FEDERAL COURT OF AUSTRALIA

Papertalk on behalf of the Mullewa Wadjari People v State of Western Australia [2022] FCA 221

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| File number(s): | WAD 32 of 2018  WAD 611 of 2018  WAD 21 of 2019  WAD 28 of 2019  WAD 30 of 2019  WAD 176 of 2019 |
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| Judgment of: | **MORTIMER J** |
|  |  |
| Date of judgment: | 16 March 2022 |
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| Catchwords: | **NATIVE TITLE** – show cause procedure – where representatives of native title claim groups reached in-principle agreements at or following mediation relating to overlapping claims– where one group refused to implement agreements – whether enforceable agreements exist – finding that no enforceable agreements exist – whether maintenance of that group’s claim is an abuse of process in light of refusal to implement agreements – finding of abuse of process – invitation for submissions on appropriate orders |
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| Legislation: | *Evidence Act 1995* (Cth), s 131  *Federal Court of Australia Act 1976* (Cth), s 37P(2)  *Native Title Act 1993* (Cth), ss 62A, 86B, 87, 94P  *Federal Court Rules 2011* (Cth), r 1.40, Sch 2 Pt 3.6, Sch 2 Pt 3.7 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Native Title |
|  |  |
| Number of paragraphs: | 240 |
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| Date of hearing: | 6 September 2021 |
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| Counsel for the Applicant in WAD 21 of 2019 (the Mullewa Wadjari applicant): | Mr G McIntyre SC with Mr Nixon |
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| Solicitor for the Applicant in WAD 21 of 2019 (the Mullewa Wadjari applicant): | Corser & Corser |
|  |  |
| Counsel for the Applicants in WAD 32 of 2018, WAD 611 of 2018, WAD 28 of 2019, WAD 30 of 2019 and WAD 176 of 2019 (the Nanda and Wajarri Yamatji applicants): | Mr T Neal QC with Mr D Yarrow |
|  |  |
| Solicitor for the Applicants in WAD 32 of 2018, WAD 611 of 2018, WAD 28 of 2019, WAD 30 of 2019 and WAD 176 of 2019 (the Nanda and Wajarri Yamatji applicants): | Yamatji Marlpa Aboriginal Corporation |
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| Counsel for the State of Western Australia: | Mr G Ranson SC |
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| Solicitor for the State of Western Australia: | State Solicitor’s Office (Western Australia) |

ORDERS

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|  | | WAD 21 of 2019 |
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| BETWEEN: | LEEDHAM PAPERTALK & ORS ON BEHALF OF THE MULLEWA WADJARI PEOPLE  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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|  | | WAD 28 of 2019 |
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| BETWEEN: | COLIN HAMLETT & ORS ON BEHALF OF THE WAJARRI YAMATJI #1  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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|  | | WAD 32 of 2018 |
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| BETWEEN: | COLIN HAMLEYY & ORS ON BEHALF OF THE WAJARRI YAMATJI #3  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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|  | | WAD 611 of 2018 |
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| BETWEEN: | COLIN HAMLETT & ORS ON BEHALF OF THE WAJARRI YAMATJI #7  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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|  | | WAD 30 of 2019 |
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| BETWEEN: | VIOLET DRURY & ORS ON BEHALF OF THE NANDA PEOPLE  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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|  | | WAD 176 of 2019 |
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| BETWEEN: | DEREK DRAGE & ORS ON BEHALF OF THE NANDA PEOPLE #3  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondent | |

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| order made by: | MORTIMER J |
| DATE OF ORDER: | 16 March 2022 |

THE COURT ORDERS THAT:

1. On or before 4 pm on 30 March 2022, the parties are to file any agreed proposed orders reflecting the Court’s reasons for judgment, together with any agreed proposed orders on costs.

2. In default of agreement, on or before 4 pm on 6 April 2022, the Wajarri Yamatji applicant, Nanda applicant and the State of Western Australia are to file and serve proposed orders reflecting the Court’s reasons for judgment together with any agreed proposed orders on costs and any submission in support of the proposed orders, limited to three pages.

3. The proposed orders and submissions in Order 2 may be joint or several.

4. On or before 4 pm on 13 April 2022, the Mullewa Wadjari applicant is to file and serve any responsive proposed orders, and any responsive submissions in support of those orders, including on the question of costs, limited to three pages.

5. If any party seeks an oral hearing on proposed orders, they are to indicate the reasons for an oral hearing in their written submissions.

6. Subject to further order, the Court will determine the question of appropriate orders on the papers.

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

REASONS FOR JUDGMENT

MORTIMER J:

1 The **area** of land and waters in issue in this matter lies to the north of the Yamatji Nation determined area, in the Geraldton region of Western Australia. The Yamatji Nation determination is reported as *Taylor on behalf of the Yamatji Nation Claim v State of Western Australia* [2020] FCA 42. All of the groups identified in the applications below are also groups identified within the Yamatji Nation determination.

2 The area has been subject to **overlapping claims** of native title for some time, made in the following applications under s 61 of the ***N****ative* ***T****itle* ***A****ct 1993* (Cth):

(a) WAD28/2019 (Wajarri Yamatji #1);

(b) WAD21/2019 (the **Mullewa Wadjari claim**);

(c) WAD31/2019 (the **Widi Mob claim**); and

(d) WAD30/2019 (Nanda People #1).

3 Under the Court’s process of converting paper files, these proceedings have been given new proceeding numbers, which disguise the age of the claims. These claims were originally made in 1998. In 2018, two further Wajarri Yamatji claims to the area were filed with the Court: WAD32/2018 (Wajarri Yamatji #3) and WAD611/2018 (Wajarri Yamatji #7). In these reasons, the three Wajarri Yamatji claims are referred to collectively as the **Wajarri Yamatji claim**. In 2019, a further Nanda claim to the area was also filed: WAD176/2021 (Nanda People #3). As with the Wajarri Yamatji claim, these reasons refer to both Nanda claims collectively as the **Nanda claim**. The area is shown on the map annexed to these reasons as Annexure A.

4 The need for this decision arises because of the conduct of the Mullewa Wadjari applicant.

5 In a position communicated to the other parties and the Court in June 2021, some three and a half years after referral to a mediation process, the Mullewa Wadjari applicant sought to depart from two in-principle agreements in relation to the area reached in 2019, purportedly on behalf of the Mullewa Wadjari claim group. The in-principle agreements were with the Nanda applicant and the Wajarri Yamatji applicant. The part of the Widi Mob claim that had overlapped with the Mullewa Wadjari claim had been withdrawn in November 2019 according to an agreement between those parties. The Mullewa Wadjari applicant changed its position on the asserted basis that the Mullewa Wadjari claim group did not authorise or endorse the in-principle agreements, and instead sought agreements with different terms, or (on one view) was not prepared to reach an agreement at all.

6 At a case management hearing on 30 June 2021, the Wajarri Yamatji and Nanda applicants drew the new position of the Mullewa Wadjari applicant to the attention of the Court. By orders made of the Court’s own motion on 5 July 2021, the Mullewa Wadjari applicant was required to show cause why the Mullewa Wadjari claim should not be dismissed, or judgment should not be entered dismissing the Mullewa Wadjari claim. The Nanda and Wajarri Yamatji applicants each contend that (separately) they reached agreement with the Mullewa Wadjari applicant, and acted upon those agreements. They contend the Mullewa Wadjari applicant and claim group should be held to those agreements, and the appropriate relief to ensure that occurs is for the Court to order the discontinuance of the Mullewa Wadjari claim insofar as it overlaps with the outstanding Wajarri Yamatji and Nanda claims. That discontinuance is said to have been a key component of each of the agreements. Alternatively, the Nanda and Wajarri Yamatji applicants contend the Court should order the dismissal of the Mullewa Wadjari claim on the basis of abuse of process, because its maintenance is contrary to the agreements reached during and after mediation, on which both the Wajarri Yamatji and Nanda applicants have relied in their subsequent conduct of their native title claims.

7 For the reasons set out below, the Mullewa Wadjari claim will not be dismissed. I have concluded there was no enforceable agreement between the Nanda and Mullewa Wadjari parties, nor was there an enforceable agreement between the Wajarri Yamatji and Mullewa Wadjari parties.

8 However, I am satisfied that the conduct of the Mullewa Wadjari applicant is an abuse of process, and in particular is an abuse of the mediation processes of the Court.

9 The question of appropriate relief is difficult. In these reasons, I have expressed some preliminary views about what the appropriate relief might be: see [230] to [239] below. My preliminary views have been shaped by my lack of satisfaction that this changed position adopted by the Mullewa Wadjari applicant is first, a position reflecting the views of all or most members of the applicant, and second, a position reflecting the fully informed decision making of the wider Mullewa Wadjari claim group.

10 The parties will be given an opportunity to reflect on the Court’s preliminary views about appropriate relief, in light of the Court’s findings and reasons for judgment, and to make submissions as to appropriate orders, including any further or other relief they contend is appropriate.

# THE EVIDENCE RELIED UPON IN THE SHOW CAUSE HEARING

11 The Mullewa Wadjari applicant read the four following affidavits, without objection.

(a) The affidavit of Glenda Jackamarra, sworn on 26 August 2021. Ms Jackamarra is a member of the Mullewa Wadjari applicant. She deposed to the exclusion of the maternal side of her family from the Mullewa Wadjari claim group description, which was raised at the 9 June 2021 meeting when the in-principle agreements were not endorsed.

(b) The affidavit of Leedham Anthony Papertalk Snr, sworn on 27 August 2021. Mr Papertalk is also a member of the Mullewa Wadjari applicant. He deposed to the re-authorisation of the Mullewa Wadjari claim back in 2006. He also gives evidence about a group he describes as the Tharwarda Wadjari People, the mediation of the overlap with the Nanda claim and the mediation of the overlap with the Wajarri Yamatji claim.

(c) The affidavit of Charmaine Green, sworn on 30 August 2021. Ms Green is a member of the Mullewa Wadjari claim group. She deposed to her belief about the lack of connection of the Nanda People to the area of their claim that overlaps with the Mullewa Wadjari claim area, and the mediation of the overlap with the Wajarri Yamatji claim.

(d) The affidavit of Chau Kim Huynh, affirmed on 30 August 2021. Ms Huynh is employed by Corser & Corser, the solicitor for the Mullewa Wadjari applicant and claim group. Ms Huynh’s affidavit annexed documents affirmed to be true copies of certain documentation relating to the Nanda and Wajarri Yamatji mediations, including correspondence between the parties and the Court, and correspondence between the parties.

12 The Nanda and the Wajarri Yamatji applicants read seven affidavits.

(a) The affidavit of Carmen Cummings, affirmed on 30 August 2021. Ms Cummings is a senior anthropologist employed by the Yamatji Marlpa Aboriginal Corporation (**YMAC**), which is also the legal representative of the Wajarri Yamatji applicant and the Nanda applicant. Ms Cummings deposed to her opinion about the correct description and composition of the Mullewa Wadjari claim group.

(b) The affidavit of Pauline Catherine Gartlan, affirmed on 11 May 2021 (**Ms Gartlan’s first affidavit**). Ms Gartlan is a lawyer at YMAC, with day-to-day carriage of the Wajarri Yamatji claims. In this affidavit, Ms Gartlan deposed to meetings of the Wajarri Yamatji claim groups in March and May 2021 regarding the nomination of a prescribed body corporate (**PBC**) and its adoption of a rule book, as well as the evidence gathered by the Wajarri Yamatji applicant about the overlap area and the Wajarri Yamatji applicant’s correspondence with the Court and the Mullewa Wadjari applicant regarding the timetable for the resolution of the Wajarri Yamatji claim.

(c) A second affidavit of Ms Gartlan, affirmed on 18 June 2021 (**Ms Gartlan’s second affidavit**). In this affidavit, Ms Gartlan deposed to a meeting of the Wajarri Yamatji claim group in May 2019, as well as the meetings of the Wajarri Yamatji claim group deposed to in her first affidavit, and the inclusion of additional apical ancestors in the Wajarri Yamatji claim group’s description.

(d) A third affidavit of Ms Gartlan, affirmed on 30 August 2021 (**Ms Gartlan’s third affidavit**). In this affidavit, Ms Gartlan deposed to the conduct and outcomes of the mediation of the Wajarri Yamatji overlap.

(e) The affidavit of Daniel Michael Gorman, affirmed on 20 August 2021. Mr Gorman is a senior solicitor in Western Australia’s State Solicitor’s Office who has day-to-day carriage of the Wajarri Yamatji claims for the State. Mr Gorman deposed to his deletion of signing blocks in the draft minute of determination for the Wajarri Yamatji claims following his receipt of death certificates for the individuals concerned. Although this affidavit was read, no party referred to it.

(f) The affidavit of Colin Alec McKellar, affirmed on 30 August 2021 (**McKellar affidavit**). Mr McKellar is a lawyer at YMAC with day-to-day carriage of the Nanda claim. He deposed to the conduct of mediation between the Nanda applicant and the Mullewa Wadjari applicant and the finalisation of the Mullewa Wadjari applicant’s claim over the Nanda claim area.

(g) The affidavit of Raquel Mary Woodcock, affirmed on 21 May 2021. Ms Woodcock is a lawyer with the primary conduct of the Mullewa Wadjari applicant’s claim. However, this affidavit was not read by the Mullewa Wadjari applicant. In this affidavit, to which I refer in more detail below, Ms Woodcock had deposed to steps taken by the Mullewa Wadjari applicant in the course of the negotiations about the Nanda and Wajarri Yamatji overlaps.

13 The Mullewa Wadjari applicant objected to some sentences in Mr McKellar’s affidavit, on the basis they were expressions of opinion by Mr McKellar. Senior counsel noted those sentences as:

paragraphs 20, 25, 29 – sorry, the second sentence of paragraph 20; second sentence of paragraph 25; paragraph 29 perhaps has relevance; and paragraph 40, the first sentence; and 45, the first sentence.

14 Those sentences clearly were expressions of opinion by Mr McKellar. Rather than disallow the sentences, the Court indicated the Mullewa Wadjari applicant could make submissions as to the weight given to these passages. Senior counsel for the Mullewa Wadjari applicant did not object to this course.

15 The Court also admitted as an exhibit a report filed by Judicial Registrar Daniel pursuant to s 94P of the NTA, and dated 31 August 2021. The Court also has admitted as exhibits Judicial Registrar Daniel’s report dated 31 August 2021 regarding the case management conferences that she conducted with the parties, and a mediation report from Judicial Registrar Daniel dated 25 June 2021. Finally, three maps showing various aspects of the overlaps between the applicants’ respective claims were marked as exhibits.

16 The Nanda and Wajarri Yamatji applicants submitted, and I accept, that evidence about the resolution of the overlap issues with the Mullewa Wadjari applicant in the course of mediation is admissible, despite the fact that without prejudice privilege would ordinarily apply to that evidence. The exceptions in s 131(2)(f) and (g) of the *Evidence Act 1995* (Cth) are applicable. No contrary submission was made on behalf of the Mullewa Wadjari applicant.

# FACTUAL BACKGROUND AND FINDINGS

17 To explain how the dispute has arisen, it is necessary to describe the key events that led to what occurred at a judicial case management hearing on 30 June 2021.

18 By orders made in December 2017, the resolution of the overlapping claims was referred to mediation before Judicial Registrar Daniel. I accept the submissions of the Nanda and Wajarri Yamatji applicants that this referral was made pursuant to the power in s 86B of the NTA.

19 The mediations in relation to this overlap thus occurred over the same period of time as the mediations which resulted in the Yamatji Nation determination, these mediations also being conducted by Judicial Registrar Daniel. At the time of these referrals, as the parties’ subsequent joint report to the Court (dated 1 May 2018) discloses, there were substantial anthropological and genealogical materials in existence to assist the mediation process. However, the parties’ 2018 report also stated (at [11]):

The Applicant parties requested the orders of 15 December 2017 on the basis that:

a. research was necessary to the resolution of the overlaps; and

b. the particulars of research, including any exchanges of existing research where previous research existed, would be the subject of mediation.

20 Active mediation commenced on 31 January 2018. The mediation included an agreement between the parties for further necessary anthropological and genealogical research to be conducted by Mr Craig Elliott – this in itself took four mediations to resolve.

21 Mr Elliott’s anthropological research was completed and provided to the parties in February 2019. The overlapping claims were then listed for further mediation before Judicial Registrar Daniel, commencing 25 February 2019. In the mediation notice of listing, the parties were informed:

The mediation on 25 and 26 February 2019 is for the purpose of a research presentation by Craig Elliot regarding his research and findings. As mentioned above, the mediation will be conducted in separate sessions with representatives of each native title claim group. This will allow questions and legal advice as necessary to also be provided. This will hopefully allow everyone to understand the results of the research and from an evidence based perspective, what options are available to resolve the overlaps. Prior to the mediation, it is expected your lawyer will also discuss this with you so you understand the background and purpose of the mediation.

The Court requests that representatives of the claim group with knowledge about the overlaps, attend the mediation and cooperate with the mediation process being convened by the Court. **The representatives attending the mediation should also have the authority of the native title applicant group to discuss and make decisions about how the issues might be resolved. If agreement is achieved in mediation, it is recorded in an in-principle agreement signed by all people attending.**

(Emphasis added.)

22 Attached to the mediation listing letter was the Court’s information booklet about mediation. This booklet applies to all mediations conducted in the Court. Amongst other matters, it states:

**It is essential that people attend the mediation with sufficient knowledge of the relevant issues in dispute and the authority to make decisions about how it might settle after the mediation.** If attending on behalf of an organisation the Court requires the attendee be an authorised officer who is able to make a decision about how the dispute might be settled and to enter into an agreement on behalf of the organisation. If you are not legally represented you may ask to bring someone for support.

