



# Browse LNG Precinct



## Browse Liquefied Natural Gas Precinct Strategic Assessment Report

(Draft for Public Review)  
December 2010

# Appendix E-2

INDIGENOUS IMPACTS REPORT VOLUME 2:  
Traditional Owner Consent and  
Indigenous Community Consultation

(Final Report to the Kimberley Land Council)



# **Kimberley LNG Precinct Strategic Assessment**

## **Indigenous Impacts Report Volume 2**

### **Traditional Owner Consent and Indigenous Community Consultation: Final Report**

**Kimberley Land Council**

**3 September 2010**

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## **Scope and Purpose of the Report on Traditional Owner Consent and Indigenous Community Consultation**

This report has been prepared by the Kimberley Land Council ('KLC') for the purposes of the strategic assessments being conducted by the governments of Australia and Western Australia into the proposed development of a common user liquefied natural LNG hub precinct (LNG Precinct) to process LNG from the Browse Basin located off the west Kimberley coast.

The KLC is the Native Title Representative Body ('NTRB') for the Kimberley region of Western Australia pursuant to a determination under section 203AD of the *Native Title Act 1993* (Cth).

The strategic assessments to which this report relates are:

- (a) a strategic assessment under section 146(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), in accordance with the agreement between the governments of Australia and Western Australia dated 6 February 2008 ('**Commonwealth Strategic Assessment**'); and
- (b) an assessment of a strategic proposal under section 38(3) of the *Environmental Protection Act 1986* (WA) ('**State Strategic Assessment**').

This report is part of the *Indigenous Impacts Report* that has been prepared by the KLC to address clauses 7 and 11, and the associated requirements in clauses 8, 9 and 10, of the Terms of Reference for the Commonwealth Strategic Assessment. More particularly, this *Report on Traditional Owner Consent and Indigenous Community Consultation* addresses clause 7(h) (Traditional Owner consent) and clause 11(b), (c) and (d) (Indigenous community consultation) of the Terms of Reference.

The KLC has undertaken the assessments, research and consultations required for the preparation of the reports comprising the Indigenous Impacts Report for the purposes of ensuring that the interests of Traditional Owners and other Indigenous people in the

Kimberley are properly taken into account and reported in the strategic assessment processes. The costs associated with these assessments, research and consultations have been met by the State of Western Australia. The KLC, as a non-profit organisation, has not obtained any financial benefit from this process and has conducted the assessments, research and consultations required for the preparation of the Indigenous Impacts Report in a manner consistent with its obligations as a Native Title Representative Body.

## Executive Summary

This Report addresses certain Terms of Reference (**ToR**) of the Strategic Assessment of the Browse Basin Common User Liquefied Natural LNG Precinct Hub (LNG Precinct) namely:

- The question of ‘whether the Traditional Owners have given informed consent, in a culturally appropriate manner’ to the establishment of an LNG Precinct in the Kimberley region (ToR cl. 7(h)).
- Details of any consultation about the proposed Precinct, including details of ‘any consultation that has already taken place, including with Indigenous communities’, and of ‘any proposed consultation about relevant impacts of the action [establishment of a LNG Precinct], including with Indigenous communities’ (ToR cl 11(b), (c) & (d)).

The Strategic Assessment is being conducted pursuant to an agreement between the governments of Australia and Western Australia under section 146(1) of the *Environment and Biodiversity Conservation Act 1999* (Cth) (**‘Strategic Assessment Agreement’**). The Strategic Assessment Agreement includes Site Selection Criteria. This report also addresses the Site Selection Criteria of ‘Indigenous Informed Consent’, the objective of which is to ‘seek to identify site supported by traditional owners through their informed consent as ratified by the Native title tribunal’ (sic)<sup>1</sup>.

The term ‘Traditional Owners’ is used throughout the Strategic Assessment Agreement, including the ToR. This term is not used in the *Native Title Act 1993* (Cth) (**‘NTA’**), *Aboriginal Heritage Act 1972* (WA) (**‘AHA’**), or any other legislation which applies to the area the subject of the strategic assessments. However, for the purposes of this Report the term ‘Traditional Owners’ is taken to mean those persons or groups who are the common law holders of native title for the area of land and waters the subject of the strategic assessments.

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<sup>1</sup> For the purposes of this report it is assumed that the consent of Traditional Owners ‘ratified by the Native Title Tribunal’ means an Indigenous Land Use Agreement under Part 2 Division 3 of the *Native Title Act 1993* (Cth).

This Report describes and assesses five sets of processes that have occurred over the period 2007 – 2010 or are currently under way, and that between them constitute the core of Indigenous consultation in relation to the LNG Precinct and of any Indigenous consent for its establishment:

- The role of the Kimberley Land Council Aboriginal Corporation (KLC) and the Traditional Owner Task Force (TOTF) in the LNG Precinct site selection process conducted by the Government of Western Australia's Northern Development Taskforce in 2007-2008;
- The process leading to the signing of the Kimberley LNG Precinct Heads of Agreement in April 2009 between the KLC, the State and Woodside Energy Ltd ('Woodside'), which contained principles and key financial and other terms that would allow the grant of native title and cultural heritage consents for the establishment of an LNG Precinct in the vicinity of James Price Point;
- The participation of Traditional Owners in identifying a specific site for the LNG Precinct at James Price Point, and in finalising the location of components of the LNG Precinct within that site;
- The consultation processes involved in an Aboriginal Social Impact Assessment (ASIA) of the proposed LNG Precinct undertaken by the KLC, as part of the strategic assessments; and
- Other processes involving Indigenous consultation or consent in relation to the LNG Precinct that are currently under way, including the strategic assessments and negotiation of an Indigenous Land Use Agreement (see Note 1), and associated agreements, which are expected to give legal effect to native title and cultural heritage consents for the establishment of the LNG Precinct.

Key findings of the Report are:

1. The principle of Indigenous Free Prior Informed Consent (FPIC) provides an appropriate standard for determining whether Traditional Owners have given 'Indigenous informed consent' or have 'given informed consent in a culturally appropriate manner', because the principle:

- sets explicit benchmarks for assessing issues related to the granting of Indigenous informed consent that are grounded in international law, are increasingly recognised in relevant international fora, are central to the United Nations Declaration on the Rights of Indigenous People, which Australia has endorsed, and are consistent with Australian common law principles on what is valid and effective consent;
  - reflects fundamental cultural values and political principles held by Kimberley Traditional Owners (see Section 2).
2. The location of a site for the LNG Precinct has been accompanied by Indigenous consultation processes, largely funded by the Government of Western Australia, that have been extensive and sustained, to a degree that is possibly unprecedented in relation to a major resource development in Australia. Kimberley Aboriginal people have been centrally involved in many facets of the LNG Precinct site selection process (Sections 3 – 7).
  3. The site selection process conducted between December 2007 and September 2008 and involving the KLC and the TOTF embodied the principle of IFPIC to a substantial degree. In particular, a number of Traditional Owner groups were able to take decisions as to whether or not their land and sea country would continue to be considered as potential LNG Precinct sites. There were some constraints on the access of Traditional Owners to relevant information during 2008. This was in part an inevitable result of the fact that Traditional Owner approval for an LNG Precinct was being sought at a time when specific proposals for LNG processing plants had not yet been developed, and that insufficient time had been available to undertake relevant environmental studies. It also resulted to some extent from delay by State agencies and consultants in responding to requests for information by the KLC and the TOTF (Section 3).
  4. The Traditional Owners of James Price Point did give their consent to the Heads of Agreement for the establishment of an LNG Precinct. Their consent was informed by detailed information and advice in relation to legal and other

options open to them, and in relation to agreement terms offered to them by the State and Woodside in negotiations. However that consent did not conform with the principle of IFPIC because:

- Traditional Owners faced the threat of compulsory acquisition by the State in the absence of an agreement and so their consent was not given freely. (On 2 September 2010, the Western Australian Government announced that a compulsory acquisition had been commenced);
  - Traditional Owners and the KLC were required to negotiate within severe time constraints, and as a result insufficient time was available to negotiate certain issues fully with the State and Woodside and for Traditional Owners to fully understand the ramifications of certain components of the Heads of Agreement;
  - Traditional Owners and the KLC faced the threat of loss of State funding to support any further participation in relevant processes if an agreement was not concluded;
  - Traditional Owners lacked adequate information about important aspects of the proposed Precinct, including its design, the location of associated facilities, and its likely environmental impacts (Section 4).
5. Traditional Owners have been closely involved in the selection of a specific site for the LNG Precinct at James Price Point during 2009-2010, with the current preferred site resulting from a consideration of heritage and environmental impacts as well as engineering and economic considerations. They will continue to be closely involved, under the terms of a Heritage Protection Agreement concluded in November 2010, in decisions about location of specific components of the LNG Precinct within the site (Section 5).
6. The ASIA conducted as part of the Strategic Assessment involved extensive consultation with those Traditional Owner groups and Indigenous communities likely to be most directly affected by the LNG Precinct. Its effectiveness in this regard has been diminished to some extent by the short

time frames created by State Government schedules for the Strategic Assessment process, and the limited availability of information regarding the proposed LNG Precinct (Section 6).

7. Further consultations in relation to ILUA negotiations, and the Strategic Assessment process, may provide additional opportunities for Traditional Owners and Kimberley Aboriginal people to help shape the development of the LNG Precinct. Without a change in State Government policy, any influence they wield through the ILUA negotiations will not constitute an ability to provide or withhold their consent in a manner consistent with the principle of IFPIC. Indeed at the time of writing the future of ILUA negotiations is unclear, as Premier Colin Barnett announced (on 2 September 2010) that the Western Australian Government had commenced a compulsory acquisition process to acquire land for the proposed LNG Precinct at James Price Point. The outcome of the Strategic Assessment process, and in particular the nature of any management arrangements incorporated into the Plan for the LNG Precinct, will be an important measure of the efficacy of consultations with affected Indigenous people (Section 7).

# 1: Introduction

This Report on Traditional Owner Consent and Indigenous Community Consultation has been prepared for the strategic assessments of a proposed Kimberley Liquefied Natural LNG (LNG) Precinct in the vicinity of James Price Point, on the Kimberley Coast some 60 km north of Broome. The Precinct will be described in detail in a 'Plan' the subject of the strategic assessments, and would include LNG processing facilities and associated infrastructure and would process hydrocarbons recovered by a number of major companies from Browse Basin LNG fields.

The requirements of the Commonwealth Strategic Assessment are set out in the agreement between the governments of Australia and Western Australia dated 6 February 2008 ('**Strategic Assessment Agreement**') and the ToR (included here as Appendix 1). A single Strategic Assessment Report, of which this report comprises a part, will address the requirements of both the Commonwealth Strategic Assessment and the State Strategic Assessment. For the purposes of this report, and unless otherwise indicated, the separate State and Commonwealth processes are not differentiated because it is the intention of both governments that a single report address the requirements of both strategic assessments.

Both strategic assessments will conclude with a decision or decisions by the relevant Commonwealth Minister for the Environment, in relation to the Commonwealth Strategic Assessment, and the State Environment Minister, in relation to the State Strategic Assessment, that:

- (a) the LNG Precinct as described in the Plan may proceed as proposed;
- (b) the LNG Precinct may proceed subject to modifications of the original Plan and/or the imposition of conditions on the development; or
- (c) the proposed development may not proceed (see Appendix 1 for more detail).

Clause 7(h) of the ToR for the Commonwealth Strategic Assessment (included here as Appendix 1) require the preparation of a Report that addresses the question of 'whether the Traditional Owners have given informed consent, in a culturally appropriate manner to the implementation of the Plan' (that is to the establishment of

‘a common user Browse Basin Liquefied natural LNG (LNG) Hub Precinct and its associated activities’ in the Kimberley region). Clause 11(b), (c) and (d) of the ToR also require that the Report also include ‘any details of consultation ... about the Plan’, including details of ‘any consultation that has already taken place, including with Indigenous communities’, and also of ‘any proposed consultation about relevant impacts of the action [establishment of a LNG Precinct], including with Indigenous communities’. It should be noted that one of the Site Selection Criteria that are attached to the Strategic Assessment Agreement (Attachment A) is ‘Indigenous Informed Consent’, with the corresponding objective being ‘seek to identify site supported by traditional owners through their informed consent as ratified by the Native title tribunal’ (sic)<sup>2</sup>.

This Report describes the processes relevant to the informed consent of Traditional Owners and consultation with Indigenous communities that have occurred to date in relation to the LNG Precinct, considers the nature of any Traditional Owner consent given to date, and indicates any existing or proposed processes of consultation and consent that have yet to be completed.

The Report is structured as follows. The next section discusses the concept of ‘Indigenous informed consent’, and sets out what is increasingly accepted in international fora as a culturally appropriate standard for achieving such consent, the principle of Indigenous Free Prior Informed Consent (FPIC). This discussion highlights the critical distinction between Indigenous consent, which involves Indigenous control over whether development occurs and, if it does occur, over the form of that development; and Indigenous consultation which does not involve such control.

The following sections discuss four sets of processes that constitute the major elements of Indigenous consultation and/or consent in relation to the LNG Precinct that have occurred to date:

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<sup>2</sup> See fn 1.

- The role of the KLC and the Traditional Owner Task Force in the LNG Precinct site selection process conducted by the State's Northern Development Taskforce in 2007 - 2008;
- The process leading to the signing of the Kimberley LNG Precinct Heads of Agreement in April 2009 between the KLC ('on its own behalf and for the Goolarabooloo Jabirr Jabirr Native Title Claimants'), the State and Woodside, which recorded that the Parties had 'reached broad agreement on a number of principles necessary to obtain native title and cultural heritage consents' for the establishment of an LNG Precinct in the vicinity of James Price Point;
- The processes undertaken in identifying a specific site for the LNG Precinct at James Price Point and in determining the location of specific components of the LNG Precinct within the site;
- The consultation processes involved in an Aboriginal Social Impact Assessment of the proposed LNG Precinct undertaken by the KLC.

The final section briefly reviews ongoing negotiations intended to result in conclusion of an Indigenous Land Use Agreement and associated agreements, including a State Agreement. These agreements are expected to give legal effect to, and contain detailed conditions in relation to, any native title and cultural heritage consents which may be given by Traditional Owners for the establishment of the LNG Precinct in the future.

## **2. The Principle of Indigenous Free Prior Informed Consent (IFPIC)**

As mentioned above, the ToR require that the report on the Commonwealth Strategic Assessment identify whether or not Traditional Owners have given their informed consent, in a culturally appropriate manner, to the Plan for the LNG Precinct. Critical to any discussion of Indigenous consent is the issue of what standard or measure should be applied in describing and evaluating processes that purport to, or attempt to, result in the provision of such consent.

The appropriate standard is provided by the principle of Indigenous Free Prior Informed Consent (IFPIC). The fact that the content of the principle reflects fundamental cultural and political norms of Kimberley Aboriginal people, that it derives in substantial measure from international agreements, and is increasingly acknowledged in international conventions and declarations to which Australia is a party, indicates that it is an appropriate standard to apply in discussing a proposed LNG Precinct whose development and operation is expected to span more than half a century. In addition, the principle of IFPIC, in indicating that ‘informed consent’:

- (a) can only be effective if all necessary information is available;
- (b) should be given a priori; and
- (c) is not valid if given as a result of undue pressure,

is consistent with the Australian common law position on what is valid and effective consent, as well as principles of equity. This interpretation of ‘informed consent’ is therefore more likely to meet Australian legal standards than one which does not require that consent be effectively informed, given before the fact, or given without undue pressure.

