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THE *BINDUNBUR* 'BOMBSHELL': THE TRUE TRADITIONAL OWNERS OF JAMES PRICE POINT AND THE POLITICS OF THE ANTI-GAS PROTEST

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On 23 November 2017, the Federal Court handed down its judgment in the Bindunbur case, a long-running native title dispute over significant areas of the Middle Dampier Peninsula in the Kimberley, North-West Australia. The decision was called a 'bombshell' because of Justice North's finding that the Goolarabooloo family, long described in the media and by the public as 'traditional owners' of James Price Point and seen as leaders of the fight against the failed Kimberley gas hub, are not traditional owners of that area after all. This article argues there are several related reasons why outsiders mistook who are the true traditional owners of James Price Point. Firstly, an entrenched association in the minds of most non-Aboriginal people between Aboriginality and wilderness; secondly, outsider ignorance of Aboriginal law; thirdly, several key differences between the customary Aboriginal normative system and Australian settler property law; and finally, that it was essential to have traditional owner support for the No Gas campaign against the project.

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I INTRODUCTION

On 23 November 2017, the Federal Court of Australia handed down its judgment in *Manado (Bindunbur Native Title Claim Group) v State of Western Australia* ('*Bindunbur*'), a long-running native title dispute over significant areas of the Middle Dampier Peninsula in the Kimberley, North-West Australia.¹ The decision was called a 'bombshell'² because of Justice North's finding that the Goolarabooloo family, long described in the media and by the public as traditional owners of James Price Point and seen as leaders of the fight against the failed Kimberley gas hub,³ are not traditional owners of that area after all. Instead, his Honour found, the Jabirr Jabirr people – who, broadly speaking, voted⁴ in favour of the gas hub – are the traditional owners of the area.

This article argues there are several related reasons why outsiders were mistaken about who are the true traditional owners of James Price Point. Firstly, an entrenched association in the minds of most non-Aboriginal people between Aboriginality and wilderness, as well as outsider ignorance of Aboriginal law; and secondly that it was essential to have traditional owner support for the 'No Gas' campaign against the project. This article also explores questions that this extraordinary decision raises for future environmental campaigns that emphasise the rights of traditional owners, particularly when there are competing Aboriginal claims and voices.

This article draws on research, including fieldwork, undertaken as part of PhD research into the native title land access and benefit sharing agreement negotiations for a proposed Liquefied Natural Gas ('LNG') processing plant on the Kimberley coast, at James Price Point.⁵ These negotiations led to the Browse LNG native title agreements, although the Browse project itself was abandoned by Woodside Energy Ltd ('Woodside') in April 2013, citing commercial reasons.⁶ The research included qualitative interviews with key participants from all parties of the negotiation, as well as from the 'No Gas' opposition. The article also draws on cases, media reports and analysis (including print, television and radio), government publications, company reports, academic research, non-academic writing, and internet materials, including websites.

1 [2017] FCA 1367. This decision was appealed, with all aspects of the original judgment discussed in this article upheld on appeal: see *Manado (Bindunbur Native Title Claim Group) v Western Australia* [2018] FCAFC 238.

2 Wendy Caccetta, 'Bombshell Ruling Overturns "Traditional Owners"', *National Indigenous Times* (online), 23 November 2017 <<https://nit.com.au/bombshell-ruling-overturns-traditional-owners/>>.

3 See, eg, Andrew Darby, 'Aboriginal Activist Named Environmentalist of the Year', *The Sydney Morning Herald* (online), 1 September 2014 <<https://www.smh.com.au/environment/aboriginal-activist-named-environmentalist-of-the-year-20140901-10aym0.html>>.

4 Please refer to the discussion in below n 7.

5 Lily O'Neill, *A Tale of Two Agreements: Negotiating Aboriginal Land Access Agreements in Australia's Natural Gas Industry* (PhD Thesis, University of Melbourne, 2016).

6 Companyinsight.net.au, Interview with Peter Coleman, CEO & Managing Director of Woodside Petroleum Ltd (Online, 12 April 2013) 1 <<https://www.asx.com.au/asxpdf/20130412/pdf/42f6shqc6w9gst.pdf>>. These commercial reasons did not relate to the Browse LNG agreements.

II BACKGROUND

A The Search for a Site for a Kimberley Gas Hub

In May 2011, the Goolarabooloo/Jabirr Jabirr registered native title group voted 164 to 108 in favour of accepting an offer from Woodside and the Western Australian Government to process offshore Browse Basin LNG on their land.⁷ These agreements were signed amidst a very high-profile environmental campaign against the development.⁸ The Browse LNG agreements struck between Aboriginal traditional owners, the State and Woodside were estimated to be worth at least \$1.5 billion.⁹ They also contained substantial commitments by the Western Australian Government and Woodside to improve the health, employment, education and social prospects of Kimberley Aboriginal people.

At the time of this agreement, the native title claim over the area had yet to be determined. This meant that it was not yet clear who would be found to be traditional owners of this area, if anyone. However the *Native Title Act 1993* (Cth) (*'Native Title Act'*) gives groups certain procedural rights prior to final determination because if they are later recognised as still holding native title, those native title rights should be protected procedurally prior to a determination by a court. The *Native Title Act's* 'right to negotiate' regime mandates that companies seeking to access land the subject of a registered native title claim must negotiate with registered native title claimants with a view to reaching an agreement over access to land.¹⁰ If no agreement has been reached after six months, either party may seek arbitration by the National Native Title Tribunal (*'Tribunal'*).¹¹ It is important to note, however, that the right to negotiate regime was drafted to allow development to occur, resulting in, as of 5 May 2019, the Tribunal refusing just three times to allow a development to occur without an agreement with traditional owners, allowing developments without agreements

7 It should be noted that this vote occurred amidst credible claims that this result did not truly constitute Aboriginal consent given the State's threats to compulsorily acquire the land if traditional owners did not agree to the deal: Victoria Laurie, 'Dividing the Territory', *The Monthly* (Carlton, Victoria) October 2010; 'Traditional Owners Back James Price Point Gas Precinct', *ABC Rural* (online), 9 May 2011 <<http://www.abc.net.au/site-archive/rural/news/content/201105/s3211289.htm>>.

8 See, eg, Adam Morton, 'Hanging by a Thread: How the River Was Won', *The Sydney Morning Herald* (online), 5 March 2013 <<https://www.smh.com.au/politics/federal/hanging-by-a-thread-how-the-river-was-won-20130304-2fgwp.html>>.

9 The estimate of \$1.5 billion for the total worth of the first phase of the benefits package was made by the State: see Colin Barnett, Premier of Western Australia, 'Historic Land Use Agreement Signed at State Parliament' (Media Statement, 30 June 2011) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2011/06/Historic-land-use-agreement-signed-at-State-Parliament.aspx>>, although this figure was an estimate based on future production projections, and on the assumption that further proponents other than Woodside would also use the site: see also O'Neill, above n 5, 106.

10 *Native Title Act* s 25.

11 *Ibid* s 35. For a detailed history of this regime, including the significant amendments made in 1998, see Marcia Langton and Alistair Webster, 'The "Right to Negotiate"', the Resources Industry, Agreements and the *Native Title Act* in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 269.