(Emphasis added.)

23 Also on 15 February 2019, Judicial Registrar Daniel wrote to the parties and their legal representatives about the specific mediation process after the presentation of Mr Elliott’s research material. In that letter, which was annexed to Ms Gartlan’s affidavit, Judicial Registrar Daniel was specific about who should participate in the mediation from each group, and what their role was:

Following the research presentations on 25 and 26 February 2019, it is expected that your lawyers will discuss the findings with you and provide legal advice to you on possible options prior to the mediation on Thursday 28 February 2019.

It will also be necessary for the mediation on Thursday 28 February 2019 **to select six representatives of the claim group with knowledge about the overlaps to attend the mediation and cooperate with the mediation process being convened by the Court. The representatives attending the mediation should also have the authority of the native title applicant group to discuss and make decisions about how the issues might be resolved**. Breaks in the mediation will be possible, if it is necessary for representatives to consult with their wider group however this will need to be managed efficiently by the lawyers. **If agreement is achieved in mediation, it is recorded in an in-principle agreement signed by all people attending**.

(Emphasis added.)

24 The mediation process conducted for this overlap was intensive, long running and fulsome. A table annexed to Judicial Registrar Daniel’s report to the Court pursuant to s 94P of the NTA lists no less than 30 mediation events between 31 January 2018 and 24 February 2021. Some of them involved group and legal representatives, and some involved only legal representatives.

25 An “in-principle agreement” between representatives of the Mullewa Wadjari and the Wajarri Yamatji groups was reached relatively early on in this process, namely at the mediation on 28 February 2019. The in-principle agreement was reduced to writing and signed at the mediation. It was admitted in evidence without objection on the show cause hearing. The document states that an agreement “has been reached”, but also states that the agreement will “require an implementation process for the agreement to be finalised”. The document records agreement having been reached in “the spirit of unity and in the interests of achieving a determination of native title”. The components of the in-principle agreement are described as being:

(a) the addition of the apical ancestor “Angelina (mother of Alice Darby)” to the Wajarri Yamatji claim;

(b) the withdrawal of the Mullewa Wadjari claim from any overlap with the Wajarri Yamatji claim area;

(c) the Wajarri Yamatji claim group agrees to seek to vary the existing Wajarri Yamatji determinations to add the apical ancestor “Angelina (mother of Alice Darby)” to the description of native title holders in those determinations; and

(d) the amended Wajarri Yamatji claim group (i.e., including those descended from Angelina) agree to “work together in good faith to develop the structure and rules” for the Wajarri Yamatji PBC.

26 The reference to the “existing Wajarri Yamatji determinations” is a reference to three determinations of native title in favour of the Wajarri Yamatji People which had been made in 2017 and 2018: see *IS (dec’d) on behalf of the Wajarri Yamatji People (Part A) v State of Western Australia* [2017] FCA 1215; *Hamlett on behalf of the Wajarri Yamatji People (Part B) v State of Western Australia* [2018] FCA 545; *Egan on behalf of the Wajarri Yamatji People (Part C) v State of Western Australia* [2018] FCA 1945.

27 The Mullewa Wadjari applicant did not dispute that, at the time of the in-principle agreement, these three determinations had not come into effect, because they were conditional upon the appointment of a PBC. Those determinations however did come into effect on 29 July 2021, by orders made by Griffiths J appointing the Wajarri Yamatji Aboriginal Corporation (ICN 7878) as PBC (see *Hamlett on behalf of the Wajarri Yamatji People v State of Western Australia (No 3)* [2021] FCA 869 869 and orders made separately by Griffiths J on 29 July 2021 in WAD28/2019, WAD382/2017, WAD44/2018 and WAD157/2018). The orders made on 29 July 2021 are particularly significant in the context of this show cause hearing, because the claim group description in each of the Parts A, B and C determinations was amended to add Angelina as an apical ancestor, thus giving effect to the in-principle agreement described at [25(c)] above.

28 The in-principle agreement is individually signed by each of the people attending the mediation as representatives of, respectively, the Mullewa Wadjari group and the Wajarri Yamatji group. For the Mullewa Wadjari group those individuals were: Leedham Papertalk Snr, Charmaine Green, Raymond Merritt Snr, Glenda Jackamarra, Patrick Papertalk and Roslyn Kelly. Of these, Ms Green, Mr Patrick Papertalk and Ms Kelly were not members of the Mullewa Wadjari applicant.

29 Malcolm Papertalk, Douglas Comeagain, Robert Flanagan, Charles Collard, Charles Green, Jamie Joseph and Karen Jones, who were the other members of the Mullewa Wadjari applicant, did not attend this mediation.

30 In a similar but separate process, an in-principle agreement was reached between representatives of the Mullewa Wadjari and the Nanda groups at a mediation conducted by Judicial Registrar Daniel on 14 May 2019. Unlike at the Mullewa Wadjari and Wajarri Yamatji mediation, there was no document recording the in-principle agreement signed at the mediation. However, four of the same individuals attended this mediation as attended the February 2019 mediation with Wajarri Yamatji, namely: Leedham Papertalk Snr, Charmaine Green, Raymond Merritt Snr and Glenda Jackamarra. Of these, only Ms Green was not a member of the Mullewa Wadjari applicant.

31 The other seven members of the Mullewa Wadjari applicant did not attend this mediation either.

32 There is no evidence at all from these other seven members of the Mullewa Wadjari applicant – no evidence about why they did not attend either mediation, and no evidence about their views on the in-principle agreements, or the later rejection of them.

33 In his affidavit at [20], Mr McKellar, who attended the mediation as lawyer for the Nanda applicant, deposes that:

After the mediation, I understood that representatives would resolve the overlap by the withdrawal of the MW Application to the extent it overlapped the Nanda Applications and by Nanda entering into an agreement with the Mullewa Wadjari to provide for non-native title arrangements within the overlap area (such as access, involvement in land management, and participation in heritage surveys).

34 That evidence was not challenged and I accept it. Consistently with this evidence, in May 2019, lawyers for the Nanda applicant and the Mullewa Wadjari applicant exchanged draft agreements. The process stretched out over several months, but on 4 September 2019, Ms Huynh, one of the lawyers for the Mullewa Wadjari applicant, sent Mr McKellar a draft with the Mullewa Wadjari applicant’s proposed amendments. In other words, the version I describe below emanated from the Mullewa Wadjari applicant, not the Nanda applicant. A copy of that draft is in evidence as Annexure CAM13 to Mr McKellar’s affidavit. Relevantly, the draft agreement contained the following recitals and terms:

(a) the Mullewa Wadjari applicant is authorised to make this Agreement for and on behalf of the native title claim group for the Mullewa Wadjari native title determination application (WAD21/2019) (cl 1.2);

(b) the parties recognise and agree that the native title rights and interests in the Overlap Area are held by the Nanda people, as identified in the determination of native title in the Nanda Part A determination (cl 3.1);

(c) the Mullewa Wadjari applicant must:

(i) consent to a determination that the Nanda People hold native title in the Overlap Area;

(ii) consent to the dismissal of the Mullewa Wadjari Claim over the Overlap Area;

(iii) not make another native title determination application over the Overlap Area or any part of it;

(iv) not apply to be joined as a respondent party to the Nanda Claim and take reasonable steps to ensure that no member of the Mullewa Wadjari native title claim group applies to be joined as a respondent party; and

(v) otherwise, not do anything that will prevent the Nanda Claim from being resolved by way of a consent determination of native title (cl 3.2).

(d) the connection of certain specified Mullewa Wadjari families to the overlap area is recognised, which entitles them to maintain that connection through camping, hunting, gathering and ritual activity in the overlap area (cl 4);

(e) representatives of specified Mullewa Wadjari families must be involved in activities in the overlap area relating to the heritage or cultural information of Aboriginal people (cl 5); and

(f) the Nanda PBC must consult with the specified Mullewa Wadjari families regarding any “major future act” in the overlap area (cl 6).

35 A mediation was convened the same day that Ms Huynh sent Mr McKellar that draft, before Judicial Registrar Daniel. The outcomes of that mediation, as communicated to the parties on behalf of Judicial Registrar Daniel, were:

1. By 13 September 2019 the legal representative for the Mullewa Wadjari will advise the preferred option for how the Mullewa Wadjari Applicant party could be described in the deed of agreement.

2. By 13 September 2019 the legal representatives for the Nanda and Mullewa Wadjari will provide a proposed indicative timetable with likely steps for implementing the agreement reached to resolve the overlap.

Following this it is likely a further mediation discussion will occur to finalise the timetable and confirm the terms of the agreement reached to resolve the overlap and next steps.

36 The evidence demonstrates that all parties (respectively, the Mullewa Wadjari and the Wajarri Yamatji applicants, and the Mullewa Wadjari and the Nanda applicants), and the Judicial Registrar, understood that there would be group or community meetings to explain and seek endorsement of the agreements reached. I infer the State also understood such meetings would occur, although it was not directly involved in the mediations. Where the parties differed was on what was intended to be the subject of the community and group meetings, and how clear the position of the Mullewa Wadjari applicant and claim group was, so far as the other applicants and their claim groups were concerned.

37 In terms of the chronology, here it should also be noted that a further outcome of the mediation process, apparently based on the positions taken by the Mullewa Wadjari applicant with both the Nanda and Wajarri Yamatji applicants, is that the Widi Mob applicant filed an interlocutory application seeking orders to amend their Form 1 native title application to withdraw any claim by the Widi Mob in relation to the overlap area. Orders permitting that amendment were made on 2 December 2019.

38 In submissions, senior counsel for the Mullewa Wadjari applicant contended that the evidence demonstrated it was always understood that community or group meetings were needed to “authorise” the agreements.

39 In the context of the NTA, the term “authorise” is of course a loaded word. It is a defined term within the NTA, in s 251A (as to indigenous land use agreements under the NTA) and s 251B (as to claimant applications for native title or for compensation). The more recently added s 251BA recognises some of the kinds of conditions which may be imposed on any authorisation given under s 251A or s 251B. In its statutory context, lack of proper authorisation may be seen (subject to s 84D and other factors) as going to the validity of the acts covered by s 251A and s 251B. Whether “authorisation” is the correct term to use in the context of the proposed resolution of these overlaps, or similar circumstances, is not a matter which need be determined. In these reasons, I have preferred to use the term “endorse”, which has the benefit of not being a statutory term in the Native Title Act, but of nevertheless recognising the important role of decision making at group level about agreements concerning rights which are communal in nature.

40 Returning for the moment to the relevant chronology, both as between the Mullewa Wadjari and the Nanda parties, and the Mullewa Wadjari and Wajarri Yamatji parties, arrangements for their respective group or community meetings proceeded.

## Mullewa Wadjari and Wajarri Yamatji communications

41 The Wajarri Yamatji claim group held a meeting on 4 May 2019, in relation to the agreement with the Mullewa Wadjari group. The outcome of this meeting was to “defer” implementation of the mediation agreement: see third Gartlan affidavit at [15]. Ms Gartlan deposes at [16] of her third affidavit:

At or around this time, YMAC understood from the Wajarri Yamatji claim group that further research was necessary as there were people who required the assistance of additional anthropological advice to understand the inclusion of Angelina (mother of Alice Darby).

42 Ms Gartlan deposes that this concern prompted YMAC to commission further research about the apical Angelina, in order to assist the lawyers and “to provide advice to the Wajarri Yamatji claim group and as a supplementary report to be provided to the State”. There was a meeting of Wajarri Yamatji elders on 24 September 2019. Ms Gartlan deposes at [19] of her third affidavit:

At the elders’ meeting held on 24 September 2019, the Wajarri Yamatji elders resolved to confirm the mediation outcomes of 28 February 2019 but with the qualification that the descendants of Angelina would only be consulted about native title decisions in relation to the area of the Wajarri Yamatji Claims overlapped by the Mullewa Wadjari claim.

43 Another Wajarri Yamatji claim group meeting was held on 26 October 2019, and at that meeting the group resolved that Angelina (mother of Alice Darby) should be included as a Wajarri Yamatji apical ancestor on the existing and future determinations. The group’s agreement was, Ms Gartlan deposes, subject to two conditions:

(a) first, that the elders’ view from the 24 September 2019 meeting (that descendants of Angelina would only be consulted about native title decisions in relation to the overlap area with the Mullewa Wadjari claim) would be implemented; and

(b) second, that the Mullewa Wadjari claim group must remove any native title claim in relation to the overlap with the Wajarri Yamatji claim.

44 This kind of evidence is relied upon by the Mullewa Wadjari applicant in its submissions to demonstrate that what occurred in February 2019 at the mediation was far from a final agreement, and was no more than indicative of the possible terms of an eventual agreement.

45 The Mullewa Wadjari group also met on 31 October 2019. The outcome of that meeting is reflected in the evidence in an email from Ms Woodcock to Ms Gartlan. The Mullewa Wadjari group did not agree to any amendment to the boundary of the Mullewa Wadjari claim to remove the overlap with the Wajarri Yamatji claim. They sought “more research” about the traditional connection of two further proposed apical ancestors to the overlap area as a precondition to any agreement. Relevantly, the Mullewa Wadjari group also expressed the view that the descendants of Angelina should be involved in *all* decision making in the Wajarri Yamatji claim area, including un-overlapped areas of the Wajarri Yamatji claim area. The communication also described the need for YMAC’s assistance as arising from “continuing issues in dispute concerning apical ancestor connection to the MW [Mullewa Wadjari]/WY [Wajarri Yamatji] overlap areas”.

46 From early 2020, and unsurprisingly, the evidence discloses that the timing of various steps, especially in-person meetings for the various groups, was affected by the COVID-19 pandemic. Notably, a meeting of the Mullewa Wadjari group scheduled for early April 2020 was postponed. That meeting did not occur until October 2020.

47 Ahead of the Mullewa Wadjari group’s October 2020 meeting, Ms Gartlan wrote to Ms Woodcock in the following terms:

I write in relation to the Mullewa Wadjari claim group meeting scheduled for 16 October 2020.

We understand that the meeting is to enable Mullewa Wadjari to resolve to confirm the mediation outcomes of 27 February 2020 (including the additional “point 5”) and provide instructions to amend the boundary of the Mullewa Wadjari claim so that it no longer overlaps the Wajarri Yamatji #1 and #3 claims.

Given the elapse of time I thought it would be useful to set out the issues on which Mullewa Wadjari is required to make decisions in order that the apical ancestor Angelina be immediately added to the Wajarri Yamatji claim group description. Provided the relevant decisions are made by Mullewa Wadjari, the Sarah Bell anthropological report in relation to Angelina can be immediately provided to the State to progress the Wajarri Yamatji consent determinations and amendment of the existing determinations on the basis of her inclusion.

The matters we consider relevant to the Mullewa Wadjari claim group meeting are as follows:

1. The mediation outcomes of 27 February [2019] are:

*a) Wajarri Yamatji claim group agrees to add Angelina (mother of Alice Darby) to the Wajarri Yamatji claim.*

*b) Mullewa Wadjari claim group agrees to withdraw the Mullewa Wadjari claim from the Wajarri Yamatji area.*

*c) Wajarri Yamatji claim group agrees to seek to vary the existing Wajarri Yamatji determinations to add Angelina (mother of Alice Darby) to the description of the native title holders in those determinations.*

*d) The amended Wajarri Yamatji claim group agrees to work together in good faith to develop the structures and rules of the Wajarri Yamatji PBC.*

2. The Wajarri Yamatji claim group resolved at its meeting held on Saturday 26 October 2019 to:

*e) amend the description of the Wajarri Yamatji native title claim group by the inclusion of Angelina (mother of Alice Darby); and*

*f) seek to amend the description of the native title holders in the Wajarri Yamatji Part A, B and C conditional determinations of native title by the inclusion of Angelina (mother of Alice Darby).*

3. Further, the Wajarri Yamatji claim group agreed:

*a) to authorise a Wajarri Yamatji Applicant at the next claim group meeting, being a meeting of the current claim group and descendants of Angelina; and*

*b) that it is for the descendants of Angelina to nominate a person to be a member of the Wajarri Yamatji Applicant.*

4. The above resolutions were made on a conditional basis being, that the Mullewa Wadjari claim group:

*a) agree to the in principle agreement reached at the mediation held on 28 February 2019 and the variation of that in-principle agreement recommended by the Wajarri elders on 24 September 2019; and*

*b) instruct their legal representatives to amend their native title claim to withdraw from the Wajarri Yamatji and Mullewa Wadjari overlap area (or otherwise remove their native title claim from this area).*

5. The additional point 5 to the mediation outcomes was that:

*The descendants of Angelina (mother of Alice Darby) will only be consulted about native title decisions in the area currently overlapped by the Mullewa Wadjari claim.*

6. While point 5 is additional to the original mediation outcomes, it is consistent with the fact that the Mullewa Wadjari claim overlaps only part of the Wajarri Yamatji claim.

7. Point 5 is broadly consistent with the proposed Wajarri Yamatji draft rulebook which makes provision for separate Land Groups within the greater Wajarri Yamatji claim area.

8. The effect of the Wajarri Yamatji claim group resolution on 26 October 2019 is that the Wajarri Yamatji claim group is amended to include Angelina immediately upon Mullewa Wadjari resolving to accept the mediation outcomes (plus point 5) and instructing you to amend the claim boundary to withdraw from the overlap area.

9. It is proposed that the next Wajarri Yamatji claim group meeting would involve descendants of Angelina in the decision making processes relevant to nomination of a PBC. To the extent that there will be matters to be finalised in relation to the rulebook and PBC it is proposed that descendants of Angelina (or representatives of them) would be involved.

Please do not hesitate to contact me to discuss any aspect of the above prior to the Mullewa Wadjari claim meeting.