This section explains the principle of IFPIC, outlines the basis for it by reference to certain defining features of Indigenous societies and to international law, and provides evidence of the increasing acceptance of the principle in international fora and national jurisdictions.

The principle of IFPIC requires that Indigenous people should have the right, free from duress and in possession of full information regarding proposed developments on their ancestral lands, to provide or withhold their consent to those developments prior to any authorisation of development activity by state authorities or developers. For this requirement to be given practical effect, decision making processes must:

1. Allow Indigenous people to make decisions in their own time, in their own ways, in languages of their choosing, subject to their own norms and customary laws, and using representative institutions which they determine are

entitled to express consent on behalf of the affected Indigenous peoples or communities.

2. Fully inform Indigenous people so that their response to a development proposal is meaningful. Information in relation to any proposed project or activity should include:

- Its nature, size, pace, reversibility and scope;
- The reasons or purposes for it;
- Its duration;
- The locality of areas that will be affected;
- A preliminary assessment of its likely economic, social, cultural and environmental impact;
- Personnel likely to be involved in the execution of the proposed project or activity;
- Procedures that the project or activity may entail.

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

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

4. Ensure that Indigenous decision making processes and Indigenous people involved in these processes are free from coercion, manipulation, or inappropriate pressure (UNDESA 2004; UNESCO 2004a, 2004b, 2005).

Free, prior and informed consent is both:

- procedural i.e. the process of obtaining consent must sufficiently inform indigenous peoples such that any final decision made by them is made in full knowledge of the consequences of that decision; and
- substantive i.e. indigenous people may either grant or not grant consent.

To simplify, the principle of IFPIC states that Indigenous people should have the right to decide whether and in what form development occurs on their land and sea country (UNDESA 2004). This highlights a critical distinction between ‘Indigenous consent’ and ‘Indigenous consultation’. In the latter, Indigenous peoples are given an opportunity to express their views, positive or negative, in relation to a proposed development. The relevant non-Indigenous decision makers may take those views into account to a greater or lesser degree, and may modify or change their decision as a result of doing so. But whether and to what extent they take account of Indigenous views is at the discretion of the non-Indigenous decision makers. Indigenous people do not have the capacity to *determine* whether or in what form development will occur on their land and sea country.

The principle of IFPIC draws on two fundamental sets of propositions. The first relate to the relationship between the ancestral lands of Indigenous peoples and their cultural, economic and social survival as distinct peoples and societies. The second relate to international law.

The ability to live on, care for and utilise resources from their ancestral lands is central not only to the economic and social well being of Indigenous people but also to their survival. Land is critical to physical sustenance, but it is much more than that. It is also the foundation for social relationships which in Indigenous societies are bound up with relations to land; for law and culture, which are interwoven with use of the land and its resources; and for spirituality and religion, which have as their basis beliefs about the creation of the land, the way in which creation spirits continue to occupy the land and influence contemporary life, and the way in which ancestors and future generations are tied to the current generation through the land. All of these dimensions of Indigenous life revolve around specific areas of land and the sites, features and landscapes they contain. Thus loss of ancestral lands cannot be addressed by financial compensation or by moving Indigenous peoples to other areas of land (UNESCO 2004b, 9).

It follows that in order to ensure their survival, Indigenous peoples must remain in possession and control of their ancestral lands and be able to ensure that any industrial development does not seriously damage those lands. Historically governments and

developers have dispossessed Indigenous peoples and failed to protect their ancestral lands, and they continue to do so today. As a result resource development has had ‘devastating impacts on Indigenous peoples, undermining their ability to sustain themselves physically and culturally’ (UNDESA 2004, 3). In this context Indigenous people can only protect their lands and so ensure their survival by themselves deciding whether development should proceed and, if it should, the extent and form of development that should occur. Application of the principle of IFPIC would allow them to do so (UNESCO 2004a, 2004b).

The second basis for the principle is international human rights law and in particular conventions and declarations related to the right to equality and non-discrimination; the right to property; the right to practice and maintain culture and religion; and the right of self-determination of peoples.

The Universal Declaration of Human Rights, passed by the United Nations General Assembly in 1948 and now binding international law, sets out certain ‘rights and freedoms’ that apply to ‘all peoples and all nations’. These include the right ‘without any discrimination to equal protection of the law’ (Article 7); ‘the right to own property alone as well as in association with others’ and the right not to be ‘arbitrarily deprived’ of that property (Article 17); and the freedom ‘either alone or in community with others ... to manifest his religion or belief ...’ (Article 18). The right of peoples to self-determination and their ‘permanent sovereignty over natural resources’ (UNESCO 2004b) is also enshrined in Article 1 of both the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). Australia is a party to both of the ICCPR and the ICESCR. Article 1 of both conventions provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own needs, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.

Given the critical role that land and resources play in the economic, social and cultural development of Indigenous peoples and in providing them with the means of subsistence, it is difficult to see how they can exercise the right of self-determination or ‘freely dispose of their natural wealth and resources’ unless the norm of IFPIC is applied to major developments on Indigenous land.

The right to equality before the law and to property is also guaranteed in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Australia is a party to the ICERD. Article 5 provides:

.... States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law notably in the enjoyment of the following things:

- (d) The right to own property alone as well as in association with others;
- (e) Economic, social and cultural rights.

The United Nations Committee on the Elimination of Racial Discrimination in its general Recommendation XXIII has highlighted some specific implications of ICERD for Indigenous peoples:

The Committee is conscious of the fact that in many regions of the world Indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized ... The Committee especially calls upon States Parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources ...

Given the link between Indigenous lands and Indigenous culture and religion, it can also be argued that IFPIC is the appropriate standard to apply so that Indigenous peoples can enjoy the right to protection and maintenance of culture contained, for instance, in Article 27 of the ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with

other members of their group, to enjoy their own culture, to profess or practice their own religion, or to use their own language.

In commenting on Article 27, the UN Human Rights Committee has stated:

... one or other aspects of the rights of individuals protected under this article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true of Indigenous communities constituting a minority (cited in HREOC 2003, 84).

That the application of the principle of IFPIC is consistent with fundamental human rights law is supported, for instance, by the conclusion of the United Nations Human Rights Committee that Canada violated Article 27 of the ICCPR by allowing the Province of Alberta to grant leases for oil and LNG exploration and timber development within the ancestral territory of the Lubicon Lake Band, without the Band's consent. The Committee also found that natural resource development was threatening the way of life and culture of the Lubicon (Orellana 2002, 9-10).

In South America, the Inter-American Court of Human Rights, established by the American Convention on Human Rights, has handed down a number of decisions requiring national governments to abide by human rights principles set out in ICERD in their dealings with their Indigenous populations, including by seeking their consent to development proposals. The Court found against Nicaragua, for instance, in a case brought against it by the Awis Tingi community, after Nicaragua had granted forestry leases over Awis Tingi ancestral lands without seeking the consent of the traditional owners and in doing so had 'violated the rights of the Mayagna Awis Tingi Community to use and enjoyment of their property ...' (cited in Bankes 2004, 3). The Court also found against the government of Belize in a case brought against it by the Maya people, on the basis that in granting extensive logging and oil concessions on traditional Maya territory Belize had ignored the Maya's community property right which was, in the Court's view, just as entitled to protection under the Convention as the state granted property rights of other Belizeans (Bankes 2004).

In summary, the principle of IFPIC is derived from fundamental aspects of international human rights law in its application to the particular situation of Indigenous peoples whose continued survival depends on their ability to protect and continue to use their ancestral lands.

There is substantial evidence of the growing acceptance of the principle of IFPIC both at international and national levels. The principle has increasingly been acknowledged in international covenants and declarations and in United Nations fora. One of the first examples is provided by International Labour Office Convention 169 on the Rights of Tribal and Indigenous Peoples (1989). The Convention states that ‘the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised’; that governments shall ‘guarantee effective protection of their rights of ownership and protection’; and that the rights of Indigenous peoples ‘to the natural resources pertaining to their lands shall be specifically safeguarded’ (Articles 14, 15). The right to IFPIC is specifically cited in relation to any proposed activities that require relocation of Indigenous peoples, which should take place ‘only with their free and informed consent’ (Article 16.2).

The Convention on Biological Diversity (1992), which has been ratified by more than 170 countries including Australia, requires the approval of Indigenous communities for the use of knowledge they hold that is relevant to conservation of biological diversity (Article 8(j)).

However, the most recent and relevant source for determining the content and scope of the principle of IFPIC is the United Nations Declaration on the Rights of Indigenous Peoples (**‘Declaration’**), which was adopted by the United Nations on 13 September 2007 and endorsed by Australia on 3 April 2009. The Declaration states that Indigenous peoples ‘have the right to self-determination’ and to ‘maintain and strengthen their distinct political, legal, economic, social and cultural institutions’. It repeatedly affirms the requirement of IFPIC (Article 10, 11, 19, 28, 29, and 32) and states (Article 32):

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate with the Indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent prior to the approval of any project affecting their land or territories or other sources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources* (emphasis added).

Many other instances of recognition of the norm of IFPIC by UN bodies and regional associations of states and in international declarations can also be cited (Caruso et al 2003; Environmental Law Institute 2004; Mackay 2004; UNESCO 2004a, 3-6; UNESCO 2004b; UNESCO 2006a; UNDESA 2004, 4-9).

The principle of IFPIC has been adopted into domestic law to some degree through *Aboriginal Land Rights (Northern Territory) Act 1976*. Furthermore, the principle of IFPIC 'is now increasingly recognised in the jurisprudence of international human rights treaty bodies. [Its] observation ... has now been recognised as 'best practice' or as required policy in a number of standards including development projects, resettlement schemes, environmental and social impact assessments, extractive industries ... the use of Indigenous people's intellectual property ... [and] the establishment of protected areas' (Forest Peoples Programme 2007). In the words of the United Nations Declaration on the Rights of Indigenous People, IFPIC represents 'a standard of achievement to be pursued in a spirit of partnership and mutual respect'.

### **3. The Site Selection Process and the Traditional Owner Task Force<sup>3</sup>**

In 2006 the Government of Western Australia indicated that, as a matter of policy, it would seek the consent of Kimberley Traditional Owners to the establishment of an LNG Precinct in the Kimberley. The then Western Australian Premier, Alan Carpenter, stated that LNG development in the Kimberley would not proceed unless is

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<sup>3</sup> This section of the Report draws heavily on a confidential report prepared for the KLC by Kim Doohan and Ciaran O'Faircheallaigh, 'Hydrocarbon Processing in the Kimberley Region: Laying the Foundations for an Aboriginal Social Impact Assessment', December 2008. Any confidential information contained in relevant sections of that report is not included here.

creates significant economic and social benefits for Aboriginal people and unless it had the support of Kimberley traditional owners (Carpenter 2006). The Deputy Premier and Minister for State Development reiterated this position in February 2008 and indicated the need for informed consent, stating that ‘LNG processing ... will only go ahead with the fully informed consent of the traditional owners and their substantial economic participation’ (Australian Broadcasting Commission 2008). The Commonwealth – State Agreement for the Strategic Assessment of the LNG precinct noted that the informed consent of Traditional Owners was ‘required by WA cabinet as [a] precondition for site selection’.

In 2007 the State established a Northern Development Taskforce (NDT) to conduct the site selection process for a LNG Precinct. As part of this process and to give effect to its requirement for Indigenous informed consent, the State provided funding to the Kimberley Land Council to establish a Traditional Owner Task Force (TOTF). Its establishment, operation and role in decision making are described in the following sections.

Appendix 2 provides a chronology of key dates and events in the development and operation of the TOTF from December 2007 to December 2008.

The TOTF constituted an attempt by the KLC and senior Aboriginal men and women to draw on their traditional governance and decision-making practices while incorporating contemporary meeting procedures, decision making and information transfer practices, to create a unique, culturally appropriate, consistent and comprehensive consultation and engagement process. This process involved interaction among themselves, with other Kimberley Traditional Owners and various other interests such as proponents, governments, NGOs and the wider public. The KLC considers that this decision making processes developed by Kimberley Traditional Owners constitutes ‘best practice’ with regard to development-related decision making.

### **3.1 Key Assumptions underlying the TOTF Process**

In considering the question of whether or not to allow hydrocarbon processing in the Kimberley, and if so where it should occur, the KLC and Kimberley Traditional Owners based their participation and the form of that participation on a number of fundamental assumptions. These assumptions underpinned the general ‘Kimberley’ commitment and involvement in the State’s NDT process, the joint State and Commonwealth’s Strategic Assessment process, discussions with individual proponents, and the way in which the KLC and the TOTF conducted their consultation and engagement programme. 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. Many of these assumptions were no longer correct after the election of the Barnett Liberal/National State Government in September 2008.

There was an assumption that the KLC and TOTF and local Aboriginal communities would be provided with sufficient and adequate information and funding in order to complete an assessment of all issues relevant to LNG development, and to negotiate fair and reasonable commercial and native title agreements. Such information would enable Traditional Owners (and others) to make informed decisions about LNG development and to develop appropriate responses in the form of implementation, management and mitigation plans. For instance, it was assumed that sufficient time and resources would be allocated to undertake a thorough social impact study with Aboriginal people at its heart.

There was an assumption that the site selection process would be completed during the life of the Carpenter Labor Government and would be governed by a commitment to the principles of IFPIC; substantial economic participation by Traditional Owners in any development; and improved lives for Kimberley Aboriginal people, with a regional benefit-sharing package available to all Kimberley Aboriginal people (KLC 2008). As explained in detail below (pp. 36-38), a number of these assumptions did not hold after September 2008. In particular, the new State Government truncated the

TOTF's involvement in the site selection process; indicated it would use compulsory acquisition powers to acquire land for the LNG if agreement was not reached with Traditional Owners; and imposed severe time frames on negotiations.

### **3.2 A New Way of Engaging: The TOTF**

The formative meeting about the LNG development process was conducted in mid December 2007, prior to the signing of a Financial Assistance Agreement (FAA) between the KLC and the State (see below). At this meeting senior Aboriginal men and women from coastal regions, as well as senior cultural bosses from elsewhere in the Kimberley, instructed the KLC to establish what they considered to be a 'proper' consultation process. They wished this process to be different from what they felt had happened in their earlier encounter with proposed LNG development, Woodside's proposal in 2005. The initial instructions and strategic advice given at this meeting were to form the basis for what unfolded in the following eleven months.

Discussions concerning hydrocarbons development and its likely impacts in the Kimberley were held over two days. A State Government representative addressed the meeting, outlining the State's preliminary ideas about LNG development, including an outline of the membership and role of the State's Northern Development Taskforce (NDT), which would be responsible for considering a series of potential sites along the Kimberley Coast and recommending a preferred site to the State. In response to this information the senior Aboriginal men and women present at the meeting outlined a consultation process and culturally appropriate representative structures, and drafted a timetable to begin to consider the Government's proposal for an LNG Precinct. They decided that there should be a Traditional Owner Task Force (TOTF) representing all native title claims groups along the Kimberley coast, as an equivalent representative and administrative body to the State's NDT.

The KLC established a Senior Leadership Group was created to advise and assist Traditional Owners of the Kimberley coastal regions and the KLC in their deliberations about the complex matters that had to be considered in making decisions about hydrocarbons development.

