FEDERAL COURT OF AUSTRALIA

Banjima People v State of Western Australia

[2015] FCAFC 84

|  |  |
| --- | --- |
| Citation: | Banjima People v State of Western Australia [2015] FCAFC 84 |
|  |  |
| Appeal from: | Banjima People v State of Western Australia (No 2) [2013] FCA 868  Banjima People v State of Western Australia (No 3) [2014] FCA 201 |
|  |  |
| Parties: | **ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE v STATE OF WESTERN AUSTRALIA AND OTHERS**  **(see Schedule of Parties at Appendix A for full list of parties)**  **STATE OF WESTERN AUSTRALIA v ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE AND OTHERS**  **(see Schedule of Parties at Appendix A for full list of parties)** |
|  |  |
| File numbers: | WAD 72 of 2014 WAD 73 of 2014 |
|  |  |
| Judges: | **MANSFIELD, KENNY, RARES, JAGOT AND MORTIMER JJ** |
|  |  |
| Date of judgment: | 12 June 2015 |
|  |  |
| Catchwords: | **NATIVE TITLE** – right of exclusive possession – ability to effectively exclude other people – permission required to be or do things on country – observance of the custom of exclusion by the relevant society – where no enforcement of customs against non-indigenous persons – spiritual or physical sanctions for contravention – whether there can be no recognition of rights and interests under the common law of Australia – whether traditional rights and customs shared with non-claim group indigenous persons at sovereignty – where there is no continuity of connection to the land by non-claim group persons  **NATIVE TITLE** – whether the primary judge made conclusions against the weight of evidence – evaluation of the facts – advantage of the trial judge over an appellate Court – need for appellate caution – rights which find their origin in pre-sovereignty law and custom  **NATIVE TITLE** – proper construction of s 47B of the *Native Title Act 1993* (Cth) – meaning of “area”, “covered by”, “in relation to an area” and “occupy the area” – whether mining exploration licenses were granted for a particular purpose  **NATIVE TITLE** – application of s 47B of the *Native Title Act 1993*( Cth) – occupation of an area – consideration of the evidence as a whole – significance of evidence of activities of a possessory nature in a particular area – establishment of occupation of a wider area which includes the particular area  **NATIVE TITLE** – application of s 23B of the *Native Title Act 1993* (Cth) – consideration of the nature of rights created by the act of reservation – whether an inquiry as to the use which has been made of a reserve can inform the nature of the rights conferred – construction of public works – authority of the Crown – when an act is attributable to the Crown – construction of buildings under a law of the State – where there is publication of the reserves on authenticated State maps |
|  |  |
| Legislation: | *Acts Interpretation Act 1901* (Cth) ss 13(2)(b), 23(b)  *Interpretation Act 1984* (WA) s 5  *Land Act 1933* (WA) ss 29, 33, 34  *Mining Act 1978* (WA) s 63  *Native Title Act 1993* (Cth) ss 13(1), 23B, 23C, 23E, 47A, 47B, 61(1), 223(1), 225, 239, 251D, 253  *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) s 12J  *Native Title Amendment Bill 1997* (Cth) |
|  |  |
| Cases cited: | *Australian Softwood Forests Pty Ltd v Attorney-General (NSW) Ex rel. Corporate Affairs Commission* (1981) 148 CLR 121; [1981] HCA 49  *Banjima People v State of Western Australia (No 2)* (2013) 305 ALR 1; [2013] FCA 868  *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63  *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171; [1999] FCA 1668  *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56  *Daniel v State of Western Australia* (2005) 141 FCR 426; [2005] FCA 178  *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110  *Fejo v Northern Territory* (1998) 195 CLR 96; [1998] HCA 58  *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22  *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391; [2007] FCAFC 178  *Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248  *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [1992] HCA 23  *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58  *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001) 110 FCR 244; [2001] FCA 45  *Moses v State of Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78  *Northern Territory v Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28  *Risk v Northern Territory* [2006] FCA 404  *Sampi v Western Australia* [2005] FCA 777  *Western Australia v Brown* (2014) 306 ALR 168; [2014] HCA 8  *Western Australia v Sebastian* (2008) 173 FCR 1; [2008] FCAFC 65  *Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191  *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28  *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 |
|  |  |
| Date of hearing: | 24-26 February 2015 |
|  |  |
| Date of last submissions: | 5 March 2015 |
|  |  |
| Place: | Adelaide (heard in Perth) |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 170 |
|  |  |
| In WAD 72 of 2014: |  |
| Counsel for the Appellant: | G McIntyre SC and S Wright |
|  |  |
| Solicitor for the Appellant: | Roe Legal Services (WA) |
|  |  |
| Counsel for the First Respondent: | K Pettit SC and M Pudovskis |
|  |  |
| Solicitor for the First Respondent: | State Solicitor’s Office |
|  |  |
| In WAD 73 of 2014: |  |
| Counsel for the Appellant: | K Pettit SC and M Pudovskis |
|  |  |
| Solicitor for the Appellant: | State Solicitor’s Office |
|  |  |
| Counsel for the First Respondent: | V Hughston SC and T Jowett |
|  |  |
| Solicitor for the First Respondent: | Yamatji Marlpa Aboriginal Corporation |
|  |  |
| Counsel for the Fifth Respondent: | A Read |
|  |  |
| Solicitor for the Fifth Respondent: | Civic Legal |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 72 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE AND OTHERS  Appellants |
| AND: | STATE OF WESTERN AUSTRALIA AND OTHERS  Respondents |
| JUDGES: | MANSFIELD, KENNY, RARES, JAGOT AND MORTIMER JJ |
| DATE OF ORDER: | 12 JUNE 2015 |
| WHERE MADE: | ADELAIDE (HEARD IN PERTH) |

THE COURT ORDERS THAT:

1. The parties file an agreed minute of orders and amended determination of native title reflecting these reasons for judgment within 14 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 73 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | STATE OF WESTERN AUSTRALIA  Appellant |
| AND: | ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE AND OTHERS  Respondents |

|  |  |
| --- | --- |
| JUDGES: | MANSFIELD, KENNY, RARES, JAGOT AND MORTIMER JJ |
| DATE OF ORDER: | 12 JUNE 2015 |
| WHERE MADE: | ADELAIDE (HEARD IN PERTH) |

THE COURT ORDERS THAT:

1. The parties file an agreed minute of orders and amended determination of native title reflecting these reasons for judgment within 14 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 72 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |  |
| --- | --- | --- |
| BETWEEN: | ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE AND OTHERS  Appellants | |
| AND: | STATE OF WESTERN AUSTRALIA AND OTHERS  Respondents | |
|  | | WAD 73 of 2014 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | STATE OF WESTERN AUSTRALIA  Appellant |
| AND: | ALEC TUCKER ON BEHALF OF THE BANJIMA PEOPLE AND OTHERS  Respondents |

|  |  |
| --- | --- |
| JUDGES: | MANSFIELD, KENNY, RARES, JAGOT AND MORTIMER JJ |
| DATE: | 12 JUNE 2015 |
| PLACE: | ADELAIDE (HEARD IN PERTH) |

**REASONS FOR JUDGMENT**

##### THE APPEALS

1. These appeals are against certain aspects of a native title determination over certain land in the north western part of Western Australia south of Port Hedland. Consequential on reasons for judgment published on 28 August 2013 (*Banjima People v State of Western Australia* *(No 2)* (2013) 305 ALR 1; [2013] FCA 868) the primary judge made orders on 11 March 2014 including that:
2. In relation to the Determination Area, there be a determination of native title in WAD 6096 of 1998 in terms of the Determination in Attachment A.
3. The Determination in Attachment A to the orders includes the following terms:

**THE COURT ORDERS, DECLARES AND DETERMINES THAT:**

**Existence of native title (s 225 *Native Title Act*)**

1. Native title exists in the Determination Area in the manner set out in paragraphs 3 and 4 of this determination.

**Native title holders (s 225(a) *Native Title Act*)**

1. The native title in the Determination Area is held by the Banjima People. The Banjima People are the people referred to in Schedule 6.

**The nature and extent of native title rights and interests and exclusiveness of native title (ss 225(b) and 225(e) *Native Title Act*)**

1. Subject to paragraphs 4, 5, 6 and 9 the nature and extent of the native title rights and interests in relation to the Determination Area (other than the Exclusive Area) are that they confer the following non-exclusive rights on the Banjima People, including the right to conduct activities necessary to give effect to them:

…

1. Subject to paragraphs 5 and 9 the nature and extent of the native title rights and interests in relation to the Exclusive Area are that they confer the following exclusive rights on the Banjima People, including the right to conduct activities necessary to give effect to them:

(a) the right as against the whole world to possess, occupy, use and enjoy the land and waters of the Exclusive Area;

(b) a right to make decisions about the use of the land and waters of the Exclusive Area by persons who are not members of the Banjima People; and

(c) a right to control the access of others to the land and waters of the Exclusive Area.

…

**Areas to which s 47A or s 47B of the *Native Title Act* apply**

1. Sections 47A and 47B of the *Native Title Act* apply to disregard any prior extinguishment in relation to the land and waters described in Schedule 4.

…

**Definitions and Interpretation**

1. In this determination, unless the contrary intention appears:

…

**“Determination Area”** means the land and waters within the external boundary described in item S1.1 of Schedule 1 and depicted on the maps at Schedule 3, but not including the Unclaimed Area;

…

**“Exclusive Area”** means that part of the Determination Area described in item S1.2 of Schedule 1 and depicted on the maps at Schedule 3;

1. In WAD 73 of 2014 the State of Western Australia (the **State**) challenges the Determination on the following grounds:

1. In determining that native title rights of exclusive possession exist in relation to the Exclusive Area as defined in the Determination of Native Title (Determination of Native Title, paragraph 4, Schedule 1.2), the Court:

(a) erred in law in ruling that evidence of a custom of expecting strangers to seek permission before entering upon or doing things in the Determination Area was sufficient to establish a native title right of exclusive possession (Reasons for Judgment given on 28 August 2013, [685]-[687]);

(b) erred in law in ruling that the Applicants will hold a native title right of exclusive possession unless it can be established against them that they share rights with persons whose rights arose through a non-Banjima normative system (Reasons For Judgment, [691]-[692]); and

(c) erred in law by failing to consider whether there was sufficient acknowledgement and observance of normative laws and customs giving rise to and sustaining rights of exclusive possession since the establishment of British sovereignty over the Determination Area (Reasons for Judgment, [685]-[687], [689], [698]) and erred in law and fact by failing to find that there was insufficient evidence of any such acknowledgement or observance.

2. [Not pressed].

3. In determining that the Banjima people held native title rights and interests in that part of the Determination Area which is north of the northern escarpment of the Hamersley Range (Reasons for Judgment, [294]-[295], [316], [318]), the Court erred in fact in that such findings are against the weight of evidence that Aboriginal groups other than the Banjima people occupied that area at and after the establishment of British sovereignty over the Determination Area (Determination of Native Title, paragraph 1, Schedule 1.1, Schedule 3).

4. The Court erred in law in ruling that prospecting licences and exploration licences under the *Mining Act 1978* (WA) were not ‘*permission[s] or authorit[ies] … under which … part of the land or waters in the area is to be used for public purposes or for a particular purpose*’ pursuant to s 47B(1)(b)(ii) of the *Native Title Act 1993* (Cth) and erred by not determining instead that there were no areas to which s 47B of the *Native Title Act* applied (Determination of Native Title, Schedule 4.2).

5. [Not pressed].

1. The Exclusive Area consists of five relatively small parcels of land immediately to the north of the Wittenoom Road. Those parcels represent the area remaining after the effects of extinguishment were taken into account. Three of the five parcels, identified as unallocated Crown lands or UCL 7, UCL 9 and UCL 42, were found by the primary judge to be subject to s 47B of the *Native Title Act 1993* (Cth) (the **NTA**) so that prior extinguishment of native title rights and interests in those areas was required to be disregarded. These are the parcels to which grounds 1 and 4 of the appeal in WAD 73 of 2014 relate.
2. In WAD 72 of 2014 the Banjima People challenge the Determination on the following grounds:

1. The primary judge erred in finding that section 47B of the Native Title Act did not apply to the areas identified in the proceedings as UCL 1-6, 8, 10-41, and 43-173 by reason that as at the date one or more of the claimant applications was made one or more members of the native title claim group did not occupy the relevant areas within the meaning of section 47B(1)(c) of the Native Title Act (Judgment [1229], [1236], [1247], [1252], [1262], [1266], [1273], [1280], [1288], [1296], [1304], [1312(1)], [1318]), and erred in failing to find that the requirement in section 47B(1)(c) was satisfied, in that his Honour:

(a) erred in law in finding that the facts as found or referred to in the Judgment at [1216]-[1318] were insufficient to satisfy the requirement in section 47B(1)(c) of the Native Title Act; further or alternatively

(b) erred in fact in failing to find that, as at the date one or more of the claimant applications was made, one or more members of the native title claim group did occupy each of the areas.

2. [Not pressed].

3. The primary judge erred in law in finding that native title was wholly extinguished in the areas of reserves 24849 and 25156 by reason of, or by inference to be drawn from, the use made of those reserves (Judgment [1396]-[1397], [1885]); whereas his Honour ought to have found that:

(a) the creation of the reserves was not inconsistent with the then surviving native title rights and interests; and

(b) subsequent use of the reserves for their purposes prevailed over but did not extinguish native title.

4. [Not pressed].

5. [Not pressed].

1. Insofar as ground 3 of WAD 72 of 2014 is concerned, the State conceded that the primary judge erred in respect of reserves 24849 and 25156 but contended that the primary judge’s conclusions of extinguishment of native title should be affirmed on another ground, that buildings constructed on reserves 24849 and 25156 were “public works” within the meaning of s 253(b) of the NTA.
2. It is convenient to deal with each appeal separately, starting with the State’s appeal in WAD 73 of 2014.

##### WAD 73 OF 2014

###### Grounds 1(a) and 1(c)

1. The State’s fundamental proposition in respect of grounds 1(a) and 1(c) is that the Determination, insofar as it grants to the Banjima People a right of exclusive possession (see paras 4(a) and (c) of the Determination above), is not supported by the primary judge’s findings about the traditional laws and customs of the Banjima People.
2. This proposition involves a number of steps.
3. First, it is said that native title has its origin in and is given content by the traditional laws acknowledged and traditional customs observed by the relevant society (*Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 (***Mabo No 2***); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [50] (***Yorta Yorta***); *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63 at [148] (***Bodney v Bennell***); *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290; [2005] FCAFC 110 at [31] (***De Rose***). This step in the reasoning process is uncontroversial.
4. Second, it is said that “acknowledgement” of a law and “observance” of a custom means the practice of the law and the custom (*Yorta Yorta* (2002) 214 CLR 422; [2002] HCA 58at [47]-[50]). This step in the reasoning process is controversial insofar as the State contends that the continued exercise of a right or custom is essential to its continued existence.
5. Third, it is said that the primary judge found only a custom of expecting others to seek permission to be or do things on Banjima country and that this custom did not involve the effective exclusion of any person or the ability to so exclude any person. This, said the State, does not involve the observance of any custom but, rather, an expectation that others will observe a belief held by the Banjima People. Further, the custom so found is not a custom of excluding anyone but a custom of protecting those who enter Banjima country from spirits or dangerous places by way of an introduction to country by a Banjima person.
6. Accordingly, the State said, the rights of exclusive possession in para 4 of the Determination go beyond the findings the primary judge made. Further, this conclusion is consistent with the reasoning in *Griffiths v Northern Territory of Australia* (2007) 165 FCR 391; [2007] FCAFC 178 at [127] (***Griffiths***). *Griffiths*, submitted the State, is authority for the proposition that “evidence of granting/obtaining permission to avoid the country’s pitfalls can found exclusive possession if the custom carries an ‘ability … to effectively exclude people not of their community’”. However, the argument of the State continued, if *Griffiths* at [127] is read more broadly than this as the primary judge erroneously did, so that a right of exclusive possession can be found merely by reason of a belief held by the indigenous claimants that permission is needed to enter their land, *Griffiths* is wrong to that extent. All aspects of this third step in the State’s reasoning process are controversial.
7. For these reasons the State contended the primary judge erred in two ways. The primary judge failed to consider whether the identified custom gave the Banjima People the “ability to effectively exclude” other people. The evidence did not support such a finding, there being, so the State argued:

…ample evidence of presence of Yindjibarndi and others on Mulga Downs, with no suggestion that any sought permission. There was ample evidence of Europeans entering, and no evidence that the custom, danger, permission or protection was brought to their attention.

1. The primary judge, submitted the State, also failed to consider whether there was sufficient acknowledgment and observance of the particular normative laws and customs to sustain exclusive possession, in the sense of sufficient for effective exclusion. Instead, the primary judge ruled that relevant maintenance of connection over the whole claim area is sufficient to establish exclusive possession. This, said the State, erroneously substituted connection for acknowledgment and observance of traditional laws and customs, contrary to *Yorta Yorta* (2002) 214 CLR 422; [2002] HCA 58 at [33]-[36] and [85]-[88].
2. The State’s submissions confront difficulties of fact and law.
3. The first difficulty is that the State’s characterisation of the custom found by the primary judge is inappropriately selective. The primary judge did not find only a custom of the Banjima People of expecting others to seek permission. He found as follows:

[686] In this case there has been ample evidence of the custom of the Banjima to expect others to seek permission to be or do things in Banjima country. Recognition of some people as “strangers” is part of that custom. The reports of Straker go to show that the Hamersley Aborigines were apparently prepared to expel people from their country. In a subsequent, post-settlement setting, the ability of the Aboriginal inhabitants to continue to act in that first contact way obviously was inhibited, not the least by the new criminal laws of the new sovereign. None the less, the evidence shows that the need for strangers to seek permission to be in Banjima country has remained strong and is not a re-introduced custom. Not the least of the reasons for this custom is the understanding by Aboriginal people that the country carries dangers and spirits and must be respected by Aboriginal and non-Aboriginal peoples alike. Seeking permission to be on country from the traditional owners is one way of avoiding pitfalls. It is also an important way of ensuring that sacred or religious sites created in the Dreaming are not violated.