115 times (50 of which had conditions attached – for example, environmental or cultural heritage protections).¹²

The key reason given by traditional owners supporting the project was to raise the socio-economic conditions of Kimberley Aboriginal people, who also emphasised that they could not legally veto the development.¹³ For many, it was a difficult decision to come to. Jabirr Jabirr traditional owner Frank Parriman, encapsulated a key conundrum:

I just hope that everything turns out well, that people do get jobs out of it, do build better lives out of it. That's my goal, I don't want anything to do with it personally, I have a decent job, if I ever leave, I will get a job somewhere else, not at Woodside. In my heart, I don't think I could be a part of something that is killing country, even though I agreed to it, maybe I could be part of the regional benefits, distributing that, or be part of the monitoring group making sure that Woodside does what it's supposed to. But as for working for them, no. Not me.¹⁴

The gas that this precinct would have processed was to have been piped from the deposits of Torosa, Brecknock and Calliance in the Browse Basin. These deposits are located off the coast of northern Western Australia, 425 km north of Broome and estimated to have reserves of 34.6 trillion cubic feet of gas and 600 million barrels of condensate.¹⁵ The Browse LNG development, had it gone ahead at James Price Point,¹⁶ would have been the first significant industrial development on the Kimberley coast.

The signing followed an extensive site selection process – known as the Northern Development Taskforce – that consulted with traditional owners, gas companies, scientists, environmentalists and the community about this development over several years.¹⁷ Woodside had first approached Kimberley traditional owners to canvass the processing of gas on the Kimberley coast in 2005. This initial approach was rebuffed, a decision that Woodside said that it respected.¹⁸ Following this, Aboriginal elders approached the Kimberley Land Council ('KLC') saying that given significant interest in industrialising the Kimberley they wanted a single consultation process in which all companies had

12 National Native Title Tribunal, *Search Future Act Applications and Determinations* <<http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>>.

13 This is discussed extensively in O'Neill, above n 5, 198–202.

14 Interview with Frank Parriman (Broome, 21 June 2012).

15 Department of State Development (WA), 'Browse Liquefied Natural Gas Precinct: Strategic Assessment Report [Draft for Public Comment]' (December 2010) ES-15 <https://www.jtsi.wa.gov.au/docs/default-source/default-document-library/browse_sar_part_1_executive_summary_1210.pdf?sfvrsn=2d686b1c_12>.

16 In April 2013 Woodside announced that the gas resources of the Browse Basin would instead be processed offshore, and later shelved the project entirely: Woodside Petroleum Ltd, 'ASX Announcement: Woodside to Review Alternative Browse Development Concepts' (12 April 2013) <https://www.asx.com.au/asxpdf/20130412/pdf/42f6qd2zv5dml6.pdf?fbclid=IwAR2t_Dm63WDyZfSK7YNKLmNCaVkulzt0mOpnr0EezXgBCpNDYRMC_OZT3EE>.

17 At the time, two joint ventures were planned led by gas companies Woodside and Inpex. However, the latter soon pulled out of processing LNG in the Kimberley, a move widely seen as a factor in the demise of the State Labor Government: Interview with Eric Ripper (Perth, 21 June 2013).

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

to come 'through one door and tell us the same message'.¹⁹ In 2006, then Western Australian Premier Alan Carpenter announced that the State was looking for a single site on the Kimberley coast to process all Browse Basin natural gas. He said that this development would only go ahead with the support of Kimberley traditional owners and would be 'a dialogue, not an imposition or a demand'.²⁰ This was seen in some quarters as giving traditional owners a right to veto the development. However, former Deputy Premier Eric Ripper – one-time lead Minister on the project – explained that this stance was not akin to giving the Aboriginal community a veto, but rather was 'a pragmatic response to the particular circumstances of the Kimberley where Indigenous people are half the population and native title land is two thirds of the area'.²¹

The first formal traditional owner meeting to consider the possibility of LNG processing was held in December 2007, in accordance with a directive from Kimberley elders. They mandated Kimberley-wide consultation because of the cultural obligations of the *wunan* (a traditional Kimberley Aboriginal law and custom relationship and trade network) and because the impact of the precinct would be felt across the region for several generations.²² This meeting decided that if Kimberley Aboriginal people agreed in principle to a development, all traditional owners' groups would support the specific traditional owner group whose land was chosen.²³ Kimberley coast traditional owners elected representatives to a 'Traditional Owner Taskforce'. Together with the state government and Woodside, this Taskforce reduced the number of possible sites from 13 to four for cultural, financial and engineering reasons, by September 2008.²⁴

This site selection process came to a halt following the 2008 State elections, which saw the Carpenter Labor Government defeated. During the election campaign, the then-Opposition Leader Colin Barnett, of the conservative Liberal Party, had been scathing of the Carpenter Government's role in gas company Inpex's decision to move their planned LNG project from the Kimberley to Darwin. Barnett accused the Carpenter Government of similarly hesitating on the Browse LNG site selection process.²⁵ He said of the Carpenter Government's so-called veto:

The traditional owners certainly have a legitimate and legal right to be involved in any discussions about the land and the site. They basically hold native title over much of that area. But they should not have a right of veto. No citizen should have a right of veto in that sense.²⁶

19 Interview with Wayne Bergmann (Broome, 20 June 2012).

20 Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 2006, 8443 (Alan Carpenter, Premier).

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

22 O'Faircheallaigh and Twomey, above n 18, 26.

23 Interview with Mary Tarran (Broome, 27 June 2012).

24 O'Faircheallaigh and Twomey, above n 18, 31–3.

25 See also 'WA Set to Lose \$25 Billion Gas Plant: Barnett', *ABC News* (online), 22 August 2008 <<http://www.abc.net.au/news/2008-08-22/wa-set-to-lose-25-billion-gas-plant-barnett/2597034>>.

26 Australian Broadcasting Corporation, 'Bran Nue Deal', *Four Corners*, 22 September 2008 (Colin Barnett) <<http://www.abc.net.au/4corners/bran-nue-deal/8953100>>.

Barnett announced James Price Point, 60km north of Broome, as the State and Woodside's preferred site in December 2008.²⁷ Barnett said that if no agreement could be reached with traditional owners, the government would compulsorily acquire the land.²⁸ Negotiations continued under this threat of compulsory acquisition for the rest of the negotiation period, drawing heavy criticism that consent could not be given freely under this threat.²⁹

B Split in the Goolarabooloo/Jabirr Jabirr Claim Group and the 'No Gas' Campaign

The selection of James Price Point precipitated an acrimonious split in the Goolarabooloo/Jabirr Jabirr claim group. The split forced negotiations to cease for significant periods of time during multiple rounds of litigation³⁰ and gave great momentum to the opposition to the project. The reasons behind this split are complex but can be largely attributed to two factors: first, Goolarabooloo objections to James Price Point as the chosen site, and second, significant questions raised by the Jabirr Jabirr people as to Goolarabooloo claims to be traditional owners of the land.

A prominent Aboriginal man, referred to by the *Bindunbur* judgment as the late Mr J Roe, was one of the named applicants of the native title claim at the time James Price Point was chosen as the preferred site. J Roe had supported the Browse LNG development up to that point, but objected strenuously to the specific area chosen by the Barnett government, saying it would disrupt important songlines and burial sites.³¹ J Roe would go on to become one of the development's most powerful opponents.

Negotiations continued until September 2010. At this time, the State government again stated it would commence the long-threatened compulsory acquisition process if an agreement was not forthcoming.³² In May 2011, the claim group voted in favour of accepting the agreements, amidst claims that this result did not truly constitute Aboriginal consent given the State's threats.³³

The cost of the four-year site selection process and subsequent negotiations is not entirely clear. A senior state government official told the Western Australian Parliament that the cost of the process between 2009 and May 2012 alone was

27 O'Faircheallaigh and Twomey, above n 18, 37.

28 Australian Broadcasting Corporation, 'Bran Nue Deal', above n 26.

29 See, eg, Wayne Bergmann, 'Mabo 20 Years On – Have Land Rights Delivered?' (Speech delivered at the National Press Club, Canberra, 27 June 2012); Laurie, above n 7.