Traditional Owners of the Kimberley coastal regions also began to consider the impacts of such development and how they could effectively engage with industry and government to implement positive outcomes, positive changes and opportunities to improve the socio-economic conditions for Aboriginal people in the Kimberley. Informal discussions among Kimberley Aboriginal people occurred over the wet season (December – February), a time when people engage in ‘on country’ activities (marine and terrestrial bush tucker is plentiful), when traditional ceremonies and rituals are conducted, when information is shared, new ideas explored and decisions made.

In January 2008 the KLC and the State of Western Australia entered into a Financial Assistance Agreement (FAA) pursuant to which the KLC committed to undertake a comprehensive consultation process with Kimberley Traditional Owners about hydrocarbon development. The State committed to providing financial assistance to the KLC to meet the costs associated with engaging with the Kimberley coastal native title holders and claimants on issues relating to hydrocarbon processing on the Kimberley coast.

In mid February 2008 another meeting of senior Aboriginal men and women, including cultural bosses from across the Kimberley, was held in Broome to discuss LNG development. At this meeting, the members of the KLC’s Senior Leadership Group were confirmed in their role, in accordance with appropriate cultural practices, including separate men’s and women’s meetings and consensus decision making, while some more senior men and women were added. This meeting also re-affirmed the Senior Leadership Group’s role in providing advice and leadership to the KLC’s consultation process, and to attend meetings with coastal native title claim groups.

The KLC was instructed to continue to engage in the consultation process about proposed hydrocarbon development in the Kimberley, and to:

- undertake a consultative process with all Traditional Owners with native title claims along the Kimberley coast;

- facilitate selection of representatives for a Traditional Owner equivalent of the established State Government's NDT; and
- gain as much information from as many sources as possible concerning proposed hydrocarbon development in the Kimberley.

As a consequence the KLC commenced a series of coastal native title claim group meetings during which the idea of LNG development on the Kimberley coast was introduced, the NDT process was explained, the KLC consultation process was outlined and the limited information about LNG development then at hand was delivered. Questions, comments and concerns were recorded at each meeting along with images in both digital and video form.

### **3.3 The Underlying Reasons for Coastal Communities to Participate**

The area of the Kimberley Coast within which the State was seeking a single suitable location for an LNG Precinct encompasses parts of the traditional country of 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. Senior Aboriginal men and women took the position that all those Aboriginal people belonging to traditional land and sea country within the 'Kimberley coast' had to be consulted, for two reasons. The first was the bond and commitment inherent in the all-pervasive cultural form, the wunan (or wirnan, discussed below); the second was Traditional Owners' obligations to land and sea country. Older Aboriginal man and women who have experienced other major developments in the Kimberley draw on those experiences to reinforce the need to consider the wunan when making decisions, negotiating agreements and planning for benefits. Aboriginal people in the Kimberley recognise that the proposed LNG development is a massive long life project, and that its impacts, positive and negative will be highly significant, felt throughout the Kimberley, and will have intergenerational effects.

The wunan can be viewed as an overarching foundational practice of local and regional Indigenous governance, like a blueprint for living, which has currency

throughout the Kimberley. The wunan is a complex and integral element of Aboriginal peoples' secular and ritual lives and includes aspects of community and individual health and wellbeing (Doohan 2007: Chapter 7). There are positive outcomes for those who have been honest, generous and expedient in their wunan exchanges, and there have been severe sanctions for those who have not met the expectations of a wunan exchange or have been dishonest in their wunan dealings, a serious and rather rare situation.

The wunan embodies a range of social relations expressed geographically and as such it is like a map that includes information about relationships within economic, social, political and ritual arenas that joins together large numbers of people over vast areas of land. The wunan also involves the exchange of objects between wunan partners. The binding, moral, ritual, economic and supportive elements of this cultural expression were often called on during the process of forming the TOTF and during TOTF meetings, as a mediating and re-affirming practice, one considered to be greater than local groups, or even larger native title groups, and to encompass 'the Kimberley'.

Application of other aspects of the wunan – most particularly regional responsibilities and sharing – applied to discussion of the 'ripples' or wider social impacts of an LNG Precinct, and how to ensure the 'sharing' of benefits among all of those affected. The underlying relevance of the wunan to the discussions about LNG development was reinforced at the 22-24 July 2008 TOTF meeting where a senior Aboriginal Law man and TOTF member, expressed the desire to 'paint' the cultural basis for benefit sharing. The elder used this graphic device whilst speaking of country and connection as a means to re-affirm the traditional and continuing cultural interconnections between all of the coastal native title claim groups. He did this as a pre-cursor to commencing more practical discussions about benefit sharing. According to this Traditional Owner, all of the coastal groups are connected by ritual practices, the wunan and a responsibility to care for country, saltwater country and family.

### **3.4 The Formation of the Traditional Owner Taskforce**

The formal consultation process to establish the TOTF commenced in March 2008 with senior KLC staff, the KLC Chair and Deputy Chair and members of the Senior Leadership Group conducting a series of native title claim group meetings. Ten meetings were held which included the fifteen Kimberley coastal native title claim groups. These meetings were held in local Aboriginal communities throughout the Kimberley (see Appendix 2 for details).

The meetings were directed to informing Traditional Owners about LNG development, what it might mean for the Kimberley, both positive and negative, and how the KLC's consultation process was intended to work; and to seek advice, suggestions, questions and direction from Traditional Owners and to establish what was important for them. Preliminary questions and concerns of participants were recorded, and the KLC committed to seek answers to the questions asked. In addition, each native title claim group was invited to consider the selection of four representatives to form the TOTF, and how the TOTF should function, including how it should report back to native title claim group members.

On 14-15 April 2008 KLC staff, consultants and the Senior Leadership Group participated in a facilitated workshop aimed at consideration of the cultural, environmental, technical, social and economic issues raised by hydrocarbon development. A broad-based strategy was established through facilitated brainstorming, and formed the basis for continuing consultations, information gathering and dissemination and establishment of project specific tasks. One of the more revealing statements from the workshop session was from a senior Bardi man who expressed the conundrum faced by Kimberley Aboriginal people and the thoughts and aspirations of many of the Aboriginal participants:

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

The Traditional Owners Taskforce (TOTF) was established in May 2008, following a series of (cultural) Bloc Meetings, which brought together clusters of related native title groups (see Appendix 2 for details). At the Cultural Bloc meetings, the KLC provided Traditional Owners with details of the possible locations being considered for development. Further information and advice was also provided regarding hydrocarbon processing and its likely cultural, social, economic and environmental impacts, and regarding some of the potential benefits of hydrocarbon development, including, for example, equity participation, employment and training, business opportunities and education. During these meetings the Traditional Owners were also given the opportunity to nominate additional areas for consideration as potential development sites. In mid May, before the first TOTF meeting, the Uunguu Traditional Owners had already suggested two other possible locations for consideration in the NDT processes.

These Bloc Meetings were conducted on the basis of a continuing commitment to Aboriginal people being well informed, and to enable them to fully express and discuss their interests, concerns and enquiries about the proposed development. The meetings were also conducted to enable each native title claim group to select four representatives to participate in the work of the TOTF. The selection process varied between each group but was essentially based on an internally agreed format. Some groups had already made selections prior to their arrival at these formal meetings. Others made selections on the day, after discussions about the degree of ‘family’ representativeness, their other commitments, capacity to travel and engage in the meetings, and so on. Some groups used a form of secret vote to make the final selection of four representatives.

At the end of each meeting the names of the representatives were recorded, called and affirmed and images of each group taken to be put into KLC newsletters about LNG consultation. Formal instructions from the native title claim group members to the KLC to act on their behalf were affirmed by each native title claim group and formally recorded.

### **3.5 The Role of the TOTF**

As noted earlier the TOTF was established as a voice for Kimberley Aboriginal people and forum for gathering and disseminating information on LNG development and site selection, an equivalent to the State's NDT. As such the TOTF was the formally endorsed point of contact and engagement as well as conduit for, to and from the wider Traditional Owner groups. During the Bloc meetings the roles and rules of the TOTF were discussed, clarified and endorsed. Of critical importance and consistent with traditional decision-making practices, it was decided that the TOTF members could not make decisions on behalf of their native title groups, and nor could they make decisions about whether to agree to the locating of a LNG hub in the Kimberley or on their traditional land and sea country. Any of these decisions would need to go back to the whole native title claim groups for areas being considered as suitable locations. TOTF members were selected to make decisions about the process(es) of consultation about LNG development, to ensure the integrity of the consultation and information delivered by the TOTF and the KLC project team members. The TOTF was a conduit for the flow of information to and from the larger native title claim group membership.

Significant decisions about the possibility of LNG development on people's land and sea country would be made within the wider native title groups. All the native title claim groups held this understanding and commitment regarding decision making, and also regarding the need to refer to senior Aboriginal Law men and women if and when necessary. There was general agreement that if Aboriginal protocol required it then neighbouring groups who shared laws and customs and even resources would be consulted before major decisions were made. The way in which the TOTF defined its role, and in particular its emphasis on provision of accurate and relevant information and on the right of Traditional Owners to make decisions about development on their land and sea country, emphasises the congruence between Aboriginal cultural values and the principle of IFPIC.

Managing what became a very large group with members from all over the Kimberley was a major logistical exercise and an indication of respect and attention to the cultural processes that Aboriginal men and women insisted must happen. It was also

an expensive exercise in terms of funding and energy, given the costs and level of administrative organisation required to move more than 60 people from throughout the Kimberley using small aircraft, vehicles and buses to meet the very demanding meeting timetable. But the establishment and management of the TOTF process generated, or more accurately, re-affirmed, a congruity between Kimberley Aboriginal people's (cultural) practice and good contemporary negotiation praxis.

### **3.6 The Operation of the TOTF**

The initial TOTF meetings were conducted every second week with Monday and Friday allocated as travel days. All meetings were held in Broome to simplify logistics and ensure adequate space and facilities for the large group of participants. This was a demanding schedule, especially as the majority of TOTF members had to travel to Broome to attend meetings and some had to travel long distances, for example from Port Hedland, Kalumburu, Kununurra and Wyndham. The first meeting was held on 27-29 May 2008, with 60 members attending. The TOTF meetings continued until September 2008 when only four potential LNG Precinct sites remained that the TOTF recommended for further consideration (see below).

Throughout the meetings the members of the TOTF engaged in exchanges with government, non-government and industry visitors all of whom presented information concerning the proposed development and answered some questions raised during the meetings. There were times when the visitors attending meetings did not have answers to questions, but commitments were made to provide responses at a later date. At each TOTF meeting an agenda was set, minutes were recorded, key issues and tasks to be undertaken were highlighted and questions unanswered or requiring further elaboration and detail were noted. These records formed the basis for preparing TOTF newsletters that were presented at the following meeting as a record of the meeting as well as the basis for wider discussion within families and the wider native title claim groups.

Between July and August 2008 the KLC met with relevant native title claim groups to determine which of the remaining 11 locations chosen for further consideration by the NDT, from 42 original possible locations, could remain in the site selection process.

Traditional Owners for these proposed locations participated in a number of scientific and engineering studies in collaboration with the NDT processes. As the process unfolded a number of Traditional Owner groups withdrew their land and sea country from consideration as potential sites, though these decisions were not made public until the four remaining locations were made known on 10 September 2009 (see below). Traditional Owners withdrew sites in some cases because multiple potential sites existed in their land and sea country and they only wished a single site to be considered. In other cases they withdrew sites because of their serious concerns about the potential impact of a Precinct on the environment and on their cultural and economic lives. The NDT site selection processes also removed some of these same sites from consideration due to environmental and/or technical considerations. The ability of Traditional Owners to decide which sites would and would not continue to be considered highlights the application of the principle of IFPIC through the TOTF process.

In deciding to withdraw these locations the Traditional Owners were cognizant that other Aboriginal people would be under extra pressure to give up their country, and they were careful to ensure that other Traditional Owners understood their reasoning and to affirm their commitment to the TOTF and associated processes.

In July 2008 a State election was called and six weeks later the election was held. This was a period of uncertainty for the TOTF and the members of the coastal native title communities, as it was unclear whether the NDT process and the TOTF would continue and, if it did not, what would replace it. Nonetheless the KLC and TOTF continued to meet and progress the consultations and decision making about LNG development and possible Precinct locations. The TOTF also continued, despite the uncertainty, to engage in formal meetings with the four native title claim groups that had decided to leave the locations within their traditional country for further consideration. These groups reaffirmed instructions to the KLC to leave their locations in the process, to seek further detailed information and to continue the consultation processes.

By early September 2008 and before the results of the State Government elections were finalised the TOTF formally announced the remaining four locations still being

considered by Traditional Owners: Anjo Peninsula, North Head, Quondong to James Price Point and Gourdon Bay. As a consequence of these decisions on potential sites, the TOTF changed its membership to recognise the increased responsibility of the remaining four groups, and their representation increased by four per group.

Following the establishment of the Liberal/National State Government on 13 September 2008 and the lack of certainty or engagement with the new government the KLC and the TOTF were confronted with very serious financial and political considerations. In an effort to retain the TOTF process in some form, and in the light of funding and process uncertainty the TOTF members and the KLC decided to reduce the active participation of TOTF members to those involved with the remaining four potential locations. The TOTF (4) would now consist of only 32 members.

Premier Barnett announced on 15 October 2008 that his preferred site for the location LNG Precinct was North Head. He stated that it was unacceptable for local Aboriginal people to have what he termed a 'right of veto' over State Government decisions in relation to choice of a location for the LNG Precinct. The State Government indicated that while it would consult with Traditional Owners regarding measures for impact mitigation and community benefits, the existing site selection process would be discontinued (see Section 4 below).

An additional source of pressure on the KLC and Traditional Owners was created by a series of media stories implying criticism of the TOTF process and the public funding allocated to it, without identifying any irregularities allegedly associated with the use of public funds (see for example Strutt 2008a, 2008b). The media also reported statements by the Premier that Inpex's decision to pipe its Browse Basin gas to Darwin rather than to the Kimberley coast for processing reflected, in part, the fact that Aboriginal negotiators had 'overplayed their hand'; and that the KLC and the TOTF had failed to come up with a suitable site for an LNG Precinct despite significant expenditure of public funds (Stutt 2008a, Laurie 2008). This was despite the fact that, as pointed out by one journalist, by September 2008 an initial list of over 40 possible sites had been reduced to four, and despite statements by the former

Treasurer, Eric Ripper, that the process was headed for a final, consensual choice of a single site by October 2008 (Laurie 2008).

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

### **3.7 Gaps in Project Related Information**

As noted above, the TOTF engaged in exchanges with government, industry and NGO groups and were given information concerning proposed LNG development. The KLC went to considerable efforts to ensure that information was made available to the TOTF in a format they needed to make informed decisions. This included the opportunity for TOTF members to request visiting representatives to further explain material provided in documents and presentations, and to have KLC staff further explain or interpret this material. A KLC staff member with many years experience communicating with Traditional Owners often made notes of key points during presentations on white boards, and reviewed these with the TOTF at the end of each session. These notes were displayed during breaks, allowing TOTF members to review them further, and a record of them was kept that could be accessed later if required. In addition, KLC staff regularly provided briefings on issues of key interest to the TOTF, further enhancing the TOTF's capacity to absorb and interpret information it received.