[687] To name but a few of the Banjima witnesses who gave evidence to the effect that strangers should ask permission before carrying out any activity on Banjima country, may be mentioned Brian Tucker, Gladys Tucker, Maitland Parker, Mr G Tucker, Alec Tucker, Timothy Parker, Mrs A Smith, Marie-Anne Tucker and Mr D Black. It may properly be inferred, taking account of the evidence of the anthropologists too, that this custom or land is deeply rooted in the culture of the Banjima.

[688] Again, to mention but a few of the witnesses who gave evidence that Banjima country is redolent with spiritual dangers for those who are not Banjima, may be mentioned Mr G Tucker, Steven Smith, Mr D Black, Alec Tucker, Mrs A Smith and Gladys Tucker. Again this may be inferred to be an ancient custom.

[689] I therefore generally accept the submissions made on behalf of the claimants that:

* It is not a necessary condition of the exclusivity of native title rights and interests that the native claimants should assert a right to bar entry to their country on the basis that it belongs to them.
* The control of access to country which flows from spiritual necessity because of the harm the country will inflict upon unauthorised entry can support a characterisation of the native title rights and interests as exclusive.
* It is not necessary to exclusivity that the native title claim group require permission for entry onto their country on every occasion that a stranger enters provided that the stranger has been properly introduced to country by them in the first place.

[690] I accept the claimants’ submission that the evidence adverted to provides an evidentiary basis for exclusive rights to the effect claimed, subject to what is said below.

1. In other words, his Honour found not only an expectation by the Banjima People that others would seek permission to enter, but also a “need” (at [686]) for them to do so. An expectation is one thing; a need is another altogether, and involves a different character of traditional law and custom than the one described by the State. The primary judge’s finding of a “need” in [686] signifies an imperative binding on Banjima People and other Aboriginal people wishing to enter Banjima country, not a mere expectation as found in the first sentence of [686]. The State’s submissions thus mischaracterise the primary judge’s findings by focusing on one sentence in one key paragraph without regard to the balance of that paragraph (and, as discussed below, the paragraphs which follow).
2. The second difficulty is that, contrary to the State’s submission, the primary judge did not find that the only reason for the custom was to protect people from the spiritual dangers of Banjima country. As the primary judge said at [686] this was one important reason for the custom. However, another reason was the custom ensured that “sacred or religious sites created in the Dreaming are not violated”.
3. The third difficulty, and again contrary to the State’s submissions, is that the primary judge found that the Banjima People had exerted their right to exclude others failing observance of their custom. This is the point of his Honour’s observation at [686] that “reports of Straker go to show that the Hamersley Aborigines were apparently prepared to expel people from their country” and, thereafter, the “need” to obtain permission remains “strong”.
4. The fourth difficulty is that the State’s submission that there was “minimal” evidence of persons actually seeking permission from the Banjima People is also unfounded. Insofar as Europeans are concerned, the primary judge engaged in understatement at [686] when observing that the ability of the Banjima People to enforce their traditional laws and customs was “inhibited”. It would be accurate to say that the Banjima People had no capacity whatsoever to enforce their laws and customs against Europeans because, until *Mabo No 2* (1992) 175 CLR 1,native title was not recognised in Australia. Moreover, Europeans stood outside the universe of traditional laws and customs. As noted in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178 at [127]: “…traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people”. In other words, it is the Banjima People and other indigenous people that matter, not people who stand outside the relevant frame of reference.
5. It follows that the conduct of Europeans in not seeking permission and not heeding the spiritual dangers of Banjima country or respecting sacred or religious sites created in the Dreaming says nothing about the acknowledgment and observance by Banjima and other traditional societies of Banjima traditional laws and customs. Accordingly, the evidence to which the primary judge rightly had regard at [687] and [688] was not that of Europeans accessing Banjima country without seeking Banjima permission, but of other indigenous people, who are not Banjima but nevertheless stand within the universe of traditional laws and customs, seeking Banjima permission to enter Banjima country. And that evidence was “ample” and “strong” as the primary judge found, not “minimal” as the State contended. For example:
6. Steven Smith, a Banjima man, said that other non-Banjima Aboriginals had to ask permission to enter and do things on Banjima country. He said “every other neighbouring tribe know my country” so they “won’t risk” doing things on Banjima country without permission because the spirits would “send you mad”.
7. Mr G Tucker, a Banjima man, said that he could stop other Aboriginals coming onto Banjima land. If a neighbour, such as the Yindjibarndi wanted to come onto Banjima country, they had to seek permission from Banjima elders. People from Roebourne often asked his permission to shoot on Banjima country. Nyiyabarli people also ask permission to look for emu in Banjima country. So did Kariyarra people. It was “our right to be asked”. If they did not ask they would get punished by an elder or sick from the spirits. Some young people do not ask permission and often they get sick. He also asked for permission before entering the country of other Aboriginal people.
8. Mr D Black, a Banjima man, said other people had to ask permission to go onto Banjima country and he had to ask to enter another person’s country. If people just drive through the country it is alright but if they want to enter onto the country or do something like take ochre or wood they have to ask as otherwise “something bad might happen, the spirits are always watching”.
9. It follows from this that the State’s submission that the primary judge failed to consider the ability of the Banjima People effectively to exclude others also cannot be sustained. Amongst others within the scope of traditional laws and customs (which does not include Europeans) there was “ample” and “strong” evidence of the “need” to obtain Banjima permission to enter Banjima country. The primary judge’s finding of “need” means that, without permission, entry to Banjima country by others could not be obtained consistent with Banjima traditional laws and customs. If entry without permission had occurred in any particular case by a person within the scope of Banjima traditional law and custom, that would be an entry in contravention of the traditional law and custom. Evidence of such an entry would not of itself undermine the continued existence of the traditional law and custom, however. The contravener may have suffered spiritual or physical sanction as a result, which would tend to confirm, not undermine, the traditional law and custom.
10. Insofar as the State relied on the presence of Yindjibarndi and others on Mulga Downs with “no suggestion that any sought permission”, it should be said that the evidence of this appears to relate to Aboriginal people working on the station and living in the associated native camp under the auspices of the station owners or managers, who were presumably European. This evidence does not contradict the evidence of Banjima People, to which the primary judge referred in [687] and [688], that non-Banjima Aboriginal people needed to ask permission to enter Banjima country.
11. For the same reasons it cannot be said that the primary judge failed to consider whether there was sufficient acknowledgment and observance of the relevant traditional laws and customs to sustain exclusive possession. As discussed, the primary judge characterised the evidence of the need to obtain permission to enter Banjima country as “strong”. Of itself, this discloses acceptance of the sufficiency of the relevant evidence. The State’s contention of error in this regard is also effectively answered by the submission for the Banjima People in these terms:

This second alleged error … raises questions involving his Honour’s assessment of a very large body of Aboriginal, historical and anthropological evidence relevant to this issue. His Honour’s assessment of that evidence and the conclusion ultimately reached clearly involved difficult issues of fact and degree. The assessment of the cogency or otherwise of that large and diverse body of evidence was quintessentially a matter for the trial judge [*Moses v Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78 (***Moses***) at [308]-[309], *Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191 (***Ward***) at [222]-[225] per Beaumont and von Doussa JJ; *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001) 110 FCR 244; [2001] FCA 45 (***Yorta Yorta****)* at [202]-[205] per Branson and Katz JJ, *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171; [1999] FCA 1668 (***Yarmirr***) at [637]-[640] per Merkel J, *Yorta Yorta*  (2002) 214 CLR 422; [2002] HCA 58 at [63]]. His Honour’s finding on this issue was not “contrary to incontrovertible facts or uncontested testimony”, “glaringly improbable” or “contrary to compelling inferences” [*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29] per Gleeson CJ, Gummow and Kirby JJ].

1. This submission is made in the context described elsewhere in the submissions for the Banjima People as follows:

The Court heard two separate tranches of Aboriginal evidence on country at various locations in and around the claim area in October 2010 and in July 2011. Detailed witness statements from each of the Aboriginal witnesses were received into evidence. In total, 23 witness statements were tendered and 22 Aboriginal witnesses were called to give further oral evidence and to be cross-examined. In addition to the evidence that was given by those witnesses in open court, the Court heard restricted men’s evidence on three separate occasions. A number of the Banjima men who took part in the restricted sessions of men’s evidence did not give evidence in open court.

In December 2011, the Court sat in Perth to receive into evidence various expert reports and to hear concurrent evidence from the claimants’ (Dr Palmer) and the State’s (Mr Robinson) expert anthropologists. As well as receiving into evidence the anthropologists’ reports, including Pt B CLD Tab 662 (Joint Report), the Court also received into evidence an Historian’s Report written by Dr Green Pt B CLD Tab 541 (Green Report) and a witness statement and master’s thesis from a linguist, Professor Dench.

1. This leads to consideration of the State’s fundamental point that the primary judge’s findings fail to sustain the rights of exclusive possession granted by para 4 of the Determination. The mischaracterisation at the heart of the State’s contentions in this regard (that is, the State’s focus on the expectation found by the primary judge, as opposed to the need for permission to be sought, which his Honour also found) has already been discussed. There is, however, another difficulty. It lies in the State’s assumption that a traditional law or custom in which permission is needed from traditional owners for others to enter their country (being others within the universe of traditional laws and customs) cannot be recognised by the common law as a right of exclusive possession. This assumption is inconsistent with the reasoning in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178.
2. Section 223(1) of the NTA provides that:
3. The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

1. Section 223(1)(c) requires that the native title rights and interests be recognised by the common law of Australia. For example, in *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 (***Yarmirr***) it was held that the common law did not recognise an exclusive native title right to fish in the sea due to inconsistency of such a right with other common law rights. Such inconsistent rights aside, in every case where there are rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders by which they have a connection with land or waters, there is a question of reflecting the content of the native title right and interest in a determination of native title. This appears from s 225 which provides that:

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease - whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

1. Section 225(b) requires the determination to include the nature and extent of the native title rights and interests. While the tendency to inquire as to the existence of native title rights and interests “in the language of the common law property lawyer” is to be curbed (*Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 at [11]), the determination is a requirement of s 225 of the NTA, not of the traditional laws and customs. At [16] in *Yarmirr*  Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

Nor is it necessary to identify a claimed right or interest as one which carries with it, or is supported by, some enforceable means of excluding from its enjoyment those who are not its holders. The reference to rights and interests enjoyed under traditional laws and customs invites attention to how (presumably as a matter of traditional *law*) breach of the right and interest might be dealt with, but it also invites attention to how (as a matter of *custom*) the right and interest is observed. The latter element of the inquiry seems directed more to identifying practices that are regarded as socially acceptable, rather than looking to whether the practices were supported or enforced through a system for the organised imposition of sanctions by the relevant community. Again, therefore, no a priori assumption can or should be made that the only kinds of rights and interests referred to in para (a) of s 223(1) are rights and interests that were supported by some communally organised and enforced system of sanctions.

1. In *Fejo v Northern Territory* (1998) 195 CLR 96; [1998] HCA 58 at 128 [46] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said:

Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title.

1. In *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (***Ward***) at [14] Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

As is now well recognised, the connection which Aboriginal peoples have with "country" is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that [(1971) 17 FLR 141 at 167]:

"the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole."

It is a relationship which sometimes is spoken of as having to care for, and being able to "speak for", country. "Speaking for" country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer. Nor are they reduced by the requirement of the NTA, now found in para (e) of s 225, for a determination by the Federal Court to state, with respect to land or waters in the determination area not covered by a "non-exclusive agricultural lease" or a "non-exclusive pastoral lease", whether the native title rights and interests "confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others".

1. The reasoning in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178deals with this intersection between native title rights and interests and the common law in the context of the common law concept of exclusive possession. The Full Court (French, Branson and Sundberg JJ) said:

[127] It is not a necessary condition of the exclusivity of native title rights and interests in land or waters that the native title holders should, in their testimony, frame their claim to exclusivity as some sort of analogue of a proprietary right. In this connection we are concerned that his Honour’s reference to usufructuary and proprietary rights, discussed earlier, may have led him to require some taxonomical threshold to be crossed before a finding of exclusivity could be made. It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”. If control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation. The status of the appellants as gatekeepers was reiterated in the evidence of most of the indigenous witnesses and by the anthropological report which was ultimately accepted by his Honour. We would add that it is not necessary to exclusivity that the appellants require permission for entry onto their country on every occasion that a stranger enters provided that the stranger has been properly introduced to the country by them in the first place. Nor is exclusivity negatived by a general practice of permitting access to properly introduced outsiders.

[128] In our opinion a proper characterisation of the effectively uncontested factual evidence of the indigenous witnesses and the opinion evidence of the anthropologists whom his Honour accepted, leads to one conclusion and one conclusion only and that is that the appellants, taken as a community, had exclusive possession, use and occupation of the application area. The appeal therefore succeeds on the question of exclusivity.

1. The State submitted that [127] in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178 is to be understood as saying that “[t]he question of exclusivity depends upon the ability of the [traditional owners] effectively to exclude from their country people not of their community”. The problem with this submission is that it fails to recognise the source or foundation of that ability in traditional law and custom. What *Griffiths* discloses is that the source or foundation of that ability is not necessarily (or even likely to be) an assertion by traditional owners that the country is “their country” but rather the control of access to the country by other indigenous people by reason of the spiritual sanctions suffered for unauthorised entry. In other words, control of access by traditional owners, who see themselves and act as “gatekeepers for the purpose of preventing … harm and avoiding injury to the country”, was found in *Griffiths* to be recognised by the common law as a right of exclusive possession. By “ability to exclude others” in the context of traditional law and custom, the Full Court in *Griffiths* did not have in mind Western proprietary concepts of barring entry with signs, fences or physical opposition, nor concepts of trespass and eviction, but an ability or capacity embedded in and springing from the spiritual relationship of indigenous people with the land to which they are traditionally connected. In this context, as the primary judge’s conclusions properly recognised, the continuing need of other indigenous people for Banjima permission to enter Banjima country to provide protection from harm for people and country provided evidence of what the common law will recognise as a right of exclusive possession in the Banjima People.
2. The State submitted that the primary judge did not find, in terms, that the Banjima People had the right to “speak for country”. That is not correct. At [695]-[696] his Honour dealt with a submission from the BHP Billiton and RTIO respondents to the effect that the pre-sovereignty rights to control access to country and to speak for country were held locally, so that there could not be found to be “exclusive” native title rights that have continued since sovereignty in the sense of conferring control of the land for all purposes.
3. At [695] his Honour rejected those submissions, saying:

As explained in the discussion above, the inferred social organisation of the Banjima people at the time of first contact was by way of a number of local (country or estate) groups and residence groups (or bands). The primary responsibility of the local groups was more religious in nature and involved obligations to protect country and particular sites and, in that context, to “speak for” country and thereby to make decisions about and to control activities within country. Members of these local (country or estate) groups on a day-to-day level, in different formations, were likely to have been members of residence groups (or bands) that made “economic” use of the Banjima land, that is to say, lived their ordinary lives on wider tracts of Banjima territory. The evidence suggests that people travelled across Banjima country as members of residence groups (or bands) and were not confined to a “country” or an “estate” within Banjima country.

1. Noting the evidence revealed that post-sovereignty these local and residence groups appear to have “coalesced” into larger groupings, his Honour found:

[696] … One thereby observes the coalescence of local groups and residence groups into larger groupings. Thus, Top End Banjima people and Bottom End Banjima people gave evidence that addressed both their right to “speak for” particular areas of Banjima country and to economically use or exploit Banjima country in customary ways. None of that means, as I apprehend the submissions of these respondents to suggest, that the right to “speak for” country was lost or that any right to exclusivity was thereby abandoned or that the people who exercise the rights to speak for country cannot now be identified. They can be, as generally they reflect the members respectively of the Top End Banjima and Bottom End Banjima. As I have found above, they have continued to possess a wide range of rights to speak for country (to make decisions about it) and to use it and its resources in customary or usufructuary ways.

1. The primary judge expressly found that under Banjima traditional law and custom, there was a need to obtain Banjima permission to enter Banjima country. The necessary corollary of this finding is that, by the system of traditional laws and interests acknowledged and observed by the Banjima People and relevant others, the Banjima People controlled access to Banjima country. The control of access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction (which underpinned the conclusion in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178 and in the present case), is readily recognisable as a right of exclusive possession. In *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 at [17] Gleeson CJ, Gaudron, Kirby and Hayne JJ described the concept of “property” as a “bundle of rights” in which the legal relationship of a person to a thing (in this case, land) is described. At [18] their Honours observed, citing Gray, “Property in Thin Air” (1991) 50 *Cambridge Law Journal* 252 at 299:

Nevertheless, as Professor Gray also says, “An extensive frame of reference is created by the notion that ‘property’ consists primarily in control over access. Much of our false thinking about property stems from the residual perception that ‘property’ is itself a thing or resource rather than a legally endorsed concentration of power over things and resources”.

