution functions** referred to in **section 203BF**;

(d) the **notification functions** referred to in **section 203BG**;

(e) the **agreement making function** referred to in **section 203BH**;

(f) the **internal review functions** referred to in **section 203BJ**;

(g) the **functions** referred to in **section 203B**; and such other **functions** as are conferred on representative bodies by this Act. Other laws may confer **functions**

(2) The **functions** conferred on a **representative body** by this Act are in addition to, and not instead of, any **functions** conferred on the **representative body** (whether in its capacity as a **representative body** or

<table>
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<tr>
<th>Failure to notify party of interest</th>
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<tr>
<td>Roe v Director General, Department of Environment and Conservation (WA) [2011] WASCA 57</td>
</tr>
</tbody>
</table>

Joseph Roe challenged the clearing permit granted to the WA Department of Main Roads. He claimed that as Law Boss for the Northern Tradition, the CEO of the Main Roads Department was obliged to invite him to comment on Woodside's application for a clearing permit within the period of the notification.

The Minister argued that Mr Roe was in fact notified through the representation of his land council (NTA. s. 203B).

The court found that the CEO had invited Mr Roe's duly appointed agent, the KLC as one with a direct interest in the subject matter [see Environmental Protection (EP) Act 1986 WA EP 51E (4) (B)]

otherwise) by or under:
    (a) any other law of the Commonwealth; or
    (b) a law of a State or Territory.

Representative bodies to perform functions

(3) Except as mentioned in section 203BB, 203BD or 203BK, a representative body must not enter into an arrangement with another person under which the person is to perform the functions of the representative body.

Priorities of representative bodies

(4) A representative body:
    (a) must from time to time determine the priorities it will give to performing its functions under this Part; and
    (b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently; but must give priority to the protection of the interests of native title holders.
Appendix I: Application of EP 1986 (WA) to the Browse LNG Precinct project - References to WA Environmental Protection (EP) Act 1986


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<thead>
<tr>
<th>Failure to notify party of interest</th>
<th>Failure to notify party of interest</th>
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<tr>
<td>51B. Environmentally sensitive areas, declaration of</td>
<td></td>
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<tr>
<td>(1) The Minister may, by notice, declare —</td>
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<tr>
<td>(a) an area of the State specified in the notice; or</td>
<td></td>
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<tr>
<td>(b) an area of the State of a class specified in the notice, to be an environmentally sensitive area for the purposes of this Division.</td>
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<tr>
<td>(2) A notice under this section is subsidiary legislation for the purposes of the Interpretation Act 1984.</td>
<td></td>
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<tr>
<td>(3) Subsections (1), (2), (3), (5), (6) and (8)(a) of section 42 of the Interpretation Act 1984 apply to a notice under this section as if it were regulations within the meaning of that section.</td>
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<tr>
<td>(4) Before a notice is published under this section the Minister shall —</td>
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<tr>
<td>(a) seek comments on it from the Authority and from any public authority or person which or who has, in the opinion of the Minister, an interest in its subject matter; and</td>
<td></td>
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<tr>
<td>(b) take into account any comments received from the Authority or such a public authority or person.</td>
<td></td>
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<tr>
<td>[Section 51B inserted by No. 54 of 2003 s. 110(1).]</td>
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</tbody>
</table>

1) That the Environmental Protection Authority’s Assessment of the Browse LNG Precinct proposal was not valid (S.11-12 of the EP Act)

LITIGATION

The Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307)
S. 11. Meetings of Authority

(1) The Authority shall hold meetings at such times and places as it determines, but —
   (a) the Chairman may at any time; or
   (b) the Minister may when he wishes the Authority to discuss a matter on which he has requested its advice, convene a meeting of the Authority.

(2) At a meeting of the Authority —
   (a) the Chairman or, in his absence, the Deputy Chairman shall preside, but, if both the Chairman and the Deputy Chairman are absent from such a meeting, the Authority members present shall elect one of their number to preside at that meeting; and
   (b) 3 Authority members constitute a quorum; and
   (c) subject to section 12(2) each Authority member present shall cast a deliberative vote on any question that is to be decided; and
   (d) any question shall be decided by a majority of the votes cast by the Authority members present, but if the voting on a question is equally divided, the person presiding at that meeting has a casting vote in addition to a deliberative vote; and
   (e) a question shall not be decided unless at least 3 Authority members vote thereon.

(3) Notice of meetings of the Authority shall be given to the Department, and the CEO, or a representative of the CEO, is entitled to attend any meeting and to take part in the consideration and discussion of any matter before a meeting, but shall not vote on any matter.