30 *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809; *Roe v Western Australia* [2011] FCA 421; *Roe v Western Australia* [No 2] [2011] FCA 102.

31 Joseph Roe, *An Open Letter from Traditional Custodian Joe Roe to Browse JV Partners Shell, Chevron, BHP and BP Regarding Proposed Gas Plant at James Price Point* (15 June 2011) Save the Kimberley <<http://www.savethekimberley.com/an-open-letter-from-traditional-custodian-joe-roe-to-browse-jv-partners-shell-chevron-bhp-and-bp-regarding-proposed-gas-plant-at-james-price-point/>>. See also Australian Broadcasting Corporation, 'Anger, Division over Decision to Use Kimberley Coast as Gas Hub', *AM*, 10 February 2010 <<http://www.abc.net.au/am/content/2010/s2815132.htm>>.

32 O'Faircheallaigh and Twomey, above n 18, 54.

33 Laurie, above n 7; see also 'Traditional Owners Back James Price Point Gas Precinct', above n 7.

\$40.4 million, of which Woodside contributed \$16 million.³⁴ The KLC received funding of \$15.6 million from this amount from the State and Woodside between January 2009 and September 2010.³⁵ This level of funding is highly unusual in a field in which native title representative bodies are usually not funded adequately to fulfil their statutory duties, let alone to do the work of negotiating with project developers.³⁶

By the time Woodside announced it was pulling out of processing Browse LNG on the Kimberley coast, the 'No Gas' campaign had drawn significant national and international attention.³⁷ The 'No Gas' campaign emphasised potential damage to Aboriginal culture, and particularly songlines through James Price Point; dinosaur footprints; a whale calving area; bilbies; and to Broome's character.³⁸ One protest sign, for example, referenced the Jimmy Chi musical *Bran Nue Day*, which is set in Broome and centres on Aboriginal characters:

On the way to a Bran Nue Dae,
Listen to what the People Say
Keep 'im Country, Culture, Town by the Bay,
Wood\$ide find Another Way.³⁹

The Browse LNG proposal was the subject of national campaigns by the Wilderness Society and Greenpeace, which sent one of its ships, the *Sea Shepherd*, to protest against potential impacts on whale calving. The campaign identified heavily with the Goolarabooloo family,⁴⁰ who were painted as being the custodians of culture and country, in contrast with avaricious or bullied traditional owners (largely Jabirr Jabirr) who supported the development. Notwithstanding that the Federal Court had yet to decide which group held native title to the area, by the end of the 'No Gas' campaign in 2013 it was clear that it was the Goolarabooloo, and not the Jabirr Jabbirr, who were widely seen by non-Aboriginal people and the media as being the true traditional owners of James Price Point.⁴¹ Arguably, this was because the Goolarabooloo acted in a way that non-Aboriginal people thought traditional owners should act: they were often seen camping at James Price Point, had long welcomed national and international

34 Evidence to Legislative Assembly Estimates Committees A & B, Parliament of Western Australia, Perth, 29 May 2012, E75 (Gail McGowan).

35 Ibid E4 (Benjamin Wyatt).

36 Ciaran O'Faircheallaigh, 'Negotiations between Mining Companies and Aboriginal Communities: Process and Structure' (Working Paper No 86, Centre for Aboriginal Economic Policy Research, July 1995) 8–10.

37 See, eg, Australian Broadcasting Corporation, 'Bran Nue Deal', above n 26; Norimitsu Onishi, 'Rich in Land, Aborigines Split on How to Use It', *The New York Times* (New York), 13 February 2011, A6; Australian Broadcasting Corporation, 'James Price Point and beyond', *Q&A*, 5 November 2012 <<https://www.abc.net.au/qanda/james-price-point-and-beyond/10660126>>.

38 See, eg, Laurie, above n 7; Australian Broadcasting Corporation, 'James Price Point and beyond', above n 37.

39 Personal observation, Broome (June 2011).

40 See, eg, Darby, above n 3.

41 For example, of the late J Roe it was said after he died by former Greens Senator Bob Brown that he had worked for decades to protect his country: 'I was struck by this man's integrity and defiance of the odds to save the country he loved': Darby, above n 3. For a more detailed discussion on this point refer to O'Neill, above n 5, ch 8.

visitors to talk about traditional law and custom, and were vocal in the media that they were the traditional owners of the area. For example, former Australian Greens Senator Bob Brown contrasted a meeting he had had with the Goolarabooloo families: 'We had the sand dune as the floor, and had the vine thickets around, and there were cultural sites', with his 2012 meeting with Jabirr Jabirr traditional owners at an office in Broome that was, he said, '[A] very modern building with air-conditioning ... [there was] a plate of fresh-cut sandwiches under plastic ... it is very much what I am used to in Parliament'.⁴²

Another prominent protester against the precinct, Louise Middleton, attributed Jabirr Jabirr consent for the gas plant to the effects of the Stolen Generation. She said that people were coming back to country:

[K]nowing nothing of their culture, coming back to their people with the pure notion of cashing in on their ignorance ... You have people like me who are *gadiya* [non Aboriginal] who fight tooth and nail for culture, and you have Indigenous people now who are fighting tooth and nail to sell it.⁴³

This was also the story that the Goolarabooloo family told the media. For example, J Roe said that 'he was defending his culture and sense of country'.⁴⁴ Aboriginal supporters of the gas plant, he said, were just 'out for the money'.⁴⁵ He said, of James Price Point, that there are 'people there, still looking after the country ... still people using it today for sustenance collecting, hunting, camping ... and what we're going to do? We're going to kill it with a gas plant. No, I don't think so mate'.⁴⁶

It is worth noting here that J Roe was not opposed to a gas hub on the Kimberley coast per se, he just didn't want it at James Price Point where he and his family had long camped and lived. One interviewee commenting on Roe's status in the gas controversy, said, 'Quite frankly, there is a lot of anger about it because those who know [him], we know that he is not the black Elvis'.⁴⁷

Eric Ripper, deputy Premier during the first phase of the search for a site to process Browse LNG, called Roe's integrity further in doubt when he recounted how, '[i]n a meeting with me, J Roe said he would support the project on his land provided the benefits went to him and his group, and the benefits sharing model was abandoned. He did not want benefits shared Kimberley wide'.⁴⁸

42 Interview with Bob Brown (Cynet, 28 July 2013). Brown made this comment while discussing an approach to him by Jabirr Jabirr in favour of the development that Brown believed was done predominately for media purposes.

43 *Heritage Fight* (Directed by Eugénie Dumont, Keystone Films, 2012). Louise Middleton was prominent in the 'No Gas' campaign. It is worth noting the film did not show Middleton presenting any evidence on a connection between Jabirr Jabirr in support of the project and people from the Stolen Generations.

44 Onishi, above n 37, A6.

45 Ibid.

46 Australian Broadcasting Corporation, 'Anger, Division', above n 31.

47 Interview with Christine Robinson (Broome, 25 June 2012). Among other violent incidents, Joseph Roe pleaded guilty to assaulting a 15-year-old boy with a 'large stick'. According to *ABC News*, Roe blamed the stress of the 'No Gas' campaign for the attack: 'Gas Hub Opponent Roe Fined for Assault on Teen', *ABC News* (online), 11 March 2013 <<http://www.abc.net.au/news/2013-03-11/roe-fined-for-assault-on-teen/4566340>>.

48 Interview with Eric Ripper (Perth, 21 June 2013).

C Who Are the Jabirr Jabirr People and the Goolarabooloo Family?