1. If permission is needed to enter land, then there can be no doubt that the person or community with the power to grant or withhold permission controls access. That person or group decides who may enter land free from the risk of spiritual harm and who may not. Those people are, as his Honour observed, charged with a responsibility to ensure sacred or religious sites on country are not violated by outsiders. As noted, the fact that a person bound by the traditional law and custom may have entered without permission, of itself, does not mean that the law and custom is undermined. Not all bound by a law obey the law at all times although, as in any normative system, they may be “expected” to do so. Spiritual or physical sanction for the contravention might also have been involved. The consequences of evidence of unauthorised entry will depend on the whole factual context.
2. The identification of a traditional law or custom that a stranger to country seek permission to enter or risk suffering spiritually detrimental consequences if he or she enters without such permission can have important consequences. The law or custom so identified can establish among, not just the ancestors of the claim group, but also the neighbouring pre‑sovereignty indigenous peoples, whose lands and waters were whose and where the common boundaries lay. That is, such an identification can establish that the consequences of unauthorised entry by a person into the country of another group were recognised and acknowledged traditionally as a normative and effective sanction. Of course, before the super-imposition of European law, the custodians of a particular country could, and did, also use force to protect that country. However, the recognition by indigenous strangers to country of the law and custom of seeking permission to enter was and is a demonstration of the normative effect of, as best the common law can characterise it, an effectual right in the custodians of exclusive possession of their country as between them and indigenous strangers. The evidence of the continued observance of such a law and custom by both the Banjima People and other indigenous peoples that the primary judge accepted justified his Honour’s finding.
3. In the present case there was cogent evidence of acknowledgment and observance by the relevant people (the Banjima and other indigenous people) of the traditional requirement for permission. The law or custom found by the primary judge, of the need for permission, was properly based on this evidence. The primary judge’s conclusion that such a native title right or interest sustained the nature and extent of rights and interests set out in para 4 of the Determination was sound. A right to control access to land (para 4(c)) is the essence of a right to exclusive possession (para 4(a)) and to make decisions about the use of the land (para 4(b)). The terms of paras 4(a) and (b) of the Determination do no more than make express what is provided for in para 4(c).
4. Accordingly, we do not accept either the State’s interpretation of *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178 or that *Griffiths* was wrongly decided.
5. The State’s focus on the necessity of the exercise of the right in question is also misplaced. In *Yorta Yorta* (2002) 214 CLR 422; [2002] HCA 58 at [84] Gleeson CJ, Gummow and Hayne JJ said:

First, the exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content. Evidence that at some time, since sovereignty, some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests, does not inevitably answer the relevant statutory questions. Those statutory questions are directed to possession of the rights or interests, not their exercise, and are directed also to the existence of a relevant connection between the claimants and the land or waters in question.

1. The nature of the right must also be considered. The right is to control access to Banjima country by the need for permission of Banjima People to be obtained to enter Banjima country, the primary sanction for contravention being spiritual harm. Of its nature, this right is not necessarily enforced by ejecting a person who has failed to seek permission. It is enforced by, or has the consequence of, spiritual sanction. Moreover, of its nature this right is not necessarily asserted or exercised by barring persons who do not seek permission from entering the country. One looks rather to how, as a matter of custom, the right is observed, and need not inquire whether there is an organised system of sanctions imposed by the relevant community: *Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 at [16]. The right is primarily asserted or exercised by the shared acknowledgment of Banjima and other indigenous people that permission of Banjima People is needed to enter the country and that, if permission is not obtained, spiritual and other sanctions are likely; it is such shared acknowledgment which forms the basis for observance of the need to obtain permission. There was ample evidence of that shared acknowledgment and observance of the requirement both at sovereignty and continuing, as the primary judge held.
2. Finally, the primary judge did not decide that exclusive possession was established merely by connection with the claim area as a whole. The impugned reasoning is at [693]. His Honour said:

[693] As to the submissions made on behalf of the state that even if the Banjima law supported exclusive possession, there has been insufficient physical presence to exercise that right, the decision of the High Court in *Yorta Yorta HC* demonstrates that it is the possession, not the exercise, of rights that is important. I have already found, in the connection discussion above, that there has been a relevant maintenance of connection which has not been substantially interrupted in respect of the whole of the claim area. In those circumstances the state’s submissions concerning no exercise of possession overall the claim area are not to the point. There is sufficient evidence of the exercise of claimed rights in the claim area to demonstrate that the rights claimed over the whole are in fact asserted and have not been abandoned and are still possessed. The connection of the Banjima with their traditional country occurs in many ways including through religious ceremony and observance. The fact that some people may not have been born within the claim area, may have gone to school and lived in towns outside the claim area and the like is neither here nor there when one takes into account the whole of the evidence to which I have already made reference.

1. It is apparent that the primary judge, in [693], was expressing his satisfaction that there was “sufficient evidence of the exercise of claimed rights in the claim area to demonstrate that the rights claimed over the whole are in fact asserted and have not been abandoned and are still possessed”. The context of expression of this state of satisfaction was the issue of exclusive possession. It follows that his Honour was satisfied that the claimed traditional laws and customs which founded the relevant native title rights and interests (that is, to control access to country by the need to seek permission) were both asserted and exercised over the whole of the claim area. The primary judge did not assume that connection established exclusive possession. The error for which the State contends cannot be sustained having regard to the primary judge’s reasons.
2. Accordingly, grounds 1(a) and (c) must be rejected.

###### Ground 1(b)

1. Ground 1(b) depends on the premise that the primary judge found that the Yindjibarndi people, including Toby Dingoman, held “traditional rights” in at least part of Mulga Downs station at sovereignty in the area known as Nyiya. According to the State, his Honour erred in ruling that the Banjima People hold exclusive possession unless they presently share rights with non-Banjima Aboriginal people notwithstanding evidence that the Banjima People earlier did share rights.
2. The first problem with ground 1(b) is the premise that the primary judge found that persons other than the Banjima held traditional rights over part of Mulga Downs (the station covering a substantial part of the area north of the northern escarpment of the Hamersley Range). The State’s submissions focus on certain paragraphs in his Honour’s reasons to found this premise, being [298], [308] and [311]-[312]. Those paragraphs are as follows:

[298] There seems little doubt that Yindjibarndi interests were traditionally expressed in or around the disputed northern boundary area. The transcript of evidence from the Daniel claim referred to by Mr Robinson supports that view, but it does not necessarily support an assertion that the Yindjibarndi held exclusive rights in that area.

[308] What the evidence does suggest more directly, and as the anthropologists in their joint report agree, is that a deceased person such as Toby Dingoman may have had traditional rights over some parts of Mulga Downs associated with the area known as Nyiya. One difficulty with this, for present purposes, however, is that there has not been any separate inquiry as to whether such rights have continued in his descendants.

[311] Notwithstanding those observations, there are grounds for thinking, from Mr Robinson’s evidence, that Toby Dingoman may have identified with the Yindjibarndi language group. But, as against that, some of the data suggests that George Toby’s country, as noted in Mr Laurence’s notes, was mixed up Palkyu, Banjima and Yindjibarndi.

[312] The circumstances of this proceeding are that no persons claiming descent through Toby Dingoman, or any other person not of the Banjima language group, have claimed rights, whether exclusive or shared, in the disputed northern border area. The anthropologists’ view is that traditional rights survive not only where there is an appropriate descent basis to those rights, but also where they have been “realised”. While there are indications that Toby Dingoman in the long past may have been associated with parts of the northern boundary area, there are little indications on the evidence in this proceeding of any assertion of continuing native title rights in that area by any individual, community or group apart from the Banjima.

1. The State’s focus is inappropriately narrow. For example, the observation in [298] that “[t]here seems little doubt that Yindjibarndi interests were traditionally expressed in or around the disputed northern boundary area” (the high point of the State’s contention) is followed by paragraphs which qualify that observation. In particular, at [299] the primary judge agreed that there is “much to be said in support of the submissions made on behalf of the claimants that caution should attend any consideration of what was said in the Daniel claim”, the Daniel claim having been said in [298] to support the view that Yindjibarndi interests were traditionally expressed in or around the disputed northern boundary area. Also in [299] the primary judge noted that the Daniel claim stopped well short of the Banjima claim area. Moreover, the Yindjibarndi had also subsequently made a claim which did not claim any part of the Banjima claim area. The primary judge then described the evidence of Mulga Downs being Yindjibarndi country as “generalised”. He said that it must also be noted that “witnesses sometimes give indicative directional evidence as to the extent of country when sitting in another place”. At [303], in respect of anthropological evidence from Mr Robinson (whom the State called), the primary judge said:

So far as additional materials referred to by Mr Robinson are concerned, while it should not be doubted they are generally relevant to the matters now in issue, they, like the evidence given in the Daniel claim, were not prepared for the purposes of this proceeding and do not on their face address with any great particularity the question of where Yindjibarndi country intersects with Banjima country in this northern boundary area.

1. This is the context in which the statement that there “seems little doubt that Yindjibarndi interests were traditionally expressed in or around the disputed northern boundary area” sits. The statement is not to the effect that the Yindjibarndi held native title rights and interests in any part of the land claimed by the Banjima People. That this is so is clear from his Honour’s subsequent observations that Toby Dingoman and others “may” have had traditional rights over part of Mulga Downs. From this, it is apparent that the primary judge was not satisfied that any person other than the Banjima People did in fact have such rights. The tentative nature of his Honour’s conclusions is repeated by the use of the word “may” in [311] and [312]. It is this fact which informs his Honour’s subsequent conclusion at [692] which should be read in the context of [691] as follows:

[691] The state also submit that where there is evidence that the Banjima shared rights in transitional or border areas with others, then it would not be appropriate to say that those rights are exclusive. However, in my view, unless it is established that presently the rights are shared with the persons who gained their rights through non-Banjima language group normative systems, then the Banjima are entitled to a determination that the rights they possess are today exclusive, subject again to what is said below.

[692] In this case, and while there has been much discussion in relation to the northern boundary and the eastern boundary and the possibility that there are shared interests, respectively, with the Yindjibarndi and the Nyiyabarli, the evidence does not in fact permit the court affirmatively to find that there were and are now realised, “shared” traditional interests, in the relevant sense, in those areas. A person such as David Stock, on the evidence before the court, enjoys his rights by his Banjima ancestry, not his Nyiyabarli. Therefore there is no impediment, in my view, to the Banjima interests in those areas, which have been demonstrated by the evidence, being found to be exclusive if they otherwise fall in Area A as defined in the application.

1. The critical conclusion is that “the evidence does not in fact permit the court affirmatively to find that there were and are now realised, ‘shared’ traditional interests, in the relevant sense, in those areas”. The relevant word, for the purpose of this discussion, is “were”. The only possible reading of [692], which the State failed to confront, is that his Honour was not satisfied that he could make any finding that, at sovereignty, any person other than the Banjima had traditional rights and interests in any part of the Banjima claim area. Accordingly, the State’s premise, that his Honour found that other Aboriginal people share rights in the Banjima claim area, is misconceived. His Honour expressly concluded that he could not make any such findings, for which the State was contending, despite the evidence suggesting that some persons may have had such rights. That is, the evidence adduced by the Banjima People satisfied his Honour on this matter and the evidence adduced by the State to the contrary was insufficiently probative, having regard to all of the evidence, to enable him to find what the State sought.
2. For these reasons, ground 1(b) cannot be sustained.
3. There is, however, another reason for rejecting ground 1(b). Assume that the primary judge, as the State contended, had found shared rights in respect of a part of the Banjima claim area. On the basis of his other conclusions discussed in the context of grounds 1(a) and 1(c) above, it would necessarily be the case that Banjima rights and interests, at sovereignty, would be exclusive of all persons other than those who had the benefit of the shared rights and interests. The point the primary judge was making at [308], [312] and [691] was what the evidence did disclose was that the people who may have had the benefit of those shared rights did not continue to assert them. Accordingly, insofar as those shared rights are concerned, there had been no continuity of connection with the part of the land over which the (presumed) shared rights had been enjoyed at sovereignty. The primary judge was saying no more than that, in such a case, the remaining native title rights and interests, those of Banjima People, would be exclusive. There is no error in this reasoning. If there is no person who can presently assert the existence of continued shared rights in any part of Banjima country, then the Banjima People’s otherwise exclusive rights and interests in the whole of their country remain and can be asserted against the world. The State’s contention to the contrary wrongly assumes that if his Honour had found shared rights at sovereignty (which he did not) then the rights and interests of the Banjima People were not now exclusive as against any person. This is not the logical concomitant of the primary judge’s reasoning. Banjima rights and interests, on that assumption, would be subject only to the shared rights of the particular persons who held them. As the primary judge correctly said at [317]:

Whether or not other language groups — such as the Palyku or the Yindjibarndi — also had interests at sovereignty becomes irrelevant for present purposes. If there is no other group that presently asserts any such interests, either exclusively or on a shared basis, and the evidence shows that on the balance of probabilities the Banjima traditionally had rights and interests in that area, then there is no adequate basis to deny the claimants’ claim that the traditional boundaries of the Banjima extend to where they currently assert that they extend, for native title purposes.

1. For these reasons, ground 1(b) must also be rejected.

###### Ground 3

1. Ground 3, which contends that the primary judge’s conclusions about the area north of the northern escarpment of the Hamersley Range were against the weight of the evidence, confronts a fundamental difficulty.
2. The primary judge heard substantial evidence on country. He alone saw the witnesses give their evidence and was able to weigh that evidence in the balance having seen the land to which the evidence referred as it was being given. He alone saw the performance of the anthropologists in concurrent session. The notion advanced by the State that the primary judge had no advantage compared to this Court in the weighing of the evidence overall is untenable. The State’s submissions fail to come to grips with the obvious significant advantage the primary judge enjoyed over this Court in respect of the overall weighing of the totality of the evidence, the need to establish error by the primary judge before appellate intervention could be justified, and the need to establish such error in circumstances such as the present by pointing to some finding contrary to “incontrovertible facts or uncontested testimony”, “glaringly improbable” or “contrary to compelling inferences” (*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29]).
3. In respect of the primary judge’s advantage in a contested native title hearing, regard may be had to the following observations:

* ***Moses* (2007) 160 FCR 148; [2007] FCAFC 78**

[308] The difficulty faced by a party alleging an error in the fact finding process in a proceeding such as the present is formidable. The question whether the applicants for a native title determination have established the necessary degree of connection to land by traditional laws and customs is a matter of judgment involving an assessment of a wide array of evidence…

[309] Nevertheless, these circumstances, however challenging, do not alter the role of an appellate court, which was explained by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* (2003) 214 CLR 118 at [25] thus:

Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. Appellate courts are not excused from the task of “weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect” (*Dearman v Dearman* (1908) 7 CLR 549 at 564, citing *The Glannibanta* (1876) 1 PD 283 at 287).

In *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458; 224 ALR 1 at [17], Kirby J (with whom Gleeson CJ agreed) explained some of the limitations on the appellate role inherent in the nature of the function as follows:

The “limitations” introduced into the rehearing based on the record of the trial are those necessarily involved in that form of appellate procedure. Such limitations include those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from the evidence, viewed as a whole.

(Footnotes omitted.)

* ***Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191**

[222] In the course of presenting these submissions, the State has sought to challenge many specific findings on matters of detail as to the ancestry and connection of applicants and witnesses to parts of the claim area, and for this purpose the Court has been directed to short passages in the evidence of witnesses which appear to contradict particular findings. These aspects of the State's submissions, in effect, invite the court to re-evaluate the mass of evidence received by the trial judge over the course of a very lengthy trial. Such a task would place an impossible burden on an appeal court. Numerous witnesses gave evidence at many sites of importance to the applicants…

* ***Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001) 110 FCR 244; [2001] FCA 45**

[202] His Honour's finding that there was a period of time between 1788 and the date of the appellants' claim during which the relevant community lost its character as a traditional Aboriginal community is not to be lightly disturbed on appeal to this Court. A finding that an indigenous community has lost its character as a traditional indigenous community involves the making of a judgment based on evidence touching on a multitude of factors. The hearing before his Honour was long and complex. As is mentioned in [95] above, evidence was taken from 201 witnesses and his Honour visited, and took evidence on, the claimed land on many occasions…

…

[204] Special difficulties which face an appeal court that is invited to re-evaluate evidence received by a trial judge in a case concerning a determination of native title were identified by Beaumont and von Doussa JJ in *State of Western Australia v Ward* at 377 [222]-[225]. It is likely that there were special difficulties in *Ward* that may not have been experienced in this case, or not experienced to the same extent. Nonetheless, considerable caution is appropriate before this Court infers that crucial evidence was not evaluated and necessary findings of fact were not made.