However as also noted above answers to questions raised by TOTF members and KLC were not always answered. In fact there were major gaps in the information made available by the State and Woodside to TOTF members and to native title claim group members and other Aboriginal people potentially affected by LNG development. These gaps, it should be stressed, did not just relate to matters of detail

that might only be finalised once ‘project level’ assessments were undertaken by individual proponents wishing to process gas in the LNG Precinct. They included for example information on land height above sea level and water depth along the Kimberley coast (see below), matters of central relevance to strategic decisions about the appropriate location for an LNG Precinct.

Indeed the lack of adequate information was a major concern to Traditional Owners and in itself constituted a major impact on them. There were repeated requests from the TOTF members for LNG related information, some of which had still not elicited a response by the end of 2008. Because of these gaps in information the members of the TOTF often felt that they had insufficient certainty as to what might happen at the LNG processing location or what positive and/or negative impacts it might generate, and so felt unable to move with confidence to the next level of negotiation about a proposed hydrocarbon processing facility on their land and sea country. They felt unable to make responsible recommendations to their respective claim groups other than to express their grave concerns about continuing in the process and possibly withdraw their location, as did the Karajarri Traditional Owners, for example (KLC 2008).

Throughout 2008, in formal and informal contexts, the TOTF made repeated requests for information about the project design and technical, managerial and commercial information related to the project. Similarly the TOTF consistently sought information and data related to the social and/or cultural impacts, positive and negative, that might come from the proposed hydrocarbons development. The following information was identified as necessary for Aboriginal people to make informed decisions about the development, and to determine what management conditions may be appropriate or required if development does proceed:

- Detailed layouts and design plans of the proposed marine and terrestrial facilities, including exclusion and buffer zones, pipeline layouts, and supporting infrastructure.
- Details of the key activities for the construction, operation and decommissioning of the facilities.

- Further details of any potential impacts on cetaceans at each location.
- Further details on the physical and environmental impacts (marine and terrestrial) of a development at each short listed location.
- Wet season environmental data for each short listed location.
- An indication of the supporting infrastructure required at each of the short listed locations.
- Information related to residential exclusion zones and lease holdings, for example how close people can live to the development.

The TOTF, through the KLC, made a number of formal information requests to the State, via the NDT, and Woodside. The majority of these requests remained outstanding in December 2008, for example:

- Cultural information held by the Department of Indigenous Affairs (requested 14 July and 21 August 2008).
- Copies of maps that show the land height above sea level on the Kimberley coast (requested 29 July 2008).
- Maps showing the water depth on the Kimberley coast (requested 29 July 2008).
- Summaries of technical issues identified by Gaffney Cline and environmental issues identified by scientists for all sites (requested 29 July 2008).
- Worley Parsons report in an audio-visual format (requested 30 September and 3 November 2008);
- Written briefings on all studies relevant to the project as provided for in the Studies Agreement between KLC and the State (requested 1 October 2008).

That the TOTF was frustrated by its inability to be technically informed indicates that the wider Traditional Owner population and community members were even less able to judge the impact of LNG development, and remained in a state of uncertainty about what might happen to their country, their livelihoods, their future and their future generations' futures.

In summary, the site selection process conducted between December 2007 and September 2008 embodied the principle of IFPIC to a substantial degree. In particular, a number of Traditional Owner groups were able to take decisions as to whether or not their land and sea country would continue to be considered as potential LNG Precinct sites. There were however some constraints on the access of Traditional Owners to relevant information, in part because of the absence of detailed proposals for specific processing operations within an LNG Precinct, in part because of the failure of Woodside and State agencies and consultants to respond to some requests for information by the KLC and the TOTF.

#### **4. The Traditional Owner Negotiating Committee and the Heads of Agreement for the James Price Point Site**

As noted above, on 15 October 2008 the newly-elected Liberal/National Party Government reversed the former State Government's policy position on Indigenous consent. The new Premier Colin Barnett stated that it was unacceptable for government to, in his words, give 'a right of veto to local Aboriginal people, expressed in the following terms that projects would not go ahead unless there was informed consent by Aboriginal people' (Government of Western Australia 2008a).

The State Government indicated that while it would consult with Traditional Owners regarding measures for impact mitigation and community benefits, the existing site selection process involving the Traditional Owner Task Force would be discontinued. The Premier indicated his preference for a site at North Head, near the community of Beagle Bay (Government of Western Australia 2008a).

In December 2008 the State, after receiving advice on the short-listed sites from the Environmental Protection Agency, announced James Price Point as its preferred site for the development of the LNG Precinct. The Premier indicated that compulsory acquisition powers would be employed to enforce its decision if Traditional Owners failed to reach agreement with the State for location of the Precinct at James Price Point. He said that provisions of the *Public Works Act 1902* would be used to acquire land so that companies could establish LNG processing facilities. As Premier Barnett stated, 'We'll acquire it as government-owned land and we will lease it out to

proponents ...' (O'Brien 2008). The Premier indicated that he would allow a period of three months ending on 31 March 2009 for the negotiation of a Heads of Agreement between the State, Traditional Owners and Woodside, that would provide Traditional Owner consent for the LNG Precinct to proceed. If this was not achieved the process of compulsory acquisition would be initiated (O'Brien 2008; Government of Western Australia 2008b).

Changes in State policy on Traditional Owner consent and the State's position on the timing of negotiations altered the basis of Indigenous participation in relation to the proposed LNG Precinct in fundamental ways. Previously Indigenous participation in the process was centred on the question of whether or not an LNG Precinct site could be found that met relevant engineering, technical and environmental requirements and whose selection as the LNG Precinct site also had the support of Traditional Owners for the area concerned (see Section 3). Now the central issue was how negative impacts associated with a choice of site made by the State without Indigenous consent could be minimised, while at the same time allowing Traditional Owners and other affected Indigenous people to share in the benefits of development.

Another basic change resulted from the imposition of very tight time frames on the negotiation process. The three months nominally allowed by the Premier for negotiation of a Heads of Agreement contrasts with the several years taken to reach an equivalent point in other ILUA negotiations for less complex projects.<sup>4</sup> This resulted in a situation in which the KLC and Traditional Owners were negotiating under enormous pressure, and under increasing pressure as the Premier's deadlines for conclusion of a key Terms Agreement approached.

While the Premier had indicated a willingness to engage in negotiations with the Traditional Owners of James Price Point, the KLC was seriously hampered in establishing an appropriate representative structure and in preparing for negotiations by the absence of any agreed framework for engaging with the State and Woodside or any funding to support negotiations. (A formal funding agreement with the State was

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

not finalised until 11 March 2009). Partly for this reason the first formal negotiation meeting did not occur until 26 February 2009. This left only 5 weeks for negotiation of a Heads of Agreement. After representations by the KLC on behalf of Traditional Owners that the 31 March deadline would allow insufficient time to properly organise a meeting that would have to take serious decisions in relation to the proposal for an LNG Precinct at James Price Point, on 1 April 2009 the Premier extended the negotiation period by a further two weeks until 15 April 2009, on the basis that a final agreement could be reached by this latter date. The Goolarabooloo / Jabirr Jabirr native title claim group authorised the KLC to enter the Kimberley LNG Precinct Heads of Agreement with the State and Woodside on 15 April 2009 (see below). Thus the KLC and Traditional Owners were allowed just seven weeks to negotiate a Key Terms Agreement for one of the largest and most complex industrial projects that has been the subject of negotiations involving Indigenous people in Australia. This situation appears to be fundamentally inconsistent with the requirements for IFPIC identified in Section 2. above.

On 19 and 20 February 2009 a meeting of the Goolarabooloo / Jabirr Jabirr native title claim group authorized the KLC to act on their behalf in relation to LNG development and unanimously endorsed motions that:

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

The meeting nominated representative members of a Traditional Owner Negotiating Committee (TONC) to represent the Goolarabooloo / Jabirr Jabirr native title claim group in negotiations with the State and Woodside.

The TONC and the KLC subsequently met formally on a number of occasions to participate in negotiations with the State and Woodside, while technical teams from

the KLC, the State and WEL continued discussions in the periods between these meetings. TONC meetings involving both internal briefings and discussions and engagement with the State and Woodside were held on 24 – 26 February 2009, 3-5 March 2009, 10-12 March 2009, 17-19 March 2009, 24 – 27 March 2009, and 14 and 15 April 2009. These meetings involved interaction between the TONC, KLC, and representatives of the State and Woodside, across a wide range of issues related to the LNG Precinct. These included environmental and cultural heritage protection, land management, native title, economic opportunities for Kimberley Aboriginal people, and financial compensation for Traditional Owners and other affected Aboriginal people. The State and Woodside presented positions across a range of relevant issues, but did not present fully developed proposals until towards the end of the seven-week period. The Traditional Owners and the KLC presented ‘Traditional Owner Rules’ that had been developed by Kimberley Traditional Owners, endorsed by the TOTF and adopted by the TONC. The Traditional Owner rules contained principles relating to agreement processes, such as the need for TO consent and for all affected Traditional Owners to be included in agreements, and also detailed requirements in relation, for instance, to the structure of financial payments and the setting of specific goals for employment and training programs. The TONC and KLC also put forward counter-proposals to positions put by the State and Woodside, and in addition made repeated representations to the State and Woodside that the State should not threaten them with, or resort to, compulsory acquisition.

The TONC meetings also involved a series of briefings for Traditional Owners by KLC staff and consultants on matters relevant to the negotiation, including the content and structure of other agreements for resource projects; precedents for agreements in the Kimberley and elsewhere; the status of Woodside’s Browse Basin project; and options for dealing with key components of an agreement, for example financial provisions. The TONC also received briefings from the KLC and its advisers on positions presented and offers made by the State and Woodside, and legal and other advice on the process of compulsory acquisition and issues it raised, and on the implications for Traditional Owners if they decided not to enter an agreement in relation to development of an LNG Precinct at James Price Point.

The KLC made every effort to ensure that TONC meetings were conducted in a culturally appropriate manner. These efforts included, in particular, emphasis on the key role in decision making of the Traditional Owners of the proposed James Price Point site. At the same time, the wider cultural ramifications of a development on this scale, and the cultural and social ties among Kimberley Traditional Owners (see Section 3.3 above) were recognized through the presence of, and support provided by, senior Law bosses (see below). In addition, to the extent possible given the limited time available, appropriate approaches were used to the presentation and discussion of information, including allowing meeting breaks for material to be discussed and absorbed, and use of graphics to interpret complex negotiation issues (e.g. a system of ‘traffic light’ signals to indicate whether the positions being presented by Woodside and the State were close to, some distance from, or in basic conflict with the ‘Traditional Owner Rules’ on relevant issues).

On 14 and 15 April 2009 the KLC, as required by the resolution of the Goolarabooloo / Jabirr Jabirr native title claim group meeting of 20 February, held a meeting of the Goolarabooloo / Jabirr Jabirr native title claim group to consider the current offers of the State and Woodside in relation to establishment of an LNG Precinct at James Price Point, and to facilitate a decision by the Goolarabooloo / Jabirr Jabirr claimants on whether to accept the offers and continue negotiations towards an ILUA or ILUAs, or to refuse the offers and conclude negotiations. Members of the ‘Goolarabooloo / Jabirr Jabirr Native Title Claim Group’ were invited to the meeting through an advertisement in the *Broome Advertiser* placed by the KLC on 30 March 2009. The subject of the meeting was described as ‘Update on Negotiations about the Premier’s Nomination for a Gas Precinct around James Price Point’. Notices for the meeting were delivered by hand or e-mail to all family representatives, and to members of the Native Title Claim Group who had attended previous meetings. Extra copies of the notices were given to these individuals to pass on to other family members.

Attendance sheets were maintained at the meeting, containing the name of each attendee. The attendance sheets indicate that representatives of all of the family groups were present. All the members of the TONC attended, which is significant given that TONC members had been nominated to represent their family’s interests in the negotiations and therefore can be seen as holding a level of authority to make

decisions on their family's behalf. Other senior Goolarabooloo and Jabirr Jabirr women and men were also present.

Following the practice established in the TOTF site selection process (see Section 3) and adopted at earlier TONC meetings, a number of senior Law bosses or cultural leaders, both men and women, who are not members of the Goolarabooloo / Jabirr Jabirr native title claim group were present at the meeting. The presence of these senior people, referred to as the Advisory Group, was to support the Goolarabooloo / Jabirr Jabirr people in their decision-making. The Advisory Group did not participate in the decision making process, but by their presence lent support to the Goolarabooloo / Jabirr Jabirr during a period of enormous political pressure and public scrutiny.

An additional source of pressure for Traditional Owners was the very high level of public scrutiny of their decision. The Premier's statement that the State Government would compulsorily acquire the land required for the LNG Precinct received significant national media coverage from December 2008<sup>5</sup>, and proportionately more intense coverage in state and local media from that period. This coverage included the fact that the Premier's deadline for an agreement had been extended from 31 March to mid-April 2009, and there was therefore a large amount of national, state and local media interest in the meeting on 14 and 15 April because of the significance of the decision that Traditional Owners had to make. There was also a lot of interest in the process from environmental activists, some of whom attended the meeting venue (uninvited) on 14 April to attempt to lobby Traditional Owners, including by telling elderly members of the claim group that they should not 'sell out'. All of these

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<sup>5</sup> "I'll take native title land: Barnett", *The Australian*, 11 December 2008; WIN Western Australia, *WIN News*, report by Eileen Jung, 12 December 2008; 6RTR (Perth), morning program Maree Boo, 15 December 2008; Darren Coyne "Premier's threat on land sparks anger", *Koori Mail*, 17 December 2008, p7; ABC North West WA (Karratha) News 7.32 am 22 December 2008; "James Price Point chosen as gas hub site", *West Australian online*, 23 December 2008 12.30pm WST; ABC North West WA (Karratha), 06:30 News - 25/03/2009 - 06:32 AM; NITV (Sydney), NITV News - 24/03/2009 - 06:34 PM; Paige Taylor, "Government close to deal on Kimberley natural gas" *The Australian*, March 30, 2009; Radio National (Perth) 19:00 News - 27/03/2009 - 07:01 PM; ABC News Online "Deadline looms for gas hub site agreement" posted 31/3/09; ABC 720 Perth (Perth) Mornings - 02/04/2009 - 08:44 AM; ABC 720 Perth (Perth) 22:00 News - 01/04/2009 - 10:05 PM; Radio National (National Australia) PM - 01/04/2009 - 05:48 PM.

matters combined to create a situation of enormous pressure on and scrutiny of Traditional Owners as they went to the meeting on 14 and 15 April.

The content of discussions at the meeting on 14 and 15 April are confidential and may be subject to legal privilege. It is therefore not possible to provide a detailed account of the content of those discussions without the consent of the Goolarabooloo / Jabirr Jabirr native title claim group<sup>6</sup>. However, the meeting discussions included:

- an explanation of and advice on the proposed Heads of Agreement, including details of the negotiations which resulted in the agreement;
- advice on the likely consequences of the various courses of action available to Traditional Owners;
- an opportunity for Traditional Owners to meet directly with representatives of the State and Woodside;
- an opportunity for further negotiations over the course of the two day meeting;
- an opportunity for Traditional Owners to discuss matters privately, without any KLC staff or other advisers present<sup>7</sup>;
- last minute discussions between Wayne Bergmann, Executive Director of the KLC, and the Premier regarding compulsory acquisition; and
- a decision, made in accordance with the appropriate decision making process, on whether or not the native title claim group would authorise the KLC to enter into the Heads of Agreement on behalf of the claim group.