Both the Jabirr Jabirr people and the Goolarabooloo family agree that the Jabirr Jabirr are the original traditional owners of the land at James Price Point.⁴⁹ The term 'Goolarabooloo' is a conflation of several Yawuru words indicating a coastal people living in or near Yawuru land.⁵⁰ The Yawuru are traditional owners of the area just south of James Price Point, including Broome. The Goolarabooloo family are primarily composed of people descending from Mr P Roe, a Nygina man who came to the area in the 1930s. His daughter, Theresa Roe, would say during the 'No Gas' campaign that Jabirr Jabirr elders had 'handed the land over to my father'.⁵¹ P Roe came to national prominence in the late 1980s as an author and activist. By this time he had successfully campaigned against a sand mine in the area, and established the Lurujarri Heritage Trail, a prominent multi-day walking tour of the area around James Price Point in which visitors are taught about Aboriginal culture. It attracts hundreds of people every year,⁵² and helped earn P Roe an Order of Australia medal.

P Roe's grandson J Roe first made a native title claim to this area solely on behalf of the Goolarabooloo families in 1994. Soon after, Jabirr Jabirr people wrote to the Tribunal that 'the Jabirr Jabirr people are traditional owners for part of the country that is included in this claim ... We ... are happy to work cooperatively with Goolarabooloo in this claim, but we do want our rights in the country recognised'.⁵³

The claim was later amended and became a joint claim by the two groups.⁵⁴ After the Browse LNG agreements were signed, the claim group split and registered competing native title claims.⁵⁵

IV THE BINDUNBUR DECISION

A The Goolarabooloo Claim

The *Bindunbur* judgment concerns a large area of land in the middle Dampier Peninsula claimed by the Jabirr Jabirr, Ngumbarl (Nyombal), Nyul Nyul and Nimanbur people, as well as the Goolarabooloo family. The majority of the judgment focuses on the dispute between the Goolarabooloo family and the Jabirr Jabirr people. The judgment noted that the Goolarabooloo family claimed

49 *Bindunbur* [2017] FCA 1367, [220], [228] (North J).

50 *Rubibi Community v Western Australia* [No 6] (2006) 226 ALR 676, 699–700 [98]–[100] (Merkel J). The Yawuru are traditional owners of the area just south of James Price Point, including Broome.

51 *Heritage Fight*, above n 43.

52 Australian Broadcasting Corporation, 'Rush to Riches', *Four Corners*, 21 June 2010 (Debbie Whitmont) <<https://www.abc.net.au/4corners/rush-to-riches/8952822>>. See also Goolarabooloo, *Lurujarri Heritage Trail* <<http://www.goolarabooloo.org.au/lurujarri.html>>.

53 *Roe v Western Australia* [No 2] [2011] FCA 102, [123] (Gilmour J).

54 Goolarabooloo – Jabirr Jabirr Peoples (Federal Court proceeding No WAD6002/1998; National Native Title Tribunal proceeding No WC1999/036).

55 In October 2013, the Goolarabooloo people registered their claim (Federal Court proceeding No WAD374/2013; National Native Title Tribunal proceeding No WC2013/008) and in November 2013, the Jabirr Jabirr people registered their claim (Federal Court proceeding No WAD357/2013; National Native Title Tribunal proceeding No WC2013/007).

native title in several ways. Primarily, their claim was based on descent from P Roe, who, the Goolarabooloo claimed, had been given custodianship of the land by Jabirr Jabirr old people in the 1930s.⁵⁶ This custodianship, they said, had converted to full native title rights and interests sometime in the period since. Their claim was also based on a 'succession' argument: that when one group dies out, a geographically and socially close group can take over ownership of the land.⁵⁷ Both these arguments rested on a story told by P Roe about what happened when he came to the area in the 1930s. P Roe's story⁵⁸ was that when he came to Jabirr Jabirr country there were no Jabirr Jabirr children for the old people to hand over ritual and sacred knowledge about country. They asked him, he said, to care for their country. The truth of the P Roe story was disputed by the Jabirr Jabirr claimants.

Some members of the Goolarabooloo family also claimed rights and interests derived from both their acquisition of ritual and spiritual knowledge, as well as descent from Theresa Roe, who had additional rights, they said, derived from a rayi (a spirit child associated with a specific place)⁵⁹ connection which, they said, they had inherited.⁶⁰

B The Judge's Findings

His Honour started with the premise accepted by all parties, that the land was traditionally owned by the Jabirr Jabirr. This meant, the accepted anthropological evidence showed, that the land would still governed by Jabirr Jabirr law even if another people later succeed them as owners. Therefore:

[F]or the Goolarabooloo applicants to show that they have acquired native title rights and interests in the Goolarabooloo application area, they must show that they acquired rights and interests in land and waters under the traditional laws and customs of the Jabirr Jabirr people at sovereignty.⁶¹

The Goolarabooloo were not able to show this, said North J. The Court heard from a large number of Aboriginal witnesses and anthropological experts on the scope and content of Jabirr Jabirr law. His Honour noted that the weight of this evidence was compelling, finding that the Bindunbur applicants as a whole had deep, detailed, and local knowledge about their country from all parts of the claim area.⁶²

North J found that:

- Jabirr Jabirr country is held, at the local level, in patrifilial family estates called bur (or burr);⁶³

56 *Bindunbur* [2017] FCA 1367, [35] (North J).

57 *Ibid* [305]–[306] (North J).

58 Which, the Court noted, had several significantly different versions as told to, and recorded by, various people many decades after the events in question: *ibid* [419]–[429] (North J).

59 *Ibid* [117] (North J).

60 *Ibid* [253] (North J).

61 *Ibid* [228].

62 *Ibid* [238], [258].

63 *Ibid* [230].

- the rights to land can only be acquired by descent or child adoption, or in very limited circumstances, by succession (and no witnesses knew of such circumstances ever occurring);⁶⁴
- the rules of descent state that it must be as part of an 'unbroken bloodline' traced back to ancestors 'beyond the remembered past and is not governed by shallow generational memory'.⁶⁵ His Honour noted that the Goolarabooloo family, being descended from Mr P Roe, a Nyikina man, and P Roe's wife MP, who was a Karijarri woman, do not fulfill Jabirr Jabirr law's rules for descent;⁶⁶
- where a landholding group has died out, succession can apply.⁶⁷ However, the evidence very strongly showed that this had not occurred because there were multiple Jabirr Jabirr still living in the region, and multiple Jabirr Jabirr babies still being born.⁶⁸ Moreover, if succession was required, P Roe, as a Nyikina man, was likely not geographically or socially close enough to Jabirr Jabirr to qualify.⁶⁹ In addition, if succession occurred, the new group would have adopted the Jabirr Jabirr landholding system of estates, which they did not,⁷⁰ and would have been adopted into the Jabirr Jabirr local language group, which also did not occur (indeed, the Goolarabooloo family defined themselves as being members of the Roe family and thus distinct from the Jabirr Jabirr);⁷¹
- Jabirr Jabirr law does not allow for someone to be appointed as a custodian of land and thereby gain native title rights and interests, nor does the evidence show that P Roe was appointed as a custodian;⁷² and
- in relation to J Roe's claim that, as repository of ritual and sacred knowledge, he had gained rights in country, his Honour accepted Aboriginal witnesses' accounts that Law men and women do not acquire rights and interests in other people's country by virtue of their religious knowledge or stature. Native title rights and interests are gained by descent.⁷³

V WHY DID SO MANY PEOPLE FALL INTO ERROR?