[205] In a case of this kind, the need for appellate caution adverted to by Lord Hoffmann in *Biogen Inc v Medeva plc* (1996) 36 IPR 438 at 452 is particularly strong. His Lordship there said:

"The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

* ***Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171; [1999] FCA 1668**

[637] Although there may have been little dispute as to the facts as the primary facts were not in dispute, there is nevertheless a need for appellate caution before a different view is taken of the trial judge's evaluation of the facts. As was said by Lord Hoffmann (with the agreement of all other members of the House of Lords) in *Biogen Inc v Medeva Plc* [1997] RPC 1 at 145…

…

[639] In the present case there is the added difficulty that the trial judge's evaluation of the facts is premised upon a plethora of factors which influenced his understanding and impressions of:

* the evidence given by the Aboriginal witnesses at various locations;
* the extensive documentary material;
* the relationship between that evidence and material and the sites to which they relate.

[640] The above matters resulted in the trial judge in the present case being in a situation of unique advantage over an appellate Court in his evaluation of the facts. In these circumstances the respondents have an onerous task in persuading the appellate court that the trial judge has "failed to use or palpably misused his advantage": see *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 and *State Rail Authority (NSW) v Earthline* *Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 307; 160 ALR 588 at 589.

* ***Yorta Yorta* (2002) 214 CLR 422; [2002] HCA 58**

[63] … At least to the extent that the primary judge's inquiry was directed to ascertaining what were the traditional laws and customs of the peoples of the area *at the time of European settlement*, the criticism is not open. The assessment of what is the most reliable evidence about *that* subject was quintessentially a matter for the primary judge who heard the evidence that was given, and questions of whether there could be later modification to the laws and customs identified do not intrude upon it. His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed…

1. The State’s basic complaint is that the primary judge ultimately gave more weight to the evidence of contemporary Banjima People than other evidence which the State had submitted should lead to the conclusion that Mulga Downs was not Banjima at sovereignty. When regard is had to the nature of the evidence on which the State relied, it is apparent that the primary judge made no error. The State relied on ethnographic materials, some evidence from the anthropologists, and certain evidence from Banjima People to support a contention that, in effect, the Banjima People had migrated to Mulga Downs post-sovereignty.
2. First, the ethnographic materials which are said to support the State’s contention. The problem for the State is the primary judge’s observations as follows:

[80] So far as early ethnographic literature is concerned, Dr Palmer in his evidence noted that there is little ethnography for the region that dates from the first decade of the twentieth century or before. Mr Robinson similarly concluded that the early ethnographic literature provided “a very meagre ethnographic base from which to try to re-construct the nature of the Aboriginal societies within this region at sovereignty”. Dr Palmer noted that subsequent field studies by professional anthropologists in the 1930s and 1940s are also conspicuously absent, with the exception of Norman Tindale who visited some places close to the claim area in 1953.

[81] Mr Robinson made the following points about the early ethnographic literature and Tindale’s work, with which Dr Palmer did not express disagreement:

(1) In assessing the early ethnographic work it should be born in mind that none of it constituted in depth ethnographic research employing long-term community-based participant observation.

(2) Much of the work relied upon was in the nature of a short-term survey conducted in English with a relatively small number of informants and therefore essentially shallow and subject to misunderstanding.

(3) The same deficiency applies to the work of Tindale.

(4) The work of Emile Clement, Daisy Bates, Alfred Radcliffe-Brown (also AR Brown) and Tindale must also be approached with caution.

…

[173] This is not a case where in earlier times any trained anthropologist, such as a Radcliffe-Brown, ventured into the central Pilbara, or the Hamersley Range, to conduct field work…

1. It is no surprise that the primary judge did not place the weight on those materials as urged by the State, given his assessment of their limited usefulness. His reasoning continued in these terms, which cannot be faulted:

[295] What the analysis of the evidence, both early ethnographic, early anthropological, more recent anthropological (particularly that of Tindale) and much more recent anthropological including that of Dr Palmer and Mr Robinson in this proceeding, together with the direct evidence of the Banjima witnesses in this proceeding, demonstrates, is that there is not always an easy or clear-cut answer to the question of which indigenous peoples held native title rights and interests over particular pieces of land or waters at sovereignty, particularly in border or transitional areas where people were multilingual and “tribal” appellations can confuse, rather than help, the analysis. The court, as the expert anthropologists did, inevitably regards ethnographic and anthropological materials in endeavouring to draw reasonable inferences on the whole of the evidence about a range of issues. There may be some circumstances where the documentary literature appears to compel the drawing of an inference about a factual matter. But in this instance there is no compelling inference to be drawn from such data that the disputed country identified on the northern boundary was not and could never have been within that over which the Banjima exercised traditional rights and interests at sovereignty. When one takes into account the strength and consistency of the direct evidence of the Aboriginal witnesses concerning the traditional boundaries of the Banjima on the northern side of the claim area and also regards the ethnographic data and other evidence, the evidence on balance leads to the conclusion that the disputed northern boundary was an area in which the Banjima traditionally held rights and interests at sovereignty.

[296] The early ethnographic materials discussed by the anthropologists is, at most, equivocal about the extent to which the disputed northern boundary area was exclusively the domain of one or other language group. It is not, in all the circumstances, appropriate to accord overriding significance to any particular data that arises from the earlier ethnographic research.

1. Second, the anthropologists. The State relied on Mr Robinson. The Banjima People relied on Dr Palmer. Unlike Mr Robinson, Dr Palmer had had the benefit of extensive field work with Banjima People. The simple fact is, where there was conflict, the primary judge tended to prefer the evidence of Dr Palmer. At [179] the primary judge recorded that:

…the anthropologists noted the following points of agreement between them in relation to the proposition that country north of the Hamersley Range escarpment in the Fortescue River Valley, on what is now Mulga Downs Station, includes areas in which members of language groups other than Banjima once held or now hold customary rights:

* The experts agree on the basis of the Banjima evidence at the hearing, as they read it, that there is support for Banjima rights in the Fortescue River Valley in the vicinity of Mulga Downs.
* The experts agree that some country may be “shared” between groups, including members of different language speaking groups. They also agree that areas may also be contested.
* The experts agree that there is ground for concluding that a long deceased man, Toby Dingoman (not a Banjima), may have had traditional rights over some parts of Mulga Downs Station associated with the area known as Nyiya. However, the continuity of those rights to his descendants and the customary bases of such a descent of rights are not demonstrated at this time, and no evidence has been adduced from those descendants and no anthropological field inquiries have been carried out on the topic for the Banjima claim.

1. His Honour referred in detail to Dr Palmer’s work at [183] to [194] including his field trips and information obtained from Banjima People. He then assessed the conflicting opinions of Mr Robinson at [195] to [209], thereafter returning to a detailed assessment of Dr Palmer’s response at [210] to [221]. Following review of the evidence given in the joint report and the submissions of the parties, the primary judge said this:

[267] In considering the submissions made, particularly those of the state challenging a Banjima connection in the area of the northern boundary, it is necessary to have regard to the whole of the evidence given by Aboriginal witnesses and to take account of context before drawing conclusions. It is well understood that in any neighbourhood, community or society there may be a range of opinion about such things as the extent of land or country. It may also be accepted that some individuals will be more precise or brief, some more general and expansive, that some may be dry and others more colourful in the giving of their evidence and that some speak very much from their own perspective. It is by reference to the whole of the evidence, as well as the general status and level of appreciation, and sources of knowledge and perspectives, of witnesses that become important in this process. It is also important to understand evidence in context; what is said, what is not said.

[268] A number of the claimant witnesses who gave evidence about the northern boundary were from the Parker family who acquired knowledge from the old and now deceased men Wobby Parker and Horace Parker. The evidence of witnesses such as Archie Tucker, Maitland Parker and Timothy Parker was to the effect that Mulga Downs was and always had been Banjima and that they had never heard of it being Yindjibarndi country. Dawn Hicks, who lived in Wittenoom among the Banjima, Gurama and Yindjibarndi people considered that that area was Banjima.

…

[270] Significantly, the evidence indicates (leaving aside Wirilimura for the moment) that claimed apical ancestors Whitehead, Yinini (Arju), Maggie Nyukayi, Sam Coffin and George Marndu are Banjima with connections under traditional law and customs to areas to the north of Hamersley Range, including Mulga Downs Station. In that regard, Whitehead was the mother of Herbert Horace and Wobby Parker (the latter being the father of the witness Dawn Hicks). Slim Parker, Margaret Rose Parker and Maitland Parker say that her country was Mulga Downs. Dawn Hicks says Flat Rock, a special women’s place near Barimuna, belonged to her.

…

[294] The fact that Bob Tucker Wirilimura appears to have moved to the Mulga Downs area at some point, having begun in the Bottom End, does not, in my view, alter the conclusion to be reached. He is not the only apical ancestor suggested by the evidence to have been connected to Mulga Downs. The evidence as a whole does not suggest Banjima traditional country did not already include this disputed area at the time of his move.

1. No error is apparent in the primary judge’s weighing of the anthropological evidence as part of the evidence as a whole.
2. The State, however, contended that one aspect of the error is disclosed at [270] in that, according to the State, the evidence did not suggest that the persons named in that paragraph had connections under traditional law and customs to areas to the north of the Hamersley Range, including Mulga Downs station. When asked to give the best example of this error the State identified Maggie Nyukayi. According to the State:

There was no evidence to support Barker J’s reliance on Maggie Nyukayi. No Aboriginal evidence was given about her. Dr Palmer could not make a conclusion as to Maggie’s country or language identity. Mr Robinson agreed.

1. It is true that Dr Palmer said in his primary report at [815] that he had insufficient data to form a concluded view about the country or language of Maggie Nyukayi. He also said in that report, however, that he had discussed the issue with claimants who were of the view Maggie’s language was Banjima and she originated from Banjima country. In his supplementary report at [110]-[114], moreover, Dr Palmer said that he had obtained further information about Maggie Nyukayi. He identified Maggie as the mother of Carey Andrews and concluded that the additional data amplified his earlier account “supporting such claims to ancestral rights in Banjima country as members of the Andrew and Carey families might press”. By the time the joint report was prepared between the anthropologists the position had developed further. They were asked to address this proposition:

There is evidence that 10 ancestors listed on the new Form 1 are apical ancestors for the claimants and that they were in possession of the claim area at sovereignty.

1. The anthropologists answered this proposition by stating that:

We agree that those noted in Table 1 are apical ancestors of the claimants and that in our expert views data support the conclusion that they were in possession of parts of the claim area at or about the time of effective sovereignty or before.

1. Table 1 appears as follows in the joint report. The reference to Maggie Nyukayi at item 8 will be noted. So too will the coincidence of the names in the table and [270] of the primary judge’s reasons.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Ancestor** | **Robinson 2011b, 238.** | **Palmer 2010 or other reference** | **Comment** |
| 1 | Bob Tucker (Wirilimura). | Agree. | Agree. Paras 752-757. | Experts differ on the strength of evidence demonstrating his customary links with Mulga Downs. |
| 2 | George Marndu. | Agree. | Agree. Paras 779-783. |  |
| 3 | Whitehead. | Uncertain. May be Palyku and/or from southeast of the Banjima Trial Area. | Believed to be a Banjima ancestor by claimants (paras 768-770) and witnesses. Question reliability of death certificate and note descendants may claim a Banjima identity via other cognatic descent pathways. | Experts agree the death certificate states Whitehead born outside Banjima trial area. Experts agree this is contrary to the evidence of Banjima witnesses who affirmed she was a Banjima person and ancestor. The experts agree that there is no reason to give more weight to the death certificate than to the evidence of the Banjima witnesses in terms of the significance of her identity in customary law reckonings. |
| 4 | Yinini (Arju). | Agree. | Agree. Paras 741-743. |  |
| 5 | Gawi. | Agree. | Agree. Paras 726-732. |  |
| 6 | Sam Coffin. | Uncertain. May be Yindjibarndi. | Agree. Paras 784-789. | The experts agree that evidence of claimants is that he was Banjima. |
| 7 | Yidingganin. | Agree. | Agree. Paras 803-809. |  |
| 8 | Maggie (Nyukayi). | Agree. | Agree. Paras 810-815. It is the view of claimants that Carey and her mother Maggie both belonged to the Banjima language group and so, by implication, originated from Banjima country. | Palmer 2011b, 110-114. Identification of additional ancestor Alice Gubarangu whose language was Banjima and whose country was Mulga Downs. |

1. To the extent the State attempted to bolster its submission by reference to the qualification “parts of the claim area” in the agreement between the anthropologists, the submissions of the Banjima People noted that there was evidence that Carey (or Carrie) Andrews, the daughter of Maggie, was born at Cowra on Mulga Downs in about 1898. Dr Parker referred to this evidence at [811] of his primary report. Further, there was evidence that Carey Andrews was still living at Mulga Downs with her son, Richard Simmons, in 1922. It follows that the submission that there was no evidence of the connection of Maggie Nyukayi with Mulga Downs at sovereignty is untenable.
2. The State’s treatment of the evidence about Bob Tucker Wirilimura is equally untenable. The State contends that the evidence shows Wirilimura migrated to Mulga Downs, the implication being that when he did so the area was not Banjima country. The primary judge found to the contrary as follows:

[294] The fact that Bob Tucker Wirilimura appears to have moved to the Mulga Downs area at some point, having begun in the Bottom End, does not, in my view, alter the conclusion to be reached. He is not the only apical ancestor suggested by the evidence to have been connected to Mulga Downs. The evidence as a whole does not suggest Banjima traditional country did not already include this disputed area at the time of his move.

1. The State relied on the evidence of contemporary Banjima witnesses for this purpose (despite denying the weight that such evidence should be given as to what their elders had told them constituted Banjima country which included Mulga Downs). It is said the evidence shows that Wirilimura brought the law with him when he moved to Mulga Downs. Alec Tucker, a descendant of Wirilimura, said in his statement that Wirilimura “moved to Mulga Downs and established himself there as important Law man and he gained the right to speak for that area of country too”. The State stressed that “established” meant that Banjima law had not previously applied to Mulga Downs. This, however, attempts to use one equivocal word to undermine the wealth of other evidence of contemporary Banjima witnesses that they had been taught by their old people that Mulga Downs was Banjima country. It will be recalled that at [295] the primary judge referred to “the strength and consistency of the direct evidence of the Aboriginal witnesses concerning the traditional boundaries of the Banjima on the northern side of the claim area”. It will also be recalled that the anthropologists, in their joint report (as set out at [67] above), had no difficulty in expressing conclusions based on the evidence of Banjima witnesses.
2. In his primary report Dr Palmer had recorded at [383]-[384] that the boundaries of Banjima country had been passed on to contemporary Banjima “from the forefathers” and the “old people”. Dr Palmer also explained that Banjima constituted a single society with two long-recognised sub-groups, the rights between them being intramurally allocated (at [176], [345]). The rights acquired by Wirilimura were thus based on Banjima traditional law in that, as Alec Tucker had explained to Dr Palmer, his ancestor Wirilimura had “brought his esoteric ritual paraphernalia to Mulga Downs and so was able to assert his authority in spiritual and ritual matters there”, with the consequence that his direct male descendants also had the right to speak for that country (at [524] of Dr Palmer’s primary report). Dr Palmer was privy to confidential information, which he could not disclose, which he said explained how the performance of culturally restricted activities is confined to people with “activated” rights to the country the ritual action celebrates (at [537]). He also explained how ritual songs, Wardiba or Wardirba, were used as a means to identify Banjima country and formed part of the activation of the relevant rights to speak for country (at [631]-[633]). Despite the State’s submissions to the contrary there was also little ambiguity in the evidence of Alec Tucker in the following exchange:

Q …about Wirilimura and how he moved…from Juna Downs…to Mulga Downs. When he moved to Mulga Downs station, whose country was Mulga Downs?...

A Banjima.

1. The State has not given any meaningful explanation as to why the primary judge was not entitled to place weight on the evidence of the Banjima witnesses, Dr Palmer and what the primary judge saw and heard during the hearing to conclude that Mulga Downs was Banjima country at sovereignty. In this regard it should not be overlooked that the primary judge took into account the importance of the ritual songs in ascertaining the extent of country. His Honour said:

[190] Dr Palmer also said that during the period of his work with the MIB claimants, senior men made extensive references to the mytho-ritual song cycle called Wardirba. This is sung by senior and ritually qualified men during the latter stages of initiation rituals. Wardirba songs are considered to be spiritually potent and not the product of human ingenuity. In their performance they are a manifestation of spirituality. Without going into detail, Dr Palmer said that he touched on the Wardirba briefly as it was relevant to how the former MIB claimants legitimate, by citing a customary reference, their knowledge of the extent of their Mungardu Banjima country.

[191] It is useful to take a moment to consider what the Wardirba is. Dr Palmer (Dr Palmer’s first report at [386]) stated there are different Wardirba. Each is understood to embody a signature reflective of both language and a country. The songs encapsulate both the spirituality of the countryside and may be related to specific places. The spiritual ordination of the place is then commemorated through the performance of the song. By dint of this association, he said, a place that may be identified in the Mungardu Banjima Wardirba is considered to lie within Mungardu Banjima country. Command of the songs in ritual practice is also a signal to others of the singer’s rights within that country, particularly in relation to the spiritual management of that country.

1. Thereafter, the primary judge noted:

[435] Extensive evidence was also given by a range of witnesses concerning the ritual processes by which the community meet to put boys through the law. Associated with this law business is the Wardirba, which involves restricted men’s practices in which Banjima country is celebrated. Brian Tucker, for example, knows the songs of the Wardirba, which he demonstrated to the court in a men’s restricted evidence session. The Wardirba contains the most important songs that the Banjima have because it talks about the birds, animals and jilbaba places. He said that the Wardirba songs are related through the country and into the next country going over. They are about Banjima country. The songs are also about water which is important to everybody.