At the end of the second day of the meeting, the Traditional Owners made a decision on whether or not to authorise the KLC to enter into the Heads of Agreement on their behalf. The decision was made in accordance with the appropriate (and agreed) decision making process. The decision of the Traditional Owners was that the KLC should enter into the Heads of Agreement with the State of Western Australia and

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<sup>6</sup> There have been a number of reports about the content, process and outcomes of the meeting on 14 and 15 April 2008 which have been reported in the media or otherwise the subject of public comment and speculation. Despite this, the KLC position is that a decision on whether or not to disclose details about the meeting should only be made by the native title claim group.

<sup>7</sup> KLC meetings with native title claim groups often involve an opportunity for claim group members to privately discuss the matters in relation to which advice or information has been provided, particularly where the discussions or decisions to be made are significant and long term.

Woodside in relation to the LNG development in the vicinity of James Price Point, for and on behalf of the Traditional Owners, for the negotiation of an ILUA.

The Traditional Owners were not successful in achieving some outcomes from the negotiations that they had established as prerequisites for an acceptable agreement. In addition, they accepted only reluctantly certain components of the Heads of Agreement.

However, the Traditional Owners determined that the Agreement they had negotiated was the best that could be achieved under the circumstances, and that it was preferable to the outcomes likely to be achieved if the State proceeded with compulsory acquisition of the Precinct site. One important consideration in this regard was that the Heads of Agreement allowed them a major and continuing role in the selection of a specific site for the LNG Precinct and in determining the location of Precinct components within that site (see Section 5), and in the ongoing management of the Precinct as it is developed, while it is operating, and when it is eventually decommissioned and rehabilitated. For the Traditional Owners, such a role was essential if they were to fulfil their obligations to look after their land and sea country, including cultural sites. There was no certainty that they would have any significant role in project design or management if the State acquired the LNG Precinct by compulsory acquisition. As one senior Traditional Owner commented in a TONC meeting, with compulsory acquisition ‘Heritage, country, everything is under threat’. The Heads of Agreement allowed Traditional Owners to ‘take ownership of the future ... with a heavy heart, but a clear head’ (KLC 2009b). The Heads of Agreement also included a commitment to a State Agreement between the State and Traditional Owners to exclude LNG development elsewhere on the Dampier Peninsular, and to provide for the return of the LNG precinct to the Traditional Owners at the end of the project life.

It is clear from the minutes and recordings of meetings between the TONC, the KLC, the State and Woodside that the Traditional Owners and KLC had the opportunity to vigorously and repeatedly press their views with State and Woodside representatives. TONC members and the KLC also pressed their case in numerous, less formal meetings with senior State and Woodside representatives, including with the Premier,

Colin Barnett and with Commonwealth ministers and officials. However in only seven weeks of negotiations it was not possible for the parties to have a robust engagement on every topic and, ultimately, elements of the Woodside and State proposals were not negotiated before the State imposed a deadline for an agreement. Traditional Owners were forced to decide whether to accept or reject the offers that the State and Woodside had put on the table. Indeed it was not possible in some cases to even fully explore the practical ramifications of certain elements of the State and Woodside's offers, for example the State's grant of an equivalent area of freehold land to that required for the industrial precinct.

The records of TONC meetings also make it clear that the Traditional Owners and the KLC did not believe that negotiations were being conducted in a culturally appropriate manner, because of the short time frame available for negotiations; the threat of compulsory acquisition by the Premier; and the lack of any continued funding for the TONC to meet or for the KLC to provide support for Traditional Owners after 31 March 2009 (or, later, after 15 April 2009). During the meetings leading to the signing of the Heads of Agreement, Traditional Owners and the KLC frequently noted, and brought to the attention of Woodside and the State, the limited information available to them regarding the proposed LNG Precinct. Key gaps in information included the specific location of the Precinct and its layout; detail of its operation including, in particular, use of water resources and any emission of noxious gases; critical aspects of its environmental impact, for instance as a result of dredging; the nature of the workforce and the location of worker accommodation; and the timing of development. Again it should be stressed that many of these issues did not involve matters of detail that could only emerge project-level assessments were conducted, but related to the 'strategic' issue of where an LNG Precinct should be located. An informed decision on this matter could hardly be made, for instance, in the absence of information on the environmental impacts of dredging and water use, or on the location of worker accommodation and on the nature of the workforce.

In summary, it is apparent that the Traditional Owners did give their consent to the Heads of Agreement that established principles necessary to obtain native title and cultural heritage consents for the proposed LNG Precinct at James price Point. However that consent:

- was not free, because it was given under the threat of compulsory acquisition and within time frames that were unduly and severely truncated ;
- was only partially informed, because while the TONC did have access to a range of information and advice, it did not have access to critical information regarding the proposed LNG Precinct, particularly regarding potential environmental impacts;
- resulted from a negotiation process that denied a fundamental cultural assumption and principle of Traditional Owners, that only they have the right and the responsibility to determine whether development occurs on their land and sea country.

## **5. Selection of a Specific Site and of Locations for LNG Precinct Components at James Price Point**

A further issue in relation to Indigenous consent and consultation involves the choice of a specific site for the LNG Precinct, and decisions regarding the location of specific components of the LNG Precinct within that site. The Heads of Agreement related to the establishment of a precinct ‘in the vicinity of James Price Point’, and decisions were and are required regarding the specific location of the LNG Precinct site and, within the Precinct site, of individual facilities including LNG processing trains, pipeline crossings, a light industrial area and an accommodation complex.<sup>8</sup>

In April 2009, in a first response to this requirement, the KLC organised site visits with senior Goolarabooloo / Jabirr Jabirr women, to ascertain the extent of ethnographic heritage issues, both on the land and in the sea, in the area being considered for the LNG Precinct. The survey team conducting the site visits was selected in consultation with senior female and male law bosses from both the Goolarabooloo / Jabirr Jabirr native title claim group and surrounding groups. The survey team, accompanied by a female anthropologist, surveyed the area using a helicopter and by motor vehicle, and by inspecting sites on foot. They had access to

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<sup>8</sup> All of these components would fall within the total area of land indicated by the Heads of Agreement, but they might not be contiguous. For example the light industrial area and accommodation complex might be outside and some distance from the buffer zone surrounding the industrial precinct.

maps showing different potential locations and layouts for the LNG Precinct. On the basis of their concerns regarding the potential impact of the alternative sites on environmental and cultural values and cultural sites, the women identified a preferred site. They women indicated 23 recommendations, including the creation of exclusion zones where no development activity would be permitted, to protect sites, limit environmental, cultural and social impacts, and maximise Traditional owner access to their land and sea country.

In May 2009 the Goolarabooloo / Jabirr Jabirr TONC nominated an Environmental and Cultural Heritage Team (ECHT) to deal further with the issue of precinct location. The majority of the ten-person Team comprised senior men and women, with a small number of younger people also included. On 19 and 20 May 2009 the ECHT, working with two KLC consultants, selected a site in the northern portion of the area around James Price Point.

On 23 and 24 September 2009 the ECHT conducted a workshop at which it considered a number of studies proposed by Woodside for the Strategic Assessment of the proposed LNG facility. The ECHT approved the studies but imposed a number of 'cultural directions' on their conduct. These directions varied from study to study, but included the participation of Traditional Owners in the surveys; measures to reduce the risk of introducing foreign and invasive species; prohibition on work in certain areas until a full heritage clearance had been completed; a prohibition on construction of new tracks; and avoidance of registered sites.

At this same meeting the ECHT was advised by the KLC, based on technical information received from the State and Woodside, that the northern location should be reconsidered because it would involve considerably more dredging, and therefore have larger environmental impacts, than two potential southern sites. The ECHT was provided with maps of these two sites, and was asked whether a further survey would be required to determine whether one or other of these was acceptable. The ECHT group indicated its willingness to approve one of these sites, but the KLC informed the meeting that a formal decision was not required at this point.

On 15 October 2009 the ECHT reconvened, and the decision to locate the Precinct at one of the southern sites was reaffirmed. This decision acknowledged there would be largely unknown heritage impacts at the southern sites, which would need to be managed by Traditional Owners. In the view of the KLC's Senior Anthropologist, who attended the meeting, the ECHT believed 'that they had indeed been authorised by the greater native title claim group to act on their behalf on this matter and that they had made their decision based on their own volition and information provided by the proponents and the State for their informed consent'.

On 13 November 2009 a more systematic basis was established for Traditional Owner input into decisions on site layout and design through the conclusion of a Heritage Protection Agreement (HPA) by the State, Woodside and the KLC on behalf of itself and the Traditional Owners of the LNG Precinct site. The HPA identifies processes for the identification, protection and management of Indigenous sites on the lands within the LNG Precinct, for the parties to work together to identify the precise layout of the LNG Precinct in the vicinity of James Price Point, and for the State and Woodside to seek permits or consents pursuant to the *Aboriginal Heritage Act 1972 (WA)*.

The HPA provides for extensive consultation with the KLC and Traditional Owners in relation to protection of cultural heritage on lands within the area of the LNG Precinct. The objective of the Parties is to try to avoid a situation in which the State or the Proponent takes a course of action in relation to cultural heritage that does not have the support of Traditional Owners and the KLC. Processes are put in place by the HPA for heritage surveys and clearances for the various areas and land uses within and associated with the LNG Precinct. The HPA does not bind the Traditional Owners to agree to heritage clearances for any part of the project area. Neither does it bind Woodside and the State to the terms of any heritage clearances provided by Traditional Owners. However the HPA does bind the parties to a process of heritage clearances which maximises the likelihood of agreed culturally and technically acceptable outcomes and discourages deviation from this process.

The HPA represents a departure from the 'No Means No' principle enshrined in a number of recent resource developments negotiated by the KLC and Traditional

Owners in the Kimberley. Under this principle, project operators agree not to proceed with a permit application under the *AHA* if the application does not have the support of Traditional Owners and/or the KLC (see for example Argyle Diamonds *et al* 2004). The State and Woodside make no such commitment under the HPA. As a result the HPA represents a departure from the principle of IFPIC, as it allows for a situation in which the State or Woodside proceed with certain activities even though they have failed to gain Traditional Owner consent to these activities.

The Traditional Owners and the KLC were placed under enormous pressure to sign the HPA in November 2009 because of commercial factors relating to project time lines. While Traditional Owners did consent to the HPA, consent was given in a context that did not provide TOs with sufficient time in which to make an informed decision in a culturally appropriate manner.

## **6. The Aboriginal Social Impact Assessment**

The KLC has undertaken an Aboriginal Social Impact Assessment (ASIA) of the proposed LNG Precinct at James Price Point as part of the strategic assessments of the Precinct. It is designed in particular to address ToR that require ‘a description of the potential impacts, including socio-economic impacts, of the Plan [i.e. the LNG Precinct] on Indigenous people’; an assessment ‘of whether any impacts on Indigenous people ... are likely to be unknown, unpredictable or irreversible’; and the identification of ‘management arrangements, including the possible role of Traditional Owners in those arrangements ... that development and operation of the Precinct ... are undertaken in a manner designed to avoid impacts on significant environments ...’ (see Appendix 1). The aims of the ASIA include:

1. To ensure that affected native title groups and other affected Aboriginal people play a central role in the impact assessment and project approval processes for the LNG Precinct;
2. To identify the social impacts of hydrocarbon-related development, with a view to maximising the positive impacts and minimising the negative impacts of the Precinct;

3. To provide a basis for input by Aboriginal people into statutory impact assessment processes, having regard to the Strategic Assessment processes being undertaken by the Commonwealth and the State in respect of Kimberley hydrocarbon-related development, and in particular to recommend conditions that should be attached to any endorsement of the Plan for the LNG Precinct (KLC 2010).

An extensive programme of consultation was undertaken to help address these aims and the relevant Strategic Assessment ToR (see KLC 2010 for further details). Native title claim groups (Yawuru, Goolarabooloo / Jabirr Jabirr, Nyul Nyul, Bardi Jawi and Nimunburr) with interests in the Area of Impact for the purposes of the ASIA (Broome, Derby and the Dampier Peninsula) were contacted by letter, with follow up contact by phone and/or e-mail, and invited to participate in the ASIA. In some cases this participation took the form of widely-advertised, day-long meetings of the group concerned, which in certain cases attracted attendees from throughout the West Kimberley and from outside the region (for example from the Pilbara). In other cases the group preferred meetings to occur with a Native Title Claim Group Steering Committee or equivalent body, or were happy for a meeting of the native title group to be combined a community meeting (see below). At meetings attendees were provided, through power point presentations, with information on the proposed LNG Precinct; large colour maps and graphic illustrations of the Precinct site were displayed on meeting room walls. Information was also provided on relevant Indigenous and government decision-making processes, including the Strategic Assessment; on base line studies being conducted as part of the ASIA; and on the LNG Precinct Heads of Agreement (see Section 5). It was important to include information on the Heads of Agreement as this offers benefits not only for the Traditional Owners of James Price Point but also for the Dampier Peninsula and the Kimberley, yet information on its content was not widely available. Fact Sheets prepared by the ASIA were provided to all attendees. These both included, and added further detail to, the information presented at meetings.

Attendees were encouraged to ask questions at any point during meetings, and in many cases extensive engagement took place around issues of particular interest or

concern to participants. Each meeting also included a separate session specifically designated to allow attendees to express aspirations or concerns in relation to the LNG Precinct, or to suggest management strategies to address likely impacts. Issues raised were noted on butchers paper or white boards, allowing people to review them during breaks or at the end of the day. Photographs were taken of all such material, ASIA staff took detailed notes of the discussion at every meeting, and meetings were recorded. In combination this ensured that all issues and questions raised by participants and strategies they suggested would be included in the ASIA Report.

Community meetings were also held in Beagle Bay, One Arm Point, Lombadina, Djarindjin, Derby and Broome, following appropriate community protocols for obtaining permission to visit communities and hold meetings. Initial community meetings were held in September/October 2009, with the format mirroring that described above for native title group meetings. A second round of community meetings was held in late November and early December 2009. At these meetings a condensed version of the project information provided at the first round of meetings was presented. This was important because a substantial number of people who attended the second round of meetings had not attended the first. The ASIA Team then provided feedback on issues raised at other meetings, and a larger part of each meeting was set aside for attendees to raise and discuss aspirations and concerns in relation to the LNG Precinct and a range of likely impacts, and to suggest management strategies to deal with these impacts.

A meeting was also held with members of the affected native title claim groups who had represented their claim groups on the Traditional Owner Task Force during 2008. As the TOTF had been discontinued (see Section 3), the KLC had not been able to convene further meetings of the TOTF after September 2008. This meeting, which followed the same format as native title group meetings, provided an opportunity to update the TOTF on developments over the previous 12 months and to obtain their input into the ASIA.

Numerous less formal engagements with community and native title group members provided additional input for the ASIA. Discussions with individuals or small family

groups often occurred before or after meetings, or as other opportunities arose during ASIA consultation meetings.

Extensive consultations were also undertaken with Indigenous organisations, with groups with a specific interest or area of expertise (for instance the Bardi Jawi Rangers) and with organizations providing services to Indigenous people, in Broome, Derby and the Dampier Peninsula communities. More than 100 organizations and groups were contacted, and the ASIA Team met with nearly all of these. Engagement with organisations was designed to:

- Obtain access to data held by organisations on existing economic, social and cultural conditions among affected Indigenous populations;
- Document the existing capacity or planned future capacity of organisations to deliver services to Indigenous people;
- Obtain input from organisations regarding the likely impacts of the LNG Precinct, particularly on demands for their services, and on their ability to meet any increased demands;
- Obtain their views regarding strategies and management plans for addressing Precinct impacts.