The large gulf between his Honour's findings, and what was generally thought to be true by non-Aboriginal people during the 'No Gas' campaign, raises the important question of why so many people were mistaken about this issue. I argue that the Goolarabooloo family were thought to be the 'true'

64 Ibid [234].

65 Ibid.

66 Ibid [252], [436].

67 Ibid [234].

68 Ibid.

69 Ibid [392].

70 Ibid [408].

71 Ibid [401].

72 Ibid.

73 Ibid [514]–[516].

traditional owners of James Price Point for several, connected reasons. Firstly, a strongly held view amongst Australians that ‘real’ Aboriginal people are closely connected to ‘wilderness’, and the mistakes that are often made about the nature and content of Aboriginal law; and secondly, the importance of having significant Aboriginal opposition to the project, as was shown during the ‘No Gas’ campaign.

To understand why these reasons had such an impact in the dispute it is first necessary to understand certain attributes of the Kimberley. The region occupies the North-West corner of the Australian continent, and was first settled by Aboriginal people approximately 40 000 years ago.⁷⁴ It has a population of approximately 34 364 people, of whom 41.6 per cent are Aboriginal Australians, and more than 70 per cent of its land mass is determined native title land.⁷⁵ While there are large pastoral leases in the Kimberley, there are also vast areas of exclusive possession native title land, and ‘unallocated Crown land’ that may also be found to be native title.⁷⁶ These large areas of native title rights are due to significantly less colonial incursions into the Kimberley than elsewhere in Australia: the region was not considered suitable for British settlement until 1879,⁷⁷ and was ‘the last fertile region of Australia to be colonised’.⁷⁸ It is an area recognised for its high environmental and cultural value: large areas of the West Kimberley received National Heritage Listing in 2011 for environmental, historical and cultural factors, including dinosaur footprints in the intertidal zone at James Price Point.⁷⁹ An observation made by many interviewees is that ‘[t]he Kimberley is still much more, it’s an Aboriginal nation ... it’s still really obvious that this is an Aboriginal country, you walk down the street, whereas in the city, the numbers are different’.⁸⁰

Aboriginal people in the Kimberley continue to practise Aboriginal law and custom and think of the region as representing a single political and cultural domain. Importantly, they are represented by several prominent Aboriginal organisations, including the Kimberley Land Council. These attributes result in Aboriginal people belonging to a highly significant political and landholding

74 Minister for Sustainability, Environment, Water, Population and Communities, ‘Inclusion of a Place in the National Heritage List: The West Kimberley’ in Commonwealth, *Gazette: Special*, No S 132, 31 August 2011, 11.

75 Australian Bureau of Statistics, *2016 Census QuickStats: Kimberley* (13 December 2018) <http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/51001?opendocument>; Rangi Hirini, ‘“Long Road to Justice”: Kimberly Pays Tribute to Historic Land Rights March’, *NITV* (online), 24 September 2018 <<https://www.sbs.com.au/nitv/nitv-news/article/2018/09/24/long-road-justice-kimberly-pays-tribute-historic-land-rights-march>>.

76 Refer to Map of Claimed and Determined Native Title in Case Study Areas, created by the National Native Title Tribunal: O’Neill, above n 5, 253.

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

78 Peter Yu, ‘The Kimberley: From Welfare Colonialism to Self-determination’ (1994) 35(4) *Race & Class* 21, 23.

79 Department of Environment and Energy, Commonwealth, *Strategic Assessment of the Browse Basin Liquefied Natural Gas Precinct* <<http://www.environment.gov.au/node/18603>>.

80 Interview with Christine Robinson (Broome, 25 June 2012).

bloc, as well as – to outsiders – appearing to be closer to their traditional forebears' way of life, more 'traditional' than in southern Australia.

A Outsider Ignorance of Aboriginal Law

Much has been written of the tendency of Australian common lawyers to 'translate' native title into terms and concepts that are distinctly common law in nature, despite courts emphasising that native title rights should not be viewed using common law concepts.⁸¹ In *Commonwealth v Yarmirr*, Gleeson CJ, Gaudron, Gummow and Hayne JJ observed that native title is sui generis, is derived from traditional laws and customs, and is not a form of common law tenure, merely a form of tenure that the common law can recognise.⁸² It is, they said, therefore 'necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer'.⁸³ The 2014 High Court decision of *Western Australia v Brown* again reiterated that '[i]t is especially important not to confine the understanding of rights and interests which have their origin in traditional laws and customs "to the common lawyer's one-dimensional view of property as control over access"'.⁸⁴

Yet, as the Australian Law Reform Commission's *Connection to Country: Review of the Native Title Act 1993 (Cth)* report points out: '[c]ourts have indicated that native title is not to be understood in terms equivalent to common law property interests, but they often still tend to draw on these concepts, using language like "bundle of rights"'.⁸⁵

However, the *Bindunbur* decision shows that it is not just courts that continue to be confused about the content of Aboriginal law. There is ample and persuasive evidence that many of the non-Aboriginal participants in the Browse LNG debates closely associated the idea of Aboriginality with that of wilderness. This discourse says that Aboriginal people in so-called 'pristine' areas like the Kimberley are more closely in touch with their traditional law and custom (an idea clearly privileged by native title case law). For example, when asked where the power of the Kimberley Aboriginal people comes from former Western Australian Premier Geoff Gallop said of the Kimberley that it 'is largely wilderness and there has been less impact of mining there, and there is just more land'.⁸⁶ The discourse also says that Aboriginal people who want to adhere to traditional law and custom will strongly reject development on their land.

Jabirr Jabirr traditional owners Mary Tarran and Frank Parriman actively rebutted the central tenets of this discourse when speaking of the 'No Gas'

81 See, eg, Lee Godden and Maureen Tehan, 'Translating Native Title to Individual "Title" in Australia: Are Real Property Forms and Indigenous Interests Reconcilable?' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (Hart Publishing, 2007) vol 4, 263, 265.

82 (2001) 208 CLR 1, 37–8 [11].

83 Ibid.

84 (2014) 253 CLR 507, 522 [36] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

85 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) 232–3 [8.27].

86 Interview with Geoff Gallop (Sydney, 18 July 2013).

campaign. Tarran, for example, said that while sacred sites should always be avoided, '[e]ven with bitumen and tar over the land, it's still our land. You can't destroy spirit, you can never destroy spirit'.⁸⁷ Similarly, Parriman pointed out that human dysfunction was a greater threat to culture than a development on country.⁸⁸

The wilderness discourse is closely associated with the continuing shadow of terra nullius because it depicts Aboriginal people as wilderness dwellers, occupying an unaltered landscape when European colonisers arrived.⁸⁹ It is a discourse that appears to have emerged from a greater understanding of Aboriginal people's relationship with their land that has developed in recent years, yet it nevertheless both simplifies and restricts what this relationship should look like. Behrendt and Kelly for example bemoan the fact that 'many non-Aboriginal people believe that Aboriginal people living within the city have lost their links to their country'.⁹⁰ Mick Dodson said of this view that '[t]here would be few urban Aboriginal people who have not been labeled as culturally bereft, "fake" or "part-Aborigines", and then expected to authenticate their Aboriginality in terms of percentages of blood or clichéd "traditional" experiences'.⁹¹

It can also portray Aboriginal people as at odds with wilderness where they are seeking to industrialise traditional land in partnership with the developmental state. This idea was widely discussed at the time that qualitative interviews were being conducted, following Professor Marcia Langton's Boyer Lecture series of late 2012 in which she accused prominent environmentalist Tim Flannery of racism for his expressed concern that a national park in Queensland had been de-listed and handed back to traditional owners.⁹² This accusation followed several other prominent clashes between Aboriginal people and environmentalists in the years previously, including over Wild Rivers legislation in Queensland, which prominent Aboriginal leader Noel Pearson argued was a 'new wave of colonialism' because it shut out Aboriginal economic development.⁹³

87 Interview with Mary Tarran (Broome, 13 June 2013).

88 Interview with Frank Parriman (Broome, 18 June 2013).

89 See, eg, the critique of the view of the Australian landscape prior to 1788 as 'unaltered': Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen and Unwin, 2011); David Ritter, 'Black and Green Revisited: Understanding the Relationship between Indigenous and Environmental Political Formations' (2014) 6(2) *Land, Rights, Laws: Issues of Native Title* 1, 3.