…

[439] The court in a restricted evidence session restricted to initiated men heard Wardirba songs sung and explained.

1. This evidence supports the submission of the Banjima People not only of the substantial advantages the primary judge enjoyed compared to this Court when dealing with an attack on the weight his Honour attributed to evidence, but also that Wirilimura’s acquisition of rights in Mulga Downs is an instance of the intramural allocation of traditional rights and interests communally held by the Banjima People. In *Bodney v Bennell* (2008) 167 FCR 84; [2008] FCAFC 63, the Full Court said:

[119] In our view the contention that there can be no new rights after sovereignty, and in particular no change in the distribution of pre-sovereignty rights, pays insufficient attention to what was said in *Yorta Yorta HC* 214 CLR 422 immediately after the passage quoted at [118]. At [44] the majority said:

[That is not] to deny that the new legal order recognised then existing rights and interests in land. Nor is it to deny the efficacy of rules of transmission of rights and interests under traditional laws and traditional customs which existed at sovereignty, where those native title rights continue to be recognised by the legal order of the new sovereign. The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. Indeed, in this matter, both the claimants and respondents accepted that there could be ‘significant adaptations’ … Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.

[120] In accordance with *Yorta Yorta HC* 214 CLR 422, when determining whether rights and interests are traditional, the proper enquiry is whether they find their origin in pre-sovereignty law and custom, and not whether they are the same as those that existed at sovereignty. Clearly laws and customs can alter and develop after sovereignty, perhaps significantly, and still be traditional. The fourth and last sentences of the passage quoted at [119] suggest that rights and interests, which are the product of laws and customs which adapt or develop, may themselves change without losing recognition.

[121] It may be that the true position is that what cannot be created after sovereignty are rights that impose a greater burden on the Crown’s radical title. For example, in this proceeding, the evidence demonstrated that the claimants had never fished in the sea. The Crown’s radical title over the sea was therefore not, at sovereignty, burdened by any native title rights to fish. If a practice of fishing in the sea had developed since sovereignty, no native title rights could attach to that practice since any such rights would constitute a greater burden on the radical title than existed at sovereignty. By definition such rights could not be traditional. On the other hand, where the Crown’s radical title was burdened at sovereignty with a right to fish, a change in the number and identity of people whose rights so burden it does not necessarily mean that those current rights cannot be traditional.

1. Wirilimura’s acquisition of rights in Mulga Downs, on the evidence, is an example of a right which finds its origin in pre-sovereignty law and custom. His Honour was conscious of the issues around whether the Banjima People were comprised of sub-groups, and whether there was intramural allocation of rights, or intramural arrangements. He deals with this extensively at [104]-[175] of his reasons.
2. It is not necessary to deal with each example given by the State of alleged factual errors said to support ground 3. It is sufficient to note that the allegations of lack of evidence are not borne out by examination of the material available to the primary judge, particularly that of the anthropologists’ joint report, Dr Palmer’s reports, and the Banjima witnesses. Insofar as more need be said it may also be noted that, in each case where the State pointed to an alleged lack of evidence to support a finding, the submissions for the Banjima people, as with the State’s best example of Maggie Nyukayi, pointed to evidence which, on any reasonable view, did support the finding. It goes without saying that in support of ground 3 the State could not identify any finding which was contrary to “incontrovertible facts or uncontested testimony”, “glaringly improbable” or “contrary to compelling inferences” (*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29]).
3. Ground 3, accordingly, must be rejected.

###### Ground 4

* + 1. The primary judge’s decision on s 47B

1. The State challenged the primary judge’s finding that two exploration licences granted under the *Mining Act 1978* (WA) (the **Mining Act**) had not extinguished native title over three areas of unallocated Crown land (described as UCL areas 7, 9 and 42) by force of s 47B(2) of the NTA (at [1312]). The primary judge’s finding in fact applied to four other parcels of land (UCL 11, 20, 22 and 23) but in respect of those other four parcels, the primary judge found there was insufficient evidence of occupation at relevant times to satisfy the requirements of s 47B. These conclusions are summarised in his Honour’s reasons at [1308]-[1312]. In respect of UCL areas 7, 9 and 42, which are located adjacent to the community of Youngaleena and on the eastern section of the Nanutarra-Munjina Road (UCL 7 and 9), or just off that road (UCL 42), the primary judge accepted the evidence of Timothy Parker that he was living at Youngaleena and hunting around the community as sufficient to establish occupation for the purposes of s 47B. The State conceded at trial that this evidence was sufficient.
2. The primary judge held that none of the exploration and prospecting licences in issue before him created a “permission or authority … under which … a part of the land or waters in the [claimed] area is to be used … for a particular purpose” within the meaning of s 47B(1)(b)(ii) of the NTA (at [1204]). No area affected by a prospecting licence was in issue in the appeals. In arriving at his finding that the licences did not extinguish native title, his Honour applied four Full Court decisions in reaching that conclusion, namely *Northern Territory v Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 (***Alyawarr****)*, *Moses* (2007) 160 FCR 148; [2007] FCAFC 78, *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178and *Western Australia v Sebastian* (2008) 173 FCR 1; [2008] FCAFC 65 (***Sebastian***).
3. He held that the Mining Actand the licences did not require that the licensees carry out activities on the land the subject of their licence for any public purpose (at [1198]). His Honour considered that the real question was whether, under the permission or authority conferred by the licences, each of the areas “is to be used … for a particular purpose” (at [1200]). He found that the licences did not either limit the use to which the land might be put or positively require the use of the area for the particular purpose of mineral prospecting or exploration. He found that the licences merely facilitated the relevant activity of prospecting or exploration, albeit that the licences were susceptible to being forfeited, in certain circumstances, if they were not used (at [1204]). He concluded that each licence did not provide that the area concerned “is to be used” in either a restrictive or positive sense for prospecting or exploration purposes or otherwise specify how the land was to be used (at [1206]-[1207]).
   * 1. The legislative scheme
4. Relevantly, s 47B of the NTA provided:

**47B Vacant Crown land covered by claimant applications**

*When section applies*

(1) This section applies if:

(a) a claimant application is made in relation to an area; and

(b) when the application is made, the area is not:

(i) covered by a freehold estate or a lease; or

(ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or

(iii) subject to a resumption process (see paragraph (5)(b)); and

(c) when the application is made, one or more members of the native title claim group occupy the area.

*Prior extinguishment to be disregarded*

(2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

*Effect of determination*

(3) If the determination on the application is that the native title claim group hold the native title rights and interests claimed:

(a) the determination does not affect:

(i) the validity of the creation of any prior interest in relation to the area; or

(ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and

(b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.

*Renewals and extensions of leases*

(4) For the purposes of paragraph (1)(b), if, after a lease covering an area expires or is terminated, the lease is bona fide renewed, or its term is bona fide extended, the area is taken to be covered by the lease during the period between the expiry or termination and the renewal or extension.

*Defined expressions*

(5) For the purposes of this section:

(a) the ***creation of a prior interest*** in relation to an area does not include the creation of an interest that confirms ownership of natural resources by, or confers ownership of natural resources on, the Crown in any capacity; and

(b) an area is ***subject to a resumption process*** at a particular time (the ***test time***) if:

(i) all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and

(ii) when that happened, the Crown had a bona fide intention of using the area for public purposes or for a particular purpose; and

(iii) the Crown still had a bona fide intention of that kind in relation to the area at the test time.

1. The Mining Act relevantly provided:

**63. Condition attached to exploration licence**

**Every exploration licence shall be deemed to be granted subject to the condition that the holder thereof will explore for minerals** and –

…

(aa) **will not use ground disturbing equipment when exploring for minerals on the land** the subject of the exploration licence **unless** –

(i) the holder has lodged in the prescribed manner a programme of work in respect of that use; and

…

(ii) **the programme of work has been approved** in writing by the Minister or a prescribed official…

(Emphasis added.)

1. Similar conditions to those in s 63 applied to prospecting licences by force of s 46 of the Mining Act*.*
   * 1. Background
2. An exploration licence that covered UCL areas 7 and 9 was in force as at both 29 October 2010 and 29 November 2010, when the relevant proceedings were filed. Another exploration licence in force on those dates partly covered UCL area 42. Neither licence was in evidence. However, the State furnished the Full Court with a print out of details of the grant register in respect of each exploration licence, although from these documents it is not possible to ascertain where each parcel of land in issue is located in respect of the whole of the land covered by the exploration licence. Each licence was subject to numerous further conditions including the following:

* **Unless the written approval** of the Environmental Officer, [Department of Mines and Petroleum] **is first obtained, the use of** drilling rigs, scrapers, graders, bulldozers, backhoes or other **mechanised equipment for surface disturbance** or the excavation of costeans **is prohibited**. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.
* The licensee notifying the holder of any underlying pastoral or grazing lease by telephone or in person, or by registered post if contact cannot be made, prior to undertaking **airborne geophysical surveys** or any ground disturbing activities utilising equipment such as scrapers, graders, bulldozers, backhoes, drilling rigs; water carting equipment or other mechanised equipment.

(Emphasis added.)

1. The Court was not taken to any evidence, and his Honour made no finding, in respect of either exploration licence, that the Minister had approved any program of work under s 63(aa)(ii) or that any approval or notification had been given under either of the above conditions. It is safe to infer that no mechanical equipment was approved for use on any of UCL areas 7, 9 and 42 for the purposes of either licence at any relevant time.
   * 1. The State’s submissions on s 47B
2. The State argued that the primary judge should have found that the licences fell within s 47B(1)(b)(ii) of the NTA so that all native title was extinguished over UCL areas 7, 9 and the whole, or the licensed part, of UCL area 42. It contended that the purpose of s 47B(1)(b)(ii) was “to avoid resurrecting native title in areas allocated for public or particular purposes”. The State submitted that the exclusion in s 47B(1)(b)(ii) should be given a very broad construction and did not mandate a requirement for any use to be made of the land or waters to which it applied. It argued that the expression “is to be used” meant “is permitted or authorised to be used”. It also contended that the Parliament could not have intended that native title would revive if the land or waters referred to in s 47B(1)(b)(ii) were used for more than one purpose.
   * 1. Construction of s 47B
3. The construction of s 47B should be approached having regard to the Preamble to the NTA, which forms part of that Act (see s 13(2)(b) of the *Acts Interpretation Act 1901* (Cth) (the **Acts Interpretation Act**)) which stated:

where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

1. McHugh, Gummow, Kirby and Hayne JJ said in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [69]:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute (see *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ). The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole” (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumble’s* [1985] AC 609 at 617, per Lord Scarman, “in the context of the legislation read as a whole”). In *Commissioner for Railways (NSW) v Agalianos* ((1955) 92 CLR 390 at 397), Dixon CJ pointed out that **“the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed”**. Thus, the process of construction must always begin by examining the context of the provision that is being construed (*Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J).

(Emphasis added.)

1. Some issues of construction arising from s 47B have been considered by Full Courts in *Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 and *Moses* (2007) 160 FCR 148; [2007] FCAFC 78and followed in *Griffiths* (2007) 165 FCR 391; [2007] FCAFC 178 and *Sebastian* (2008) 173 FCR 1; [2008] FCAFC 65. In *Sebastian* at [226] Branson, North and Mansfield JJ held that the construction of s 47B adopted in *Alyawarr,* having been followed in *Moses* and *Griffiths*, should be accepted as correct until a decision of the High Court determined it to be erroneous. We agree. In any event, as explained in these reasons, that construction was correct.
2. As Wilcox, French and Weinberg JJ held in *Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 at [187], the purpose of s 47B is beneficial. They explained the reason for a narrow construction of s 47B(1)(b)(ii) of the identified purpose of an affectation to which the provision applied as follows:

[187] The purpose of s 47B is beneficial. The qualification on its application in s 47B(1)(b)(ii) is no doubt intended to minimise the impact of native title determination applications on areas set aside by proclamation or otherwise under statutory authority for public or particular purposes. That limitation should not be construed more widely than is necessary to achieve its purpose. A proclamation for a broadly expressed purpose which encompasses a variety of potential but unascertained uses is not a proclamation for a particular purpose. The term “public purposes” may arguably encompass a land use planning purpose which is met by establishing a framework or condition for the allocation of private rights such as the grant of residential or commercial leases in a township. Alternatively, it may be construed as referring to purposes of a public nature such as the creation of reserves for public works or recreation or environmental protection. **A narrower construction accords with a comprehensible policy that, in the public interest, prior extinguishment which might obviate public exposure to compensation claims or a future act process should be continued in force.** It is not necessary in aid of the narrower construction to define its outer limits here. It is sufficient to say that the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does not define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii).

(Emphasis added.)

1. There they held that s 47B(1)(b)(ii) was framed so as to minimise the impact of native title determinations on areas set aside by proclamation or otherwise under statutory authority for public or particular purposes. They added that this limitation should not be construed more widely than is necessary to achieve its purpose. The beneficial purpose of s 47B to which their Honours referred is the preservation, by force of s 47B(2), of native title rights and interests “in relation to the area”, from extinguishment by “any prior interest in relation to the area” in situations to which s 47B applies. The expression “in relation to **the** area” is used six times in s 47B in contrast to the single initial use of the expression “in relation to **an** area” in s 47B(1)(a). The latter is also used in both ss 13(1) and 61(1) in connection with the making of an application for “a determination of native title in relation to **an** area for which there is no approved determination of native title”.
2. The word “area” can be used to signify both the whole geographic expanse the subject of an application for a determination of native title and lesser portions as small as an individual parcel of land or a part of such a parcel. Moreover, this meaning of “area”, as capable of applying to an individual parcel or a larger aggregation of parcels, in the sense or senses in which it is used in the Act, is reinforced by s 23(b) of the Acts Interpretation Act. That section provides that “words in the singular number include the plural and words in the plural number include the singular”. That said, the use of the word “area” in s 47B is not straightforward, although it is unnecessary to consider the multiple permutations of the provision given the facts of the present case.
3. In considering how s 47B(1) operates, it is important to keep in mind that it defines the circumstances in which the preservatory effect of s 47B(2) will apply by prescribing two positive and one negative precondition, each of which must be satisfied. The positive preconditions are that, *first*, a claimant application, being defined in s 253 as, relevantly, a native title determination application, “is made in relation to **an** area” (para (a)) and, *secondly*, when that application is made, “one or more members of the native title claim group occupy **the** area” (para (c)). The negative precondition is that when the application is made “**the** area is not” any of the three particular categories specified in s 47B(1)(b).
4. Suffice to say that the State’s appeal can be determined by our proceeding on the basis of the State’s acknowledgment that the relevant “area” is the land and waters in respect of which it denied s 47B applied, namely here UCL 7, 9 and 42. Accordingly, it is not necessary to determine precisely how the word “area” ought be construed in each of its uses in s 47B.
5. When a claimant application is made, it usually covers a large geographic expanse of land and waters without the claimant group necessarily being aware of all or, indeed, very much, of the land title tenure details. It would be unlikely that any claimant application would not include some parcel of freehold or leasehold estate referred to in s 47B(1)(b)(i) or land or waters subject to an affectation of the kind referred to in s 47B(1)(b)(ii). In that context, the expression “the area is not” in the chapeau to s 47B(1)(b) could not have been intended to apply to all of the land and waters comprised in the claimant application referred to in s 47B(1)(a). And the expression “covered by” in s 47B(1)(b)(i) and (ii) could not have been intended to refer to a situation in which, if the specified form of land tenure or affectation existed over all or any part of the whole area claimed in the claimant application, s 47B(2) would be incapable of applying to land and waters in that whole claimed area that did not fall within the specification.
6. The definition of a claimant application, which incorporates by reference the definition of native title determination application under s 61(1) of the NTA, itself requires that it be made “in relation to an area”, so the additional words repeating that expression in s 47B(1)(a) must be used to narrow the focus of each paragraph in s 47B(1)(b), and of s 47B(1)(c), to each particular parcel of land and waters individually covered by the claimant application and to which s 47B is alleged to apply. And, the use of the expression “the whole or a part of the land or waters in the area” in s 47B(1)(b)(ii) reinforces the narrowing effect of “in relation to an area” in s 47B(1)(a).
7. In other words, the exclusion from the beneficial operation of s 47B(2) effected by each paragraph in s 47B(1)(b) should be given a narrow reading so that the exclusion will apply only in respect of each particular parcel of land or waters that falls within the express words. Thus, native title will be treated, for the purposes of s 47B, as having been extinguished only in respect of each freehold or leasehold estate, and each particular part of land or waters subject to an affectation referred to in s 47B(1)(b)(ii), and each set of interests referred to in s 47B(1)(b)(iii) and (5)(b), and s 47B(2) will not operate to affect that status.
8. Accordingly, the exclusion from the general application of s 47B effected by s 47B(1)(b), will apply only to an individual parcel of land or waters that meets one of the precise criteria in subparas (i), (ii) or (iii) that is the subject of a claimant application. And, in the case of a parcel that is affected only in part, as contemplated in s 47B(1)(b)(ii), the exclusion affects only the part meeting the criterion, so that the balance of the land or waters in the area or parcel not within the satisfied criterion, is still subject to the application of s 47B(2).
9. Moore, North and Mansfield JJ in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at[207]-[208] approved Olney J’s observation in *Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248 at [162] that the word “occupy”, as used in ss 47A and 47B, “should be understood in the sense that the indigenous people have traditionally occupied land”, that is in accordance with their traditional way of life, habits, customs and usages.
10. The operation of s 47B(1)(c) also raises the question of “the area” to which it refers, but as noted above, because of the way in which the State put its argument it is not necessary to decide this question. The impact of extinguishing acts, such as the grant of a freehold estate or a lease, will mean that as a matter of law, there will often be areas of land or waters claimed in a claimant application over which native title cannot be found to exist. Nonetheless, the claimant application necessarily will make a general claim over the larger area based on historical connection between the native title claim group and its ancestors over that larger area. A person can occupy land without any legal right to do so. The common law relating to trespass to land is based on providing a remedy for, among other matters, wrongful occupation of land by a person without the right to immediate possession of that land or the licence of such a person to another to occupy the land.
11. Often, indigenous people sought to maintain their connection to their country by working for pastoralists or others who had come to hold the land and waters under land tenures granted pursuant to acts of the Crown after British sovereignty. In a real sense, the presence of those indigenous people and their families was capable of being seen as occupation by them of their country or a part of it even though their presence, while licensed by, say, the pastoralist, fell short of possession. In other cases, as history has demonstrated, pastoralists and others were prepared to allow, or involuntarily experienced, indigenous people passing over the land tenure area in their traditional ways. The historical activities of indigenous peoples maintaining their connection to their country have been varied and often necessarily adapted to sometimes hostile or difficult circumstances following European settlement that restricted, or sought to restrict, both their access and their ability to access their country.
12. Given the way in which the State put its argument, it is appropriate to apply the construction of the expression “occupy the area” in ss 47B(1)(c) and 47A(1)(c) that the Full Court in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at [214] assumed on the basis of the agreed position of the parties to that appeal, namely:

It was accepted by the parties that the “area” of which s 47B(1)(c) speaks is the "particular area in relation to which it has been concluded that, but for the section, native title rights would be extinguished": *Neowarra* [2003] FCA 1402 at [721]; *Rubibi (No 7)* [2006] FCA 459 at [71]. Merkel J also said in *Rubibi (No 7)* [2006] FCA 459 at [72]that "the occupation that must be established for the purposes of s 47B(1)(c) must also be an occupation in respect of the whole, rather than merely a part, of the particular area in respect of which, but for s 47B, native title rights would be extinguished".