48 I accept the Wajarri Yamatji applicant’s submission that the terms of the agreement outlined by Ms Gartlan in this letter substantially reflect, or are consistent with, the “in-principle agreement” reached at the mediation in February 2019.

## Mullewa Wadjari and Nanda communications

49 Before turning to the outcome of the Mullewa Wadjari meeting on 16 October 2020, it is appropriate to set out the course of events in relation to the Mullewa Wadjari and Nanda mediation, after the September 2019 communication from the Mullewa Wadjari applicant to the Nanda applicant’s lawyer. Mr McKellar took the cautious step in early October 2019 of seeking confirmation that what was being offered on behalf of the Mullewa Wadjari group in the September 2019 draft agreement was a firm position. He deposes (at [27]):

On 3 October 2019 I asked Ms Woodcock to confirm that it was anticipated that the Mullewa Wadjari claim group would not seek any changes to the draft agreement other than as to how Mullewa Wadjari would be described. On 8 October 2019 Ms Woodcock confirmed this.

50 The confirmation from Ms Woodcock was unequivocal:

Hi Colin,

Yes that is correct.

51 It was Mr Papertalk, Ms Jackamarra and Mr Merritt, together with the other seven members of the Mullewa Wadjari applicant I have referred to above, who jointly bore the statutory responsibility of dealing with the Mullewa Wadjari claimant application, and giving instructions to their lawyers. Of course, as senior counsel for the Mullewa Wadjari applicant accepted, lawyers in the position of Ms Woodcock must act on instructions. It can be assumed Ms Woodcock sought instructions from the Mullewa Wadjari applicant members before sending this response. Otherwise, she could have no authority or basis to answer Mr McKellar’s question in the way she did.

52 Therefore, I infer that as of October 2019, those identified as the representatives of the Mullewa Wadjari group in the mediation process, and the Mullewa Wadjari applicant, were willing to have their lawyers represent to the Nanda applicant and its lawyers that they were adhering to the agreement they had made with Nanda in the May 2019 mediation.

53 Notwithstanding this apparent clarity, Mr McKellar deposes that, in November 2019, Ms Woodcock communicated to Mr McKellar that the Mullewa Wadjari group needed further research to be conducted into the connection of three persons to the overlap area before they would approve the process to resolve the overlap as agreed at the 14 May 2019 mediation.

54 Judicial Registrar Daniel convened a mediation on 18 December 2019 between the legal representatives of the Mullewa Wadjari and Nanda applicants. Some agreed timelines were placed around the further research proposal, including a confirmation by early 2020 from the Mullewa Wadjari group whether it “remained in agreement with the resolution of the dispute by an inter-indigenous agreement with Nanda and the withdrawal of the MW Application from the overlap area”.

55 As I have explained above, the Mullewa Wadjari group meeting was postponed from April 2020 to October 2020. No confirmation of the kind requested by Judicial Registrar Daniel from the Mullewa Wadjari group was given before this meeting. It is appropriate therefore to return to what happened at the 16 October 2020 Mullewa Wadjari group meeting, which dealt with both the Nanda overlap and the Wajarri Yamatji overlap.

## The 16 October 2020 Mullewa Wadjari meeting

56 The following account of what occurred at that meeting is taken from a report filed by the Mullewa Wadjari applicant after that meeting, pursuant to a direction given by Judicial Registrar Daniel. The report described the 16 October 2020 meeting as an “authorisation meeting”. The report covered both the Mullewa Wadjari and Wajarri Yamatji mediation and the Mullewa Wadjari and Nanda mediation.

57 In respect of the *Mullewa Wadjari/Nanda mediation*, the report recorded that the Mullewa Wadjari group now proposed that the settlement with the Nanda group was to be contingent on the Mullewa Wadjari group’s settlement with the Wajarri Yamatji group. The report uses the term “applicant” instead of group but the report can only be construed as representing what occurred at the group meeting, rather than simply the view of the members of the Mullewa Wadjari applicant. Otherwise, the 16 October 2020 meeting would not have been necessary. The need for the Mullewa Wadjari group and the Nanda group to enter into an “intra-indigenous” agreement was accepted and if that occurred, the report indicated the Mullewa Wadjari claim group accepted that the Mullewa Wadjari claim should be dismissed in respect of the overlap area with the Nanda claim.

58 In respect of the *Mullewa Wadjari/Wajarri Yamatji mediation*, and aside from the proposal that the Nanda agreement be contingent on the Wajarri Yamatji agreement, the report states there would be no withdrawal of the Mullewa Wadjari claim over the area that overlapped with the Wajarri Yamatji claim but rather the Mullewa Wadjari and Wajarri Yamatji claims would be combined, and three apical ancestors added (one being Angelina) to the combined claim. The report proposed that Leedham Papertalk, one of the members of the Mullewa Wadjari applicant, was to be added as a member of the Wajarri Yamatji applicant. Finally, the report recorded that the Mullewa Wadjari group required that the “principle of right people for country be accepted in traditional and heritage protection activities in the combined claim area”. Again, the report to the Court uses the term “applicant” but this can only be construed in the circumstances as a representation that these were the terms of the agreement acceptable to the Mullewa Wadjari *group*, since it is a report following a group meeting.

59 I accept the submissions of the Nanda and Wajarri Yamatji applicants that the terms of agreement proposed by the Mullewa Wadjari group at the October 2020 meeting, and recorded in the report to the Court, departed in material ways from the in-principle agreement in February 2019 between the representatives of the Mullewa Wadjari and Wajarri Yamatji groups, and from the agreement proposed by the Mullewa Wadjari applicant in the draft agreement sent to the Nanda applicant in September 2019. I also accept the evidence on behalf of the Nanda and Wajarri Yamatji applicants that the report to the Court was the first time their respective claim groups had heard of some of these proposals by the Mullewa Wadjari group.

60 However, the evidence also shows that, by correspondence on 18 December 2020, the Mullewa Wadjari applicant drew back from its insistence that agreement with the Nanda applicant was contingent on agreement between the Wajarri Yamatji and Mullewa Wadjari groups: see [40] of Mr McKellar’s affidavit. Indeed, I find that, by the communication on 18 December 2020, the Mullewa Wadjari applicant purported to confirm its adherence to the outcome of the mediation with the Nanda representatives in May 2019, as reflected in the draft agreements sent by Ms Woodcock.

61 By the 18 December 2020 correspondence, the Mullewa Wadjari applicant through Ms Woodcock confirmed to the Nanda applicant:

Pursuant to outcome 3 of the mediation conference on 17 November 2020, we confirm instructions have been obtained to progress the withdrawal of the Mullewa Wadjari overlapping claim over the Nanda claim and the execution of the inter-indigenous agreement, and that the matter be progressed independent of the Mullewa Wadjari/Wajarri Yamatji overlap proceedings.

62 Mr McKellar deposes, and I accept, that from the time of this communication until the communication of 14 June 2021 (see [94] below) he received no communication from the legal representatives for the Mullewa Wadjari applicant that qualified or contradicted what was said in the 18 December 2020 email. Again, I infer the Mullewa Wadjari applicant gave Ms Woodcock instructions to send this communication.

## Further meetings and communications

63 Thereafter, further delays of meetings occasioned by the COVID-19 pandemic and sorry business occurred. This included the postponement of a Wajarri Yamatji claim group meeting scheduled for 28-30 November 2020 and a Mullewa Wadjari group meeting scheduled for 18 March 2021.

64 However, Mr McKellar had begun substantial progression of the Nanda Part C determination on the basis that the overlap issue with the Mullewa Wadjari claim was substantively resolved: see [41]-[43] of his affidavit. This included resolutions by a working group of the Nanda People on 30 March 2021. Mr McKellar deposes, and I accept, that his understanding of the firmness of the resolution of the overlap with the Nanda claim was confirmed by an affidavit filed by Ms Woodcock on behalf of the Mullewa Wadjari applicant on 21 May 2021, in which she deposed (at [16]) that the Mullewa Wadjari claim would be withdrawn for the Nanda overlap area, subject to entry into an “intra-indigenous” agreement; this was, in other words, the mediated outcome from May 2019.

65 The Nanda claim group met on 8 June 2021. Mr McKellar deposes:

On 8 June 2021 I convened a Nanda claim group meeting. The Nanda claim group authorised the Nanda Applicants to agree to a consent determination as presented, endorsed the inter-indigenous agreement with Mullewa Wadjari, and authorised Nanda Aboriginal Corporation RNTBC (the nominated prescribed body corporate for the Nanda Part C area) to execute the inter-indigenous agreement. From communication with my colleague Deepak Negi, I understand that the cost of holding this meeting, not including staff time or administration costs was about $53,000.

66 Events on 14 June 2021 were to frustrate the steps taken by the Nanda claim group.

67 Meanwhile, the Mullewa Wadjari applicant also continued to communicate with the Wajarri Yamatji applicant about resolving the other overlap. There was a further mediation convened on 24 February 2021 before Judicial Registrar Daniel. A communication to the parties on behalf of Judicial Registrar Daniel confirmed the steps the Mullewa Wadjari applicant and claim group needed to take, with a timeline, including seeking instructions on some matters concerning group membership if there was to be a determination in favour of the Wajarri Yamatji People over the overlap area, and also including:

4. Mullewa Wadjari claim group meeting for the purpose of seeking instructions to discontinue the remaining Mullewa Wadjari proceeding is being organised for late March 2021/early April 2021.

5. By 30 April 2021, a formal application seeking dismissal of the remaining Mullewa Wadjari proceeding is to be filed with the court, subject to instructions.

68 This is a further example of the kind of evidence emphasised by senior counsel for the Mullewa Wadjari applicant. He submitted, where steps to be taken involved seeking instructions from the Mullewa Wadjari group, this clearly indicated that there was no final agreement on any material aspect of the asserted resolution of the overlap dispute.

69 These two groups provided an update to the Court, by way of correspondence, on 16 March 2021. The correspondence was sent on behalf of the Mullewa Wadjari and Wajarri Yamatji applicants by Ms Gartlan. It relevantly stated:

This [is] email is sent on behalf of both Wajarri Yamatji and Mullewa Wadjari.

A Mullewa Wadjari claim meeting is not proceeding on Thursday 18 March 2021.

The Wajarri Yamatji claim group will be asked to consider the inclusion of Angelina (mother of Alice Darby) without qualification at the Wajarri Yamatji claim group meeting on 20-22 March 2021.

It is not proposed to suggest an ILUA or intra indigenous agreement to the Wajarri Yamatji claim group meeting. No such agreement has been agreed between the parties and we do not consider this would assist with the consideration of the apical Angelina.

If Angelina is included in the Wajarri Yamatji common law holder description for the various Wajarri Yamatji claims, the Mullewa Wadjari proceeding will be discontinued by 30 April 2021 in accordance outcome 5 of the mediation of 24 February 2021. That discontinuance is identified in the Mediation report as an event which is ‘subject to instructions’. Those instructions have not yet been obtained and the opportunity to obtain those instructions is now likely to be delayed until a date early in April, as a consequence of funeral attendance obligations which [led] to the cancellation of a Mullewa Wadjari claim group meeting scheduled for 18 March 2021.

There are no plans to hold any Wajarri Yamatji community meetings (nor is funding available for such meetings) after the upcoming meeting on 20 to 22 March 2021 and accordingly there will be no opportunity for any further agreements to be considered.

70 Of this correspondence, the Nanda and Wajarri Yamatji applicants submit that:

No doubt the 16 March 2021 communication to the Court, as a communication by one legal practitioner on their own behalf and on behalf of another legal practitioner, was a communication made by the first practitioner with the consent of the second.

71 That submission should be accepted, and the Mullewa Wadjari applicant did not seriously contend to the contrary. A further Nanda and Wajarri Yamatji submission about this communication which should be accepted is that the absence of any references to the other two mooted apical ancestors (aside from Angelina) could be taken to indicate the Mullewa Wadjari group were not pressing for the Wajarri Yamatji applicant to include any further apical ancestors on their amended claim in relation to the overlap area.

72 Senior counsel for the Mullewa Wadjari applicant submitted that the correspondence also plainly qualifies the proposal about discontinuance by making the statements about the need for instructions from the Mullewa Wadjari group. That submission should also be accepted. Nevertheless, the plain trend of representations and communications on behalf of the Mullewa Wadjari applicant was that *it* was committed to the implementation of both agreements.

73 At [38] of her third affidavit, Ms Gartlan deposes that the Wajarri Yamatji meeting was held in Geraldton as foreshadowed on 20-22 March 2021. Taking into account the extra precautions needed to comply with COVID-19 restrictions, Ms Gartlan deposes that:

the actual cost of holding the three day meeting exclusive of costs associated with staff time was approximately $447,000.

74 The Wajarri Yamatji group endorsed the agreement to add Angelina as a recognised Wajarri Yamatji apical ancestor, without qualification.

75 On 22 March 2021, Judicial Registrar Daniel made the following order:

By no later than 30 April 2021, the Applicant is to seek dismissal or withdrawal of that part of the [Mullewa Wadjari] claim which overlaps WAD28/2019 Wajarri Yamatji #1 and WAD32/2018 Wajarri Yamatji #3.

76 The evidence does not disclose precisely what prompted this order, but it is clear it was made after the outcome of the Wajarri Yamatji group meeting. I infer from the events and communications to this point that Judicial Registrar Daniel considered it was fair and appropriate to require the Mullewa Wadjari applicant to formalise its position in a timely way by taking this step, the context being that this step had first been agreed “in principle” more than two years earlier, and confirmed in the draft agreements exchanged between the parties.

77 In the show cause hearing, the Mullewa Wadjari applicant impugned the making of these orders, a similar order made in relation to the Mullewa Wadjari and Nanda overlap on 25 February 2021, and subsequent orders made on 28 May 2021 extending the compliance dates to 18 June 2021, contending all orders were beyond power. I deal with this contention at [203]-[213] below.

78 After the 30 April 2021 deadline in these orders had passed, on 3 May 2021, by both a telephone call and email, Ms Woodcock as the lawyer for the Mullewa Wadjari applicant informed Judicial Registrar Daniel, through Ms Kershaw, who is the Court’s Senior Legal Case Manager assigned to these proceedings, that the Mullewa Wadjari applicant could not comply with Judicial Registrar Daniel’s order. This communication appears to have been prompted by an inquiry from Ms Kershaw as to whether the Mullewa Wadjari applicant proposed to comply with the Court’s orders. Ms Woodcock informed Ms Kershaw:

The Mullewa Wadjari are unable to comply with the orders made by Judicial Registrar Daniel on 22 March 2021 and the court timetable and convene a claim group meeting due to the cyclone’s impact in the Midwest region and the COVID-19 restrictions. The Mullewa Wadjari seeks to have the date of item 10 of the court timetable extended to the end of May- early June 2021.

We confirm we are conferring with the other parties in relation to a revised court timetable to propose to the Court.

79 This prompted a response from Ms Kershaw (on 3 May 2021), on behalf of Judicial Registrar Daniel, to the effect that the Mullewa Wadjari applicant should file an interlocutory application, supported by affidavit material, if it sought a variation of the Court’s orders. The following, appropriate, statements were also made:

The Mullewa Wadjari applicant should also note in future it is expected if they cannot comply with an order, they should take steps prior to the compliance date to seek a variation with reasons.

Noting the long delay in progressing this proceeding, it is expected urgent action is taken.

80 An interlocutory application was filed on 21 May 2021. The orders sought by the Mullewa Wadjari applicant (as subsequently corrected) were:

1. For the purposes of these orders:

a. *Nanda overlap area* means the portion of the Applicant’s claim which overlaps the area the subject of the native title determination applications WAD30/2019 (Nanda People) and WAD176/2019 (Nanda People #3).

b. *Wajarri Yamatji overlap area* means the portion of the Applicant’s claim which overlaps the area the subject of the native title determination applications WAD28/2019 (Wajarri Yamatji # 1), and WAD32/2018 (Wajarri Yamatji #3).

2. Order 1 of the orders of Judicial Registrar Daniel on 25 February 2021 be amended to order that the Applicant file an application either to discontinue the Applicant's native title determination application, or to amend it to exclude the Nanda overlap area, by 18 June 2021.

3. Order 1 of the orders of Judicial Registrar Daniel on 22 March 2021 be amended to order that the Applicant file an application either to discontinue the Applicant’s native title determination application, or to amend it to exclude the Wajarri Yamatji overlap area, by 18 June 2021, in either case to be conditional upon the filing by 18 June 2021 of an application to vary the native title determinations in each of WAD 6033/1998 (Wadjari Yamatji Part A), WAD382/2017 (Wadjari Yamatji Part B) and WAD 44/2018 and WAD157/2018 (Wadjari Yamatji Part C) to include Angelina (mother of Alice Darby) as an apical ancestor, and the subsequent determination of all those applications contemporaneously.

81 In her affidavit sworn on 21 May 2021 supporting the application for these orders, Ms Woodcock on behalf of the Mullewa Wadjari applicant, described the 28 February 2019 in-principle agreement with Wajarri Yamatji, and the Mullewa Wadjari agreement with Nanda reached after mediation, as “conditional” agreements, and set out the chronology of events since those agreements, as well as explaining why the Mullewa Wadjari applicant had been unable to comply with Judicial Registrar Daniel’s orders of 25 February 2021 and 22 March 2021.

82 Orders were made by Judicial Registrar Daniel on 28 May 2021 extending time for the Mullewa Wadjari to take the steps about dismissal or withdrawal of the overlap with the Nanda and Wajarri Yamatji claims to 18 June 2021.