90 Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 99.

91 Mick Dodson, 'The End in the Beginning: Re(de)fining Aboriginality' (Speech delivered at the Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, 30 June 1994) <<https://www.humanrights.gov.au/news/speeches/end-beginning-redefining-aboriginality-dodson-1994>>.

92 ABC Radio National, 'Lecture 4: The Conceit of Wilderness Ideology', *The Boyer Lectures*, 9 December 2012 (Marcia Langton).

93 See, eg, Nic MacBean, 'Divisions Run Deep in Qld Wild Rivers Debate', *ABC News* (online), 15 December 2010 <<https://www.abc.net.au/news/2009-04-20/divisions-run-deep-in-qld-wild-rivers-debate/1656948>>. For a critique of this argument, see Timothy Neale, 'Duplicity of Meaning: Wilderness, Indigeneity and Recognition in the *Wild Rivers Act* Debate' (2011) 20 *Griffith Law Review* 310.

Environmental organisations, he said, were engaged in 'colonial manipulations' in Indigenous communities.⁹⁴

The idea that wilderness was at threat from some Aboriginal people was clearly in play in the Browse LNG negotiations. This discourse painted Aboriginal opposition to any development as legitimate, and therefore Aboriginal support for the project as coerced or driven by greed. One traditional owner in support of the project, for example, was the subject of a protest brochure that depicted his face covered in dollar signs.⁹⁵ The Kimberley Land Council's Broome office was also vandalised with spray painted dollar signs, as well as being the subject of protest signs that said: 'KLC: Killing Land and Culture'.⁹⁶

It also meant that those Goolarabooloo opposing the project at James Price Point were largely able to assume the mantle of the 'real' traditional owners by the media and general public, because it appeared they were seeking to preserve, rather than plunder, country. This combination of ideas forms a very powerful discourse. It was a message the traditional owners in support of the project found offensive. One traditional owner was scathing about protestors who:

[P]ainted a few people like heroes who should be worshipped, but they were just using them in one way. There were a few that I thought got captivated by this so-called elder. The type of person that travels to India to become enlightened, they are obviously searching for something in their own lives. There are many misconceptions about culture, and people are manipulating it to suit their own needs.⁹⁷

It was deeply resented by Jabirr Jabirr traditional owners. Mary Tarran said of the 'No Gas' campaigners that they were:

Screaming blue murder about damage to country ... [but that] even with bitumen and tar over the land, it's still our land. You can't destroy spirit ... it's a living thing. I could go down to Melbourne, Sydney and my country is still in me.⁹⁸

It led to acrimonious insults being traded by both sides. KLC chief executive Nolan Hunter⁹⁹ said that 'the hate mail came so thick and fast he now instructed staff at the KLC office not to open letters with their bare hands'.¹⁰⁰ Hunter said that 'green groups have betrayed the region's Aborigines', saying that those

94 Noel Pearson, 'When Outsiders Stir Up Tensions in Tribal Societies', *The Australian* (online), 10 September 2011 <<https://www.theaustralian.com.au/national-affairs/opinion/when-outsiders-stir-up-tensions-in-tribal-societies/news-story/749a657a6c3cd0f94671fc20ba5feaa6?nk=129697dc8ce014b563d129f33289018e-1550956129>>.

95 Interview with Frank Parriman (Broome, 18 June 2013).

96 Personal observation, Broome 2011.

97 Interview with Frank Parriman (Broome, 18 June 2013).

98 Interview with Mary Tarran (Broome, 27 June 2012).

99 Nolan Hunter took over from Wayne Bergmann as CEO of the KLC in March 2011: 'Kimberley Land Council CEO Steps Down', *WA Today* (online), 4 March 2011 <<https://www.watoday.com.au/national/western-australia/kimberley-land-council-ceo-steps-down-20110304-1bh3.html>>.

100 Paige Taylor, 'Coconut Slurs as Woodside Gas Deal in the Kimberley Riles Greens', *The Australian* (online), 21 September 2011 <<https://www.theaustralian.com.au/national-affairs/coconut-slurs-as-woodside-gas-deal-in-the-kimberley-riles-greens/news-story/c727adcb82ab19686a1e36ccaa8ea6ed?nk=129697dc8ce014b563d129f33289018e-1550957070>>. 'Coconut' is a derogatory term denoting an Aboriginal person who behaves like a white person.

opposed to the hub had called him a ‘money hungry coconut’.¹⁰¹ He said ‘for them, the environment can stay pristine and the people in it can live in poverty and destitution’.¹⁰² There were also questions in Western Australian parliament, including the following from local MP Carol Martin speaking in support of the development: ‘Aboriginal people have been colonised so many bloody times: first, by the British; second by the do-gooders; third, by the missionaries; fourth by industry; and now, by the bloody greenies!’¹⁰³

The counter-narrative surrounding the protection of culture was that Kimberley elders had given their blessing and support to negotiators because of the potential change it represented to the health, wealth and happiness of Kimberley Aboriginal people. Traditional owner Wayne Barker pointed out that the 2011 KLC annual general meeting passed a motion that stated that 52 different traditional owner groups supported the Jabirr Jabirr in agreeing to the development.¹⁰⁴ Traditional owner Frank Parriman said of non-Aboriginal protestors using Aboriginal culture:

Maybe some of them genuinely think that they don’t want the Aboriginal way of life to be destroyed, but it is already being destroyed by alcohol, drugs and violence. Our biggest scourge now is going to be foetal alcohol syndrome. If those things are not addressed, the next generation coming through will not know how to administer culture. There are many misconceptions about culture, and people are manipulating it to suit their own needs. The biggest threat to culture is the dysfunction among us, it is a much bigger threat than any development.¹⁰⁵

However, this counter-narrative did not gain the same media traction as the narrative linking Aboriginality with wilderness.¹⁰⁶

Ciaran O’Faircheallaigh says of this tension that: ‘they are a manifestation, albeit extreme, of a deepening rift between Green and Black interests in relation to development in Australia’s resource-rich regions’.¹⁰⁷ This came after, he said:

A widespread assumption in Australia that Black and Green groups are natural allies. It was assumed they share a commitment to looking after the environment, and in particular to stopping development in areas of high environmental and cultural significance ...¹⁰⁸

However, David Ritter argues that rather than there being a recent schism between the interests of green groups and Aboriginal peoples, there exist certain contextual factors that can result in the appearance of one. These include media reporting, the presence of the extractive industry and its influence on public debate, and the immediate need of Aboriginal groups to address socio-economic

101 Ibid.

102 Ibid.

103 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2012, 7624 (Carol Martin).

104 Interview with Wayne Barker (Broome, 18 June 2012).

105 Interview with Frank Parriman (Broome, 18 June 2013).

106 Some key exceptions to this were in articles written in Australian newspapers, which generally portrayed the KLC in a sympathetic light: see, eg, Wayne Bergmann, ‘A Chance at a Better Life’, *The Australian* (online), 24 September 2011 <<https://www.theaustralian.com.au/opinion/a-chance-at-a-better-life/news-story/b3c75cc54435efe60524478c0227237a>>.