1. That said, it must be recognized that the indigenous peoples’ conception of their country did not develop or accord with the common law and statute law concepts of land holding or land tenure. As the Full Court held in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at [210] the question of whether some activity amounts to occupation within the meaning of s 47B(1)(c) is a factual one dependent on the evidence in each case. They went on to observe (at [216]) that given the purposes and context of the NTA, whether one or more members of the claim group “occupy the area” involved “the exercise of possessory rights over the area”. In making that observation, their Honours were not, however, referring to “possessory rights” in the common law sense, but rather in the sense of asserting native title rights sufficient in law to support a determination under the NTA that the claim group had a right of exclusive or non-exclusive possession: cf *Moses* at [216]; *Western Australia v Brown* (2014) 306 ALR 168; [2014] HCA 8. We return to this issue below.
2. It would be unrealistic to ascribe to the Parliament the intention of requiring the individual proof of physical occupation of each and every land holding type in a large area claimed in a claimant application, and indeed the approach taken in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 does not require this. Even so, there may be some areas within the land and waters claimed that were not occupied by one or more members of the native title claim group, because for example, the indigenous traditional law or customs prohibited access to them. Whether such areas, to which traditional laws and customs prohibit entry, can be occupied within the meaning of ss 47A(1)(c) and 47B(1)(c) is a question that will need to be decided, if such a scenario is presented, in a future matter.
3. The Full Court recognised this in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at[217], where it reserved the question of whether French J had been correct to hold in *Sampi v Western Australia* [2005] FCA 777 at [1111]-[1113] that native title could not exist over land or waters to which traditional law or customs prohibited entry. French J came to that conclusion because the laws and customs there did not assert a right to exclude others from the land and waters concerned.
   * 1. Consideration – Did the exploration licences fall within s 47B(1)(b)(ii)?
4. The State’s arguments must be rejected. *First*, the exploration licences did not require that any specific part of the three UCL areas (areas 7, 9 and 42) be explored or used for the purpose of exploration. The conditions in s 63(aa) of the Mining Actand the two additional licence conditions set out at [85] above, prohibited the use of any mechanical exploration equipment without prior government approval. The Court was not taken to any evidence of any such approval or, indeed, of any exploration activity under any of the licences.
5. The condition imposed in the chapeau of s 63 of the Mining Act, that the holder of an exploration licence “will explore for minerals”, did not require, when incorporated in each of the two licences here in issue, the whole or any identified part of UCL areas 7, 9 or 42 to be used for that particular purpose. The conditions of each licence expressly contemplated that no mechanical exploration activity was authorised unless a further governmental approval were granted. Thus, on the evidence to which the Court was taken, there was no relevant permission or authority in existence at any relevant time for one category of use potentially permitted or authorised by each licence. Nor did the licences require their holders to explore all, or any identified area, of the areas covered by the licences.
6. Notably, it is apparent from the mining tenure extracts that the licensee could carry out the activity of exploration, under the licences, by an airborne geophysical survey (as one of the conditions quoted in [85] above provided) without the licensee engaging in any physical activity on or under the surface of the land or waters. The conduct of an airborne geophysical survey would have no practical impact on the use of any of the land or waters surveyed and, in particular, would not involve any activity that could interfere with the exercise of native title rights and interests. In a legally technical sense, the aircraft’s flight path or paths, as it passed over the survey area, ordinarily would be a trespass to the common law right of immediate possession of land on, above and below its surface boundaries. But, that aerial activity would have no substantive practical effect on the use or enjoyment of, let alone access to, the licensed land or waters. Such activity, although permitted or authorised by the licences, is not a use, for a particular purpose of the whole or any part of the land and waters. Moreover, the licensee has no obligation to explore at any particular location or in any particular way or at any particular time in the licensed areas.
7. It is unlikely that the Parliament intended that the requirement for use in s 47B(1)(b)(ii) could be satisfied if the use of only a small fraction of a very large parcel of land or waters under a permission or authority were sufficient to extinguish native title over the whole parcel. The consequence of such a broad construction would be the entire loss of the beneficial preservatory effect of s 47B(2) even if a trivial portion of a much larger area in a claimant application fell within s 47B(1)(b)(ii).
8. The effect of the grant of the exploration licences, on the evidence, is the same as that discussed in *Alyawarr* (2005) 145 FCR 442; [2005] FCAFC 135 at [187] of a proclamation of a township or a town planning zoning instrument prescribing permitted uses. The general purpose of “exploration” in the licences did not amount to “public purposes” within s 47B(1)(b)(ii). That is because any licensee would not be the State, or one of its authorities, but a private person engaging in activities for his, her or its personal benefit.
9. Moreover, at the time of grant of the licences, they did not create or confer a permission or authority under which any of the land or waters was “to be used … for a particular purpose”. A mere permission or authority to enter and be upon land or waters coupled with a discretionary power to determine when, and in what particular way and at what place that permission or authority might be exercised cannot, of itself, amount to a use of the land that is capable of extinguishing or partially extinguishing native title. No mechanical work for exploration purposes could be carried on without a further grant of permission or authority by the State.
10. At most, the licensee had permission or authority to be physically present on or above the land or waters at any time or location and to look at and take samples of anything that could be examined without mechanical assistance for the purpose of exploration. The licensee derived no immediate benefit from the permission or authority to explore the land or waters. The licensee could not work, or do more than take samples of, the land or waters. The licences gave the licensees no interest in the land or right to use it: *Australian Softwood Forests Pty Ltd v Attorney-General (NSW) Ex rel. Corporate Affairs Commission* (1981) 148 CLR 121 at 130-132 per Mason J.
11. It follows that the Mining Act and the terms of the licences, including the conditions incorporated in them by that Act, did not require the lands and waters to which they applied to “be used for public purposes or for a particular purpose”. Rather, the licences amounted to a mere permission or authority to explore for minerals, including from the air. While the permission or authority in the licences extended to the whole of UCL areas 7 and 9 and part of UCL area 42, it did not identify any particular area or period of time, beyond the term of the licence, in which exploration had to occur. The licensee was not obligated to explore the whole of the licensed area. Thus, the whole licensed area was not to “be used” for any particular purpose under the licence, far less did the licences require the licensee to use that entire area for the purpose of exploration. Nor did the licences require any identified portion of the licensed area to “be used” for any particular purpose. And, because the licence in respect of UCL area 42 was only granted over part of the land and waters in that area, native title over the unlicensed part of UCL area 42 could not have been extinguished.
12. It would be an odd result if the State’s argument were correct, namely that the grant of an exploration licence that conferred no more than a permission or authority to explore identified land and waters, including from the air, but excluded any immediate right to use ground disturbing equipment (s 63(aa)), wholly extinguished all native title rights and interests in such land and waters.
13. The grant of whatever rights the permission or authority in the licences conferred did not have the effect of necessarily interfering with the continued existence of the native title rights and interests over UCL areas 7, 9 and 42 identified by the primary judge’s orders giving effect to his determination of native title. The primary judge was correct to so conclude at [1204] of the reasons for judgment. Such rights as the licences conferred could continue to be exercised under s 47B(3)(a)(i) as a prior interest while the licences remained in force.
14. At the time of the grant of the licences, or at 29 October 2010 or 29 November 2010, the Banjima People could have exercised all those native title rights anywhere on UCL areas 7, 9 and the affected part of UCL area 42 without any breach of any right that had been granted to the licensees: *Western Australia v Brown* (2014) 306 ALR 168; [2014] HCA 8 at 180 [57] per French CJ, Hayne, Kiefel, Gageler and Keane JJ. Thus, there was no inconsistency between the native title rights and interests found by his Honour and the licensees’ rights.
15. For these reasons ground 4 fails.

###### Conclusions

1. None of the State’s grounds of appeal in WAD 73 of 2014 can be sustained. That appeal must be dismissed.

##### WAD 72 of 2014

###### Ground 1

1. Section 47B(1)(c) of the NTA provides that the section applies if “when the application is made, one or more members of the native title claim group occupy the area”.
2. The Banjima People do not suggest that the primary judge misstated the principles relevant to the question of occupation. The primary judge said in this regard:

[1210] *Introduction*: In assessing occupation for the purposes of s 47B(1)(c) the claimants contend the court should have regard to the evidence as to the “patterns of Aboriginal occupation” of the claim area, referring to what was said in *Moses FC* [*Moses v Western Australia* (2007) 160 FCR 148; [2007] FCAFC 78] at [207] and [208] and the cases there cited. Relevantly, in this case, the claimants say the evidence included:

* the use of gorges to travel through the Hamersley Range (to and from Mulga Downs);
* the use of increase sites to look after large areas of country and associated fauna;
* extensive evidence from Banjima witnesses of collecting bush foods and hunting for bush turkey and kangaroo over large parts of the application area. The claimants refer specifically to the evidence of Maitland Parker concerning occupation of UCL.

[1211] In *Hayes* [*Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248] Olney J observed (at [162]) that occupancy of land for the purposes of s 47B “should be understood in the sense that the indigenous people have traditionally occupied land”. His Honour there expressed the view that the use of particular land by members of a claimant group which is not random or coincidental, but in accordance with the traditional way of life, habits, customs and usages of the community, is sufficient to indicate occupation of the land. Those views have been approved in a number of cases including *Griffiths FC* [*Griffiths v Northern Territory* (2007) 165 FCR 391; [2007] FCAFC 178] at [662] and [703]; *Risk* [*Risk v Northern Territory* [2006] FCA 404] at [888]; *Rubibi (No 7)* [*Rubibi Community v Western Australia (No 7)* [2006] FCA 459] at [81].

[1212] In *Ward FC* [*Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191], the majority said that a broad view should be taken of the word “occupy” in s 47A(1)(c). That view was adopted and expanded upon in *Alyawarr FC* [*Alyawarr v Northern Territory* (2004) 207 ALR 539; [2004] FCA 472] in relation to s 47B(1)(c) (at [193]–[195]) where the Full Court also referred to what was said by Merkel J in *Rubibi Community v Western Australia* (2001) 112 FCR 409; [2001] FCA 607 (***Rubibi***), by Black CJ in *Passi v Queensland* [2001] FCA 697 and by Toohey J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 188; 107 ALR 1 at 147 concerning presence on land not having to be possession at law to amount to occupancy.

[1213] In *Moses FC*, the Full Court (at [210]) said that whether an area is “occupied” by one or more members of the claim group is a factual inquiry which must be considered in the context of each individual case. However, occupation cannot be simply equated with connection, as explained *Risk* at [890] by Mansfield J and in *Rubibi (No 7)* at [83] by Merkel J.

[1214] The Full Court (at [215]), in the light of the authorities mentioned, adopted the following general approach to the question of occupation under s 47A and s 47B:

* To “occupy” an area involves the exercise of some physical activity or activities in relation to the area.
* To occupy an area does not require the performance of an activity or activities on every part of the land.
* To occupy an area does not necessarily involve consistently or repeatedly performing the activity or activities over part of the area.
* To occupy an area does not require constant performance of the activity or activities over parts of the area and it is possible to conclude that an area is occupied where there are spasmodic or occasional physical activities carried on over the area.
* To occupy an area at a particular time does not necessarily require contemporaneous activity on the area at the particular time and it is possible to conclude that an area is occupied in circumstances where at the time the application is made there is no immediate contemporaneous activity being carried on in the area.
* The fact of occupation does not necessarily entail a frequent physical presence in the area; for example, a storage of sacred objects on the area or the holding from time to time of traditional ceremonies may constitute occupation.
* Evidence to establish occupation need not necessarily be confined to evidence of activities occurring on the particular area and it may be possible to establish that a particular area is occupied by reference to occupation of a wider area which includes the particular area.
* Occupation need not be “traditional”.
* Whether occupation has been made out is always a question of fact and degree.

[1215] At [216], the Full Court discussed the general law concept of occupation by reference to *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255; [1959] ALR 817 at 818-9; [1959] 1 All ER 734 at 735 and confirmed that the word “occupy” denotes some physical presence or activity by one or more members of the claim group from time to time, not necessarily continuously, “and a presence or activity in the area so that as a matter of practicality that presence or activity involves the assertion of being established over the area itself”. The occupation must be contemporaneous rather than historical. If the native title rights and interests were exclusive, so there was a right to control the access to the area, the exercise of the right to exclude strangers would indicate its occupation. To occupy an area under the NTA, the court said, given its purpose and content, involves the exercise of possessory rights over the area. Continuous exercise of rights, however, is not required or their exercise at the precise time of the application because the occupation is a “state of affairs which must exist rather than the precise activity which illustrates the existence of the state of affairs”.

1. The primary judge then dealt with what he described as “general occupation evidence” at [1216] to [1229]. At [1218], he said:

The claimants refer to Maitland Parker’s evidence as to occupation and submit it should be assessed in the context of his evidence as a whole and that of other lay witnesses. At the relevant times he was living in the Karijini National Park, within the claim area. During this time, whilst earning a living as a ranger, he was entrusted to look after the country by his old people such as Wobby Parker (deceased) and H Parker (deceased) from Youngaleena. He identifies the various sections of UCL as areas where he would go on trips. These trips were to carry out traditional activities including hunting, fishing camping and looking after country. They were often made with his family and those of his cousin brother J Parker (deceased) (brother of Dawn Hicks, son of Wobby Parker (deceased)) and their fathers and uncles and the reference to “we” in his statement is to be interpreted accordingly. Many of these areas contain sites of significance and the claimants submit it can be inferred from his evidence that Maitland’s trips with family were part of a process of looking after country in accordance with the traditional laws and customs of the Banjima people. These trips took place throughout the 1990s and right up to the present. They were part of a continuous process of looking after country established by the lay evidence taken as a whole.

1. At [1229] the primary judge concluded in these terms:

I generally accept the state’s submissions. To find that the general “occupation” evidence relied on by the claimants is sufficient to show one or more claimants did occupy the relevantly large area concerned at the time the application was filed, would be tantamount to finding that because relevant connection has been established, occupation is made out. In the event, while there are a number of activities pointed to, which I accept occurred, the question is always a matter of “fact and degree”. I do not consider the evidence supports the conclusion that at the time of the applications one or more members of the claim group occupied the relevant area in the sense described in *Moses FC*. Undoubtedly they used it from time to time, but, in my view, they did not relevantly “occupy” it. As it was put in *Moses FC* at [218], what is required is a presence or activity in the area concerned so that as a matter of practicality that presence or activity involves the assertion of being established over the area itself. I will now consider claims of occupation in respect of particular areas.