[Section 11 amended by No. 34 of 1993 s. 8; No. 54 of 2003 s. 140(2).]

S. 12. Disclosure of interests by Authority members

(1) An Authority member who has a
direct or indirect pecuniary interest in a matter that is before a meeting of the Authority shall, as soon as possible after the relevant facts have come to his knowledge, disclose the nature of his interest to Authority members who are at that meeting, and that disclosure shall be recorded in the minutes of the proceedings of that meeting.

[(2) deleted]

(3) If an Authority member has, in the opinion of the person presiding at a meeting of the Authority, a direct or indirect pecuniary interest in a matter before that meeting, the person so presiding may call on the Authority member to disclose the nature of that interest and, in default of any such disclosure, may determine that the Authority member has that interest.

(4) A determination under subsection (3) that an Authority member is interested in a matter shall be recorded in the minutes of the proceedings of the meeting concerned.

(5) If an Authority member discloses an interest in a matter under subsection (1) or is determined under subsection (3) to have an interest in a matter, the Authority member shall not —

(a) take part, as an Authority member, in the consideration or discussion of the matter; or

(b) vote on the matter.

[Section 12 amended by No. 54 of 2003 s. 124.]
Appendix J: Application of Planning and Development Act 2005 (WA) to the Browse LNG Precinct project


<table>
<thead>
<tr>
<th>Planning approval</th>
<th>Planning approval</th>
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<tbody>
<tr>
<td>1) s. 102 . Making and purpose of order</td>
<td>LITIGATION</td>
</tr>
<tr>
<td>(1) Pending the consideration by</td>
<td>Hunter v The Minister for Planning</td>
</tr>
<tr>
<td>the Minister of a proposed local</td>
<td>[2012] WASC 247</td>
</tr>
<tr>
<td>planning scheme for a district or part</td>
<td>Goolarabooloo Law Boss Richard</td>
</tr>
<tr>
<td>of a district situated outside the</td>
<td>Hunter brought a civil case in he</td>
</tr>
<tr>
<td>metropolitan region, the Minister may</td>
<td>Supreme Court against the WA</td>
</tr>
<tr>
<td>make such local interim development</td>
<td>government arguing that Woodside</td>
</tr>
<tr>
<td>orders as are necessary and in the</td>
<td>carried out illegal development</td>
</tr>
<tr>
<td>public interest for regulating,</td>
<td>without planning approval for four</td>
</tr>
<tr>
<td>restricting or prohibiting the</td>
<td>weeks between May 21 and June 25</td>
</tr>
<tr>
<td>development of any land within the</td>
<td>2012 and in the previous dry season in</td>
</tr>
<tr>
<td>district or such part of the district.</td>
<td>2011.</td>
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<tr>
<td>(2) If a local planning scheme is</td>
<td>Before the hearing of that challenge,</td>
</tr>
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<td>already in effect in a district or part</td>
<td>the Minister for Planning amended the</td>
</tr>
<tr>
<td>of a district and it is proposed to make</td>
<td>statutory planning framework (s.76</td>
</tr>
<tr>
<td>a further local planning scheme for that</td>
<td>Planning &amp; Development Act). This</td>
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<tr>
<td>district or part of a district, the</td>
<td>amendment meant that planning</td>
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<tr>
<td>Minister is not to make a local interim</td>
<td>approval would not be needed for</td>
</tr>
<tr>
<td>development order that has effect in</td>
<td>Woodside’s development if the Panel’s</td>
</tr>
<tr>
<td>that district or part of a district unless,</td>
<td>decision was invalid.</td>
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<tr>
<td>in the opinion of the Minister, it is in</td>
<td>Mr Hunter then challenged the</td>
</tr>
<tr>
<td>the public interest to do so.</td>
<td>Minister’s amendment because it</td>
</tr>
<tr>
<td>s. 76 . Minister may order local</td>
<td>undermined the utility of his pending</td>
</tr>
<tr>
<td>government to prepare or adopt</td>
<td>litigation to challenge Woodside’s</td>
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<tr>
<td>scheme or amendment</td>
<td>planning approval, He argued that the</td>
</tr>
<tr>
<td>(1) If the Minister is satisfied on</td>
<td>amendment was made for an improper</td>
</tr>
<tr>
<td>any representation that a local</td>
<td>purpose.</td>
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<tr>
<td>government —</td>
<td>The Court dismissed Mr Hunter’s</td>
</tr>
<tr>
<td>(a) has failed to take the</td>
<td>challenge, inferring that a substantial</td>
</tr>
<tr>
<td>requisite steps for having a satisfactory</td>
<td>purpose of the Minister’s intervention</td>
</tr>
<tr>
<td>local planning scheme or an</td>
<td>was the orderly and proper planning of</td>
</tr>
<tr>
<td>amendment to a local planning scheme</td>
<td>the subject site.</td>
</tr>
<tr>
<td>prepared and approved in a case</td>
<td>(p. 182-184 thesis) ve4</td>
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</tbody>
</table>
owners of any land, in a case where a
local planning scheme or an
amendment to a local planning scheme
ought to be adopted; or

