FEDERAL COURT OF AUSTRALIA

Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia [2017] FCA 803

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| File number: | WAD 6005 of 2003 |
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| Judge: | **RARES J** |
|  |  |
| Date of judgment: | 20 July 2017 |
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| Catchwords: | **NATIVE TITLE** – *Native Title Act 1993* (Cth) – application under s 225 for determination of native title of land or waters in claimed area – where applicant claims right to control access to or exclude others from claimed area equivalent to right of exclusive possession – evidence of practice of non-claim group member, or “stranger”, needing to seek permission from claim group elder before entering or carrying out activities on claimed area – whether current practice substantially reflects traditional laws and customs or is a mere matter of courtesy or respect – where claim group’s land redolent with spirituality – where traditional laws and customs made access without permission punishable by both death and spiritual harm – where current traditional laws and customs only recognise spiritual harm as consequence of access without permission – whether changes and or adaptations in observance and acknowledgement of traditional laws and customs amount to substantially continuous observance since sovereignty  **NATIVE TITLE** – *Native Title Act 1993* (Cth) – s 47B(1)(b)(ii) – extinguishment of native title – where miscellaneous licence and exploration licences granted under *Mining Act 1978* (WA) over certain land and waters in claimed area – whether any of licences is “permission or authority” under which the whole or any part of the licensed land or waters is to be used “for a particular purpose”  **NATIVE TITLE** – *Native Title Act 1993* (Cth) – ss 24OA and 28 – where State originally gave applicant notice of proposed grant of exploration licence under s 29(2) – where State subsequently gave fresh notice under s 29(7) that it considered proposed grant to be act attracting the expedited procedure under s 32 but State failed to give such notice to applicant – licence subsequently granted – whether ss 24OA and 28 rendered licence invalid to the extent it affected native title because of failure of State to give notice to applicant under ss 29(7) and 32 that it considered that the act of the proposed grant attracted expedited procedure  **NATIVE TITLE** – *Native Title Act 1993* (Cth) – ss 47A(1)(c) and 47B(1)(c) – whether one or more members of claim group occupied particular areas in claimed area – meaning of “occupied the area” – where members of claim group visited, but did not reside on, relevant area – whether applicant’s evidence demonstrated assertion of “being established” over areas in issue – whether evidence of activities at one site in relevant area could reasonably be inferred to have amounted to occupation of whole of larger area – whether regular maintenance of spiritual connection to country relevant to finding of occupation  **ESTOPPEL** – abuse of process by relitigation of issue – issue estoppel – *Native Title Act 1993* (Cth) – where applicant claims exclusive native title rights to control access to claimed area adjacent to area over which the Court made prior determination under s 225 that applicant had non-exclusive native title and no right to control access to that other area – whether applicant’s subsequent claim for exclusive native title attempt to relitigate earlier adverse determination and would produce conflicting determinations of native title – whether claim for determination of exclusive native title abuse of process or subject to issue estoppel arising from earlier determination that applicant had only non-exclusive native title rights that did not include a right to control access to its country – whether a determination under s 225 of *Native Title Act* is final – where s 13(1)(b) and (5)(b) enabled revocation or variation of original determination on the ground that “the interests of justice require the variation or revocation of the determination” – whether s 13(1)(b) is statutory exception to general law principles of issue estoppel, abuse of process or res judicata  **EVIDENCE** – *Native Title Act 1993* (Cth) – whether s 86(1) prohibited applicant from tendering or relying on transcript of hearing for earlier determination of native title in order to seek finding contrary to finding in earlier determination – whether Court can receive or use evidence from other proceedings to arrive at finding contrary to what earlier Court had found  **PRACTICE AND PROCEDURE** – amendment of pleadings – whether leave be granted to respondents to amend, shortly before trial, statement of contentions to raise new contention that applicant is estopped from, or would be engaging in abuse of process by, seeking determination under s 225 of *Native Title Act 1993* (Cth) that it has exclusive right to control access to land and waters – whether in interests of justice to grant leave to amend – where respondents had not previously raised abuse of process or issue estoppel as issue in dispute |
|  |  |
| Legislation: | *Constitution* s 75  *Acts Interpretation Act 1901* (Cth) s 13  *Evidence Act 1995* (Cth) ss 8, 9, 63, 91, 140  *Federal Court of Australia Act 1976* (Cth) Pt VB, ss 21, 37M  *Native Title Act 1993* (Cth)Pt 2, Divs 3, 6, Pt 2, Div 3, Subdiv P, ss 3, 4, 10, 11, 13, 24AA, 24OA, 28, 29, 32, 47A, 47B, 55, 56, 57, 61, 66B, 80, 82, 84, 86, 223, 225, 227, 238, 251A, 251B  *Racial Discrimination Act 1975* (Cth)  *Aboriginal Affairs Planning Authority Act 1972* (WA)  *Iron Ore (Robe River) Agreement Act 1964* (WA) Sch 1  *Land Act 1933* (WA) s 33  *Mining Act 1978* (WA) ss 57, 58, 63, 63AA, 66, 91, 94, 94A, 103F, 132  *Mining Regulations 1981* (WA) regs 41, 42B, 97 |
|  |  |
| Cases cited: | *Annetts v McCann* (1990) 170 CLR 596  *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175  *Arnold v National Westminster Bank PLC* [1991] 2 AC 93  *Arnold v Nat-West Bank plc* [1989] Ch 63  *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321  *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345  *Banjima People v State of Western Australia* (2015) 231 FCR 456  *Banjima People v State of Western Australia* *(No 3)* [2014] FCA 201  *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1  *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256  *Blair v Curran* (1939) 62 CLR 464  *Burrell v The Queen* (2008) 238 CLR 218  *Coco v The Queen* (1994) 179 CLR 427  *Dale v Western Australia* (2001) 191 FCR 521  *Daniel v State of Western Australia* [2003] FCA 666  *Daniel v State of Western Australia* (2004) 138 FCR 254  *Daniel v State of Western Australia*) [2005] FCA 536  *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140  *Entick v Carrington* (1765) 2 Wils 275 [95 ER 807]  *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303  *Fejo v Northern Territory of Australia* (1998) 195 CLR 96  *Griffiths v Northern Territory* (2007) 165 FCR 391  *Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365  *Hughes (on behalf of the Eastern Guruma People) v State of Western Australia (No 3)* [2016] FCA 840  *Hughes on behalf of the Guruma People (No 2) v State of Western Australia* [2012] FCA 1267  *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529  *Jacob v State of Western Australia* [2014] FCA 1106  *Johnson v Gore Wood & Co* [2002] 2 AC 1  *Jones v Dunkel* (1959) 101 CLR 298  *Luxton v Vines* (1952) 85 CLR 352  *Mabo v Queensland [No 2]* (1992) 175 CLR 1  *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Moses v Western Australia* (2007) 160 FCR 148  *Narrier v State of Western Australia (No 2)* [2017] FCA 104  *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442  *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232  *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404  *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  *Ridgeway v The Queen* (1995) 184 CLR 19  *Samson on behalf of the Ngarluma People v State of Western Australia* [2015] FCA 1438  *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262  *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699  *State of Western Australia v Brown* (2014) 253 CLR 507  *Tamaya Resources Ltd (In Liq) v Deloitte Touche Tohmatsu* (2016) 332 ALR 199  *The Lardil Peoples v State of Queensland* (2001) 108 FCR 453  *The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45  *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2016] FCA 553  *TJ (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2015] FCA 1358  *TJ v Western Australia* (2015) 242 FCR 283  *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507  *Tottenham Urban District Council v Metropolitan Electric Tramways Ltd* [1913] AC 702  *Tucker (on behalf of the Banjima People) v Western Australia [No 2]* (2015) 328 ALR 637  *Walton v Gardiner* (1993) 177 CLR 378  *Western Australia v Fazeldean (No 2)* (2013) 211 FCR 150  *Western Australia v Ward* (2002) 213 CLR 1  *Wik Peoples v Queensland* (1996) 187 CLR 1  *Wik Peoples v State of Queensland* (1994) 49 FCR 1  *Wintawari Guruma Aboriginal Corporation RNTBC v State of Western Australia* (2015) 238 FCR 428  *Yanner v Eaton* (1999) 201 CLR 351  Brown AR, “Three Tribes of Western Australia” (1913) vol xlii *Journal of the Royal Anthropological Institute* 143  Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (3rd ed, Butterworths, London, 1996) |
|  |  |
| Date of hearing: | 7-13 September 2015, 5-9 and 13-14 September 2016 |
|  |  |
| Date of last submissions: | 14 June 2017 |
|  |  |
| Registry: | Western Australia |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Native Title |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 521 |
|  |  |
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| Solicitor for the Fifth Respondent: | Yamatji Marlpa Aboriginal Corporation |
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| Counsel for the Sixth Respondent: | Mr S Wright |
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| Solicitor for the Sixth Respondent: | Integra Legal |