83 At [30] of her affidavit in support of extending the timetable in the orders, Ms Woodcock deposed, on behalf of the Mullewa Wadjari applicant:

The Applicant seeks that order 1 of the Orders, dated 25 February 2021, be amended to order that the Applicant file an application **either to discontinue** the Applicant’s native title determination application, or to **amend it to exclude the Nanda overlap area**, by 18 June 2021.

(Emphasis added.)

84 In other words, at the time of making her affidavit, Ms Woodcock was representing to the Court, and to the other parties (especially the Nanda applicant), that, subject to the Wajarri Yamatji applicant formally applying to include Angelina as an apical ancestor on its claim, she had instructions from her client that, whether through a dismissal or an amendment to the Mullewa Wadjari claim, the overlap with the Nanda claim would be removed by 18 June 2021.

85 The affidavit evidence provided by Ms Woodcock in support of the interlocutory application was not qualified. She did not, for example, depose that no time for compliance should be set because there was a lack of clarity or certainty in the views amongst the Mullewa Wadjari *claim group*, or that the Mullewa Wadjari *applicant* had instructed her not to seek a date for compliance because the Mullewa Wadjari applicant had insufficient confidence that the Mullewa Wadjari claim group would agree to removal of the overlap with the Nanda claim. Instead, she represented the Mullewa Wadjari applicant was proceeding along the agreed course.

86 Paragraph [31] of Ms Woodcock’s affidavit makes substantively identical representations about the removal of the overlap with Wajarri Yamatji.

## The 9 June 2021 meeting

87 On 9 June 2021, a small number of people from the Mullewa Wadjari claim group met at Geraldton. There is no description of this meeting in the evidence from Ms Woodcock or Ms Huynh. Indeed, neither made an affidavit on behalf of their clients on this show cause hearing, other than an affidavit by Ms Huynh annexing correspondence. As I have noted, it was the Wajarri Yamatji and Nanda applicants who read her 21 May 2021 affidavit.

88 Despite the absence of evidence that Ms Woodcock might have been expected to give, Ms Jackamarra deposes that she attended the 9 June 2021 meeting, and she annexed the resolutions of the meeting to her affidavit. It should be recalled that Ms Jackamarra is a member of the Mullewa Wadjari applicant.

89 The annexure records twelve (or possibly thirteen) group members as attending the meeting. The Mullewa Wadjari claim group is obviously considerably larger than this. In uncontested evidence, Ms Cummings deposed:

The Mullewa Wadjari Native Title Claimants are members of the Collard, Merritt, Flanagan, Hannah, Joseph, Jones, Green, Papertalk, Comeagain and Collins families, all originally from the Mullewa region, whose adult living members are hereunder listed in their entirety. The native title claim group is those people here listed and their biological descendants. Rae Collard, Charles Collard, Cynthia Collard, Gavin Collard, Christine Collard, Adrian Collard. Raymond Merritt, Graham Merritt, Marilyn Merritt, Helen Merritt, Eric Merritt. William Flanagan, Leslie Flanagan, Roslyn Kelly, Henry Flanagan, Elizabeth Flanagan, Robert Flanagan, Ernest Flanagan, Dawn Hamlett, Donna Flanagan. Norma Hannah, Michael Hannah, Francis Hannah. Robert Joseph, Max Joseph, Francis Joseph, Jamie Joseph. Jennifer Jones, Tony Jones, Robert Jones. Charmaine Green, Caroline Green, Charlie Green jnr), Carl Green. Donald Papertalk, Victoria Papertalk, Kate Papertalk, John Papertalk, Doreen Papertalk, Margaret Papertalk, Henry Papertalk, Leedham Papertalk, Patrick Papertalk, Dorothy Papertalk, Marilyn Papertalk, Alison Papertalk. Douglas Comeagain (Snr), Elizabeth Comeagain, Allan Comeagain, Grace Comeagain, Morris Comeagain, Jacqueline Comeagain. Malcolm Papertalk (Collins), Alison Collins, Victor Collins, Edward Collins.

90 In the 9 June 2021 meeting records, it is called an “authorisation meeting”. The record shows Mr McIntyre SC and Ms Woodcock attending as “Lawyers/Facilitators”.

91 As to the Mullewa Wadjari/Nanda overlap, the following resolution is recorded as passed unanimously:

In relation to the area of the overlap between the Nanda and the Mullewa Wadjari claims, there is information [some words here are redacted without explanation] which connects Angelina to that area and senior Nanda women, Sandra Kelly and Carol Kelly, in discussions with Leedham Papertalk Snr, have provided information that the overlap area is Wadjari country. On that basis the Mullewa Wadjari claim group do not agree to withdraw their claim or discontinue their claim of that overlap area.

92 As to the Mullewa Wadjari/Wajarri Yamatji overlap, the following resolutions are recorded as passed unanimously:

It is not accepted by the Mullewa Wadjari claim group, that *Biddy Wittamurra* and her daughter *Fanny* *(“Judy”) Comeagain (nee Taylor)* did not have a connection in accordance with traditional law and [custom] to the area of the overlap between the Wajarri Yamatji #1 and #3 claims, and the Mullewa Wadjari claim further asserts that *Lottie Hannah* was adopted by *Jack Comeagain Snr* and her descendants have a claim to a Wajarri identity through that descent line.

…

The Mullewa Wadjari native title claim group do not authorise any application to dismiss, discontinue or amend the Mullewa Wadjari application in WAD21/2019.

(Emphasis original.)

93 Of the twelve (or thirteen) who attended the meeting, four of the six Mullewa Wadjari signatories to the “in-principle” agreement in February 2019 were present: Leedham Papertalk, Patrick Papertalk, Roslyn Kelly and Glenda Jackamarra. Two of these individuals are members of the Mullewa Wadjari applicant.

## The 14 June 2021 communication and steps taken thereafter

94 On 14 June 2021, by correspondence, the Mullewa Wadjari applicant informed the State and the Wajarri Yamatji and Nanda groups about the resolutions passed at the 9 June 2021 meeting. The letter concludes with the following suggestion:

In order to progress […] the resolution of its overlapping claims with Nanda and Wajarri Yamatji, the Mullewa Wadjari Applicant suggest that the matter be reconvened before the mediator, Judicial Registrar Daniel.

95 There was no acknowledgement that the last two and a half years of negotiations and in-principle outcomes were being set aside and the Mullewa Wadjari applicant sought to return to a situation of active contest about the overlaps with both the Nanda and Wajarri Yamatji claims. There was certainly no apology for the waste of time and resources over that period. There was no recognition or acknowledgment that this position was inconsistent with the negotiated outcomes of the mediations (whether “binding” or not).

96 In relation to the Nanda People, consistently with the Court’s timetable, on 25 June 2021 the State filed the Nanda Part C minute of consent determination in the proceedings for the Nanda Application and the Nanda #3 Application, executed by all parties to those proceedings, and Mr McKellar filed an affidavit in support of the proposed consent determination.

97 The Wajarri Yamatji applicant also pressed on with the implementation of its side of the bargain it contends had been struck between the groups. On 18 June 2021, the Wajarri Yamatji applicant filed:

(a) an interlocutory application to amend Parts A, B and C of the Wajarri Yamatji conditional determinations to include Angelina (mother of Alice Darby) in the list of Wajarri Yamatji apical ancestors in those determinations; and

(b) the Wajarri Yamatji Part D (Byro Plains) and Part E minutes of consent determination, which both included Angelina (mother of Alice Darby) as a Wajarri Yamatji apical ancestor.

98 The State also pressed on. On 26 July 2021, complying with the timetable set down by Judicial Registrar Daniel, the State filed the documents necessary for a Wajarri Yamatji determination in respect of the overlap area, including Angelina as an apical ancestor.

99 Orders were made by this Court (Griffiths J) on 29 July 2021. Those orders:

(a) amended the existing Wajarri Yamatji determinations to include Angelina (mother of Alice Darby) as an apical ancestor (see *Hamlett on behalf of the Wajarri Yamatji People v State of Western Australia (No 3)* [2021] FCA 869); and

(b) determined the Wajarri Yamatji Part D and Part E determinations with Angelina (mother of Alice Darby) included as an apical ancestor in both determinations: see *Dann on behalf of the Wajarri Yamatji People (Part D) v State of Western Australia* [2021] FCA 867; *Hamlett on behalf of the Wajarri Yamatji People v State of Western Australia (No 2)* [2021] FCA 868.

100 The Nanda and Wajarri Yamatji applicants contend that the making of these orders fulfilled the agreement they made with the Mullewa Wadjari applicant and claim group representatives back in February 2019. They contend that despite the earlier views of their elders that some qualifications should be placed around the inclusion of Angelina, that did not occur, and the fact no qualifications were added is indicative that the Wajarri Yamatji group treated what had been agreed at the mediation as concluded.

## The 30 June 2021 case management hearing

101 After the correspondence from the Mullewa Wadjari applicant, instead of the matter returning before Judicial Registrar Daniel, the proceedings were listed for judicial case management on 30 June 2021.

102 By this stage:

(a) the Wajarri Yamatji group had endorsed the agreement to add Angelina as a recognised Wajarri Yamatji apical ancestor, without qualification;

(b) the Wajarri Yamatji group had altered their position by including Angelina on all five Wajarri Yamatji determinations – whether by amendment or by fresh application;

(c) the Nanda group had endorsed the inter-Indigenous agreement with the Mullewa Wadjari applicant, and authorised Nanda Aboriginal Corporation RNTBC (the nominated prescribed body corporate for the Nanda Part C area) to execute the inter-Indigenous agreement;

(d) the State had filed proposed consent determinations in respect of the overlap areas in favour of the Nanda and Wajarri Yamatji claim groups; and

(e) until the 14 June 2021 correspondence, the Mullewa Wadjari applicant had otherwise not informed the Nanda applicant or the Wajarri Yamatji applicant of any change in its position after 18 December 2020.

103 Given those circumstances, and having heard the parties, the Court considered it appropriate to issue the 5 July 2021 orders, including an order that the Mullewa Wadjari applicant show cause why its native title claim over the overlap area should not be dismissed, or judgment entered dismissing the Mullewa Wadjari claim insofar as it relates to the overlap area with Nanda and Wajarri Yamatji.

104 As the Wajarri Yamatji and Nanda applicants point out in their written submissions, an own motion process, and own motion orders by the Court are at times employed in native title proceedings, where the Court considers it appropriate: see, e.g., *Johnson on behalf of the Barkandji (Paakantyi) People v Minister for Land and Water Conservation (NSW)* [2003] FCA 981; *George on behalf of the Gurambilbarra People v State of Queensland* [2008] FCA 1518; *Hill on behalf of the Yirendali People Core Country Claim v State of Queensland* [2011] FCA 472; *Budby on behalf of the Barada Barna People v State of Queensland (No 2)* [2013] FCA 314.

105 It was apparent that if the Court did not make such an order, there would have been an interlocutory application on behalf of (at least) the Nanda and Wajarri Yamatji applicants to the same effect, which would have involved more delay and more cost.

106 The Court having been apprised of the change of position by the Mullewa Wadjari applicant, and apprised of the reliance by the Nanda and Wajarri Yamatji groups on the position previously communicated by the Mullewa Wadjari applicant, the most efficient and effective course was for the Court to make orders of its own motion. The Court also took into account that it had been informed by Judicial Registrar Daniel in her s 94P report that she did not agree with the characterisation by the Mullewa Wadjari applicant of there being no concluded agreement between the Mullewa Wadjari and Wajarri Yamatji parties, and between the Mullewa Wadjari and Nanda parties.

107 Procedural directions were made for the filing of evidence and submissions, and an oral hearing was held on 6 September 2021.

# THE CONTENTIONS OF THE NANDA AND WAJARRI YAMATJI APPLICANTS

108 The Nanda and Wajarri Yamatji applicants submitted there should be orders dismissing so much of the Mullewa Wadjari claim as overlapped with the Nanda and Wajarri Yamatji claims, on two bases.

109 First, and as to the Wajarri Yamatji, it was contended that by 16 March 2021 at the latest (but possibly earlier) the Wajarri Yamatji applicant and the Mullewa Wadjari applicant reached an agreement that the Mullewa Wadjari applicant would withdraw the Mullewa Wadjari claim to the extent it overlapped with the Wajarri Yamatji claim “by 30 April 2021”. The agreement was, the Wajarri Yamatji applicant accepts, conditional upon the Wajarri Yamatji claim group agreeing to accept “Angelina (mother of Alice Darby)” as an apical ancestor on all Wajarri Yamatji determinations, at the claim group meeting on 20-22 March 2021. The Wajarri Yamatji applicant having performed its side of the agreement by including Angelina, the Court should enforce the agreement by dismissing that part of the Mullewa Wadjari claim which overlaps with the Wajarri Yamatji claim.

110 As to the Nanda, it was submitted:

commencing with and founded upon the consensus between the MW Applicant and the Nanda Applicants achieved in mediation on 14 April 2019, the Nanda Applicants and the MW Applicant reached an agreement, by 18 December 2020 at the latest, that the MW Applicant would withdraw the MW Claim to the MW-N Overlap and the inter-indigenous agreement between Mullewa Wadjari and Nanda would be executed.

111 Second, it was contended that, if the Court is not satisfied there was a binding agreement between the parties, the maintenance of a claim by the Mullewa Wadjari applicant to the overlap area with the Wajarri Yamatji claim was an abuse of the process of the Court because:

(a) the Mullewa Wadjari group secured a benefit which they sought from the Wajarri Yamatji group, being the addition of Angelina as an apical ancestor on all Wajarri Yamatji determinations of native title, but they have not provided the (promised or at least represented) reciprocal benefit sought by the Wajarri Yamatji group, being the withdrawal or discontinuance of the Mullewa Wadjari claim for the overlap area;

(b) in such circumstances, the conduct of the Mullewa Wadjari applicant in maintaining the Mullewa Wadjari claim where it overlaps with the Wajarri Yamatji claim is unjustifiably oppressive; and

(c) maintenance of the Mullewa Wadjari claim to the overlap area would also bring the administration of justice into disrepute, because it would effectively sanction the conduct of the Mullewa Wadjari applicant in resiling from commitments generated by a lengthy, court-authorised mediation, and would downgrade a process to which the NTA gives some primacy.

112 As to Nanda, the conduct of the Mullewa Wadjari applicant is said to constitute an abuse of process because:

(a) the Mullewa Wadjari applicant had made an “unequivocal representation” to the Nanda applicant, and to the Court, by the Corser & Corser communication of 18 December 2020, which the Nanda applicant relied on by taking steps such as procuring the authorisation of the execution of the inter-Indigenous agreement at a Nanda claim group meeting on 8 June 2021;

(b) the Mullewa Wadjari applicant’s refusal (in the 14 June 2021 correspondence) to withdraw the overlap claim with Nanda was based on new factual assertions about the connection of Angelina to that area, and new assertions the area is “Wadjari country”, despite such assertions not being made as part of the mediation process over the previous two and a half years; and

(c) this conduct brings the administration of justice into disrepute because it devalues commitments made as part of the mediation process before the Court.

113 The Nanda applicant and the Wajarri Yamatji applicant also submit that the Mullewa Wadjari applicant is in default of the 25 February 2021 and 22 March 2021 orders (as amended by the orders of 28 May 2021) and the Court should enforce the consequences of non-compliance with those orders by ordering the dismissal of the Mullewa Wadjari claim.

# THE CONTENTIONS OF THE STATE

114 The State’s written submissions did not adopt a position supporting either the Wajarri Yamatji and Nanda applicants, or the Mullewa Wadjari applicant. Instead, the State made some helpful submissions about the way the abuse of process arguments need to be considered in the context of the present matter. The State submitted:

Accordingly, in this case, the Court will need to consider two seemingly competing principles. On the one hand, the summary dismissal of a native title determination application should be an exceptional occurrence. On the other, there is a strong emphasis in the Native Title Act 1993 (Cth) (“NTA”) and FCA upon good faith negotiation and parties’ conducting themselves in accordance with their duty to resolve disputes efficiently.

115 The State referred to the Full Court decision in ***Widjabul*** *Wia-Bal v Attorney General (NSW)* [2020] FCAFC 34; 274 FCR 577, and the rejection of a submission put on behalf of the Attorney General of NSW that there is no remedy available for a breach of the s 94E good faith obligation. The Court held (at [36]-[39]) that the good faith obligation is founded upon the same fundamental principle as the doctrine of abuse of process.

116 The State also made the following submission:

A further consideration in determining whether the Mullewa Wadjari application should be dismissed as an abuse of process is the future conduct of the proceeding should the matter continue on foot. Following the case management hearing before Registrar Daniel on 8 July 2021, there is no active proposal for any further mediation in relation to the Mullewa Wadjari application. Unless there is a change in circumstances, it would appear that the overlaps between the Mullewa Wadjari application and the Nanda and Wajarri Yamatji #1 applications will need to be resolved in a contested hearing. The delay and additional costs which would be associated with such a hearing is a relevant consideration for the Court in determining whether the present Mullewa Wadjari application should be permitted to remain on foot. This consideration may be particularly relevant in the event that the Mullewa Wadjari applicant does not have the funding and/or resources to proceed to a timely hearing of the dispute.

117 In oral submissions, senior counsel for the State submitted that the State, as a non-participating party in the mediations about the overlap, received information from the Court (specifically from or on behalf of Judicial Registrar Daniel) which reflected an understanding by the Registrar that the overlap was being resolved by agreement, and in fact, then had been resolved by agreement. He submitted it was implicit in the information the State received, as an outsider to the mediation, that this was the basis on which the Registrar had been proceeding. He further submitted it had always been “relatively clear to us that the Wajarri Yamatji and the Nanda had the same understanding”.