(c) has refused to consent to any
modifications or conditions imposed
by the Minister, the Minister may order
the local government, within such time
as is specified in the order, to prepare
and submit for the approval of the
Minister a local planning scheme, or an
amendment to a local planning scheme
or to adopt a local planning scheme, or
an amendment to a local planning
scheme or to consent to the
modifications or conditions imposed.

(2) If the representation under
subsection (1) is that a local
government has failed to adopt a local
planning scheme or an amendment to a
local planning scheme, the Minister, in
lieu of making an order to adopt the
scheme or amendment, may approve of
the proposed scheme or amendment
subject to such modifications and
conditions, if any, as the Minister
thinks fit.

(3) A local planning scheme or an
amendment approved under
subsection (2) has effect as if it had
been adopted by the local government
and approved by the Minister under
this Part.

(4) The Minister must ensure that
written reasons for making an order
under subsection (1) are provided with
the order.

(5) The Minister must, as soon as is
practicable after an order is given to
the local government under
subsection (1), cause to be laid before
each House of Parliament or dealt with
under section 268A —

(a) a copy of the order; and
(b) a copy of the reasons for
making the order.

[Section 76 amended by No. 28 of
2010 s. 56(1)-(3); No. 45 of 2011
s. 141(6).]
Performativity as defined by Barker (2004, p. 142) is “a discursive practice that enacts or produces that which it names through citation and reiteration of the norms or conventions of the “law”. Thus, the discursive production of identities through repetition and recitation of regulated ways of speaking about identity categories.”

Structure is “a term loosely applied to any recurring pattern of social behaviour; or, more specifically to the ordered interrelationships between different elements of a social system or society.”

Ang (1996), viewed 18 September 2015, in

Prelude Floating Liquefied Natural Gas (FLNG) Development, viewed 20 September 2015,

The publication of the report, Breaking New Ground: Mining, Minerals and Sustainable Development (MMSD) in 2002 by the International Institute of Environment and Development, was considered a landmark report that embraced the idea of social licence (Owen & Kemp 2012).

‘What is the Social Licence to Operate (SLO)?’, miningfacts.org, viewed 21 September 2015,

Intersubjectivity refers to a shared perception of reality between or among two or more individuals (see Munroe, P.T., viewed 10 September 2015,

Referring to the representation of research agenda, Smith (1999, p. 116) discusses Indigenous conditions and states in relation to “the recovery of territories, of indigenous rights and histories”, pointing out that “indigenous peoples are not in control and are subject to a continuing set of external conditions.”

The House of Commons Select Committee on Aborigines 1837 recommended that missionaries for Aboriginal people be sent to Australia as protectors for their defence and special codes of law adopted to protect them, 

The Queensland protectionist policy was an attempt to regulate the lives of Queensland Aborigines. An exemption to this policy was incorporated after Federation (1901) in the WA Aborigines Act 1905. Like the Queensland legislation, the conditions of exemption included the requirement of severing family connections and could be revoked at any time (see Wicks 2008).

The ramification of this thinking was that Aboriginal access to state programs would need to be closely monitored and subject to strident regulatory requirements.
Ostrom critiques the belief of contemporary policy analysts in the feasibility of designing optimal rules to govern and manage common-pool resources using ‘top-down direction’. See Elinor Ostrom in <http://www.annualreviews.org/doi/pdf/10.1146/annurev.polisci.2.1.493>
Viewed 26 December 2013

In 1941, 205 bales of wool were sold. Then in 1975, the station shifted operation from sheep to cattle.

Mining interests in Western Australia began when American Metals Climax (Amax Inc), a US based American transnational company sent its executives to Australia in 1963 as part of a world tour in search of new mining projects. AMAX found rich iron ore deposits in the Western Australian Pilbara region of Mt Newman and a joint venture was formed. CSR joined Amax in the Mt Newman project in 1964. BHP became part of the joint venture in 1966. In the late 1970s, Amax was considered a leading strategic innovator in the international resources sector with interests in oil, diamonds, nickel, and copper.