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| **Table of Corrections** |  |
|  |  |
| 21 August 2017 | In paragraph 3, “before the trial and then adopted” has been replaced with “before the trial. All of those parties, except Yamatji, adopted” |
|  |  |
| 21 August 2017 | In paragraph 3, a final sentence has been added: “Yamatji submitted, but did not dispute any of the matters for which the applicant contended.” |
|  |  |
| 21 August 2017 | In paragraph 48, “dreaming mediation” has been replaced with “dreaming meditation” |
|  |  |
| 21 August 2017 | In paragraph 52, second dot point, “Aboriginies” has been replaced with “Aborigines” |
|  |  |
| 21 August 2017 | In paragraph 79, “a sister” has been replaced with “an aunt” |
|  |  |
| 21 August 2017 | In paragraph 81, “grab a water and blow” has been replaced with “grab a water [sic] and blow” |
|  |  |
| 21 August 2017 | In paragraph 87, “her sister, Lorraine Coppin”, has been replaced with “her daughter, Lorraine Coppin” |
|  |  |
| 21 August 2017 | In paragraph 159, “photography shows” has been replaced with “photography show” |
|  |  |
| 21 August 2017 | In paragraph 241, the two spaces between “said :” have been deleted |
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| 21 August 2017 | In paragraph 262, the word “argum`ent” has been replaced with “argument” |
|  |  |
| 21 August 2017 | In paragraph 327, “seriously comprised” has been replaced with “seriously compromised” |
|  |  |
| 21 August 2017 | In paragraph 380, “finding did negate” has been replaced with “finding did not negate” |
|  |  |
| 21 August 2017 | In paragraph 391, “internal diversion” has been replaced with “internal division” |
|  |  |
| 21 August 2017 | In paragraph 469, “a[]” has been replaced with “[a]” |
|  |  |
| 21 August 2017 | In paragraph 491, “who was an anthropologist working for WMYAC” has been replaced with “who was an independent anthropologist engaged by the parties for the mediation” |