118 He submitted that the evidence bore out that this understanding was well-founded. He then made this submission:

I suppose the only other observation I wish to make in relation to that question is, even if it were right on the facts, as we interpret them from the materials – even if it were right that strictly speaking, there was no agreement which was somehow binding on the Mullewa Wadjari to carry out the withdrawals or the amendments to the claim – if you like, even on the Mullewa Wadjari’s best case – we would say there were a number of very obvious opportunities for the Mullewa Wadjari to take action that would prevent the other parties from acting in certain ways in reliance on an understanding that these things have been resolved. So there were certainly opportunities at various points that weren’t taken for them to, at an earlier date and in clearer terms, indicate that in fact there had been a change of position or in fact there was no such agreement. So that would seem to us to be the best case, with great respect, that the Mullewa Wadjari could put forward. There was an agreement, but even if there wasn’t, they were tardy and could have done a lot more to let everybody else know that in fact, they may have been going off in reliance on something that was wasn’t quite what it seemed to be.

119 Finally, when asked by the Court, senior counsel for the State clarified that the State did not make a positive submission that the continuation of the Mullewa Wadjari claim would be an abuse of process, because the State had to negotiate with all parties, and therefore preferred not to make a positive submission on that issue. However, senior counsel did submit that the Court did not need to find that there was a binding or enforceable agreement that was subsequently repudiated in order to find an abuse of process. Counsel referred again to the submission I have extracted at [118] above.

# THE RESPONSE OF THE MULLEWA WADJARI APPLICANT

120 The written submissions on behalf of the Mullewa Wadjari applicant described the situation as the:

result of the parties having formed differing understandings regarding the outcomes of a convoluted mediation sequence that has been conducted as a means of attempting to resolve their disputes relating to the respective overlap areas.

121 Some antipathy to the mediation process is apparent even from this initial submission.

122 The principal contentions made on behalf of the Mullewa Wadjari applicant are as follows.

123 First, there never was any agreement between the Mullewa Wadjari applicant and the Nanda applicant, or between the Mullewa Wadjari applicant and the Wajarri Yamatji applicant. Two reasons are given, apparently in the alternative:

(i) the persons who attended the mediations on behalf of MW were not authorised to agree to relinquish its claim over either overlap area by way of withdrawal or dismissal of the claim, and were therefore incapable of doing so in law; and

(ii) in any event, those persons did not in fact purport to create any binding agreement to do so.

124 A foundational part of this first contention was the alleged limits on the authority of the Mullewa Wadjari applicant, arising from a 2006 claim group meeting. The Mullewa Wadjari applicant contended:

The effect of the selection process was to limit the authority of the named applicants such that decisions concerning the Application (including as to the making of any agreement to relinquish MW’s claim over a particular area included in it) could only validly be made where the nominated representative of each family group participated in the decision-making process. The corollary of that limitation was that any decision in which the representatives of one or more family groups were not included would not be authorised.

125 The Mullewa Wadjari applicant’s submissions then contended that the Mullewa Wadjari people who attended the 28 February 2019 mediation were only those who were available, did not represent all relevant Mullewa Wadjari families and had not been authorised by a meeting of the Mullewa Wadjari claim group to make decisions on behalf of the claim group. The Mullewa Wadjari applicant made the same submission in substance about the mediation between the representatives of the Mullewa Wadjari and Nanda groups on 14 May 2019. The Mullewa Wadjari applicant further contended that the legal authority of a s 61 applicant did not extend to terminating, or agreeing to terminate, a native title application. Relying on a number of pieces of evidence to which I have referred in the narrative above, the Mullewa Wadjari applicant submitted that with each of the Nanda and the Wajarri Yamatji parties, the Mullewa Wadjari applicant (and group) did not intend to create legally binding relations unless and until the Mullewa Wadjari claim group as a whole had endorsed the proposals agreed at mediation.

126 Second, if there were such agreements and they were validly made (i.e., with each of the Nanda and the Wajarri Yamatji representatives or applicants), the agreements were conditional on endorsement by the Mullewa Wadjari claim group, and that endorsement was not given. I note here the word “authorisation” is not used, in contrast to most of the documentation produced by the Mullewa Wadjari applicant. The Mullewa Wadjari applicant contended that the “process identified in section 87” is the only process by which a negotiated outcome to a native title claim could be reached, and every agreement made pursuant to Div 1C of the NTA can only be enforceable if it complies with s 87. These alleged agreements did not.

127 On both these issues, the Mullewa Wadjari applicant emphasised that the moving parties (here the Nanda and Wajarri Yamatji applicants) bore the burden of proving the agreement.

128 Third, the Court cannot order that the Mullewa Wadjari applicant comply with the orders of 25 February 2021 as Judicial Registrar Daniel lacked power to make those orders. This contention built on the previous submission about the need for compliance with s 87 of the NTA. That being the case, the Mullewa Wadjari applicant submitted the powers of the Registrar under Pt 3.6 of Sch 2 to the ***Federal Court Rules*** *2011* (Cth) do not include any reference to s 87 of the NTA, and so the powers under s 87 (which is what the Mullewa Wadjari applicant contended were in substance the powers the Registrar sought to exercise) are outside the scope of the Registrar’s powers.

# THE REPORT BY JUDICIAL REGISTRAR DANIEL UNDER SECTION 94P

129 Subsections 94P(4) and (5) provide:

*Reports to the Federal Court*

(4) If the person conducting [a mediation under NTA Pt 4 Div 4] considers that a party, or the party’s representative, did not act or is not acting in good faith in relation to the conduct of the mediation, the person may, despite subsection 94D(4), report that failure to the Federal Court (whether or not a report is also provided as mentioned in subsection (1) or (2) of this section).

*What a report must include*

(5) A report must include:

(a) the details of the failure to act in good faith; and

(b) the context in which the conduct took place.

130 In her s 94P report, and contrary to the position now taken by the Mullewa Wadjari applicant, Judicial Registrar Daniel describes the parties’ agreement that they would be represented at mediations by people who “have the authority of the native title applicant group to discuss and make decisions about how the issues might be resolved, and if agreement is reached in mediation, the in-principle agreement [was] to be signed by all people attending the mediation, and the agreement implemented”. Judicial Registrar Daniel describes what thereafter occurred as a failure by the Mullewa Wadjari applicant to implement the agreements and a departure from the mediation process agreed between the parties. Judicial Registrar Daniel also reports that the Mullewa Wadjari applicant delayed in advising the Court or the other parties that they were experiencing issues with implementing the in-principle agreements and delayed in informing the Court and other parties that they did not intend to implement them. Judicial Registrar Daniel explains that this delay has incurred unnecessary expense for the Nanda and Wajarri Yamatji parties, as well as the Court. Finally, Judicial Registrar Daniel reports that the Mullewa Wadjari applicant put forward a new position at the 8 July 2021 case management conference that the Mullewa Wadjari People are a part of the Tharwarda dialect, which forms a part of the Wajarri Yamatji group. Judicial Registrar Daniel reports that this position was never advanced at the mediations.

131 When the Court raised the admission into evidence of the s 94P report, and an earlier mediation report to the Court by Judicial Registrar Daniel of 25 June 2021, senior counsel for the Mullewa Wadjari applicant in substance objected, submitting the documents have no “evidentiary position in these proceedings”, other than suggesting one answer to the “ultimate question” on the show cause hearing. He submitted the question whether negotiations were conducted in good faith was not before the Court; rather, the issues were whether there was an agreement or whether maintenance of the Mullewa Wadjari claim in relation to the overlap was an abuse of process. After hearing the position stated by counsel for the other parties, senior counsel for the Mullewa Wadjari applicant accepted that factual matters contained in the report, in terms of the chronology of events, could be taken into account, but maintained that the “conclusions and opinions” expressed by Judicial Registrar Daniel in the reports, especially in the s 94P report, could not.

132 I concluded, in short oral reasons, that both reports should be admitted. I stated:

In my view, the reports should be admitted into evidence and marked as exhibits. The purpose of doing so is because they are reports by an officer of the court to the court about the matters which are in dispute in this hearing. I don’t propose to make any decision about Judicial Registrar Daniel’s views as she has expressed them in her section 94P report about an absence of good faith on behalf of the Mullewa Wadjari applicant. That may be a matter for another day, but nevertheless, the fact that the report has been made under section 94P seemed to me to be relevant at least, and certainly both reports contain matters of fact which are likely to be relevant in the court’s assessment of the arguments and they come from an officer of the court, and so in those circumstances I think I can treat them as reliable and admissible. So the report under section 94P of the Native Title Act by Judicial Registrar Daniel will be exhibit D. And the report dated 31 August 2021 by Judicial Registrar Daniel for the court will be exhibit E.

133 The 25 June 2021 mediation report from Judicial Registrar Daniel was also tendered, on the same basis. In addition to the reasons I gave at the time, I also consider that the s 94P report, and the earlier mediation report, can both be relied upon as evidence of Judicial Registrar Daniel’s own understanding, as the Registrar responsible for the conduct of the mediation process, of whether the Mullewa Wadjari applicant, and the Mullewa Wadjari representatives, had agreed to a resolution of the overlap claims, and were adhering to a path to implement that agreement. It is clear in my opinion that these reports demonstrate Judicial Registrar Daniel did have that understanding, as did the Nanda and Wajarri Yamatji applicants, the State and their respective legal representatives.

# RESOLUTION

134 During the show cause hearing, I raised with the parties my concern that there was to be no cross-examination of any witness who had provided an affidavit. In particular, no cross-examination was proposed of the Mullewa Wadjari applicant’s three witnesses. Counsel confirmed their respective positions that there would be no cross-examination. Nevertheless, the Court is not obliged to accept the affidavit evidence if it is not reliable or credible, or is inconsistent with other evidence.

## Was there an enforceable agreement between the parties?

135 In relation to both the Wajarri Yamatji and the Nanda groups, I do not accept there was a concluded and enforceable agreement between the parties. I reject the Wajarri Yamatji and Nanda applicants’ submissions to this effect.

136 No party disputed that a mediation agreement, to be enforceable, needed to satisfy the ordinary principles of contract. The Wajarri Yamatji and Nanda applicants bear the onus of proving there was an intention to create a contractual relationship, and to commit to an agreement which would be legally enforceable. The correct approach was set out by the plurality in *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 at [24]-[25]:

“It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.” To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet “[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts”.

Because the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of cases in which an intention to create contractual relations should, or should not, be found to exist, it would be wrong to do so. Because the search for the “intention to create contractual relations” requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word “intention” is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.

(Citations omitted.)

137 The Wajarri Yamatji and Nanda applicants need to prove the relevant intention with respect to all of the terms they allege constituted the agreement: see *Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCAFC 231 at [113]. Relevantly here, those terms were the inclusion of Angelina as an apical ancestor on all Wajarri Yamatji claims and determinations, entry into an inter-Indigenous agreement between the Nanda and Mullewa Wadjari parties, and the withdrawal or amendment by the Mullewa Wadjari applicant of any claims that overlap with the Wajarri Yamatji and Nanda claims.

138 That intention to create binding contractual relationships must be objectively ascertained – in other words, what would a reasonable person in the circumstances have thought was being conveyed by both the communications and the conduct of the Mullewa Wadjari applicant, and the Nanda and Wajarri Yamatji applicants? I refer here to the *applicant* for each claim, because there was no contention on behalf of the Nanda and Wajarri Yamatji applicants that a binding agreement was concluded *at* the mediations on 28 February 2019 and 14 May 2019 respectively, which were attended by some individuals who were not members of the relevant native title applicant; cf the factual situation and the conclusions of the NSW Court of Appeal in ***Jingalong*** *Pty Ltd v Todd* [2015] NSWCA 7 at [78]-[82], where the parties had signed a Heads of Agreement document at a mediation which included a clause that stated (see [31]):

These Heads of Agreement have effect unless any later deed is entered into by the parties.

139 Rather, as I understood it, what the Wajarri Yamatji and Nanda applicants contend is that a binding agreement was created at a later stage: they nominate in their submissions by 16 March 2021 (at the latest) as between the Wajarri Yamatji and Mullewa Wadjari applicants, and 18 December 2020 (at the latest) as between the Nanda and Mullewa Wadjari applicants.

140 At any mediation, and as the example of *Jingalong* demonstrates (albeit outside a native title context), persons with the authority of the claim group to attend mediation and resolve the dispute may have the *capacity* to enter into a binding agreement to resolve a native title dispute, including a dispute about overlapping claims, whether or not they are members of the native title applicant. In that situation, their authority is likely to be derived from the authority given to them, *ahead* of the mediation, to represent a claim group and negotiate a binding agreement on its behalf. I return to this issue below.

141 Aside from conduct within a mediation itself, given the structure of the NTA and the role accorded by that scheme to a native title applicant, the question about ascertaining contractual intention (and authority) may need to be posed differently. These are not matters which need be decided in this proceeding, but whether the intention to enter into a binding agreement is to be ascertained objectively by reference to the members of the native title applicant (and their instructions to their legal representative), or only by reference to the objective “intention” of the claim group, is a large question.

142 These issues need not be decided because in my opinion it is clear that no matter whether it is the claim group as a whole (and of course, how the claim group decides is yet another question), or members of the native title applicant, on no view of the evidence can it be said binding agreements had been reached. None of the evidence produced, considered with all the surrounding circumstances, demonstrates that at any point in time up to 14 June 2021 there was any agreement between the Wadjari Yamatji and Mullewa Wajarri applicants, or between the Nanda and Mullewa Wadjari applicants (or their respective claim group members) which was intended to be binding and enforceable. That is so whether one takes the latest dates nominated by the Nanda and Wajarri Yamatji and Nanda applicants (18 December 2020 and 16 March 2021, respectively), or any other dates.

143 In order to explain this conclusion, it is necessary to consider what the evidence reveals about the parties’ intentions, having regard to the surrounding circumstances at various points in the chronology.

### Events prior to 16 October 2020: Wajarri Yamatji

144 While I accept the February 2019 in-principle agreement set out what had been agreed between the parties during the mediation process, I do not accept that prior to the events at the 16 October 2020 Mullewa Wadjari group meeting, either party conducted itself on the basis they had, on behalf of their respective claim groups, assumed legally binding obligations. That is because (taking these matters cumulatively):

(a) The 2019 in-principle agreement itself states that the agreement will “require an implementation process for the agreement to be finalised”.

(b) There was a resolution to “defer” of the implementation of the mediation agreement at a Wajarri Yamatji claim group meeting on 4 May 2019, because of a concern that further research about the family of Angelina (mother of Alice Darby) was required: see [41] above.

(c) YMAC commissioned further research and made a presentation to a group of Wajarri Yamatji elders on 24 September 2019: see [42] above.

(d) At the Wajarri Yamatji claim group meeting on 29 October 2019, there was a *conditional* acceptance that Angelina be accepted as an apical ancestor: see [43] above.

(e) The Mullewa Wadjari group refused to agree to any amendment to the boundary of the Mullewa Wadjari claim to remove the overlap with the Wajarri Yamatji claim at a meeting on 31 October 2019, unless and until certain conditions were fulfilled: see [45] above.

(f) Both parties (respectively, the Mullewa Wadjari and the Wajarri Yamatji applicants), and the Judicial Registrar, understood that there would be, and they planned for, group or community meetings to explain and endorse the agreements reached: see my findings at [36] above.

### Events prior to 16 October 2020: Nanda

145 I do not accept that, prior to the events at the 16 October 2020 Mullewa Wadjari group meeting, either party conducted itself on the basis it had, on behalf of their respective claim groups, assumed legally binding obligations. That is because (taking these matters cumulatively):

(a) There was no signed in-principle agreement between the Nanda and Mullewa Wadjari applicants, or group representatives, after the May 2019 mediation.

(b) While Mr McKellar deposes to an understanding of how the overlap would be resolved, being an understanding which arose from the mediation, and while that understanding is consistent with what is recorded by Judicial Registrar Daniel in her s 94P report, the fact that the parties then commenced a process of exchanging draft agreement indicates there was no intention to create a binding agreement at or shortly after the 4 May 2019 mediation.

(c) There was an apparently firm proposal by way of a draft agreement sent by Ms Woodcock for the Mullewa Wadjari applicant to Mr McKellar for the Nanda applicant on 4 September 2019, but it was clearly still a *proposal*, and not an executed agreement, despite the parties having clearly reached an advanced stage of agreement about terms.

(d) The outcome of the mediation on 4 September 2019 (see [35] above) made clear a timetable was needed to finalise the agreement, and that matters such as how to describe the Mullewa Wadjari applicant party remained outstanding.

(e) Both parties (respectively, the Mullewa Wadjari and the Nanda applicants), and the Judicial Registrar, understood that there would be, and they planned for, group or community meetings to explain and endorse the agreements reached (see my finding at [36] above).

### Events after 16 October 2020

146 The outcome of the 16 October 2020 Mullewa Wadjari group meeting involved a substantial departure by the Mullewa Wadjari applicant from the core terms which had been negotiated at the mediations and thereafter: see my findings at [59] above. I do not consider on the evidence that this was a repudiation of any existing binding agreement; rather, it was yet another demonstration of the approach of the Mullewa Wadjari applicant and other Mullewa Wadjari representatives, in treating the mediation process and in-principle resolution as having no particular status, and as giving rise to no particular responsibilities.

147 The correspondence from Ms Woodcock to Mr McKellar on 18 December 2020 (concerning the Mullewa Wadjari/Nanda agreement, see [60] above) is certainly worded as if a resolution to the overlap is agreed. Ms Woodcock states (with my emphasis) that “*instructions have been obtained* to progress the withdrawal of the Mullewa Wadjari overlapping claim over the Nanda claim and the execution of the inter-indigenous agreement”. Objectively, that statement by a legal representative must be taken, in all the circumstances, as a firm indication that the Mullewa Wadjari *applicant* agreed to a resolution of the overlap on this basis, and had instructed their lawyers accordingly. Those circumstances include the 4 May 2019 mediation outcome and the negotiations after that, the proffering of a proposed final draft agreement by Ms Woodcock and critically also what Ms Woodcock deposed to in her 21 May 2021 affidavit. However, taken together with the other circumstances to which I have referred above, the fact that this communication was not made until mid-December 2020, more than 18 months after the mediation and with different forms of agreement having been proposed during those 18 months, indicates there was still no concluded agreement, intended to give rise to binding obligations, before this time.