1. His Honour then dealt with the evidence on which the Banjima People relied of the occupation of specific areas of unallocated Crown Land (or UCL). The areas in question consisted of numerous parcels of UCL in a number of areas described as the Mt King area, Bee Gorge/Wittenoom, Top of Tableland White Springs, Dignam’s Gorge/Wadugara, road areas through Karijini National Park, Rockhole Bore/Gunadayanah, road/easement Yandi – Barimuna, Mulga Downs homestead, Cowra, Thulanygara (hills) Djadjaling, Youngaleena and Auski and Gundawana – Top End Banjima country (Mt Robinson; The Governor). The grouping of UCLs reflects the submissions of the parties to the primary judge. Apart from UCL 7, 9 and 42 (discussed under grounds 1(a), 1(c) and 4 in WAD 73 of 2014 above) the primary judge concluded that the Banjima People had not established that they occupied the areas in question.
2. The Banjima People now contend that his Honour erred in so concluding in respect of 18 of the numerous areas of UCL in issue before the primary judge, being UCL 2, 3, 12, 13, 14, 15, 16, 17, 18, 22, 23, 26, 27, 28, 34, 40, 44, and 46. The maps depicting these areas are not readily capable of reproduction in these reasons for judgment. Suffice to say, the areas are mostly along or adjacent to the ridge lines of the Hamersley Range, as well as some additional parcels of UCL adjacent to the Auski roadhouse. The general premise is that the primary judge ought to have found occupation of these areas by reason of the evidence of the Banjima People using the various nearby gorges to pass through the Hamersley Range. We will deal with this general premise as part of our discussion of the specific errors alleged by the Banjima People.
3. The Banjima People contend that the primary judge erred in four ways.
4. First, it is said that the primary judge failed to consider the evidence as a whole. The Banjima People accept that his Honour, at [1218], referred to the evidence of Maitland Parker in respect of the use of the area as a whole and, at [1229], considered the evidence in a global sense. However, they contend that, thereafter, when he came to deal with the specific areas of UCL, the primary judge did not refer back to [1218] and did not consider the general import of Maitland Parker’s evidence, but “instead looked for evidence of particular activities at particular times” and, in so doing, erred. According to the Banjima People the primary judge’s characterisation of the evidence of Maitland Parker at [1272] is unsustainable on a consideration of the evidence as a whole. At [1272], his Honour said:

The position is the occupation area in this case (as indeed many of the other instances) relies on the evidence of Maitland Parker, as one of the members of the claim group. That is quite appropriate in terms of seeking to meet the requirements for the application of s 47B of the NTA. However, Mr Parker’s evidence generally relates to various parts of the claim area, which over time, he has visited. Again, there is nothing wrong with that aspect of his evidence, as a Banjima man with his extended family he has conducted activities on Banjima country. The difficulty is that it cannot easily be drawn from the evidence exactly where and when those visitations or activities took place and the extent to which those activities display a possessory nature. In my view, in the particular circumstances of this claim, the sorts of passing trips, visits and activities, while no doubt meaningful to Mr Parker and his extended family at material times, is insufficient, on the balance of probabilities, to establish occupation having regard to the principles laid down by the Full Court in *Moses FC*. The presence of activities relied on do not, in my judgment, involve the assertion of being established over that place, as was put in *Moses FC*.

1. If the primary judge had required proof of activities of a “possessory nature” in order to found occupation, then we would have concluded that his Honour erred in principle. It may be accepted that in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at [216] the Full Court said that “[t]o occupy an area under the NTA, given its purposes and context, involves the exercise of possessory rights over the area, but the exercise of those rights does not require their continuous exercise, or their exercise at the precise time of the application because the occupation of which ss 47A and 47B speak is a state of affairs which must exist rather than the precise activity which illustrates the existence of the state of affairs”. This sentence, however, must be read in the context of the whole paragraph. First, by “area”, their Honours had made clear at [215] that “evidence to establish occupation need not necessarily be confined to evidence of activities occurring on the particular area; it may be possible to establish that a particular area is occupied by reference to occupation of a wider area which includes the particular area: *Risk* [2006] FCA 404 at 890”. Second, their Honours had also made clear at [215] that to “occupy” an area involves “the exercise of some physical activity or activities in relation to [in contrast to ‘on’] the area”, which activities may be spasmodic or occasional and not immediately contemporaneous with the application. Third, at [216], the reference to “the exercise of possessory rights over the area” must be understood in the context of the statements surrounding it, in particular, that “‘occupy’ denotes some physical presence or activity by one or more members of the claim group from time to time, not necessarily continuously, and a presence or activity in the area so that as a matter of practicality that presence or activity involves the assertion of being established over the area itself”. In context, “the exercise of possessory rights over the area” is proved by such physical presence or activity involving an “assertion of being established over the area itself”. Such assertion by relevant activity itself involves “the exercise of possessory rights over the area”.
2. There is nothing in the primary judge’s reasons suggesting that he adopted a different approach to *Moses* (2007) 160 FCR 148; [2007] FCAFC 78. To the contrary, his Honour’s reasons indicate that he approached the question of occupation consistently with this reading of *Moses*. In particular, he made no reference to “the exercise of possessory rights over the area” in his principal conclusion based on the whole of the evidence at [1229]. Save for his conclusion at [1272] (applying *Moses* (2007) 160 FCR 148; [2007] FCAFC 78), when the primary judge did refer to “possessory rights” it was in the context of summarising the relevant case law (at [1215]) or recording a submission from the State (at [1227], [1234], [1269], [1283], [1276(1) and (3)], and [1306]), it being noted that while the State referred to this part of *Moses*, it did not contend before the primary judge that occupation required possession of land. At [1272], his Honour’s reference to activities of a “possessory nature” is to be understood in a sense consistent with our reading of *Moses*. So much appears from his Honour’s overall conclusion that the evidence of activities did not “involve the assertion of being established over that place”. The same conclusion must apply to the primary judge’s other reference in findings to “possession” at [1265].
3. Nor can it be said that his Honour required proof of a kind different from that said in *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 to be necessary to found occupation. It cannot be accepted that, in dealing with the specific UCL areas, his Honour somehow forgot the overall activities of Maitland Parker which he had otherwise extensively analysed. Throughout the sections of his judgment dealing with the specific UCL areas (at [1230]-[1318]) the primary judge referred to Maitland Parker’s evidence. The problem was that this evidence was too vague and imprecise to satisfy the primary judge that there had been an assertion of being established over the areas in question. The quality (or perceived lack thereof) of the evidence was repeatedly referred to by the primary judge, for example, at [1235], [1245]-[1246], [1251], [1260], [1272], [1278], [1287], [1295], [1303] and [1317]. The primary judge was not looking for “particular activities at particular times in particular areas”. He was looking for evidence “in relation to” the UCL areas which involved the “assertion of being established over that place”. The primary judge, moreover, had the benefit of seeing the terrain and hearing the evidence on country and was thus best placed to assess the issue of occupation and the quality of the evidence led to establish it.
4. Second, it is said that the primary judge was led into error by dealing with the areas of land in question by reference to the State’s parcel numbers. In particular, it is said that his Honour required occupation to be established over entire parcel numbers (an example being said to be at [1240]) and declined to find occupation because of insufficient evidence about particular parcels without regard to the generality of the evidence of Maitland Parker (an example being at [1263]-[1266]). Apart from this, it is said (and it is the fact) that the primary judge erred at [1230]-[1236] because he referred to UCL 25, which had been erroneously identified in written submissions, but was clarified subsequently to concern UCL 44.
5. It is convenient to deal with the UCL 25 and UCL 44 issue first. There is no doubt the primary judge erred when he identified the relevant parcel as UCL 25. However, the error is only material if there was evidence of occupation at the time the relevant claim was made (the hearing having related to an amended claim which was a combination of four earlier claims as described at [9]-[14] of the primary judge’s reasons). As the Banjima People accepted, the error in respect of UCL 44 would be material only if the evidence of activities in and around 1998 (when WAD 6278/1998 was filed) could be applied to the position as at 2010 (when WAD 319/2010 and WAD 371/2010 were filed). This is because, at the time the application in 1998 was made, UCL 44 was subject to a lease and thus excluded from the operation of s 47B of the NTA. The Banjima People conceded that this was their “weakest area” in oral submissions, a concession which was sound. The evidence of Maitland Parker on which the Banjima People principally relied concerned his time as a ranger when he lived in the Karijini National Park which was during the 1990s (at [1218]). It is not possible to conclude from the very sparse evidence of subsequent trips into or around the areas that the primary judge’s error by not dealing with UCL 44 is material.
6. Otherwise, it cannot be said that the primary judge was led into error by dealing with the UCL areas in a manner which, it should be said, was consistent with the submissions of the State (albeit that the submissions of the Banjima People were that the general approach should be preferred, an approach which his Honour adopted at [1229]). In respect of Bee Gorge/Wittenoom, the primary judge was not looking for evidence of activities on the whole area. At [1240] the primary judge merely recorded the State’s submissions as follows:

As to Maitland Parker’s evidence (at [111]) the state says at most it amounts to hunting in Bee Gorge and Wittenoom Gorge at some time in the 1990s. In the absence of any details, it cannot be inferred that this hunting was contemporaneous with the filing of the MIB claim in 1998. Also, Bee Gorge and Wittenoom Gorge comprise a very small part of the UCL in this area. Mr Parker does not attest that he hunted on top of the plateau surrounding the gorges, nor should it be inferred. Given the stark differences in topography and large areas involved any occupation of the gorges cannot amount to occupation of the whole of the plateau areas surrounding the gorges. The same can be said of the evidence of Marie-Anne Tucker.

1. There is no finding by the primary judge at [1240]. The relevant findings are in these terms:

[1245] I generally accept the submissions of the state concerning the sufficiency of the occupation evidence in relation to these areas of land. I am not satisfied on all the evidence, as a matter of fact and degree, that the use and activity evidence of Maitland Parker is sufficient to amount to occupation, in the sense discussed in *Moses FC*, and also for the practical reasons suggested by the state having regard to the terrain involved, the evidence supporting occupation is necessarily limited. I am also not satisfied that at any material time the town of Wittenoom can be said to have been occupied, even taking into account the claimants’ submission that it is common knowledge that the townsite has been likely deserted since the 1990s. That common knowledge works more than one way and does not necessarily suggest that the town then became open to occupation and was in fact occupied by one or more members of the claim group.

[1246] The difficulty is that the presence indicated by the evidence fails to disclose the assertion of being established over any particular area, unlike, for example, the fishing evidence in *Moses FC* that related to quite particular areas and involved activities “to a not insignificant degree”: see *Moses FC* at [223].

1. The evidentiary inadequacy was not one of the lack of evidence of particular activities on the whole of a UCL area. The inadequacy was that the evidence failed to disclose the “assertion of being established over any particular area”. That conclusion did not involve any requirement of occupation of a whole UCL area.
2. Further, the contention that the primary judge erred at [1263]-[1266] by not referring to the general evidence of Maitland Parker is unreasonable. In those paragraphs the primary judge was dealing with some late discovered small UCL areas about which the Banjima People appeared to have made specific submissions based on specific evidence. The primary judge was dealing with those areas in that context, and made findings (especially at [1265]) about the insufficiency of that specific evidence, which related to supervisory and protective activities by senior law men in relation to a feature known as the Stone Man. It must also be remembered that the primary judge had already rejected the claim of occupation based on the general evidence, particularly that of Maitland Parker at [1229]. If the evidence did not sustain a finding of occupation of the areas as a whole it is hard to understand why his Honour is said to have erred by not relying on the same evidence to conclude that there was not occupation of a small area.
3. Third, it is said that the primary judge erred in considering the inaccessibility of the terrain in the Hamersley Range as weighing against a finding of occupation (at [1237], [1240], [1245] and [1268]). The Banjima People submitted that evidence of the rugged nature of the terrain which meant Banjima People used the gorges for hunting and fishing, and had rituals associated with the gorges and prohibitions on access associated with going into the hills, should have meant there could be a finding of occupation over the Range generally.
4. At [1237] the primary judge referred to evidence about activities in Bee Gorge and Wittenoom Gorge. At [1240] the primary judge referred to the State’s submission that the evidence did not extend to activities on top of the plateau surrounding the gorges and that “[g]iven the stark differences in topography and large areas involved any occupation of the gorges cannot amount to occupation of the whole of the plateau areas surrounding the gorges”. At [1245] the primary judge said that he generally accepted the State’s submissions and noted that “for the practical reasons suggested by the state having regard to the terrain involved, the evidence supporting occupation is necessarily limited”. At [1268] the primary judge referred to the State’s submission about a lack of evidence concerning activities on top of the Hamersley Plateau.
5. In this context, it may be accepted that the primary judge considered that the terrain weighed against a finding of occupation of the ridgeline areas based on activities in the surrounding gorges. However, this was a conclusion the primary judge reached based on the whole of the evidence including views of the relevant areas. The primary judge was not suggesting that, as a matter of principle, activities in gorges could not establish occupation of ridgelines or occupation of an area of Hamersley Range as a whole. He was concluding only that the evidence in the case before him did not establish occupation of any of the current areas in dispute. Nothing suggests that his Honour’s conclusions involved findings which were contrary to “incontrovertible facts or uncontested testimony”, “glaringly improbable” or “contrary to compelling inferences” (*Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [28]-[29]). It follows that the Banjima People cannot establish error in respect of these conclusions. Given that the conclusion is based on detailed considerations of fact and degree, error is not established merely because the evidence might have supported a contrary conclusion being reached. The fact that in other cases considerations of terrain led to a different result (the Banjima People referred to *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 at [215], [222]-[223], [226] and [231]) is immaterial. The primary judge was dealing with the evidence before him in the context of this particular terrain with the benefit of having taken that evidence on country.
6. Fourth, it is said the primary judge misconstrued *Moses* (2007) 160 FCR 148; [2007] FCAFC 78 by requiring evidence of the “assertion of being established” in respect of each UCL parcel to a degree and with a particularity beyond that which was required in *Moses*. For the reasons given above we are unable to accept this submission. The primary judge’s characterisation of the evidence in *Moses* as relating to “quite particular areas” and activities to “a not insignificant degree” at [1246] does not disclose an error of this kind. The result in *Moses*turned on its own facts, as did the result in the present case. There is no error apparent in the reasoning of the primary judge. It is not possible to reason (as invited by the Banjima People) that there was no qualitative or quantitative difference in evidence in *Moses* and the present case. In *Moses*, as in the present case, the evidence was extensive, occupying many days of hearing. It is impossible for this Court to conclude that the evidence in *Moses* was not different in quality or quantity to that in the present case.
7. The submission of the Banjima People that this Court is “in as good a position … to make findings and draw inferences from the evidence” is untenable. It is inconsistent with the submissions of the Banjima People in WAD 73 of 2014. It is, moreover, inconceivable that this Court, based on transcripts and the reasons for judgment, is in the same position as the primary judge who heard evidence on country from numerous witnesses over many days.
8. For these reasons ground 1 of this appeal must be rejected.

###### Ground 3

1. As noted above, the State conceded that the primary judge’s conclusions about extinguishment of native title over reserves 24849 and 25156 at [1390]-[1397] involved error. As the Banjima People submitted:

28. The creation of the reserves did not, without more, wholly extinguish native title: *Western Australia v Ward* (2002) 213 CLR 1 at [221].

29. The trial judge evidently accepted the State’s submission that “an inquiry as to the use which has been made of a reserve can inform the nature of the rights conferred” and “the construction of the buildings … indicates the existence of a right to construct the buildings” ([1394]). In doing so his Honour implicitly rejected the Banjima submission that “the nature of the rights created by the act of reservation is to be construed from the legislation and the Gazette notices” and that “those rights would be the same whether or not a building was actually built on the land any time after the creation of the reserves” ([1395]).

30. The correctness of the Banjima submission is confirmed by *Western Australia v Brown HC* [*Western Australia v Brown* (2014) 306 ALR 168; [2014] HCA 8] at [34], [37], [39], [48]-[49], [51], [57], [59]-[64]. See also *Griffiths v North Territory* [2014] FCA 256 per Mansfield J at [82]-[90]. The exercise of native title rights may well have been prevented while the reserves and the buildings remained, but upon cancellation of the reserves in 1995 or the earlier removal of the buildings, non-exclusive native title rights and interests remained unaffected. To the extent there was any doubt, *Brown HC* confirms that *Western Australia v Ward* (2002) 213 CLR 1 at [216]-[217], [219]-[221] is to be understood in this way.

1. The State contended, however, that the conclusion of extinguishment could be sustained on other grounds. The State’s contention was explained in these terms:

… the construction of each buildings was a public work which extinguished native title, as follows:

* s 253(b) NTA defines “public work” to include “(b) a building that is constructed with the authority of the Crown, other than on a lease”. *Daniel v WA* [2005] FCA 178 at [18]-[23].
* That definition is supplemented by s 251D, which adds to the definition of “public work”, the building’s curtilage “the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work”. Each building in question was on a ¼ acre block, all of which should be regarded as necessary or incidental, so that the whole of each reserve is a “public work”.
* Each building was constructed with the authority of the Crown in right of the State. His Honour below found each was constructed under a right conferred by the State: Banjima Reasons [1396].
* Each building was a “previous exclusive possession act” under s 23B(7) of the NTA and s 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (the ‘TVA’). His Honour addressed the same issue, but in respect of different reserves and works, at [1480]-[1488].
* Each building was “attributable” to the State, in the sense required for s 12J TVA.

1. The notices of reservation of the land in question under s 33 of the *Land Act 1933* (WA) (the **Land Act**) are as follows:

RESERVES.

Department of Lands and Surveys,

Perth, 20th November, 1957.

HIS Excellency the Governor in Executive Council has been pleased to set apart as a Public Reserve the land described in the schedule below for the purpose therein set forth.

…

Corres. No. 1472/57.

WITTENOOM GORGE. – No. 24849 (Depot Site – St. John Ambulance), lot No. 145 (39.3p.). (Plan Wittenoom Gorge Townsite).

…

Department of Lands and Surveys,

Perth, 17th November, 1958.