Other names used for this site — daiwul, dayiwul, barramundi gap, barramundi dreaming all refer to the mythic narrative associated with the site which describes the formation of the range and gap by an ancestral barramundi (Dillon 1983: 491).


Premier Colin Barnett’s government introduced the Browse Land Agreement Act 2012 (WA) legislated as a way of sealing the Indigenous Land Use Agreement reached by the native title party with Woodside Energy Ltd.

Sullivan (2006, p. 123) points out that Aboriginal organisations are “intermediate systems acting as a conduit between cultures”. They are not culturally European but they need to retain ambiguity (between European and Aboriginal organisations) that would allow “room for Aboriginal cultural development and modernization” (ibid). Akerman and Stephens’ role that illustrates collaboration between concerned whites and Aboriginal landowners, assists Aboriginal people in “the creation of systems of dual meaning and purpose” (ibid) was a way by which Aboriginal people could be mentored to learn European rules in order to enhance their negotiating prowess and develop stronger agency in their dealings with resource developers and the state.

Commissioner Seaman referred to almost all the Aboriginal submissions that he received suggesting to him that “if there are to be authorities in relation to sites they should be controlled by Aboriginal people…I can say no more than that the people to run organisations created to protect Aboriginal sites ought to be Aborigines” (Seaman 1984, s. 7.21, p. 58).

A recent UN study of transnational ‘governmentality’ and resource extraction involving Indigenous peoples noted trends in the practice of multinational companies such as selectively engaging with consenting, often elite Aboriginal groups, invoking the ‘language of indigenous rights’, buying consent through building infrastructure, awarding contracts, offering scholarships or paying ‘salaries’ (see Sawyer and Gomez 2008: 25).

Amended in 1987, ALRA could be used to exercise veto rights only at the exploration stage whereas prior to 1987, it covered both exploration and mining stage.

States were pressed at the international level to meet international standards
in the governance of Indigenous interests. A key theme in the Declaration was the right of 'self-determination' and the right to freely determine Indigenous people's political status and development priorities through FPIC. The FPIC acronym means: Free - ‘free of coercion, corruption, interference, and external pressure’; Prior - there should be a ‘[m]utually agreed period of time in advance of an activity or process when consent should be sought’; Informed - ‘[t]he type of information that should be provided prior to seeking consent and also as part of the ongoing consent process’; Consent - ‘[c]ustomary decisions made by indigenous peoples and other forest dependent communities reached through their socio-cultural decision-making process’. When the Declaration was first adopted by the General Assembly in 2007, the Australian government, along with USA, Canada and New Zealand, voted against state adoption of the Declaration. Two years later, in 2009, Australia endorsed UNDRIP and thus FPIC. In Australia, FPIC provisions could be overridden by national interest considerations. In endorsing the Declaration, the Australian Government's reputation outside Australia could be enhanced without being put at a disadvantage in any way because its endorsement of the Declaration was not legally binding (Altman (2011). Australia elected in 2009 to endorse UNDRIP, which promotes FPIC. In practice, Australia does not need to commit to FPIC because Australia’s UNDRIP endorsement does not make the signing of the Declaration binding.

23 Commissioner Paul Seaman commented on submissions received from Aboriginal people. He noted that “[s]ome submissions favour the creation of land councils, some favour regional grouping. Some do not favour land councils and one proposes the amalgamation of a number of Aboriginal communities into an Aboriginal local government body...Some submissions wish to afford primacy to traditional interests in the land, others embrace the needs of a wider group of related people and many suggest that land should be held by incorporated community bodies for the benefit of those who live in a particular community.”

24 The Argyle Agreement’s legacy was that it provided traditional owners with a ‘range of social, economic and development opportunities’ on their own terms. See Doohan, K., Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner, Interview, 17 October 2006, <https://www.humanrights.gov.au/publications/native-title-report-2006-chapter-5-argyle-participation-agreement> Viewed 6 August 2014

25 Compulsory acquisition of native title land for private infrastructure was the brainchild of the Howard government (see Botsman 2012 referring to the 1998 Amendments to the NTA). In 1998 the State and Territories gained the right to extinguish or impair native title in their jurisdictions. In particular States gained the right to compulsorily acquire native title land for private infrastructure (NTA 1993 s24AMD(6B). This was an initiative of the Howard government and, as Paul Keating has recently argued, it set back native title rights a decade.