148 I accept that, from at least December 2020, the Nanda applicant and claim group (and their legal representatives) relied on Ms Woodcock’s representation on behalf of the Mullewa Wadjari applicant, and acted in a way which sought to fulfil the bargain they believed had been struck, or would be struck, with the Mullewa Wadjari applicant. The reliance is demonstrated by what occurred at the 8 June 2021 Nanda claim group meeting: see [65] above. However, viewed objectively it cannot be said that by December 2020 both the Nanda and the Mullewa Wadjari applicants were acting in ways consistent with an intention that they had already assumed binding obligations towards each other. That is principally because both parties had yet to have the claim group meetings, which were always foreshadowed to be a critical part of the process.

149 The terms of the 21 February 2021 mediation before Judicial Registrar Daniel (see [67] above) indicate the still somewhat equivocal nature of the details of the resolution between the Mullewa Wadjari and Wajarri Yamatji applicants. On the one hand, an outcome of that mediation was that the Mullewa Wadjari applicant would convene a Mullewa Wadjari claim group meeting “for the purpose of seeking instructions to discontinue the remaining Mullewa Wadjari proceeding”. This was a meeting which had been scheduled previously, but postponed because of COVID-19. Nevertheless, the outcome as expressed contemplates that the Mullewa Wadjari claim group still need to give their approval, or instructions, to the resolution of the overlap. Yet on the other hand, approval and instructions *are* indicated, because the next scheduled outcome was the filing of an application for dismissal of the Mullewa Wadjari overlap claim by a certain date. That is the same indication which is, in my opinion, clearly evident in the joint Mullewa Wadjari/Wajarri Yamatji communication to the Court on 16 March 2021: see [69] above.

150 Contrary to thrust of the submissions on behalf of the Mullewa Wadjari applicant, the filing of this interlocutory application – to alter dates for dismissal of the overlapping Mullewa Wadjari native title claim – was not a neutral or insignificant step. It was a step which had to be taken on instructions, and the Court and the other parties were entitled to understand those instructions included instructions that such a step (i.e., dismissal) *was* *intended* to be taken. Conduct of this nature confirmed and encouraged reliance by the parties (including the State by this point), and the Court, on what had been the intention of the Mullewa Wadjari applicant as objectively presented, namely that it was proceeding to honour the in-principle agreements that had been reached.

151 I find that those who attended the Wajarri Yamatji claim group meeting, which occurred on 20-22 March 2021, including the Wajarri Yamatji applicant and its legal representatives, relied on the representations on behalf of the Mullewa Wadjari applicant that it continued to intend to honour the agreement reached. Those representations were made through the Mullewa Wadjari applicant’s consent to the content of the report to the Court by Ms Gartlan, and by the way the members of the Mullewa Wadjari applicant had conducted themselves in relation to the proceedings. For example, the interlocutory application, which represented that the Mullewa Wadjari applicant intended to fulfil the bargain struck through mediation. Reliance by the Wajarri Yamatji group is demonstrated by what occurred at the 20-22 March 2021 claim group meeting in Geraldton. However, I do not consider that, objectively, it can be said that from 16 March 2021 (or earlier) the Wajarri Yamatji and Mullewa Wadjari applicants, or their respective claim groups, were acting on the basis there was already an enforceable agreement between them. That is principally because both parties had yet to have the claim group meetings which were always foreshadowed as a critical part of the process.

152 In other words, the evidence demonstrates in my opinion that *all three groups* always intended that it would be the claim group members themselves, at a meeting, who would decide whether to endorse the creation of a binding agreement to resolve the overlapping s 61 applications in the way proposed. Members of both Nanda and Wajarri Yamatji claim groups had shown, after the respective mediations, that at times they had different views about what the terms of any resolution should be. Ultimately, the Nanda and Wajarri Yamatji groups reached the position of endorsing terms reflecting the outcome of their respective mediations. But that only occurred after an iterative process within each claim group, where substantively different terms were proposed and then withdrawn.

153 The evidence does not disclose whether – as compared to Mullewa Wadjari – there was a greater commitment by those elders and leaders within the Nanda and Wajarri Yamatji groups to ensuring the in-principle agreements were honoured, and engaging with members of their respective claim groups to help those members understand the importance of acting in good faith and honouring in-principle positions agreed to on their behalf. The process of withdrawing the substantively different terms proposed at times through claim group meetings, and returning to the original terms, supports an inference that this was the case.

154 In my opinion it is likely that leadership in these circumstances, ensuring the claim group members as a whole appreciate and give due weight to the values which lie behind the making of in-principle agreements to compromise legal proceedings, are critical aspects in seeking communal endorsement of proposed outcomes. If such leadership is not shown, and members of claim groups are given the impression that they can place little or no weight on what has been negotiated in careful, extensive and lengthy mediation processes, then it is hardly surprising that individual claim group members might approach their decision making as if those processes had never occurred.

155 Compromise is at the centre of successful mediation and negotiation. That is no less true in situations of overlapping native title claims, where each native title claim group bases its assertion of native title on what the elders of the group have said, on what the circumstances were prior to British sovereignty, and on a genuinely felt connection to the land and waters in issue. As in any other sphere of litigation, parties *can* compromise, not only on their views of the facts, but also on their views of the law. In a compromised or negotiated outcome, there is no pronouncement by a court by way of an exercise of judicial power, and so each party brings their own views of the law and the facts, as well as their own views about other matters which may drive a negotiated settlement rather than litigated outcome: for example, legal costs, delays, uncertainty, expenditure of human resources, the stress and strains of litigation.

156 Yet, there are unique, and legally difficult, features of mediation in a native title context, and especially during the negotiation of overlapping claims, where more than one native title claim group is involved. That is why clarity about negotiating authority is especially critical. It is also why those who are given, or represent they have been given, negotiating authority must display considerable strength and leadership in encouraging claim group members to understand and respect negotiated outcomes. On the evidence, the Mullewa Wadjari applicant did not show that leadership.

### The affidavit evidence of the three Mullewa Wadjari group members

157 The evidence from the three Mullewa Wadjari claim group members demonstrates that at least some Mullewa Wadjari claim group members, and some members of the Mullewa Wadjari applicant, have not been genuinely interested in any compromise position in relation to the overlap area, nor prepared to respect the reliance that their neighbours may have placed on Mullewa Wadjari representatives making in-principle agreements on their behalf. In my opinion, the evidence does not necessarily suggest their views are representative of even a majority of the Mullewa Wadjari claim group, especially since only twelve (or possibly thirteen) people attended the 9 June 2021 meeting at which the reversal of position was reached. Nevertheless, the affidavit evidence establishes that individuals who appear to have been influential in that reversal occurring have long held views inconsistent with the in-principle agreements they participated in negotiating.

#### Ms Jackamarra

158 Ms Jackamarra became a member of the Mullewa Wadjari applicant in 2007, when the previous members of the applicant had all passed away. She deposes that, since being appointed a member of the named applicant, she has been “involved in and attended every meeting”.

159 Ms Jackamarra devotes a large proportion of her affidavit to providing information about her maternal great-grandmother, Fanny Comeagain, and the connection of Ms Jackamarra’s extended family (whom she describes as the “Hannah family”) to what Ms Jackamarra describes as “the Mullewa Wadjari/Wajarri Yamatji overlap area”. Fanny Comeagain was one of the two apical ancestors that the Mullewa Wadjari applicant proposed, at one stage during the negotiations and communications, also needed to be included on the Wajarri Yamatji claim: see [92] above. At [27], Ms Jackamarra ends her affidavit with this statement:

I believe that the Hannah Family have a valid claim [to] connection to the Mullewa Wadjari/Wajarri Yamatji overlap area through Fanny and Lottie.

160 Ms Jackamarra does not suggest in her affidavit evidence that this is a recently formed belief. Indeed, before describing her maternal great-grandmother, she deposes that

I was taken out on country from a very young age by my maternal uncle and aunts, my older sister and my parents. I remember being taken to areas around Yuin to go hunting and swimming in the water holes.

161 The remainder of her evidence on this topic makes it clear she, and other members of her family, have held this view for some time.

162 Ms Jackamarra gives no direct evidence at all about what happened at the two mediations with the Wajarri Yamatji and Nanda representatives, nor the views she held before, during or after those mediations. She does not depose, for example, to what is obviously a critical issue on the show cause hearing – why she signed the Wajarri Yamatji in-principle agreement and what this signified from her perspective. Despite being a member of the Mullewa Wadjari applicant since 2007, she gives no evidence of what position she communicated to the Mullewa Wadjari applicant’s lawyers about the resolution of the overlaps, either at the two mediations or after them. She offers no evidence about how all of the correspondence, exchange of draft agreements with Nanda, reports to the Court, and the like sat with her views at the time those events occurred.

163 The evidence she does give suggests that she has at all material times held a belief that the Mullewa Wadjari People should not surrender their claims to the overlapping areas with the Nanda and Wajarri Yamatji claims. Her evidence does not suggest that the addition of Angelina as an apical ancestor on the Wajarri Yamatji application and determination would have changed her mind, because, as she deposes at [22]:

The Hannah family have a connection to the overlap area, not through the descendants of Angelina (mother of Alice Darby), but through Jack Comeagain Snr. I was told stories by the old people that this was Fanny's country and she spent time out there.

#### Ms Green

164 Ms Green’s brother, Charles Green, became a member of the Mullewa Wadjari applicant at the same time as Ms Jackamarra. Ms Green is not a member of the applicant, but deposes that she:

volunteered to attend the mediation between Mullewa Wadjari and Wajarri Yamatji on 28 February 2019.

….

Being the eldest of the Green family, I attended the mediation to represent my family because my brother was not available to attend at the time.

165 Ms Green does describe some aspects of the February 2019 mediation with Wajarri Yamatji. Most critically for present purposes, as to the proposal to add Angelina as an apical ancestor (Ms Greene’s great-grandmother), Ms Green deposes:

I did not think that was a fair result because the Wajarri Yamatji’s proposal only included some of the families on the Mullewa Wadjari claim and exclude Glenda Jackamarra’s family, the Hannah family.

The families proposed to be included in the Wajarri Yamatji were only the descendants of Angelina. There was no mention of the other Mullewa Wadjari families being included in the Wajarri Yamatji claim. Those other families were the Jones family, the Joseph family and the Hannah family.

166 This evidence purports to describe Ms Green’s state of mind at the time she signed the in-principle agreement at the February 2019 mediation. That description is contrary to the fact of her signature on the in-principle agreement. Her sworn evidence to the Court is that she did not agree with the in-principle outcome to which she purported to agree by affixing her signature.

167 Ms Green also attended the mediation with the Nanda in May 2019, but gives no evidence about that mediation, or her views on the outcome agreed upon. Nor does she explain why she attended that mediation as a person purportedly holding authority to negotiate an outcome for the Mullewa Wadjari claim group.

168 The remainder of Ms Green’s affidavit describes in some detail her belief about her connection, and the connection of other Mullewa Wadjari families, to both the area covered by the Wajarri Yamatji/Mullewa Wadjari overlap and the area covered by the Mullewa Wadjari/Nanda overlap. The information to which she refers is information which she describes as having been known to her for a long period of time – some of it for example from the 1990s. Other key aspects of her evidence – which I find seek to explain why the Mullewa Wadjari People are connected to these overlapped areas and sometimes seek to assert that the Nanda People are not connected – also entirely relate to evidence known to her for a long period of time. For example:

My late mother, MG, who was an old named applicant, told me when I was young that the country forming the Mullewa Wadjari/Nanda overlap area is Mullewa Wadjari country but that the area relates to men’s law business and initiation rights. As women, we have limited knowledge of that area.

169 Ms Green’s evidence suggests she has at all material times held a belief that the Mullewa Wadjari applicant should not surrender its claims to the areas of land that overlaps with the Nanda and Mullewa Wadjari claims. It does not suggest any willingness to compromise the Mullewa Wadjari native title claims in the way recorded during the February and May 2019 mediations, or in the correspondence, affidavit, reports and draft agreements afterwards.

#### Mr Leedham Papertalk Snr

170 Mr Papertalk is a member of the Mullewa Wadjari applicant. He has been a member of the Mullewa Wadjari applicant since 2007. He deposes that his father was the leading claimant for the Mullewa Wadjari claim when it began. He describes himself as a “senior Wajarri law man” who has “authority to speak for Mullewa Wadjari country and that authority was passed down to me from my father and elder brother”.

171 In his affidavit, having described some his background, including having been a member of the Western Australian Police Force, he describes how he came to be appointed as a member of the Mullewa Wadjari applicant after all the old people had passed on.

172 He deposes that he has a connection to the Mullewa Wadjari/Wajarri Yamatji overlap area through Angelina, who is his paternal great-grandmother. He deposes to which of his ancestors are descended from Angelina and how he understands them all to be connected to the overlap area with the Wajarri Yamatji claim.

173 Again, this is not new information for Mr Papertalk, on his own evidence. This is information which has been handed down to him and which, I infer, he has been aware of and taken as accurate since at least the time he became a member of the Mullewa Wadjari applicant.

174 Mr Papertalk deposes:

As an elder and senior law man, I have a cultural and spiritual obligation to ensure that everyone included in the Mullewa Wadjari claim has been acknowledged as having a connection to the Mullewa Wadjari claim, and that their connection is recognised. I would be contravening our law and customs if I did not defend their spiritual connection to country. The old people made that claim for a reason.

175 There is nothing in Mr Papertalk’s affidavit evidence that suggests this is a recently formed opinion or position. Rather, I infer he has always held this opinion. That is, he has always considered the Mullewa Wadjari applicant should pursue native title in relation to the overlap area with the Wajarri Yamatji claim.

176 Mr Papertalk’s affidavit then deals with a group he calls Tharwarda Wadjari, whom he describes as Wajarri People whose country lies within the Mullewa Wadjari claim area, and is east of the Murchison River. He deposes (at [24]-[27]):

West of the Murchison river is Nanda country. They are the coastal people. Nanda are not Tharwarda Wadjari. Their law is different.

My father told me that there is a change of culture and rituals, that changes at the Murchison river. The tribes on either side of the river are different.

I was told this as part of becoming a law man.

I was told by the old people that Angelina was on that country with AD, JD and her son-in-law NP, but the white man never recorded them being there.

177 Again, it is clear on the face of this evidence that this is knowledge Mr Papertalk has held, and believed, for a long period of time. As I understand it, Mr Papertalk is asserting that this group, Tharwarda Wadjari, have particular apical ancestors who should be recognised in the overlap area with the Nanda claim, and/or are the people who held native title in the overlap area with the Nanda claim, rather than the Nanda People. Mr Papertalk does not acknowledge that this is a new assertion as far as the formal claims to the overlap area are concerned, and as far as the mediation process was concerned. However, that is plainly the case on the evidence before the Court.

178 As to the overlap with the Wajarri Yamatji claim, Mr Papertalk’s evidence, as I understand it, is that there are other apical ancestors who belong to the country in that overlap, including Fanny Comeagain. He deposes (at [48], [52]-[53]):

At the meeting on 31 October 2019 (refer to annexure LAP 3) the outcomes of the mediation were discussed, including the issue relating to Glenda’s great grandmother, Fanny Comeagain (nee Taylor) (**Fanny**). It was resolved at the meeting that more research be conducted in relation to Fanny’s connection to the Mullewa Wadjari/Wajarri Yamtaji overlap area.

….

At a subsequent meeting on 9 June 2021 (refer to annexure LAP 5) the question of the Tharwarda Wadjari and Fanny’s connection with the Mullewa Wadjari/Wajarri Yamatji overlap area was raised again.

The old people told me that Fanny’s daughter, Lottie, was adopted by Jack Comeagain Snr at some point and she moved in from another group into the Mullewa Wadjari area. I was told that Lottie’s father was Ned Papertalk.

(Emphasis original.)

179 Although there was no cross examination of Mr Papertalk, taking his evidence as a whole, in particular his evidence that he is an elder and a senior law man, and his prominent and longstanding role as a member of the Mullewa Wadjari applicant, I infer and find that what he describes hearing from his elders at the 9 June 2021 meeting was not information he was hearing for the first time. That would not be credible. Mr Papertalk does not depose to this information having been discovered, for the first time, by any of the research conducted after the February 2019 mediation. In my opinion, it is more likely than not, given his position as a senior Mullewa Wadjari law man and a lead member of the Mullewa Wadjari applicant, that he has known this information for a considerable period of time, and certainly well before the mediation in February 2019.

180 Mr Papertalk also deposes (at [55]):

The community members who attended the 9 June 2021 meeting expressed the belief that the connection of Fanny to the Mullewa Wadjari/Wajarri Yamatji overlap area is genuine, and as a consequence, the community decided not to authorise the dismissal or discontinuance of the Mullewa Wadjari claim over Wajarri Yamatji claim area.

181 To be clear, there were only twelve (or possibly thirteen) people at that meeting, and putting to one side the three members of the Mullewa Wadjari applicant who attended that meeting (Mr Leedham Papertalk, Ms Jackamarra and Mr Charles Collard) the phrase “community members” could only describe nine or (possibly ten) people. There is no evidence which, if any, of those nine or ten people expressed this belief. Again, Mr Papertalk was also not cross-examined on this evidence, including (insofar as it is admissible and could be given any weight) the statement that the belief of the claim group was “genuine”. Consistently with the findings I have made above, I find Mr Papertalk is more likely than not to have been aware that the belief he describes at [55] of his affidavit had been the belief of at least some Mullewa Wadjari claim group members for a considerable period of time, and in any event well before February 2019.