While the ASIA involved extensive consultations, it did suffer from a number of constraints (KLC 2010, Chapter 1). Two are particularly significant. A critical limitation was that the ASIA was conducted under severe time constraints, commencing in August 2009 and concluding in February 2010. This shaped and limited the geographical scope of the ASIA; the extent of consultation it was possible to conduct; the range of matters considered; and the depth and detail in which these matters are considered. For instance, it was not possible to conduct key components of base line data collection, including a household survey of the Indigenous population most likely to be affected by the LNG Precinct. Comprehensive and accurate base line data is essential to accurately assess future impacts and to develop strategies to address negative impacts and maximise opportunities. As a result, much additional work remains to be done to complete a full and satisfactory ASIA. A key element of this ASIA Report involves identification of the additional work and recommendations that its completion should constitute a condition of any approval the Federal Minister for the Environment may grant for development of an LNG Precinct (see KLC 2010,

Chapter 2.3 and Chapter 4). These severe time constraints reflected, in large measure, the decision of the State that studies for the Strategic Assessment, including the ASIA, should be completed by December 2008 (DSD 2009, Table 2.5, p.17) This deadline was subsequently adjusted, after sustained representations by the KLC, to February 2010. However, this small extension was not sufficient to substantially address the issue of a truncated timeframe.

A second constraint facing the ASIA involves access to information regarding the proposed LNG Precinct. For example, none of the environmental studies and few of the social studies required under the *Kimberley LNG Precinct: Scope of the Strategic Assessment* (DSD 2009, Appendix I) had been completed prior to the ASIA consultations. In addition, while the vicinity of James Price Point had been identified as the location for the LNG Precinct, a specific location had not been finalised, and key components of project design (for instance the location of workforce accommodation and of the light industrial area) and operation had not been determined. Critical aspects of timing for the project were also not yet decided, for instance when Woodside and its partners would make a final 'Theme Select' decision between piping Browse gas to the Kimberley or the Pilbara and when project construction would commence.

This meant that the ASIA Team had to inform participants about the likely scope and impact of the LNG Precinct on the basis of the limited project information available in the *Kimberley LNG Precinct: Scope of the Strategic Assessment*, and information regarding LNG development and LNG processing available as a result of the NDT and TOTF site selection processes conducted during 2008. It also meant that additional or updated information had to be incorporated into ASIA presentations and information materials as it became available. For example the first estimates of the potential impact of the LNG Precinct on population growth and demand for housing in Broome did not become available until November 2009, and so could only be incorporated into consultations that occurred after that date.

The KLC's Aboriginal Social Impact Assessment Report was provided to the State Australian Governments in March 2010. It contains some 70 recommendations regarding conditions that should be attached to any endorsement of the Plan for the

LNG Precinct, designed to minimise negative social, economic and cultural impacts from the project, and to maximise the benefits it generates for Traditional Owners and other affected Indigenous people.

## **7. Ongoing or future processes involving Indigenous Consultation and Consent**

The TONC and the KLC undertook, during 2009 and early 2010, negotiations with the State and Woodside towards conclusion of an ILUA and related agreements that would give legal expression to the principles and commitments contained in the LNG Precinct Heads of Agreement. These negotiations should provide further opportunities for expression of Indigenous values and objectives in relation to the LNG Precinct development, within the constraints represented by the desire of the parties to adhere to the terms of the Heads of Agreement. However at the time of writing the future of these negotiations is unclear, in particular because of the announcement by Premier Barnett on 2 September 2010 that the Western Australian Government had commenced a compulsory acquisition process to acquire land for the proposed LNG Precinct at James Price Point. A compulsory acquisition of the land (including all native title rights and interests) is not consistent with the Heads of Agreement because:

- it is a statutory process of compulsion, as opposed to a negotiation process that would result in an agreement consistent with the commitments of the parties as recorded in the Heads of Agreement; and
- more particularly, compulsory acquisition extinguishes native title, which is not consistent with the commitment of the State in the Heads of Agreement that the non-extinguishment principle would apply to the LNG Precinct land.

If negotiations do proceed to a conclusion, the authorisation processes required under the *Native Title Act* would involve consultation within the relevant native title groups and a decision by the group on whether or not it wishes to enter into the ILUA and related agreements. It is too early to comment in detail on the specific nature of the Indigenous consultation and consent involved in development and consideration of these agreements. However it must be remembered that, unless there is a change in State Government policy, Traditional Owners will face compulsory acquisition of

land for the LNG Precinct if they reject the proposed ILUA or if negotiation of the ILUA was not achieved within the statutory time frame, and so any Indigenous consent in this case cannot be ‘free’. As was the case with the Heads of Agreement, there are pressures to negotiate the ILUA within timelines that are driven by Woodside’s commercial needs rather than the requirements for culturally appropriate decision making and informed consent.

Another relevant process is the Strategic Assessment. The period of public comment on the Draft Strategic Assessment Report (currently expected to occur in October – November 2010) may provide an additional opportunity for the expression of Indigenous values, priorities and concerns in relation to the LNG Precinct. In addition, a critical rationale for the ASIA, discussed in the previous section, is to put forward recommendations to the Federal Minister for the Environment regarding measures to address impacts and maximise opportunities arising from the Precinct. The extent to which the Minister accepts these recommendations will be very relevant to a judgement regarding the effectiveness of ASIA consultations in advancing Indigenous values and interests.

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## Appendix 1

### Commonwealth – State Strategic Assessment Agreement 6 February 2008



**ENVIRONMENT PROTECTION AND BIODIVERSITY  
CONSERVATION ACT 1999  
Part 10 Strategic Assessments  
Section 146 (1) Agreement**

Relating to the assessment of the impacts of actions under the Plan for the Browse Basin Common-User Liquefied Natural Gas Hub Precinct and associated activities

between

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND THE ARTS ON BEHALF OF THE  
AUSTRALIAN GOVERNMENT

and

THE WESTERN AUSTRALIAN MINISTER FOR STATE DEVELOPMENT AND THE WESTERN  
AUSTRALIAN MINISTER FOR THE ENVIRONMENT AND CLIMATE CHANGE ON BEHALF OF THE  
WESTERN AUSTRALIAN GOVERNMENT

## 1 PARTIES

This is an agreement between:

The Australian Government Minister for the Environment, Heritage and the Arts (Minister) on behalf of the Australian Government

and

The Western Australian Minister for State Development and the Western Australian Minister for the Environment and Climate Change (WA Ministers) on behalf of the Western Australian Government.

## 2 DEFINITIONS

- 2.1 *Working days* means a business day as measured in Canberra, ACT.
- 2.2 *Browse Basin Liquefied Natural Gas Common-User Hub Precinct* (the Precinct) means an area of land suitable for development of gas processing infrastructure, gas storage and port facilities and associated activities.
- 2.3 *Plan* means the Plan for a Common-User Liquefied Natural Gas Hub Precinct and its associated activities.
- 2.4 *LNG* means Liquefied Natural Gas.
- 2.5 *EPBC Act* means the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth).
- 2.6 *EP Act* means the *Environmental Protection Act 1986* (Western Australia).
- 2.7 *EPA* means the Environmental Protection Authority (Western Australia).
- 2.8 *Environment* means environment as defined in section 528 of the EPBC Act. Note this definition includes heritage values.
- 2.9 Unless stated otherwise within this agreement, the definitions, meanings and terms in the *Environment Protection and Biodiversity Conservation Act 1999* apply to this agreement and its attachments.

## 3 PREAMBLE

- 3.1 The Western Australian Government and the Australian Government recognise that the Kimberley Region of Western Australia (as generally identified in Map 1) has significant environmental and heritage values as well as significant economic potential in relation to the extraction and processing of LNG from the Browse Basin.
- 3.2 Both Governments commit to undertake an assessment under section 146 of the EPBC Act, of a Plan for a Common-User Liquefied Natural Gas Hub Precinct and its associated activities, and recognise the requirements for assessment under s38 of the EP Act. To ensure the best sustainable and timely outcome, assessment of the plan will be undertaken concurrently through a coordinated and collaborative process, producing a set of reports that meet the requirements of both the EPBC Act and EP Act. The Plan will promote ecologically sustainable development and provide for the protection and conservation of the environment, especially matters of National Environmental Significance.
- 3.3 The parties agree that their Departments will share information and work collaboratively on the analysis of the environmental issues associated with the hub. Subject to a separate agreement, the parties will provide funding in relation to implementation of this agreement.

#### 4 BACKGROUND

- 4.1 Section 146(1) of the EPBC Act allows the Minister to agree in writing with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected by a provision of Part 3 of the EPBC Act. This agreement provides for the assessment of impacts of actions under the Plan for a Common-User Liquefied Natural Gas Hub Precinct on all matters protected by Part 3 of the EPBC Act.
- 4.2 In accordance with section 146(1A) of the EPBC Act, WA Ministers request that the assessment provided for by this agreement will deal with the impacts of actions under the Plan on the environment generally, being impacts referred to in the Terms of Reference (other than impacts mentioned in clause 4.1) within the area identified in Map 2.
- 4.3 Section 38 of Division 1 of Part IV of the EP Act enables the EPA to carry out a Strategic Environmental Impact Assessment (SEIA) of proposals that it considers are likely to have a significant effect on the environment, where the proponent has requested a SEIA.
- 4.4 The EPA may develop Memoranda of Understanding or guidelines with decision-making authorities to provide guidance on the environmental impact assessment of proposals under Division 1 of Part IV of the Act.
- 4.5 It is intended under this agreement that an assessment will be undertaken in accordance with the approved Terms of Reference of this agreement, to meet the requirements of both the EPBC Act and the EP Act.
- 4.6 In addition to the strategic assessment of the Plan the parties to this agreement have collaborated in the development of the draft site selection criteria (Attachment A) to cover all relevant matters, including particularly matters of National Environmental Significance. The process for selection of the Precinct will consider feasible alternatives to locations of the Precinct outside of the Kimberley Region. The parties to this agreement agree to finalise the criteria following further consultations.
- 4.7 Further to the strategic assessment of the Plan, this agreement acknowledges the outstanding natural, Indigenous and historic heritage values of the region. The parties agree to immediately commence a formal assessment of the National Heritage (and potentially international heritage) values in accordance with the requirements set out in the EPBC Act and as part of a strategic assessment of broader land use development within the Kimberley Region, as generally identified in Map 1. Regular progress reports will be provided to the parties. It is anticipated that this assessment will be completed within 2 years of signing this Agreement.

#### 5 TERMS OF REFERENCE

- 5.1 The Western Australian Government shall as soon as possible seek public comment on the Draft Terms of Reference (Attachment B) for the preparation of a report on the impacts of actions under the Plan.
- 5.2 The Western Australian Government shall provide the Draft Terms of Reference for public comment by Notice:
  - a) posted on the Western Australian Government's website; and
  - b) published in a newspaper(s) circulating nationally, in Western Australia, and locally in the Kimberley region.

The Notice must advise that the Draft Terms of Reference is available and how copies may be obtained, provide contact details, invite public comments on the Draft Terms of Reference and set a period of 28 days within which comments must be received.
- 5.3 The Western Australian Government and Australian Government Department of the Environment, Water, Heritage and the Arts may each notify specific interested parties of the Notice and of the availability of the Draft Terms of Reference. The Western Australian Government and Australian Government Department of the Environment, Water, Heritage and the Arts will make copies of the Notice and Draft Terms of Reference available electronically through their websites.

5.4 Following the consideration of public comments on the Draft Terms of Reference the Western Australian Government will provide Revised Terms of Reference to the Minister.

5.5 The Minister shall as soon as possible either:

- a) notify the Western Australian Government that the Revised Terms of Reference are satisfactory; or
- b) if not satisfied that the Revised Terms of Reference will provide for an adequate assessment of the impacts of the actions under the Plan, the Minister will:
  - (i) notify the Western Australian Government of his concerns and provide an opportunity for the Western Australian Government to respond and provide further Revised Terms of Reference which take those concerns into account; and
  - (ii) within 15 working days of receipt of the further Revised Terms of Reference, mentioned in (i) above, either:
    - (A) notify the Western Australian Government of his acceptance of the Revised Terms of Reference; or
    - (B) provide Terms of Reference further amended to meet his requirements.

## 6 PREPARATION OF REPORT

### DRAFT REPORT

6.1 The Western Australian Government will as soon as possible after agreement on the Terms of Reference cause a Draft Report to be prepared in accordance with the approved Terms of Reference (as in accordance with clause 5).

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

6.3 The Western Australian Government shall provide the Draft Report for public comment by Notice:

- a) posted on the Western Australian Government's website; and
- b) published in a newspaper(s) circulating nationally, in Western Australia, and locally in the Kimberley region

The Notice must advise that the Draft Report is available and how copies may be obtained, provide contact details, invite public comments on the Draft Report and set a period of 28 days within which comments must be received

6.4 The Western Australian Government and Australian Government Department of the Environment, Water, Heritage, and the Arts may each notify specific interested parties of the Notice and of the availability of the Draft Report. The Western Australian Government and Australian Government Department of the Environment, Water, Heritage and the Arts will make copies of the Notice and Draft Report available electronically through their websites

### COLLATION AND ASSESSMENT OF PUBLIC COMMENTS

6.5 If possible, within 60 days of the closure of the public comment period, the Western Australian Government will prepare an amended Draft Report, or a Supplementary Report to the Draft Report, taking account of the comments received

## 7 MINISTERIAL CONSIDERATION

7.1 The WA Government will submit to the Minister:

- a) the Final Report, which must comprise of either the amended Draft Report or the Draft Report and a Supplementary Report as referred to in clause 6.5 above;
- b) the Plan;
- c) public responses relating to the Draft report; and
- d) comments on how the public responses have been taken into account in the Final Report

7.2 In accordance with section 146 of the EPBC Act, the Minister will consider the Final Report on impacts of actions under the Plan. Attachment C outlines what the Minister will consider when deciding whether to make an endorsement of the Plan.

7.3 If not satisfied that the Plan will adequately address the impacts of the actions to which the Agreement relates:

- a) The Minister will make recommendations to the WA Ministers about the management arrangements for the Precinct, including recommendations for its modification
- b) The Western Australian Government will consult with the Australian Government Department of the Environment, Water, Heritage and the Arts on the recommendations made by the Minister, including those for modification of the Plan, and will take those recommendations into account in amending or modifying the Plan
- c) Where it considers it necessary, the Western Australian Government may provide to the Minister a proposed response on particular recommendations, which in its view require clarification, or where the Western Australian Government has formed a view that it may not be practicable or reasonable to implement the recommendation
- d) The Western Australian Government will provide to the Minister the revised Plan and a summary of the way in which recommendations have been addressed, the required modifications have been made, or in which modifications having the same effect have been made
- e) The Minister will consider the revised Plan and supporting material and may either accept it or request further modifications if not satisfied that it addresses adequately the impacts of the actions to which the agreement relates

7.4 If satisfied that the Final Report adequately addresses the impacts to which the agreement relates, and that any recommended modifications of the Plan or modifications having the same effect have been made, and the requirements set out in Attachment C are met the Minister will endorse the Plan.

## 8 VARIATION

8.1 The parties may vary this Agreement by an exchange of letters (including electronic communications) to the extent only that such variation is consistent with the provisions of the EPBC Act.