HIS Excellency the Lieutenant-Governor and Administrator in Executive Council has been pleased to set apart as public reserves the lands described in the Schedule below for the purpose therein set forth.

…

Corres. No. 2313/58.

WITTENOOM GORGE. – No. 25156 (Church Site – Church of England), lot No. 16 (39.3p.). (Plan Wittenoom Gorge Townsite.)

1. The primary Judge identified the relevant evidence and his conclusions about the reserves in these terms:

[1390] …there is evidence of the following two reserves being used for their purpose:

(1) reserve 24849, being used for the purpose of “Depot Site St John Ambulance”; and

(2) reserve 25156, for the purpose of “Church Site — Church of England” (discussed above).

[1391] In relation to reserve 24849 the evidence comprises:

(1) a certified aerial photograph taken on 1 June 1979 which shows a building within the area of the reserve;

(2) a letter from the Secretary of the St John Ambulance Association to the Secretary of the Tableland Shire Council dated 2 April 1965 containing an application for a building permit for an extension “to the building at present under construction on our site”;

(3) a letter from the Tableland Shire Council to the St John Ambulance Committee dated 13 April 1965 notifying the approval of an application for a building permit;

(4) a letter from the Tableland Shire Council to the St John Ambulance Association dated 14 April 1965 notifying that “[p]ermission has been granted by this Local Authority for the commencement of extensions to the St John’s Ambulance Building”; also associated Council records; and

(5) a plan entitled “Proposed modifications to St. John Ambulance Headquarters Wittenoom Sub-centre” showing a building on the site.

[1392] In relation to reserve 25156 the evidence comprises:

(1) a certified aerial photograph taken on 1 June 1979 showing a building within the area of the reserve;

(2) a letter from the Wittenoom Planning Committee to the Hon Ernie Bridge, Minister for the North West dated 20 December 1988 referring to the “St Marks Church” as a building proposed to be retained in Wittenoom; and

(3) a letter from State Development Western Australia to the Chief Executive Officer of the Building Management Authority dated 20 March 1991 including an attachment referring to building No 6, “church”, at the corner of Second Ave and Lockyer St (reserve No 25156), as a building proposed to be demolished.

…

[1396] As to reserves 24849 and 25156, I am satisfied from all the evidence that the court should infer a right in the respective users from the state to construct and use the buildings and land that were completely inconsistent with native title.

1. Section 253 of the NTA defines a “public work” to mean:

(a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:

(i) a building, or other structure (including a memorial), that is a fixture; or

…

(b) a building that is constructed with the authority of the Crown, other than on a lease.

1. It may be accepted that the primary judge found at [1396] that there should be inferred “a right in the respective users from the state to construct and use the buildings and land”. The Banjima People submitted that the primary judge’s inference was wrong in that the mere creation of a reserve, even for a specific purpose, is not a source of authority for the construction of buildings within the meaning of para (b). If it were otherwise, they noted, any building constructed on any reserve consistently with the purpose of the reserve would be a “public work” under para (b). Further, s 29 of the Land Act permitted a reserve to be created, in effect, for any purpose. In the present case, the Banjima People contended, what is missing is evidence of any authority from the Crown (in contrast to mere local government permission) to construct the particular buildings erected on each reserve. In contrast, in *Daniel v State of Western Australia* (2005) 141 FCR 426; [2005] FCA 178 (***Daniel***) at [22] Nicholson J said:

In my view the textual difference between the reference to the Crown in para (a) and para (b) of the definition of ‘public work’ supports the submissions of the first respondents on this issue. I therefore consider that the reference to authority should be read as referrable to its normally understood meaning of providing justification by the grant of approval or permit. That would not mean wide application of the section in an inappropriate way because the grant of authority is one conditioned by application of the *Land Act* and so only applicable to private persons in circumstances considered to properly attract that grant of authority.

1. His Honour continued at [23] in these terms:

Reference to the affidavit of Mr Farrar shows that on 29 October 1975 the Under Secretary for Lands accepted that Wickham Lot 138 should be ‘made available’ to the Roman Catholic Church as a Crown Grant in Trust. That was not a lawful authority to commence construction. However, the grant of a Right of Entry made on 12 December 1975 was expressly made ‘to enable work to commence’. That is to be understood in the context of the letter from the Bishop of Geraldton to the Under Secretary for Lands dated 2 December 1975 in which it was made clear that the parishioners were anxious to ‘commence work on the building of a new church’. In my view this establishes that the church was a building constructed ‘with the authority of the Crown’.

1. These circumstances are different from the present case. As the Banjima People submitted, there was no evidence as to when the buildings were erected or how they came to be there other than the local government permission in respect of reserve 24849. The question is whether, by fact of the existence of the reserves and the buildings, an inference may properly be drawn that each building was constructed “with the authority of the Crown”. We are not satisfied any such inference can be drawn. There are other equally plausible possibilities. The buildings might have been constructed with no thought being given to the status of the land as reserved land of the Crown. The buildings might have been constructed on the erroneous belief that the reservation was itself the source of authority from the Crown to construct any building on the land provided the building was for the requisite reservation purpose. The reserves might have been placed under the control of a body corporate or other persons named in an order pursuant to s 34 of the Land Act with the power to make by-laws with respect to the reserve. The fact that the buildings exist says nothing about the authority of the Crown, if any, with which they were constructed.
2. Insofar as the State relied on the Explanatory Memorandum accompanying the *Native Title Amendment Bill 1997* (Cth), which amended the definition of “public work” in s 253, we accept the submission for the Banjima People that the Explanatory Memorandum supports their submissions rather than those of the State. In para 24.24 the Explanatory Memorandum states:

A ‘public work’ is also defined to include a building that is constructed with the authority of the Crown, other than on a lease. An example would be a church facility constructed on vacant Crown land in accordance with an agreement with a government.

1. In the present case, there is no evidence of an agreement with the State. This is the point of the submissions for the Banjima People.
2. Moreover, para (b) of the definition of “public work” cannot be read as having the literal and unconfined meaning contended for by the State, because that construction would produce the absurd consequence that every building, constructed on any land, other than on a lease, would be a public work. Thus, every dwelling house constructed on freehold land with local government approval, would be a public work, if the State’s argument were correct.
3. The definition must be read in the context that it is seeking to identify a building that has a public character derived from the authorisation of the Crown for its construction. The public character is evident from the list of works set out in para (a). They are all works which confer broad and long-term benefits on the community generally. Thechapeau to para (a) in the definition of “public work” distinguished between something constructed or established, by or on behalf of, one of three governmental institutions, namely the Crown, a local government body and any other statutory authority of the Crown, but then limited the first limb of the definition by reference to the character of particular works. Thus, the expression “with the authority of the Crown” in para (b) should be read as being limited to the Crown itself, and not as including the two other governmental institutions specified in para (a), so as to maintain consistency between the two limbs of the one definition.
4. For these reasons we consider the primary judge was in error at [1396]. We are not satisfied that the buildings were constructed with the authority of the Crown as required by para (b) of the NTA. Although this conclusion disposes of the issue in favour of the Banjima People, we discuss the alternative argument they put in answer to the State’s contention below.
5. By s 23B(7) of the NTA:

An act is a ***previous exclusive possession act*** if:

(a) it is valid (including because of Division 2 or 2A); and

(b) it consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996.

1. Section 23 of the NTA provides that:

If a law of a State or Territory contains a provision to the same effect as section 23D or 23DA, the law of the State or Territory may make provision to the same effect as section 23C in respect of all or any previous exclusive possession acts attributable to the State or Territory.

1. Section 23C(2) states that:

If an act is a previous exclusive possession act under subsection 23B(7) (which deals with public works) and is attributable to the Commonwealth:

(a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and

(b) the extinguishment is taken to have happened when the construction or establishment of the public work began.

1. By s 239(c) of the NTA:

An act is ***attributable*** to the Commonwealth, a State or a Territory if the act is done by:

(a) the Crown in right of the Commonwealth, the State or the Territory; or

(b) the Parliament or Legislative Assembly of the Commonwealth, the State or the Territory; or

(c) any person under a law of the Commonwealth, the State or the Territory.

1. Section 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (the **WA Titles Act**) provides that:
2. If an act is a previous exclusive possession act under section 23B(7) of the NTA (which deals with public works) and is attributable to the State -

(a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and

(b) the extinguishment is taken to have happened when the construction or establishment of the public work began.

1. In *Daniel* (2005) 141 FCR 426; [2005] FCA 178 at [30] Nicholson J said:

The phrase ‘under a law of … the State …’ is in different terms to either of the phrases in issue in s 253 of the NTA, namely ‘by or on behalf of the Crown’ and ‘with the authority of the Crown’. The phrase now in issue arises in the context of s 239. That section is concerned with attribution. The *Macquarie Dictionary* at p 106 defines ‘attribute’ to include the meaning of ‘something attributed as belonging’. Paragraphs (a) and (b) include acts done by the Crown and the Parliaments of the Commonwealth, State and Territories; that is, acts intrinsically belonging to the State. It is in that context that para (c) must be understood. When it refers to ‘any person under a law of the Commonwealth, the State or the Territory’ it is speaking of a person who is given the authority of the State to do that act. It therefore seems to me that it is not addressing a person who has obtained the authority of the State under a provision in a law of the State; it is someone whose act is attributable to the State because the State by a law has authorised that person to do the act, not merely authorised all persons to apply for an authority by some process. Thus understood, para (c) is consistent with the notion of ‘attributable’ and consistent with paras (a) and (b) in satisfying the element of closeness to the State and so belonging to it.

1. We agree with this reasoning.
2. The State submitted that the notices in the Gazette of the creation of the reserves under s 29 of the Land Act constitute a “written law” (s 5 of the *Interpretation Act 1984* (WA) (the **Interpretation Act**)) and the buildings were constructed under those laws of the State. Alternatively, it argued, the buildings were constructed under ss 29 and 30 of the Land Act.
3. We are unable to accept these submissions. Section 29 of the Land Act permitted the Governor to reserve to the Crown any land vested in the Crown for nominated purposes including “any other purpose of public health, safety, utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement of the State”. Section 30 required:

A description of every such reserve, and of the purposes for which it is made, shall be published in the Gazette; and all reserves shall be set forth on the authenticated maps of the department.

1. Compliance with s 30 does not make the publication in the Gazette a law of the State within the meaning of s 239(c) of the NTA. Section 5 of the Interpretation Act, which defines “written laws” to mean “all Acts for the time being in force and all subsidiary legislation for the time being in force”, does not transform a publication in the Gazette into a law of the State merely because the publication is in writing.
2. We also do not accept that the buildings were constructed “under” ss 29 or 30 of the Land Act. As discussed, those provisions relate to the reservation of land for a purpose, not the construction of any building on the land. They do not authorise any building to be constructed. The construction of these buildings was not done “under” the Land Act within the meaning of s 239(c). We accept the submission for the Banjima People that for an act to be done under a law of the State within the meaning of s 239(c), the act must involve an exercise of a power directly conferred by a law of the State, and not an exercise of a power under an authority, permission or instrument itself permitted to be conferred under a law of the State. In the former case, the act is done under the law of the State. In the latter case, the act is done under an authority, permission or instrument permitted to be conferred under a law of the State. It is consistent with the language and context of s 239(c) to so read the provision. It is only those acts done under a law of the State in this sense which are attributable to the State as provided for in s 239(c). There being no suggestion that these buildings were constructed under a law of the State, it follows that for this reason also the act of construction was not a previous exclusive possession act extinguishing native title.
3. Neither reservation did more than, in terms, reserve the land described for the purpose of being respectively “Depot Site – St John Ambulance” and “Church Site – Church of England”. Each reservation was of a site for a nominated purpose. Neither granted permission to erect any work; rather each reservation set aside the land and permitted a particular use, but did no more. In particular, like a local government planning zoning that permits land to be used for a particular purpose, neither reservation created any authority in anyone to construct any, or any particular form of, work on the land. The reservation did not exclude the need for a person wishing to carry out any work to obtain planning and building approvals in accordance with local government requirements before it was constructed or used.
4. As a result it is unnecessary to deal with the submission of the Banjima People about s 251D of the NTA which provides that “a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work”.
5. For these reasons the appeal in WAD 72 of 2014 must be allowed to the extent necessary to correct the determination of native title in respect of the primary judge’s conclusion that native title in reserves 24849 and 25156 was extinguished.

##### CONCLUSIONS

1. The appeal in WAD 73 of 2014 must be dismissed. The appeal in WAD 72 of 2014 must be allowed in part to deal with the fact that native title was not extinguished over reserves 24849 and 25156, but otherwise that appeal should also be dismissed. The parties should confer and submit orders and an amended determination of native title so as to reflect these reasons for judgment within 14 days.

|  |
| --- |
| I certify that the preceding one hundred and seventy (170) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mansfield, Kenny, Rares, Jagot and Mortimer. |

Associate:

Dated: 12 June 2015

**APPENDIX A**

**Schedule of Parties**

Federal Court of Australia No: WAD 72 of 2014

District Registry: Western Australia

Division: General

**WAD 72 of 2014:**

ON BEHALF OF THE BANJIMA PEOPLE:

First Appellant: ALEC TUCKER

Second Appellant: KEITH LETHBRIDGE

Third Appellant: STEVEN SMITH

Fourth Appellant: CHARLES SMITH

Fifth Appellant: MAITLAND PARKER

Sixth Appellant: TIMOTHY PARKER

Seventh Appellant: DAWN HICKS

Eighth Appellant: ARCHIE TUCKER

First Respondent: STATE OF WESTERN AUSTRALIA

Second Respondents: BHP BILLITON IRON ORE (JIMBLEBAR) PTY LTD

BHP BILLITON IRON ORE PTY LTD

BHP MINERALS PTY LTD

ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD

MITSUI IRON ORE CORPORATION PTY LTD

MITSUI ITOCHU IRON ORE PTY LTD

MARILLANA STATION

BEN NEWLAND (SYLVANIA STATION)

Third Respondents: CHANNAR MINING PTY LTD, CMIEC (CHANNAR) PTY

LTD

HAMERSLEY EXPLORATION PTY LTD, HAMERSLEY IRON – YANDI PTY LTD

HAMERSLEY IRON PTY LTD

HAMERSLEY RESOURCES LTD

JUNA STATION PTY LTD

MITSUI IRON ORE DEVELOPMENT PTY LTD

MOUNT BRUCE MINING PTY LTD

PILBARA IRON PTY LTD

NIPPON STEEL AUSTRALIA PTY LTD

NORTH MINING LIMITED

ROBE RIVER MINING CO PTY LTD

ROCKLEA STATION PTY LTD

SUMITOMO METAL AUSTRALIA PTY LTD

WRIGHT PROSPECTING PTY LTD

Fourth Respondents: HANCOCK PROSPECTING PTY LTD

HOPE DOWNS IRON ORE PTY LTD

WESTRAINT RESOURCES PTY LTD

MULGA DOWNS IRON ORE PTY LTD

MULGA DOWNS INVESTMENTS PTY LTD

G H RINEHART

Fifth Respondent: THE SHIRE OF ASHBURTON

Sixth Respondents: CHICHESTER METALS PTY LTD

FMG PILBARA PTY LTD

FORTESCUE METALS GROUP LTD

THE PILBARA INFRASTRUCTURE PTY LTD

**WAD 73 of 2014:**

Appellant: STATE OF WESTERN AUSTRALIA

ON BEHALF OF THE BANJIMA PEOPLE:

First Respondents: ALEC TUCKER

KEITH LETHBRIDGE

STEVEN SMITH

CHARLIE SMITH

MAITLAND PARKER

TIMOTHY PARKER

DAWN HICKS

ARCHIE TUCKER

Second Respondents: BHP BILLITON IRON ORE (JIMBLEBAR) PTY LTD

BHP BILLITON IRON ORE PTY LTD

BHP MINERALS PTY LTD

ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD

MITSUI IRON ORE CORPORATION PTY LTD

MITSUI ITOCHU IRON ORE PTY LTD

MARILLANA STATION

BEN NEWLAND (SYLVANIA STATION)

Third Respondents: CHANNAR MINING PTY LTD

CMIEC (CHANNAR) PTY LTD

HAMERSLEY EXPLORATION PTY LTD

HAMERSLEY IRON – YANDI PTY LTD

HAMERSLEY IRON PTY LTD

HAMERSLEY RESOURCES LTD

JUNA STATION PTY LTD

MITSUI IRON ORE DEVELOPMENT PTY LTD

MOUNT BRUCE MINING PTY LTD

PILBARA IRON PTY LTD, NIPPON STEEL AUSTRALIA PTY LTD

NORTH MINING LIMITED

ROBE RIVER MINING CO PTY LTD, ROCKLEA STATION PTY LTD

SUMITOMO METAL AUSTRALIA PTY LTD

WRIGHT PROSPECTING PTY LTD

Fourth Respondents: HANCOCK PROSPECTING PTY LTD

HOPE DOWNS IRON ORE PTY LTD

WESTRAINT RESOURCES PTY LTD

MULGA DOWNS IRON ORE PTY LTD

MULGA DOWNS INVESTMENTS PTY LTD

G H RINEHART

Fifth Respondent: THE SHIRE OF ASHBURTON

Sixth Respondents: CHICHESTER METALS PTY LTD

FMG PILBARA PTY LTD

FORTESCUE METALS GROUP LTD

THE PILBARA INFRASTRUCTURE PTY LTD