182 Finally, Mr Papertalk gives evidence about both the 14 May 2019 mediation with the Nanda group representatives and the 28 February 2019 mediation with the Wajarri Yamatji group representatives.

183 In relation to the 14 May 2019 mediation with the Nanda group representatives he deposes (at [30]-[31]):

The Mullewa Wadjari claimants who attended the mediation were Glenda Jackamarra, Charmaine Green, Raymond Merritt and me. The following family groups of the Mullewa Wadjari claim were not represented at the mediation: the Comeagain family, the Collins family, the Flanagan family, the Jones family, the Joseph family, and the Collard family.

**The people who attended the 14 May 2019 mediation were the only individuals who could be contacted and were available to travel to attend the mediation at the time**.

(Emphasis added.)

184 Mr Papertalk gives, word for word, precisely the same evidence (at [47]) as the paragraph in bold in relation to the 28 February 2019 mediation with the Wajarri Yamatji group representatives.

185 As I have noted, there was no cross-examination of this account, especially the potential inconsistency between the last paragraph of his evidence and what those participating in the mediation were told by the Court, and what I infer would have been told by their own lawyers (assuming those lawyers were acting consistently with their professional obligations). This evidence also does not explain why it happened to be the case that the same four people (Mr Papertalk, Ms Green, Ms Jackamarra and Mr Merritt) were the “only individuals who could be contacted” for the May 2019 mediation, three months after the February mediation. I do not consider that explanation, given by Mr Papertalk and Ms Jackamarra, is a credible explanation in relation to how certain individuals came to attended each of the mediations.

186 Notably, Mr Papertalk gives no evidence at all about the in-principle agreement he signed on 28 February 2019. He does not even mention it in his evidence. He does not disclaim signing it, but he also gives no explanation of what he understood he was doing in signing it, and what responsibilities he understood it placed on him, especially as a lead member of the applicant. His evidence implicitly ignores that in-principle agreement. I find it is more likely than not that he regarded his signing of that in-principle agreement as having no or no real effect on what the Mullewa Wadjari applicant, and Mullewa Wadjari claim group members might do in their decision making about the overlap area. It is otherwise inconceivable that, in evidence obviously carefully and fully prepared, with legal advice and assistance, Mr Papertalk could omit any reference to such a significant fact.

### Conclusion on enforceable agreement

187 To place as much weight, as senior counsel for the Mullewa Wadjari applicant did, on the references in various communications and documents to matters being “subject to instructions” is, with respect, by no means conclusive. Inclusion of a phrase such as that does not absolve legal representatives, and in a native title situation does not absolve those who constitute an applicant or represent a claim group, from being clear and transparent about whether or not a resolution to a dispute has been reached, or is to be honoured.

188 If there was no real intention in the members of the Mullewa Wadjari applicant, or persons who purported to be claim group representatives such as Ms Green, to make an agreement to resolve both overlaps, then inserting the phrase “subject to instructions” in communications and documents which otherwise purported to record an agreed resolution, was misleading and inappropriate. The correct, and appropriate, approach would have been to say, clearly, that those Mullewa Wadjari individuals could do nothing more than discuss a *proposal* and then take that proposal to the entire Mullewa Wadjari claim group. Or, as the Mullewa Wadjari applicant’s evidence now reveals, the most honest and transparent approach would have been to say there could be no agreement to withdraw from the overlap area on the terms proposed.

189 I infer from the evidence that if the position of the Mullewa Wadjari applicant and other purported Mullewa Wadjari representatives had been clearly and frankly communicated to the Nanda and the Wajarri Yamatji applicants and their legal representatives, neither the Nanda applicant nor the Wajarri Yamatji applicant would have taken the steps they did. Nor would the Court, and particularly Judicial Registrar Daniel, have expended more than three years of time-consuming, resource-intensive and personally taxing efforts at mediation when there was, in fact, no real intention to resolve the dispute by any form of compromise on the part of the Mullewa Wadjari applicant or other purported representatives.

190 Nevertheless, for the reasons I have explained I conclude there never was an enforceable agreement between the Mullewa Wadjari and Nanda applicants, nor between the Mullewa Wadjari and Wajarri Yamatji applicants. No relief can be granted on this basis.

## Abuse of process

191 The next question is whether it is an abuse of process to permit the Mullewa Wadjari claimant application to continue in its present form, so as to permit the Mullewa Wadjari applicant to agitate a claim to each overlap area as if three years of negotiations had not occurred. The Court having found there was no enforceable agreement, can it be said that the continuation of a claim by the Mullewa Wadjari applicant over the two overlap areas is an abuse of the process of this Court? At the outset, I accept the State’s submission that the Court does not need to find there was a binding or enforceable agreement that was subsequently repudiated in order to find an abuse of process.

192 Before explaining my answer to this question, it is necessary to address two specific submissions put on behalf of the Mullewa Wadjari applicant, which could have informed my consideration of this issue, but which I do not accept. The first is the asserted invalidity of the orders made by Judicial Registrar Daniel in February and May 2019.

193 The second is the Mullewa Wadjari applicant’s contention about those who attended the mediation having “no authority” to make an agreement on behalf of the Mullewa Wadjari claim group. Although this might be seen as more naturally fitting within the issue whether there is an enforceable agreement, since I have found there was no enforceable agreement, I consider this contention here because it is capable of having a bearing on whether there has been an abuse of process.

### The Registrar’s February and March 2021 orders

194 As I understood it, the purpose of this argument was first, to support the contention there had been no enforceable agreement made, and second, to resist the allegation that the Mullewa Wadjari applicant was in default of those orders and should either be compelled to comply with them, or that their non-compliance was grounds for an order under s 37P(2) of the *Federal Court of Australia Act 1976* (Cth) to dismiss the Mullewa Wadjari proceeding.

195 Judicial Registrar Daniel made orders on 25 February 2021 in relation to the Nanda overlap and 22 March 2021 in relation to the Wajarri Yamatji overlap, the time for compliance with each order subsequently extended by orders dated 28 May 2021.

196 The Mullewa Wadjari applicant contended the Registrar’s orders:

purport to oblige MW to apply to the court for the withdrawal or dismissal of part of the MW claim over the respective overlap areas

197 It contended the substance of the order is to compel the Mullewa Wadjari applicant to take a step (withdrawal and/or amendment of a s 61 claimant application) which can only be taken after the Court has exercised its “supervisory” power in s 87 of the NTA, where all the preconditions in s 87 are satisfied. That power, the Mullewa Wadjari applicant contend, is not exercisable by a Registrar.

198 I do not accept the Mullewa Wadjari applicant’s submissions. These orders were not purporting to compel an outcome pursuant to s 87 of the NTA without the agreement of the Mullewa Wadjari applicant; that is a distorted way to characterise them.

199 The two orders were made in a context where, objectively, and subjectively insofar as the Nanda and Wajarri Yamatji applicants, the State and Judicial Registrar Daniel were concerned, the Mullewa Wadjari applicant appeared to be proceeding down the path of an agreement to pull its native title claim back out of the two overlapped areas, provided Angelina was added as apical ancestor on the Wajarri Yamatji #1 claim and the Wajarri Yamatji #7 claim and provided there was an inter-Indigenous agreement reached with the Nanda applicant about use by Mullewa Wadjari people of the overlap area for specified purposes. I have found both the other groups relied on this being the Mullewa Wadjari applicant’s position. Before the February and March 2021 orders, there was no conduct, or representations by or behalf of the Mullewa Wadjari applicant, or the Mullewa Wadjari claim group, to disabuse the other parties or Judicial Registrar Daniel of this position.

200 All the orders did was set a timeline for the agreed steps to be taken, in the context of some considerable delay on behalf of the Mullewa Wadjari applicant. Indeed, there was no response or communication at all from the Mullewa Wadjari applicant and it was the Court that had to communicate on 3 May 2021, to ask why the orders had not been complied with.

201 If, in the days or weeks after those orders, the Mullewa Wadjari applicant considered those orders were requiring it to do something it had not agreed to do, or that there was some impediment to compliance, or the orders were made without power, it could have sought that the orders be vacated, and explained why. Instead, all the Mullewa Wadjari applicant did was ask for an extension of time to the orders. Again, the Nanda and Wajarri Yamatji parties, and Judicial Registrar Daniel, were entitled to rely on this conduct as indicating a continuing intention to take the steps the parties had agreed would be taken. There was never any formal suggestion from the Mullewa Wadjari applicant to Judicial Registrar Daniel before or after she made those orders, that they were compelling the Mullewa Wadjari applicant to take steps it had not agreed to take, or that there was no power to make such orders. Further, after the first order was made in February 2021, the Mullewa Wadjari applicant did not then, a month later when the second order was made, make a submission to Judicial Registrar Daniel, or bring any interlocutory application before the Court, that such an order would compel the Mullewa Wadjari applicant to take a step it had not agreed to take, or was without power and contrary to s 87 of the NTA.

202 While those orders were made on Judicial Registrar Daniel’s own motion, a Registrar has power to make own motion orders: see Federal Court Rules r 1.40, Sch 2 Pt 3.7 item 99. The orders were nothing more than orders fixing time: Federal Court Rules r 1.38, Sch 2 Pt 3.7 item 96.

### The Mullewa Wadjari applicant’s ‘lack of authority’ argument

203 This contention relies on the evidence given in the affidavits of the Mullewa Wadjari applicant’s three witnesses about the authorisation of the members of the Mullewa Wadjari applicant in 2006. There is said to have been a “selection process” so that the Mullewa Wadjari applicant comprised “someone from each family group comprising the Mullewa Wadjari claim group”.

204 The Mullewa Wadjari applicant’s written submissions then contend (at [12]):

The effect of the selection process was to limit the authority of the named applicants such that decisions concerning the Application (including as to the making of any agreement to relinquish MW’s claim over a particular area included in it) could only validly be made where the nominated representative of each family group participated in the decision-making process. The corollary of that limitation was that any decision in which the representatives of one or more family groups were not included would not be authorised.

205 The submissions go on to contend that, at both the Nanda and Wajarri Yamatji overlap mediations, the Mullewa Wadjari people who attended were “only those who could be contacted and were available at that time to travel to attend the hearing”.

206 I have found there was no enforceable agreement between the Mullewa Wadjari and Wajarri Yamatji applicants, nor between the Mullewa Wadjari and Nanda applicants. To that extent, the Mullewa Wadjari applicant’s submissions about “authority” to *conclude* an agreement *at* mediation may be put to one side. That is not to say I accept the Mullewa Wadjari applicant’s submissions at a more general level. To the contrary.

207 The assertion that the Mullewa Wadjari people who attended the mediation were “only those who could be contacted and were available at that time to travel to attend the hearing” should be rejected. I reject the evidence of the Mullewa Wadjari applicant’s witnesses to this effect. The fact that the same four people went to both mediations (together with an extra two people who attended the February 2019 mediation) suggests those four individuals considered they could exercise agreement making authority on behalf of the wider claim group. Mr Papertalk is experienced in native title processes. His own evidence shows he appears to have almost single-handedly organised the 2006 authorisation meeting, its agenda, and driven how the meeting was conducted. Ahead of these mediations, the communications from the Court were very clear about the need for people to attend who had authority to settle the subject matter of the mediation. That is the most basic of rules for a mediation. Members of the Mullewa Wadjari applicant, and the other claim group representatives who attended each mediation, were legally represented by experienced native title lawyers. I find it is more likely than not that these basic rules were explained to them. It is inconceivable they would not have been, because that would be a significant dereliction of professional duties, which should have been the subject of evidence, by way of admissions, on this show cause hearing if such a dereliction of professional duty had occurred. I am satisfied Judicial Registrar Daniel also explained this aspect of the mediation process to the participants in writing prior to the day of the mediation (see my summary at [21]-[23] above).

208 Being experienced practitioners, I find the Mullewa Wadjari applicant’s lawyers also well understood this baseline proposition. If they had any doubts about the “authority” of their own clients to agree to a resolution of the overlap disputes, their professional ethical obligations would have obliged them to inform the other parties and their legal representatives, and to inform Judicial Registrar Daniel. Good faith negotiations required no less. I find if that position had been conveyed, it is more likely than not that the mediations would not have gone ahead.

209 Those Mullewa Wadjari applicant members and other claim group representatives who attended each of the Nanda and Wajarri Yamatji overlap mediations manifested ostensible authority to make an agreement on behalf of the Mullewa Wadjari applicant and claim group, especially in relation to the Wajarri Yamatji negotiation when they signed an in-principle agreement. There is no evidence from any other Mullewa Wadjari claim group member that those individuals did not have authority to attend the mediation and agree outcomes on behalf of the claim group. There is no evidence any of the individuals refused to sign, or expressed any concerns about signing the in principle agreement with Wajarri Yamatji, because they had no authority to do so.

210 While, as I have found earlier, it was made clear that each agreement needed to be endorsed by *each* claim group at a meeting (including the Nanda and Wajarri Yamatji groups), the “authority” in a mediation situation is the capacity to make a commitment on behalf of the native title applicant and claim group, being a commitment those individuals present have an objective and rational basis for considering is an outcome the claim group will accept, and which those individuals are prepared to take all reasonable steps to encourage the group to accept, in line with the in-principle commitment made. Otherwise, “agreement” or “resolution” at a native title mediation is worthless.

211 Taken at face value, these submissions on behalf of the Mullewa Wadjari applicant are mischievous, and have the capacity to undermine the conduct of all mediations under the NTA, which is a position especially deserving of criticism given the central place of mediation in the legislative scheme. The inclusion of the good faith provisions in relation to mediation makes it clear, as the Full Court in *Widjabul* explained, that the legislative scheme intends that mediations should be capable of resulting in outcomes all parties (and the Court) can rely upon, and that all parties (and the Court) can take steps in reliance upon. That can only occur if an approach of the kind I have set out at [207]-[210] is brought to the conduct of the mediation.

212 The real difficulty for the Mullewa Wadjari applicant’s contentions about “authority” is that the negotiations continued well after the actual mediations – both in further mediations, and outside them, and by correspondence. In the Nanda negotiations, draft agreements were exchanged until legal representatives of the Mullewa Wadjari applicant and the Mullewa Wadjari claim group proffered a version they represented their clients were content with. In relation to Wajarri Yamatji there was considerable correspondence, as well as other steps such as the 16 March 2021 report to the Court. In all these steps, communications and reports, I infer the Mullewa Wadjari applicant’s legal representatives were acting on instructions from the members of the Mullewa Wadjari applicant as a whole, and not (improperly) simply on the instructions of a single individual such as Mr Papertalk. And in turn, on the Mullewa Wadjari applicant’s own arguments, the members of the Mullewa Wadjari applicant must have been acting on the basis that the family groups agreed with what was being proposed on their behalf. Otherwise, the conduct of the Mullewa Wadjari applicant’s legal representatives, and the Mullewa Wadjari applicant, would have been inconsistent with its own evidence.

213 For clarity, I also do not accept the Mullewa Wadjari applicant’s contention at [17] of its submissions that the terms of s 62A of the NTA (“deal with all matters arising under [the] Act in relation to the application”) should not be construed as extending to an authority in a native title applicant to discontinue a s 61 claim. Subject to any express limitations placed on the authority of the applicant by the claim group (see NTA s 62A(2) and s 251BA), the proper construction of s 62A may well include that step. However, that is not a matter which need be finally determined on this application.

### My conclusions on abuse of process

214 The centrality of mediation to the statutory scheme in the NTA is apparent from the text of the Act itself, in particular the mandatory terms of s 86B(1). The extrinsic material to the 2009 amendments also emphasised its importance. Relevant extracts of that material are reproduced in *Widjabul* at [32]. In *Widjabul* at [36]-[37], the Full Court explained how the duty to act in good faith in the conduct of a mediation was “beyond argument”:

Given the terms of s 94E(5) of the NT Act, the existence of a duty on the part of each party and its representatives to act in good faith in relation to the conduct of a mediation should be beyond argument. Mansfield J had no hesitation in inferring such a duty from the provisions of the NT Act without apparent regard to the express terms of s 94E(5): *Brown v South Australia* (2010) 189 FCR 540 at [38] (*Brown*). His Honour also identified one circumstance in which there would be a breach of the duty to act in good faith in the conduct of a mediation (or, as Mansfield J framed it without regard to the terms of s 94E(5), to negotiate in good faith). At [38] he said:

If there is no bona fide dispute about issues concerning a proposed consent determination, it would be a breach of any obligation to negotiate in good faith to use the carrot of consent to the determination as leverage to secure agreement on other matters such as a sustainable benefits term.

We agree with this observation. In *Charles v Sheffıeld Resources Ltd* (2017) 257 FCR 29 at [94], in the context of the right to negotiate procedures in Pt 2 of the NT Act, White J said:

[94] Negotiating in good faith has been said to involve acting honestly, without ulterior motive or purpose, with an open mind, willingness to listen, willingness to compromise, an active and open participation of the other parties, and the making of every reasonable effort to reach an agreement: *Brownley v Western Australia* [1999] FCA 1139, (1999) 95 FCR 152 at [20], [23]-[24]; *Walley v Western Australia* [1999] FCA 3, (1999) 87 FCR 565 at [7]. Delay, obfuscation, intransigence and pettifoggery have been said to be indicia of a want of good faith: *Brownley* at [25]. Negotiation in good faith is not confined to the making of a reasonable offer: *Walley* at [15].