SIGNED BY:

The Honourable Peter Garrett AM MP  
Minister for the Environment, Heritage and the Arts  
(Australian Government)

Other Party

The Honourable Eric Ripper MLA  
Treasurer; Minister for State Development  
(Western Australia)

The Honourable David Templeman MLA  
Minister for the Environment; Climate Change  
(Western Australia)

Dated this 6<sup>th</sup> day of February 2008



Attachment A: Site Selection Criteria				
Sub-set A	Category	Sub-set B	Sub-set C	Guiding Principle / Objective
	Public Perception	Interest Groups	e.g. NGOs, local business and community groups	Respond to legitimate concerns through transparency of decision making
		Relational and Informational Perception	e.g. NGOs, business and community groups, media	Respond to legitimate concerns through transparency of decision making
		Public Consultation process under Strategic Assessment (L44) clause (2)(b)(ii)	Public Consultation process under Strategic Assessment (L44) clause (2)(b)(ii)	Respond to legitimate concerns through transparency of decision making
		Capacity	Ability to manage risk that of people in relation to housing, services and infrastructure	The new infra should be integrated with the existing community
	Urban	Proximity	Access to accommodation and services	Seek to identify advantages and disadvantages of sites related to proximity to urban services areas and of accommodation (L44) clause (2)(b)(ii)
		Integration	Fit with existing services, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Community	Services	Medical, Education, Emergency Services, Police, Local Government, etc.	Seek to assess existing services & impact of existing services, identify any need for or potential for new services
		Health	Public Health Community Health of new development	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Regional/Local economic development	Local business	Positive and negative impact	Positive impact that can deliver positive impact or seek to mitigate significant negative impact
		Cost of living	Positive and negative impact	Positive impact that can deliver positive impact or seek to mitigate significant negative impact
		Indigenous Communities	Positive and negative impact	Positive impact that can deliver positive impact or seek to mitigate significant negative impact
		Employment of Labour	Employment of local residents	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Land-Use/Urban Use	Permitted	Local, regional and international markets	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Industry	Characteristics in alignment with other industry	Provision of services that can deliver positive impact or seek to mitigate negative impact
		Infrastructure	Provision of services, e.g. not, water, sewerage, waste supply, telecommunications, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Access to	Provision of services, e.g. not, water, sewerage, waste supply, telecommunications, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Cultural Heritage	Heritage	Significant sites including historic, historic, archaeological, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Heritage	Significant sites including historic, historic, archaeological, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Tenure	State Agreements	e.g. Northern Island	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Localities	e.g. 191 Land Administration Act	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Security	Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Statutory Approval	Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
	Tourism	Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid
		Localities	e.g. Planning Law, Police Law, etc.	Seek to avoid or mitigate impact. Risk that it will be a priority to avoid



#### SITE SELECTION CRITERIA EVALUATION METHODOLOGY

The Site Selection Criteria (SSC) is constructed as a multivariate matrix intended to provide a means to compare the net impacts of the Gas Processing Hub on various short listed sites

The criteria will be populated by the array of experts and working group participants assembled by the Northern Development Taskforce (NDT) and will draw upon both quantitative data and qualitative assessments.

It is not intended that the SSC alone will determine the preferred site but rather help inform the ranking of sites and identify potential cumulative impacts both negative and positive which may indicate a site is problematic or prospective.

Sites to be evaluated through this process have already been screened for basic technical viability reducing some 43 possible sites to 9. As a consequence of this preliminary assessment the SSC being applied are focused predominantly on environmental impacts, socio economic impacts and indigenous interests. The technical criteria will be used to establish the relative advantages and disadvantages of sites when considered for use as single operator sites, multi operator sites or as a processing Hub.

The SSC will be applied within the overall framework of the Strategic Assessment report which in turn responds to the Terms of Reference endorsed by the Commonwealth Environment Minister and the State Environment Minister related to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and *Environmental Protection Act 1986* (WA) respectively.

It is envisaged that most criteria will be both quantitatively and qualitatively assessed and the results compiled within the Strategic Assessment report or other referenced documents.

The use of the matrix as a decision making tool will be limited to demonstrating the potential of cumulative impacts across a wide range of criteria and to assist with ranking prospective sites and will be supported by the creation of a GIS platform of underpinning data.

It can be identified that some criteria are of greater significance than others and should be weighted more heavily when undertaking comparative analysis.

It is also recognised that not all impacts can be quantified through available data. To overcome this the environmental and other working groups have developed complex sub criteria and the use of High, Medium and Low as indicators of potential impact risk to reflect the uncertainty of knowledge implicit in areas of the State that are remote and not fully studied. This process might see some groupings of criteria being assessed holistically rather than individually.

The SSC are intended to be used by groups with differing representation undertaking independent assessment of the criteria using the same data but bringing their own subjective assessments to the process. These groups will include the proposed Independent Assessment Group (made up of representatives nominated from each of the NDT working groups), the NDT itself, industry interests and the Traditional Owner Taskforce leading to a comparison of the outcome of each group's assessment and the identification of both a shortlist and a ranking of sites.

The assessing groups will participate in a three day seminar program where each working group inclusive of the environmental experts and traditional owners will present information on each of the sites relative to the SSC.

The NDT proposes that each selection criteria will be evaluated subjectively for potential advantage or disadvantage based on the available technical data and non technical information provided by the experts and interested parties incorporated within the NDT stakeholder process.

A six point relative scale will be used with three scales for disadvantage, Minor, Major and Significant, Neutral and two scales for advantage, Minor and Major.

It is recognised that a significant environmental or heritage value or major technical constraint issue may constitute a fatal flaw for any one site and the application of a fatal flaw evaluation on a critical criterion could potentially eliminate the site from further consideration. The application of Fatal Flaw analysis would need to be determined on a quantitative basis where possible, or a risk assessment basis with the reasonable application of the precautionary principle, where there is incomplete information.

The SSC evaluation and resulting ranking will be incorporated into the Strategic Assessment report and subject to public release and comment.

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## ATTACHMENT B

### TERMS OF REFERENCE FOR STRATEGIC ASSESSMENT OF A PLAN FOR A COMMON-USER LIQUEFIED NATURAL GAS HUB PRECINCT TO SERVICE THE BROWSE BASIN GAS FIELD

The following Terms of Reference (ToR) provide the basis for a report, referred to in clause 6.1 of the Agreement, assessing the environmental, heritage and socio-economic impacts of actions under a Plan for a Browse Basin Common-User Liquefied Natural Gas (LNG) Hub Precinct and its associated activities, as defined in the Agreement. It is intended that this assessment report will satisfy the requirements of both the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *WA Environmental Protection Act 1986* (WA EP Act). A process diagram outlining the respective assessment processes is attached to these ToR.

#### 1. Project Purpose

The Report must include a general description of the purpose that a Common-User LNG Hub (the Precinct) will serve, including the resources the Precinct will need to function, the actions or classes of actions likely to be undertaken, the scope of related activities, the estimated life of the Precinct, and the regional context in which the Precinct will operate.

#### 2. Description of the Plan

The Report must include a detailed description of the Plan to which the Agreement relates, including (but not limited to):

- how the plan has been developed and its legal standing;
- identifying the person(s) or authority responsible for its adoption or implementation, and their jurisdiction;
- the legal structure under which owners, managers and users of the Precinct will participate in the Precinct;
- the basis of land/asset tenure;
- a description of the management arrangements required to ensure the Plan is implemented successfully; and
- identifying the actions or classes of actions that are a subject of the Plan, including the short, medium and long term aspects of the actions or classes of actions at or associated with the Precinct. These could include relevant construction, operational and decommissioning aspects as well as a comprehensive description of each type of development or facility comprising the Precinct and its associated infrastructure.

#### 3. Project Focus

The Report must provide the rationale for the need to develop the Precinct. The Report must include an analysis of the impacts as they relate to the bio-physical, social and economic aspects of the development proposal associated with the development of the Precinct.

#### 4. Short-Listing Process

The Report must include a copy of the finalised Site Selection Criteria, and a comprehensive description of how the proposed site(s) for the Precinct were identified including (but not limited to) consideration of:

- EPBC Act matters of National Environmental Significance (NES) (both current and identified as prospective, including likely National Heritage values);
- land tenure;
- stakeholder and public consultation;
- how the Site Selection Criteria were used in the shortlisting
- the independent verification of feasibility and technical or engineering constraints as identified by the oil and gas industry;
- regional environmental and social context and other relevant socio-economic matters inclusive of site security issues;
- An analysis of technically and economically viable gas processing options outside the Kimberley, focussing on locations that already have substantial industrial infrastructure, inclusive of floating LNG; and
- cultural heritage and Indigenous knowledge, and Indigenous aspirations

#### 5. The Environment Likely to be Affected

The Report must provide a detailed description of the environment likely to be affected by the Plan, the actions or classes of actions taken under the Plan including any associated infrastructure and construction and operational activities. This description must identify the environmental assets and characteristics, including biophysical processes associated with the site(s) selected in the Plan and the terrestrial and marine environments likely to be directly or indirectly impacted, for example:

- a) components of biodiversity including maintenance of important ecological processes recognising the potential importance of large intact areas in protecting and maintaining ecological processes;
- b) listed threatened species, other protected and significant taxa (EPBC Act or WA listed), and new, unnamed species or taxa;
- c) a description of ecological communities, with reference to Threatened Ecological Communities (EPBC Act or WA listed) or other significant ecological communities;
- d) a description given about how uncertainties will be treated in relation to the environment that will be affected;
- e) potential National Heritage values;
- f) any physical environmental drivers influencing the environmental characteristics of the site or surrounds, or influencing the potential impacts on the site or surrounds, including tidal regime, cyclonic and other severe weather conditions and coastal processes;
- g) any other environmental factors required to be described in the environmental impact assessment scoping document developed for the assessment under the EP Act; and

- h) Indigenous environmental values and Indigenous cultural heritage (environmental) values, including all values held by Traditional Owners in the area likely to be affected and including broader biological communities, habitats and environments in which species with Indigenous environmental/conservation values might live\*

#### 6. Environmental Impacts

The Report must include an assessment of the potential impacts of the Plan, the actions or classes of actions taken under the Plan including any associated infrastructure, construction and operational activities on the environment including matters of NES and effects of the environment on the Plan.

In particular, the assessment must include:

- a) a description of the potential impacts of the Plan on the environment (including to the extent possible, information on the degree of confidence with which impacts can be predicted and quantified and any indirect impacts as defined by Section 527E of the EPBC Act);
- b) an assessment of the nature and extent of the likely impacts on the environment, including whether the impacts will be short or long term, at the local and/or regional scale and cumulative impacts;
- c) an assessment of the extent to which impacts on the environment are likely to be unknown, unpredictable or irreversible;
- d) an analysis of the significance of potential impacts on known (or prospective) matters of NES – with reference to the EPBC Act Policy Statement 1.1 Significant Impact Guidelines and other relevant guidelines or policy advice; and
- e) reference to the technical data (including traditional/Indigenous knowledge) and other information relied upon in assessing the environmental impacts of the Plan, including information collected and compiled to be consistent with the expectations of the Western Australian Environmental Protection Authority (WA EPA), including, but not limited to, that outlined in relevant position and guidance statements.

#### 7. Indigenous Impacts

The Report must include a comprehensive analysis of the potential impacts of the Plan on Indigenous people and culture (including matters of NES and those prescribed under the *WA Aboriginal Heritage Act 1972* and the WA EP Act) that are likely to be directly or indirectly affected by the Plan.

In particular, the analysis must include:

- a) a description of the potential impacts, including socio-economic impacts, of the Plan on Indigenous people (including to the extent possible, information on the degree of confidence with which impacts and indirect impacts can be predicted and quantified);
- b) an assessment of whether any impacts on Indigenous people (including Indigenous heritage) are likely to be unknown, unpredictable or irreversible;
- c) an analysis of the significance of potential impacts on known listed and unlisted Aboriginal heritage sites, objects or landscapes and values of cultural

\* Certain Indigenous information and knowledge provided as part of the assessment and consideration of approval for a Common-User LNG Hub will not necessarily be made available to the public

- significance with reference to the *Aboriginal Heritage Act 1972*-section 5,6 and Indigenous Heritage values under the EPBC Act
- d) reference to the technical data and other information relied upon in assessing the Indigenous heritage impacts of the Plan; and
  - e) whether the Traditional Owners have given informed consent, in a culturally appropriate manner to the implementation of the Plan.

**8. Proposed Management Arrangements for the LNG Precinct and associated activities**

The Report must include a description of legislation, policies, performance and mitigation measures that are relevant to the implementation of the Plan, the actions and classes of actions undertaken under the Plan, to avoid, minimise, manage and mitigate the associated environmental and Indigenous impacts

The Report must include information on any other requirements for approval that apply, or are likely to apply, in relation to the Plan including details of any Local or State Government planning scheme, or plan or policy under any Local or State Government planning system, or State or Commonwealth legislation, such as:

- a) what environmental assessment of the proposed project has been, or is being, carried out under the scheme, plan or policy;
- b) how the scheme, plan or policy provides for the prevention, minimisation and management of any relevant impacts;
- c) explicit clarification as to who is responsible for the proposed management arrangements;
- d) how the scheme will ensure that obligations contained in the *Aboriginal Heritage Act 1972* (WA) are met; and
- e) how to provide effective protection for places that can be considered under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The Report must set out specific management arrangements, including the possible role of Traditional Owners in those arrangements. It must describe arrangements that will be in place under or associated with the Plan that are intended to ensure that development and operation of the Precinct and associated actions and classes of actions are undertaken in a manner designed to avoid impacts on significant environments, minimise environmental impacts generally and enable areas beyond the hub and port precinct to be maintained in an environmentally and an ecologically sustainable manner.

The report must also provide a description of the likely effectiveness of these management arrangements and how and to what extent they will meet endorsement criteria at Attachment C.

**9. Proposed Safeguards and Mitigation Measures**

The Report must identify and describe the specific measures intended to prevent, minimise and compensate for the potential environmental impacts of the Plan, and any measures to rehabilitate or offset damage to the environment. The Report must recognise and detail the role that Traditional Owners will play in these matters.

The Report should include an analysis of the expected or predicted effectiveness of these measures. The assessment should identify the basis (e.g. statutory or policy) for implementation of each measure and the agency or authority responsible for ensuring

implementation. The assessment must also identify how the relevant agency or authority will ensure compliance with these measures, and what steps will be taken in the event that environmental performance is other than anticipated.

The Report must also provide a description of how and to what extent these proposed safeguards, mitigation and offset measures will meet the endorsement criteria at Attachment C.

The Report must identify and describe the specific measures intended to avoid, minimise and mitigate for the potential environmental and Indigenous impacts of the Plan, and any measures to rehabilitate damage to the environment or impacts on Indigenous peoples' live, values, or culture.

The Report must also identify any program that is proposed to be put in place under the Plan to monitor and report on the proposed safeguards, mitigation and offset measures in the short and long term.