27 This map relates to the period after the Goolarabooloo and Jabirr Jabirr separated their joint native title claim application. This map shows that their application now overlaps. The two claim groups are awaiting native title determination.

28 Environs Kimberley Director, Martin Pritchard claims to have seen a government map that identified Quondong Point as a possible site for industrial development. <http://www.abc.net.au/news/stories/2009/03/31/2530845.htm> Viewed 22 April 2009

29 Indeed, on 10 April 2010, native title claimant, Joseph Roe took legal action against the KLC, alleging that Goolarabooloo Jabirr Jabirr and Djabeera Djabera meetings were held without proper notice and that these meetings were not valid. Federal Judge Justice Gilmour dismissed the case on 2 August 2010. The court’s finding was Joseph Roe as a single person who was part of a joint native title application had no legal standing to commence the application in the Federal Court in his own right. It was Mr Roe’s legal standing and not the meeting processes that were the basis of the court’s findings. <http://uploads.klc.org.au/2012/03/FINAL_2011-Annual_Report_with_financials-lo_res.pdf> Viewed 21 September 2014

30 Phrase borrowed from Herbert Marcuse (1898-1979).


33 Passing on of tradition and custodianship involves being walked through the land, given the names of key features of the land, the significance of the stories of the land, and the encoded songs about keeping the spirit of the land alive ‘through the power of sound’. The ‘Law-keeper’ is able to walk the entire length of the land, and ‘recite the name, song and story of each sacred place’. <http://www.goolarabooloo.org.au/paddys_story.html> Viewed 4/November 2014

34 TONC member, Mary Tarran disputes Goolarabooloo’s claim that there was no one to pass heritage knowledge in the 1930s because the children were taken to the mission. She said that her mother who had only passed away in 1983 possessed heritage knowledge (Personal communication, 15 September 2014).

35 This statement was based on the evidence — [2006] FCA 82 — given by Kimal Barrett, an anthropologist on Yawuru claimants’ case on cognitive or ambilineal
descent. Ambilineal descent is a form of cognatic descent in which individuals can select to trace descent either matrilineally or patrilineally. (see http://anthro.palomar.edu/kinship/glossary.htm Viewed 7 October 2012)

36 At the April 2009 KLC-facilitated meeting that gave in-principle support for Woodside’s LNG project, she felt that the information made available was inadequate for her to make an ‘informed consent’, so she decided to abstain from voting.

37 As it turned out, separation desired by both parties was not possible or they put at risk of being rejected if they started all over again by applying for registration as individual claimants. There are legal implications also for the benefits received from Woodside and the State Government by the joint native title claimants.

38 Bradshaw and Fry (1989) completed A Management report for the Lurujarri Heritage Trail for the Department of Sites Museum so that tourists would abide by the existing Aboriginal Law of that area, and the existing State laws.


40 Mautner (2011) asserts that the ‘constitutive approach’ is the cultural studies perspective — the so-called ‘cultural turn’ that emerged in Britain in the 1960s and 1970s.

41 Southropmasane, T. ‘NBA’s response to bigotry proves value of power’, the Sydney Morning Herald, 5 May 2014, p. 17.

42 McPherson, T. http://3degree.ecu.edu.au/articles/3448 Viewed 06 May 2014


44 The significance of archaeology as a knowledge framework relates to a two-system approach that the Australian legal system tends to adopt based on a “separation of powers — archaeologists concerned with archaeological value” while Indigenous people, with “particular values of place to particular communities and to Aboriginal people generally” (see Sullivan 2008, p. 107). Any heritage listing methodology would need to account for the distinction between archaeological standards and Aboriginal heritage values. The question of heritage values is essential in progressing development projects and native title. For example, in December 2009, the KLC contracted Eureka Archaeological Research and Consulting UWA (Eureka) to undertake an Aboriginal archaeological site avoidance survey of the proposed Browse LNG Precinct.


46 Mautner (2011) cites Bourdieu’s argument that lawyers make their decisions not by following rules but by following the dictates of the legal habitus.

47 I note the insertion of ‘our’ in the Australian Government’s business plan, Caring for our Country Business Plan that may be an appropriation of the notion of Indigenous ‘Country’ by its replacement with ‘our’ country to refer to Australia as a nation-state.

48 The outgoing CEO of the KLC, Wayne Bergmann stated that the rationale for establishing KRED and Ambooriny Burru was to create a capital base (KLC newsletter, April 2011).