[95] The conduct of the negotiating parties is to be assessed objectively.

215 On this show cause hearing, the Court is not determining, in isolation, whether the Mullewa Wadjari applicant, or those individuals who represented the Mullewa Wadjari claim group at the mediations (or both), failed to act in good faith. Nevertheless, the relationships between first, the prominence given by the NTA to mediation and to negotiated outcomes, second, the statutory obligation to act in good faith and third, the concept of abuse of process must be recognised. That was, in my respectful opinion, one of the points being made by the Full Court in *Widjabul* at [39]-[42], including by explaining what kinds of orders the Court could make to remedy conduct of this nature:

To the extent the Attorney General also denied the existence of any remedy against a party for breach of the duty to act in good faith in the conduct of a mediation, we also disagree. It is a fundamental principle that a court has control of its own processes. The doctrine of abuse of process is founded on the same fundamental principle. That doctrine, and the remedies available to a court to prevent the abuse of process, provide a useful analogue for the considerations that might inform an evaluation of whether a party to a mediation is not conducting itself in good faith and the remedies that might be available to redress the breach of the duty imposed by s 94E(5).

The touchstones of an abuse of process are use of the court’s procedures in a way which would be unjustifiably oppressive or bring the administration of justice into disrepute: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25]. As the High Court explained in *UBS AG v Tyne* (2018) 265 CLR 77 at [1]:

The varied circumstances in which the use of the court’s processes will amount to an abuse, notwithstanding that the use is consistent with the literal application of its rules, do not lend themselves to exhaustive statement. Either of two conditions enlivens the power: where the use of the court’s procedures occasions unjustifiable oppression to a party, or where the use serves to bring the administration of justice into disrepute.

As with the doctrine of abuse of process, it is not possible to attempt to identify the circumstances which might give rise to a breach of the duty to act in good faith in the conduct of a mediation of a native title determination application. Nor is it possible to identify the orders which a court may make to remedy the breach. The appropriate remedy will be dictated by the particular circumstances constituting the breach of the duty. What is apparent, in our view, is that nothing in the NT Act suggests that because the mediator may make a report that a party is not acting in good faith in the conduct of a mediation, the power of the Court to control its own processes by whichever remedy is best tailored to suit the circumstances is excluded or in any way curtailed.

Accordingly, we reject the Attorney General’s submissions to the extent they suggested that there is no duty on the part of a party (and its legal representatives) to act in good faith in the conduct of a mediation. We also reject the Attorney General’s submissions to the extent they suggested that there was no duty, breach of which could give rise to any consequence other than the making of a report under ss 94P or 94Q. A party in breach of the duty to act in good faith in the conduct of a mediation is exposed to any order that has the effect of redressing or ameliorating the effect of the breach. Powers available to the Court include:

(1) an order that a person cease to be a party: s 84(8) of the NT Act;

(2) an order for costs tailored to the circumstances of the case, including an order for security for costs: s 85A(1) of the NT Act;

(3) an order requiring oppressive material to be removed from the Court’s file or struck out of a document: r 6.01 of the *Federal Court Rules 2011* (Cth) (the **FCR**);

(4) an order striking out a pleading: r 16.21 of the FCR;

(5) an order for summary judgment: r 26.01 of the FCR; and

(6) in an appropriate case an order for an injunction, be it mandatory or prohibitory: s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **Court Act**).

216 It is clear from the evidence that the Mullewa Wadjari applicant now seeks to contend the Mullewa Wadjari People have native title in both the area overlapping with the Nanda claim and the area overlapping with the Wajarri Yamatji claim. At the hearing, senior counsel for the Mullewa Wadjari appeared at first to suggest the question of the overlaps could go back into mediation. As I responded to senior counsel, it is inherently unlikely that either the Nanda applicant or the Wajarri Yamatji applicant, or for that matter the State, would have enough trust in the Mullewa Wadjari applicant or in Mullewa Wadjari claim group members to re-commence any mediation process. Further, I do not see how Judicial Registrar Daniel could be asked to do so either, given that three years of her efforts have come to naught because of the position of the Mullewa Wadjari applicant conveyed after 14 June 2021. Nor, unless and until there is some kind of acceptance or rejection of the s 94P report, could any other Registrar of the Court reasonably be asked to engage with the Mullewa Wadjari applicant in a mediation setting.

217 Responsibility for this conduct falls on the Mullewa Wadjari applicant. A native title applicant bears responsibility for the conduct of a native title application, both expressly by s 62A of the NTA, and implicitly in the structure and content of the legislative scheme more generally. I consider the conduct of the Mullewa Wadjari applicant has been unjustifiably oppressive towards the Nanda and Wajarri Yamatji claim groups and their respective applicants. The unjustifiable oppression includes:

(a) attendance in good faith at multiple mediations over more than three years, on the represented basis that the Mullewa Wadjari individuals who attended had authority to, and were prepared to, compromise the overlap claims;

(b) all the preparation, consultation, meetings and discussion with claim group members and with lawyers which goes with these mediations;

(c) the holding up of the resolution of the Wajarri Yamatji claim, and of the Nanda claim, to the overlap areas for more than three years;

(d) the considerable efforts (by claim group members, YMAC, anthropologists and lawyers) which were deployed to the process of adding Angelina as an apical ancestor as a way of ensuring that those who identified as Mullewa Wadjari People but also had her as an apical ancestor could be recognised as native title holders, but in a Wajarri Yamatji determination;

(e) the considerable efforts (by claim group members, YMAC, and lawyers) to reach an inter-Indigenous agreement between the Nanda and Mullewa Wadjari applicants, which involved considerable compromise by the Nanda applicant about how at least some of their native title rights might be exercised; and

(f) the prospect that – if no further or other orders are made – Nanda and Wajarri Yamatji claim group members must face going to trial on the overlap claims, with elders having either passed away or become more infirm, with the struggles to find and be given funding for such trials, and having to endure what is a stressful and anxious process, drawn out probably over several more years.

218 I have rejected the Mullewa Wadjari applicant’s contention, and evidence from its three witnesses, that those individuals attended the mediations because they were the “only ones who could be contacted and were available” to attend. The fact that the same four people attended mediations three months apart is evidence of a conscious choice about who was to attend. As I have found elsewhere, no Mullewa Wadjari attendee, nor their lawyer, suggested to the other parties or the mediator that, contrary to the Court’s clear instructions and basic mediation principles, those individuals were a haphazard and somewhat accidentally selected group, with no authority to reach a resolution (or even propose terms of any resolution). This is relevant to my findings about abuse of process because I find there was a deliberate representation to the Nanda and Wajarri Yamatji, to Judicial Registrar Daniel and to the Court, as well as indirectly to the State who had placed reliance on the proper conduct of the mediation process, that these individuals had authority reach in-principle agreements on behalf of their claim group, which were capable of being implemented and which those individuals would support and encourage the Mullewa Wadjari claim group to honour. The evidence and submissions now presented on behalf of the Mullewa Wadjari applicant is that this was not the case. The very proffering of that evidence and that submission, more than three years later, is capable of constituting an abuse of the mediation processes of the Court.

219 There are tangible wider effects, which can also be described as oppressive. The waste of the Court’s finite mediation resources for over three years. The considerable public resources which might now need to be expended on a trial about the overlaps, which will include on-country aspects that are highly cost and resource intensive for the Court and for the parties. The extraordinary amount of additional public funds to be expended for three claim groups in resourcing such a trial, in terms of legal, logistical and expert assistance. The prospect that public funding may not be available in the foreseeable future or that any trial may have to be put off into future financial years, because this funding is limited and must be carefully allocated. The delays and continued uncertainties for all third parties with proprietary interests in the overlap areas, including the State. The expenditure of considerable additional public resources by the State in a trial.

220 These are very significant consequences. Mullewa Wadjari claim group members may not feel them directly because this is a jurisdiction where neither members of a native title applicant, nor claim group members, pay for their own legal and trial costs, and do not face the prospect of costs being awarded against them. Those beneficial circumstances should not obscure the magnitude of the costs consequences for the administration of justice, and for the expenditure of public resources.

221 All this because of a belated announcement, in June 2021, of a different position from that represented to other parties and to the Court for the three years prior to this, but a position which I have found appears always to have been held by at least the three influential claim group members who gave evidence.

222 The Wajarri Yamatji and Nanda applicants submit:

For the court now to effectively sanction the MW Applicant resiling from commitments generated by a lengthy, court-authorised mediation would be to downgrade a process to which the NTA gives some primacy and to bring the administration of justice into disrepute.

223 I agree with that submission. As well as unjustifiable oppression, I consider allowing the Mullewa Wadjari applicant and the claim group it represents to set the last three years at naught and to contest each of the overlaps with the Nanda and Wajarri Yamatji claims brings the administration of justice into disrepute. It allows the Mullewa Wadjari applicant, as the responsible statutory entity, to thumb its nose at the mediation process. It may encourage a lack of good faith to be applied to that process. It appears to sanction a lack of candour by a party. It appears to sanction a lack of candour by legal representatives, and does not encourage legal representatives to ensure that their actions do not mislead those with whom they are negotiating. It fails to hold those who purport to represent a claim group to any responsibility for their conduct and suggests that a native title applicant, and its claim group, can say what they like, encourage reliance by their neighbours on a certain position and then retreat from it. It threatens the fabric of how this Court conducts its native title mediation processes, and must be viewed as a serious threat to this critical aspect of the conduct of native title claims.

224 The challenging question is: what should be done, in the face of what I am comfortably satisfied should be characterised as an abuse of process? What remedy is fair, and justified, and might ensure the abuse of process does not continue into the future? It must be a remedy which does justice between all the parties, recalling that, collectively and communally, the individual members of each claim group are somewhat removed from what has occurred, yet they are, collectively and communally, the putative native title holders. The remedy must also recognise the State’s role, on behalf of the wider community, in ensuring that native title is recognised where it should be recognised, and that there is a credible basis for recognition of a specific group or groups.

225 The Wajarri Yamatji and Nanda applicants contend that the appropriate remedy is dismissal of the Mullewa Wadjari claim over the overlap areas, being the alleged agreed outcome of the negotiations. I have found that is not, and is likely never to have been, an outcome that at least those individuals purporting to represent the Mullewa Wadjari applicant and claim group were prepared to encourage the wider claim group to endorse. Yet the other side of this bargain has been implemented by the two other parties to the negotiations, while the Mullewa Wadjari applicant stood by and allowed that to occur, all the time aware of the unlikelihood that the Mullewa Wadjari applicant would carry through on withdrawing from the overlap areas. As Mr Neal QC recognised in oral argument, the identification of Angelina as an apical ancestor on the Wajarri Yamatji determinations has been accepted by both the Court and the State as having a credible basis, and should not be undone. She is there as a Wajarri Yamatji person, not a Mullewa Wadjari person, and the Mullewa Wadjari applicant and claim group are as bound by that outcome as anyone else. With two parties having honoured their side of the bargain, and the other having purported to discard its side, what is a just remedy?

226 I do not consider dismissal of the Mullewa Wadjari application insofar as it overlaps with the Nanda and Wajarri Yamatji applications would be an order which would do justice between the parties, even given the abuse of process by the Mullewa Wadjari applicant. That is to inflict on a wider group of Mullewa Wadjari claim group, and their descendants throughout generations, a consequence for actions they were neither involved in, nor sanctioned. It would also involve the Court imposing an outcome about who are the native title holders for the area, against the asserted position of at least some prominent members of the Mullewa Wadjari claim group who now allege they hold native title in those overlap areas. The same reasoning means that no remedy such as a stay would be appropriate.

227 Although the evidence on this application could be understood as suggesting the Mullewa Wadjari applicant wishes to go to trial on the overlaps on this allegation of native title, in reality that is only the evidence of three Mullewa Wadjari individuals. Those three, and Mr Papertalk in particular, had personal interests in defending their own conduct to this point, interests which might well be said in some way to conflict with the responsibilities of two of them as purported statutory representatives of the Mullewa Wadjari claim group.

228 I am not prepared to accept what those three individuals have said defensively in the context of this show cause hearing as the final position of the Mullewa Wadjari claim group on the mediated outcomes with the Nanda and Wajarri Yamatji parties.

229 If the mediation outcomes are to be honoured, it is the members of the Mullewa Wadjari claim group as a whole who must decide to honour them, and they must do so on a properly informed basis, in a manner which reflects the communal nature of the rights held. If the mediation outcomes are *not* to be honoured, the same approach should be applied. My preliminary view is that orders which are designed to ascertain which path the Mullewa Wadjari claim group as a whole wishes to take may be an appropriate remedy for the abuse of process I have found to have been committed by the Mullewa Wadjari applicant.

## Possible orders

230 I set out below a framework of the orders which I am presently inclined to consider may achieve that objective. I will hear the parties’ submissions on this framework, and on any alternative proposed orders, in due course after the parties have had an opportunity to consider these reasons.

231 The Mullewa Wadjari applicant should be ordered to conduct a meeting of the Mullewa Wadjari claim group, and in preparation for that meeting to circulate and distribute the summary of these reasons for judgment which the Court has prepared. It should be ordered to post that summary on relevant websites and social media sites, and ask YMAC to post it on its website. The purpose of the further meeting will be to invite the Mullewa Wadjari claim group, as a whole, to consider whether, having seen what the Court has said, they are prepared to honour the position their representatives encouraged the Nanda and Wajarri Yamatji groups to rely upon and to act in accordance with, and are prepared to discontinue any Mullewa Wadjari claim in the two overlap areas.

232 An independent facilitator should conduct that meeting. It seems to me that it may be wise, even if not the subject of an order, that counsel and instructing solicitors who have been involved to this point on behalf of the Mullewa Wadjari are not involved in the conduct of the meeting.

233 If they are prepared to do so, the Court could direct a lawyer or lawyers for the State to attend that meeting and to provide such assistance as they consider appropriate. Of course, lawyers and others from YMAC may also seek to assist, as the responsible representative body for the region.

234 All members of the Mullewa Wadjari applicant should be directed to attend the meeting. A majority of members of the Mullewa Wadjari applicant appear to have been absent from almost all of the key events which have produced this situation. That is a failure of their responsibilities as members of the Mullewa Wadjari applicant.

235 It seems likely to be the case that YMAC will need to provide funds for the conduct of the meeting, and the Court should hear YMAC’s position on providing such funding, and how if at all the funds might be kept to an absolute minimum.

236 A deadline by which the meeting must be held should be imposed. The Court could well consider the holding of this meeting as the central evidence that the Mullewa Wadjari claim group wishes to prosecute its native title application over the overlapping areas with the Nanda and Wajarri Yamatji claims, either by honouring the mediation outcome, or by rejecting it once and for all and seeking to go to trial. If the meeting is not held by the deadline, the Court might treat that failure as a failure to prosecute the Mullewa Wadjari application in the overlap areas and it might dismiss the Mullewa Wadjari application insofar as it overlaps with the Nanda and Wajarri Yamatji claims on the basis of want of prosecution.

237 If the meeting is held by the deadline, then after the meeting the Mullewa Wadjari applicant could be directed to report back to the Court, in writing and signed by all members of the Mullewa Wadjari applicant, ahead of a case management hearing on a date to be fixed. The report should inform the Court whether, as a whole, the Mullewa Wadjari claim group are prepared to honour the mediation outcomes reached with the Nanda and Wajarri Yamatji parties, or are not prepared to do so. Meeting resolutions should be attached so that the Court can see how many people attended, and what resolutions were proposed and voted on.

238 If the Mullewa Wadjari claim group as a whole is prepared to honour the mediation outcomes, the Court will hear all parties on next steps. If it is not, then the question of who holds native title in the overlap areas will need to be set down for trial. The Court may consider whether there should be a sum paid by the Mullewa Wadjari applicant as security for the costs of the trial. The conduct of the trial should be subject to tight deadlines, and to strict measures to keep costs to an absolute minimum, including consideration of whether there should be limits on the number of witnesses, and how any expert evidence might be contained. Consideration might be given to whether there should be self-executing orders dismissing the proceeding for want of prosecution if deadlines are not complied with by the Mullewa Wadjari applicant.

239 If the Mullewa Wadjari claim group collectively decide not to honour the mediation outcomes, my present view is that there is a proper basis for the Court to consider whether there should be compensation (by way of costs orders) for the tremendous amount of legal time and resources the Wajarri Yamatji and Nanda parties have expended, in reliance on the actions of the Mullewa Wadjari applicant, but which would have been thrown away. Whether or not the State seeks to be included in any compensation for costs should be addressed. It might be perceived as unjust, having found an abuse of process, for the Court not to order some compensation by way of legal costs. There could be a question whether, to ensure responsibility is taken by those who are on the evidence responsible for the abuse of process, costs orders should be against those people present at each of the mediations, and/or each of the members of the Mullewa Wadjari applicant who are responsible for instructions given to their lawyers. It is these individuals who bear the responsibility for not being candid over a period of three years with their neighbours, and/or for treating the Court’s mediation process as something they could simply disregard. To be clear, there is no suggestion YMAC should incur any liability for those costs.

# CONCLUSION

240 There is no pleasure in a set of reasons containing findings of the kind made here. What has happened in these proceedings reflects poorly on a number of people. What has happened, in terms of the faith placed by the Wajarri Yamatji People and the Nanda People, in the Court’s mediation processes, and in their neighbours, is to be regretted. There is a real risk that what has happened might cause other claim groups to mistrust the Court’s mediation processes. That is why the orders which are ultimately made at this point, may have significance over and above their effects as between the parties.

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| I certify that the preceding two hundred and forty (240) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer. |

Associate:

Dated: 16 March 2022

# ANNEXURE A – MAP OF THE NANDA, MULLEWA WADJARI AND WAJARRI YAMATJI CLAIMS