107 Ciaran O’Faircheallaigh, ‘Green–Black Conflict over Gas Development in the Kimberley: A Sign of Things to Come?’, *The Conversation* (online), 18 October 2011 <<https://theconversation.com/green-black-conflict-over-gas-development-in-the-kimberley-a-sign-of-things-to-come-3539>>.

108 Ibid.

disadvantage.¹⁰⁹ Ritter's observations are pertinent in the context of the Browse LNG development.

The polemics of this argument caused considerable distress to people from all sides of the Kimberley Gas debate. Many people interviewed expressed considerable sadness that the nuances of each position were lost in the need to produce media sound bites. Prominent environmentalist Pat Lowe, for example, talked of the many times that Kimberley environmentalists had campaigned with the KLC. She said of Langton's lecture series, for example, 'I think she accused us of things that simply weren't true, setting up straw men. It's very damaging. Saying that we want to keep Aboriginal people in the dark ages, it's such nonsense. But we don't think that you need a gas hub to do it'.¹¹⁰

B Goolarabooloo Support Crucial to the Campaign

The final reason that the Goolarabooloo were seen as the 'true' traditional owners was for pragmatic reasons: the 'No Gas' campaign was reliant on Aboriginal support. Those in the 'No Gas' campaign were unanimous in their view that Aboriginal consent was vital to the project, and Aboriginal support was vital to those in opposition. For example, former Australian Greens Senator Bob Brown said that Goolarabooloo support for the 'No Gas' campaign was 'fundamental' and that 'I think that the mining industry ... are well aware that a united Aboriginal voice is going to beat them, particularly because it will bring public opinion on side'.¹¹¹

He identified the power of the Goolarabooloo as stemming from an 'openness'¹¹² about their culture, and particularly songlines, to the broader public:

It is a very special place in that sense, that they are prepared to talk about how that place evolved, and that there are songlines going across to central Australia and the north. It is an eye-opener to a lot of non-Aboriginal Australians, and a lot of Aboriginal Australians I expect. P Roe had understood that unless the culture was opened up and celebrated, it would ultimately fall.¹¹³

Maria Mann, former coordinator of Environs Kimberley, was typical of much of the 'No Gas' discourse when she said that the Goolarabooloo were 'critical' to the anti-gas campaign:

They were the hub around which everybody else gathered. They had the ultimate reason for protecting James Price Point, and they had a very clear argument and vision for leaving it the same, and preserving it until the end of time. This was really powerful. And people did defer to them. Their needs and their arguments were paramount. It was their country, and they stood to lose more than anybody else.¹¹⁴

¹⁰⁹ Ritter, above n 89, 5–8.

¹¹⁰ Interview with Pat Lowe (Broome, 12 June 2013).

¹¹¹ Interview with Bob Brown (Cygnets, 28 July 2013).

¹¹² This 'openness' was one of the key disputes that senior Kimberley elders had with J Roe, who, they said, was not authorised to be making public secret traditional knowledge: Interview with Wayne Bergmann (Broome, 1 August 2016).

¹¹³ Interview with Bob Brown (Cygnets, 28 July 2013).

¹¹⁴ Interview with Maria Mann (Perth, 7 June 2013).

This alliance was made in good faith by many protesting against the gas hub. For example, Bob Brown pointed out when asked about the division in the claim group that, 'I was approached by the Goolarabooloo people, not the Jabirr Jabirr people. I was informed by the people who had approached me, and I was always open to an approach but I was never asked until [later]'.¹¹⁵

Yet, the alliance was also a very pragmatic decision. For example, Glen Klatovsky of the Wilderness Society, speaking of who would eventually be found to be traditional owners, observed:

For the vast majority of Australians ... [when] an Aboriginal person who stands on their land, say Walmadan [the Goolarabooloo term for James Price Point], and says that this is my land, my country, I don't think that people say, 'well, but what did the Federal Court decide?'¹¹⁶

Bob Brown, when asked about the split, demurred:

I was aware at this stage about the differences between the Goolarabooloo and the Jabirr Jabirr, and within them. When the Sea Shepherd left from Melbourne, a Jabirr Jabirr man performed a smoking ceremony for us which was amazing.¹¹⁷

When pressed on what would happen where environmental and Aboriginal voices differ in relation to development, Brown made a very fair observation about the motivations of environmental movements:

[T]he ecosystems of Australia predate all of us, and they are in a spiral of human led destruction. I am an environmentalist because I am a human being, and I want human beings down the line to know what it is that has inspired all cultures and all creativity in humanity, and that's nature. Without nature, we are not here.¹¹⁸

He added that:

Aboriginal people should be able to make decisions for their land. And if that means that they decide on a gas factory at Walmadan, fine, but with that comes the ability of people to protest against it, just the same as with any other state government.¹¹⁹

Brown was asked about whether it was 'fair game' to protest 'if Aboriginal people did have the authority to make a decision, and decided on a gas hub?' He said that 'yes, it is'.¹²⁰ However, this is clearly not what had occurred during the 'No Gas' campaign.

VI WHAT OUTSIDERS FAILED TO SEE

The *Bindunbur* court win is likely bittersweet for the Jabirr Jabirr who negotiated the Browse LNG agreements. What non-Aboriginal people largely did not appreciate was that the Browse LNG negotiation was an extraordinary act of Aboriginal self-determination, by a strong and united Aboriginal population exercising its jurisdiction over the Kimberley. The Browse LNG agreements

115 Interview with Bob Brown (Cygnnet, 28 July 2013). The implication of this late approach to Bob Brown by the Jabirr Jabirr was that it was slightly disingenuous and done with an eye to publicity.

116 Interview with Glen Klatovsky (Melbourne, 15 April 2014).

117 Interview with Bob Brown (Cygnnet, 28 July 2013).

118 Ibid.

119 Ibid.

120 Ibid.

came about as a result of a monumental effort on the part of Kimberley elders in particular,¹²¹ and the Kimberley Land Council. The Northern Development Taskforce had broad regional support from Kimberley Aboriginal people. Unlike many native title negotiations, traditional owners were able to exercise significant influence over the way the negotiation was conducted (most notably including the negotiation agenda and timelines). Agenda setting, Peter Bacharach and Morton Baratz argue, is one of the most powerful ways to ensure favourable outcomes: for example, when institutional changes are made to ensure that certain issues are not discussed, when agendas are continually limited to 'safe' issues, or when certain social or political values are strengthened or constructed.¹²²

This agenda setting was visible in the highly strategic approach the KLC took to the negotiations. This resulted in traditional owners exercising a significant amount of control over the negotiation agenda and being well-resourced to conduct the negotiation. KLC CEO Wayne Bergmann made it clear what he expected of potential proponents, stating that:

If the companies aren't going to engage with us in a meaningful way that is going to create legacies and have a compensation package that creates precedents in the international community ... they're not welcome in the Kimberley from our perspective.¹²³

This strategic approach is seen in the way in which the Traditional Owner Rules for Major Resource Development ('TO Rules')¹²⁴ partially shaped the Browse LNG agreement outcomes. The TO Rules were used throughout the negotiation process as a barometer, that is '[a] system of 'traffic light' signals to indicate whether the positions being presented by Woodside and the State were close to, some distance from, or in basic conflict with the 'Traditional Owner Rules' on relevant issues'.¹²⁵

Of course, there were both internal and external ways in which the KLC's influence over the negotiation agenda was limited. For example, during negotiations traditional owners and the KLC were unable to exert control over certain issues, particularly in relation to the Goolarabooloo litigation and compulsory acquisition.¹²⁶ Nevertheless, it is clear that from the beginning of the search for a site to process Browse LNG gas that the KLC strenuously advocated for Kimberley Aboriginal people's right to be at the heart of decision-making about the project, and for the project to impact beneficially on their lives. This pre-negotiation advocacy also saw the KLC seek out early cooperation with traditional allies including environmental groups, churches and unions. They also placed 'an ad in the paper for expressions of interest to come and build an LNG plant in the Kimberley' following which they negotiated 'confidentiality

121 In particular, the support of Aboriginal elders of the Kimberley was emphasised by many: O'Faircheallaigh and Twomey, above n 18, 41; Interview with Mary Tarran (Broome, 27 June 2012).