#### **10. Information Sources**

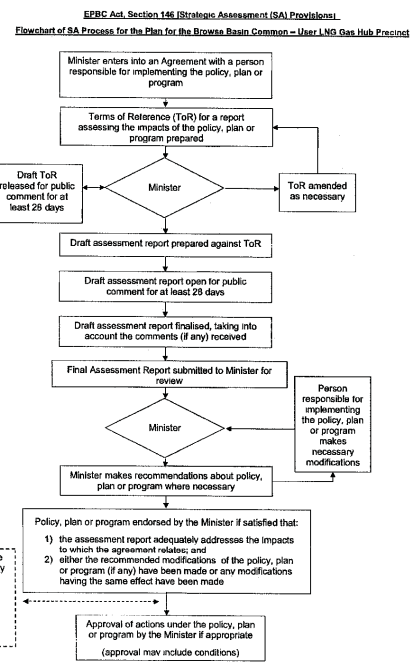
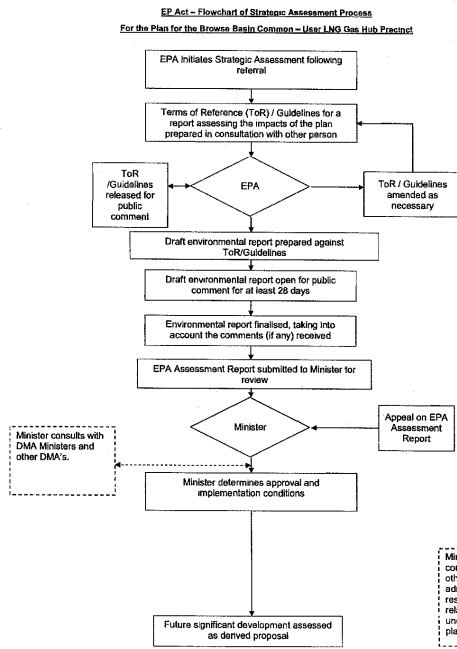
For information used in the assessment, the Report must state:

- a) the source of the information used in the assessment;
- b) how recent the information is;
- c) how the reliability of the information was tested; and
- d) what uncertainties (if any) are in the information.

#### **11. Consultation**

The Report must include any details of consultation, in addition to the statutory consultation, about the Plan, including:

- a) details of the consultation process for site selection including the public process and directed engagement with stakeholders, and the outcome of these consultations;
- b) any consultation that has already taken place, including with Indigenous communities;
- c) proposed consultation about relevant impacts of the action, including with Indigenous communities; and
- d) if there has been consultation about the proposed development, and if so, whether there is any documented response resulting from the consultation (including how the assessment and Report have addressed issues raised by the consultation).



## Attachment C

### Strategic Assessment - Endorsement Criteria:

The EPBC Act permits the Australian Government Minister for the Environment, Heritage and the Arts to approve the taking of actions or classes of actions in accordance with an endorsed policy, plan or program (section 146B). The effect of such a decision is that the approved actions or classes of actions would not need further approval from the Minister under the EPBC Act.

When deciding whether to endorse a policy, plan, or program the Minister must be satisfied that the assessment report adequately addresses the impacts to which the agreement relates, and that any recommendations to modify the policy, plan or program have been responded to appropriately.

In determining whether or not to endorse the Plan the Minister will have regard to the extent to which the Plan meets the Objects of the EPBC Act. In particular, that it:

- protects the environment, especially matters of National Environmental Significance;
- promotes ecologically sustainable development;
- promotes the conservation of biodiversity; and
- provides for the protection and conservation of heritage.

Accordingly, the Plan should:

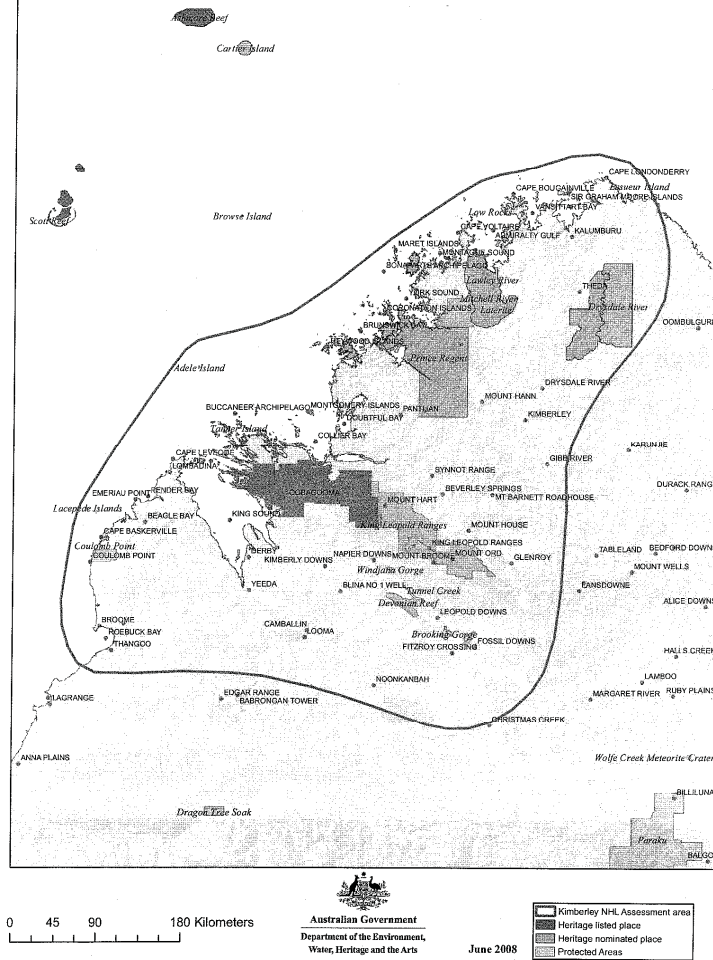
- prevent actions from being taken in any location that have an impact on matters of National Environmental Significance or of high biodiversity or heritage value); or
- where potential impacts can not be avoided, then the impacts should be less than significant; and
- provide for effective management, mitigation or offset of the likely impacts; and
- contain an effective system of adaptive management that is independently audited and publicly reported.

The extent to which the Plan adequately incorporates the precautionary principle and the other principles of ecologically sustainable development, in particular, intergenerational equity in relation to areas containing matters the Minister considers have a high likelihood of being potentially eligible for listing as matters of National Environmental Significance, will also be considered.

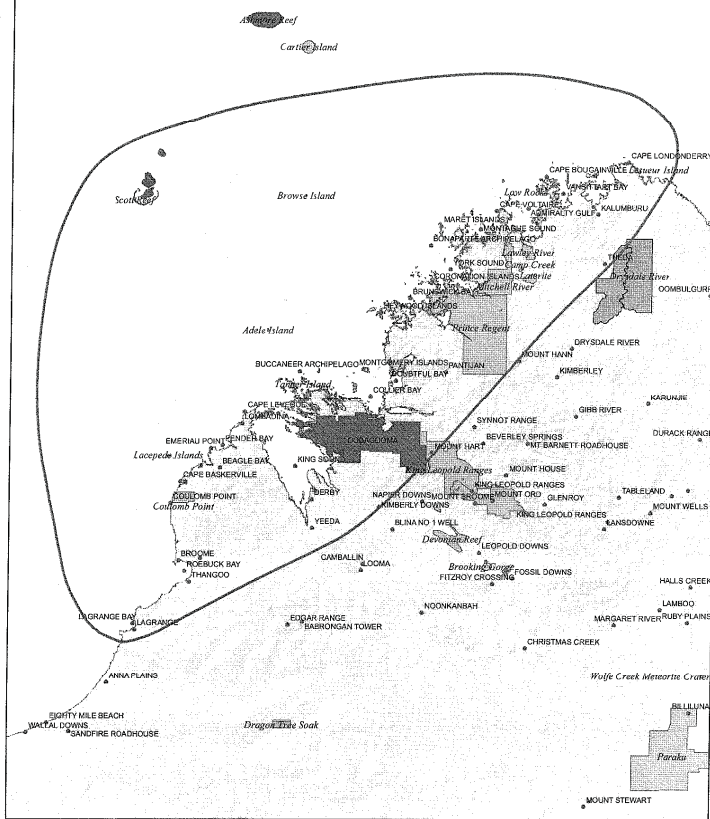
In arriving at a decision to approve an action or a class of actions the Minister must act in accordance with his obligations, including giving consideration to:

- issues relevant to any matter protected by a provision of the EPBC Act; and
- social and economic matters.

Map 1: Kimberley National Heritage List Assessment



Map 2: Kimberley Hub Regional Assessment



0 50 100 200 Kilometers

Australian Government  
Department of the Environment,  
Water, Heritage and the Arts

July 2008

Kimberley Hub Strategic Assessment  
Heritage listed place  
Heritage nominated place  
Protected Areas



## Appendix 2

### Key Dates and Events, Site Selection Process and Traditional Owner Task Force Processes, December 2007 – December 2008

Date	Event
Dec 2007	Senior Kimberley Traditional Owners meet in Broome to discuss the possibility of hydrocarbon development in the Kimberley and the role that Aboriginal people must play in any development and site selection process.
14 Feb 2008	Senior Aboriginal men and women meet in Broome to discuss process and methodologies for community and native title claim group meetings and final formation of a Senior Leadership Group.
Mar 2008	<p>KLC's Senior Leadership Team visits coastal communities to introduce the KLC's consultation process and to assist the KLC with presenting a range of information relating to hydrocarbon development.</p> <p>KLC holds ten separate meetings with fifteen Kimberley Coastal native title claim groups and groups culturally associated with them:</p> <p>11 March, Kalumburu: Wanjina Wunguur Uunguu, Balangarra, Wanjina Wunguur Willinggin  12 March, Wyndham: Wanjina Wunguur Uunguu, Balangarra, Wanjina Wunguur Willinggin  13 March, Kununurra: Miriung Gajerrong  14 March, Broome: Djabera Djabera, Nyul Nyul, Goolarabooloo / Jabirr Jabirr  17 March, Beagle Bay: Southern Peninsula Groups  18 March, One Arm Point: Mayala, Bardi &amp; Jawi, Nimunburr, Nyul Nyul  25 March, Mowanjum: Wanjina Wunguur Dambimangari, Wanjina Wunguur Willinggin, Wanjina Wunguur Uunguu  26 March, Derby: Nykina Mangala, Warawa  27 March, Broome: Yawuru  28 March, Bidjard: Karajarri</p>
14-15 April 2008	KLC staff, the Senior Leadership Team, and KLC consultants participate in a workshop in Broome at which cultural, technical, environmental and social issues arising in respect of hydrocarbon related development are discussed. A broad strategy is established, which forms the basis for continuing consultations, information gathering and dissemination and the establishment of project specific tasks.
May 2008	<p>KLC holds seven 'Cultural Bloc' meetings in Derby, One Arm Point, Broome, Wyndham and Kununurra.</p> <p>May 5 – Nykina Mangala, Warawa, Karajarri  May 6 – Wanjina Wungurr Dambimangari, Wanjina Wungurr</p>

Date	Event
	<p>Wilinggin, Wanjina Wunggurr Unguu</p> <p>May 8 – Bardi Jawi, Nyul Nyul, Mayala, Nimunburr</p> <p>May 9 – Yawuru</p> <p>May 12 – Balangarra</p> <p>May 13 – Mirriuwung Gejerong</p> <p>May 19 – Djerbera Djerbera, Goolarabooloo / Jabirr Jabirr</p>
16 May 2008	KLC informs the NDT that the Wanjina Wunggurr Unguu native title claim group has conditionally nominated Anjo Peninsula and Cape Voltaire as potential locations for development in the North Kimberley.
7 May 2008	KLC and the State of Western Australia enter into a Studies Agreement, which relates to all studies undertaken by the State in relation to the NDT site selection processes for hydrocarbon development, and requires that the State work with Traditional Owners to ensure that all studies are undertaken in a culturally appropriate manner, and provides for the conduct of ethno-biological studies by Traditional Owners.
7 – 8 May 2008	KLC and Traditional Owners participate in intertidal studies being undertaken by the NDT at Gourdon Bay.
19 – 28 May 2008	KLC and Traditional Owners participate in flora and fauna studies being undertaken by the NDT at Perpendicular Head.
27- 29 May 2008	KLC convenes the first TOTF meeting over three days. The TOTF is initially comprised of 60 Traditional Owner representatives, plus Senior Advisers, the KLC Chairman and the KLC Deputy Chairman. KLC presents information to Traditional Owners that has been sourced from Woodside and the NDT, as well as information and advice from relevant independent experts.
June – Sept 2008	TOTF meets on the following dates: 10-12 June 2008; 23-26 June 2008; 22-24 July 2008; 19-21 Aug 2008; 3-4 Sept 2008. All meetings were held in Broome to simplify logistics and to ensure adequate space and facilities for the large group of participants.
3 - 13 June 2008	KLC and Traditional Owners participate in flora and fauna studies being undertaken by the NDT at Packer Island.
17 – 26 June 2008	KLC and Traditional Owners participate in flora and fauna studies being undertaken by the NDT at Gourdon Bay.
25 June 2008	TOTF and KLC visit Woodside's hydrocarbon processing facility on the Burrup Peninsula. This trip is facilitated by Woodside in conjunction with the NDT.
23-25 July 2008	TOTF and KLC attend some key presentations of the NDT's Site Selection Workshop in Broome. Scientists involved in the site selection and impact assessment process present their findings from the flora and fauna studies, in order to assist Traditional Owners with their decision-making.
30 July 2008	KLC Women's Executive meeting discusses regional impacts of LNG development and benefits.
8 – 14 Aug 2008	KLC and Traditional Owners participate in flora and fauna studies being undertaken by the NDT on Anjo Peninsula.
20 – 26 Aug 2008	KLC and Traditional Owners participate in flora and fauna studies being undertaken by the NDT at Quondong Point.

Date	Event
Late Aug and early Sept 2008	KLC meets separately with members of the native title claim groups still considering hydrocarbon development on their country, namely: 27 Aug: Goolarabooloo / Jabirr Jabirr 29 Aug: Nyul Nyul 1 Sept: Wanjina Wungu Uunguu 2 Sept: Karajarri
Sept 2008	KLC and Traditional Owners participate in engineering-related walkovers of each of Anjo Peninsula, Gourdon Bay, North Head and Quondong/James Price Point with representatives from Worley Parsons, the NDT, Woodside and (in the case of Anjo Peninsula) Inpex Browse Ltd.
6 Sept 2008	State Government election – results undecided for more than a week.
10 Sept 2008	KLC announces publicly the four locations that Traditional Owners are willing to consider further as potential LNG development sites: Anjo Peninsula, North Head, James Price Point, Gourdon Bay
13 Sept	Liberal/National Party forms coalition to become State Government of Western Australia
22-24 Sept 2008	A meeting of the full TOTF is held at the KLC's Annual General Meeting at Old Mount Barnett Station.
30 Sept - 1 Oct 2008	KLC meets with TOTF(4)
15 Oct 2008	Premier Barnett announces his preferred location for the development is North Head, also announces that he would use compulsory acquisition if necessary.
3-4 Nov 2008	KLC meets with TOTF(4)
18-19 Nov 2008	KLC meets with Nyul Nyul native title claim group in Broome to discuss the possibility of hydrocarbon development at North Head and to seek instructions about this issue.
25 Nov 2008	KLC meets with Jabirr Jabirr (Goolarabooloo / Jabirr Jabirr, Djaberra Djaberra) native title claim groups in Broome to discuss the possibility of hydrocarbon development at James Price Point and to seek instructions about this issue.
26 Nov 2008	KLC meets with TOTF (4)
16 Dec 2008	KLC meets with Karajarri native title claim group in Bidadanga hydrocarbon development at Gourdon Bay. The Traditional Owners remove the site from further consideration.