122 Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1962) 56 *American Political Science Review* 947, 948.

123 Australian Broadcasting Corporation, 'Bran Nue Deal', above n 26.

124 The author has a copy of these confidential rules and was given permission to write about them generally.

125 O'Faircheallaigh and Twomey, above n 18, 40–1.

126 Refer to discussion in O'Neill, above n 4, 121–36.

agreements with some of the biggest international LNG developers'.¹²⁷ Bergmann later heard that the head of the World Council of Churches in Perth '[h]ad knocked on the door of the Premier and said "tut tut, we expect you to treat Aboriginal people in the Kimberley with respect"'.¹²⁸

These activities not only served to ensure that the KLC received support from its Aboriginal constituency and acted in accordance with Aboriginal law, they also sent an unambiguous message to the State and Woodside: Aboriginal people own the Kimberley and they are not to be underestimated. This message was clearly heard by the State and Woodside.

This stance continued during the negotiations. For example, Wayne Barker made sure he chaired all meetings that occurred in the Kimberley: 'I made it my meeting, as I have always done. I walked into the negotiating meeting, said OK, this is blackfellas country so I am the chair of the meeting'.¹²⁹

It changed the dynamic of the meeting, he felt '[i]t gave them the impression, that what we really wanted to do was not come in as poor dysfunctional Indigenous people pleading for a benefit'.¹³⁰

This message was also emphasised by having traditional owners from the Traditional Owner Negotiating Committee ('TONC') in the negotiations at all times.

O'Faircheallaigh writes of this period of time that:

The establishment and management of the [Traditional Owner Taskforce] process reaffirmed Kimberley Aboriginal people's cultural practices, and their right to make decisions about their country, in the context of contemporary large-scale resource development. It constituted a significant departure from a historical pattern where Aboriginal cultural values were entirely ignored in appraisal and approval of resource projects.¹³¹

Woodside lead negotiator Betsy Donaghey concurred that the KLC were able to maintain a largely united front:

[E]ach time we had been asked to leave, it meant that an issue had come up, between the women and the men, or some of the families, and they wanted to resolve that. And they did a wonderful job of not exposing those. And when I say united front, I am talking about the Jabirr Jabirr, not the Goolarabooloo.¹³²

Traditional Owner Mary Tarran said:

I don't let anything else influence me except for those old people and our cultural connections. The Jabirr Jabirr are spiritually and physically strong. At these negotiations we carried our community with us through the negotiations, and the regional beneficiaries, on our back. We were committed to them. Inter-marriage, cultural obligations, everything came with us. And so while we were obliged to have the negotiation, we were stern in our negotiating ... You build a tower, and you have all these cables anchoring it up – that's what I had with our TOs.¹³³

127 Interview with Wayne Bergmann (Broome, 20 June 2012).

128 Ibid.

129 Interview with Wayne Barker (Broome, 18 June 2012).

130 Ibid.

131 Ciaran O'Faircheallaigh, 'Extractive Industries and Indigenous Peoples: A Changing Dynamic?' (2013) 30 *Journal of Rural Studies* 20, 25.

132 Interview with Betsy Donaghey (Melbourne, 19 August 2014).

133 Interview with Mary Tarran (Broome, 27 June 2012).

According to Wayne Bergmann, a key way in which Aboriginal jurisdiction was recognised was through the State's enactment of the *Browse (Land) Agreement Act 2012* (WA) which, among other things, grants the LNG precinct to the native title party at the end of its life and guarantees that the State will not operate a gas processing facility anywhere else on the Kimberley coast.¹³⁴

Wayne Bergmann said:

I reckon it's the closest thing to a Treaty that Australia has ever signed, because it's an Act of Parliament, so it's the sovereign power of the State agreeing with an Indigenous group whose sovereignty is through native title.¹³⁵

Carol Martin, the Kimberley region state Member of Parliament, while not using the language of sovereignty, expressed her support for the *Browse (Land) Agreement Act* in the following terms, '[t]his is the first time I have ever seen a State Agreement Act that recognises Aboriginal people as key stakeholders'.¹³⁶

Former Western Australian Premier Eric Ripper, musing on the 'No Gas' campaign said, 'I think that the real Indigenous hero in all this is Wayne Bergmann, not J Roe'.¹³⁷

VII CONCLUSION

That the *Bindunbur* judgment was a 'bombshell' is indicative of a deep misunderstanding of Aboriginal law and society by the broader Australian public. Moreover, the public appear totally unaware of the depth of this misunderstanding, a mistake greatly aided by Goolarabooloo assertions that they, not the Jabirr Jabirr, were the traditional owners of James Price Point.

This article has argued this misunderstanding derives from long-held erroneous beliefs about Aboriginal culture and people that have their origin in *terra nullius*. Its continuing influence brings to mind Foucault's observation that:

Each society has its régime of truth ... the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned ... the status of those who are charged with saying what counts as true.¹³⁸

Yet these misinterpretations also show that there exists much goodwill towards understanding Aboriginal culture better in many quarters. This poses the question of whether Aboriginal people could potentially put this misunderstanding to positive use. Native title is both Australian law and representative of a powerful idea: that Aboriginal people could be recognised as landowners. The two are often found together: where Aboriginal people are seen as being on their traditional land by the world at large, they often also have native title rights in that land. However, it may be possible to use native title's symbolism even where Aboriginal people do not possess strict legal rights, or

134 *Browse (Land) Agreement Act 2012* (WA) ss 7–8.

135 Interview with Wayne Bergmann (Broome, 20 June 2012).

136 Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2012, 7624 (Carol Martin).

137 Interview with Eric Ripper (Perth, 21 June 2013).

138 Michel Foucault, 'Truth and Power' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Pantheon, 1980) 109, 131.

where native title has been extinguished. The Goolarabooloo were making a very public claim to land that has very strong native title rights, but this idea could also apply to land where native title has been extinguished. There are other Aboriginal groups around Australia whose native title claims have not succeeded but who nevertheless make strong and believable claims to their traditional land, for example the Yorta Yorta people of northern Victoria and southern New South Wales.¹³⁹

What the *Bindunbur* judgment also highlights is that environmental groups should be more prepared to consider options, including opposing Aboriginal traditional owners, where their interests and those of Aboriginal people differ. In an environmental campaign, it may be considered ‘fair game’ to draw on only some Aboriginal voices. However, the voices of Aboriginal people who want different outcomes should be respectfully disagreed with. At the time of the ‘No Gas’ campaign it was still not clear who would be found to be the true traditional owners of James Price Point, but what was clear was that significant numbers of people likely to be found to be traditional owners were in favour of the development.

139 The Yorta Yorta people lost their native title claim: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. However, the Yorta Yorta people are nevertheless recognised as a strong group. For example, they have been granted ‘Registered Aboriginal Party’ status under the *Aboriginal Heritage Act 2006* (Vic), and co-manage the Barmah National Park under the 2010 Traditional Owner Land Management Agreement pursuant to the *Conservation, Forests and Land Act 1997* (Vic).