ORDERS

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|  | | WAD 6005 of 2003 |
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| BETWEEN: | WARRIE (FORMERLY TJ) (ON BEHALF OF THE YINDJIBARNDI PEOPLE) AND OTHERS (AS PER THE SCHEDULE)  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA AND OTHERS (AS PER THE SCHEDULE)  First Respondent | |

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| JUDGE: | RARES J |
| DATE OF ORDER: | 20 JULY 2017 |

THE COURT ORDERS THAT:

1. The parties consult and seek to agree and prepare a draft determination of native title for the Court to make under s 225 of the *Native Title Act 1993* (Cth) to give effect to the reasons for judgment delivered today.
2. The proceeding be listed for case management on 17 August 2017 at 11.30am.

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

REASONS FOR JUDGMENT

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RARES J:

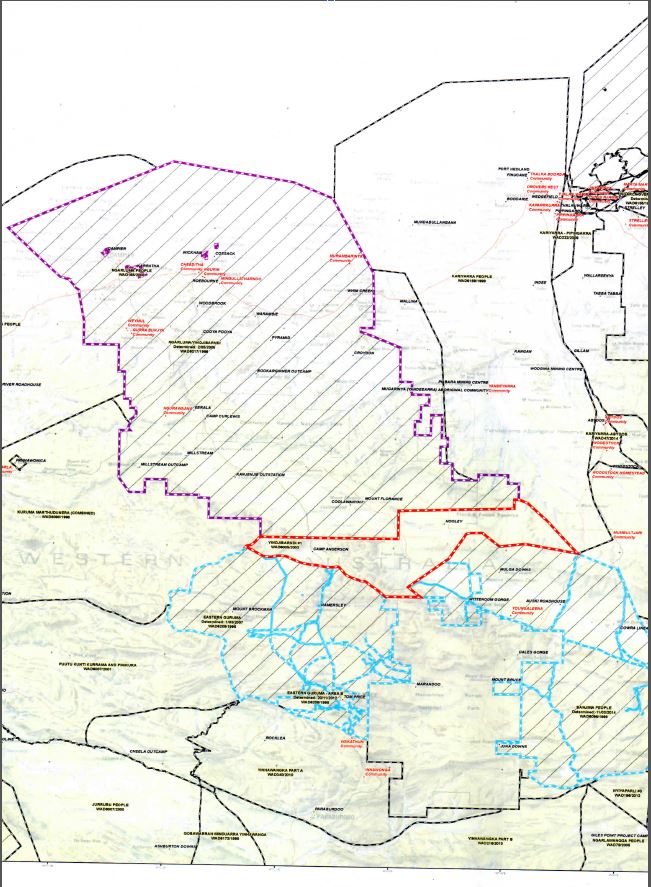
1. The **Yindjibarndi** people inhabited an area of the Pilbara in north-western Western Australia since before British **sovereignty** or European settlement. They lived on Yindjibarndi country until around the middle of last century. On 9 July 2003, this **claimant application** was filed. In it the applicant claims, on behalf of the Yindjibarndi, that it is entitled to a determination of native title under s 225 of the *Native Title Act 1993* (Cth)over a part of that area (**the claimed area**).
2. In *Moses v Western Australia* (2007) 160 FCR 148, the Full Court of this Court made an amended determination of native title in respect of a large area of land to the north (**the Moses land**) of the claimed area (**the 2007 determination**). The Full Court amended the original determination that Nicholson J had made earlier on 2 May 2005 (*Daniel v State of Western Australia*) [2005] FCA 536) (**the 2005 determination**). His Honour ordered there that Yindjibarndi Aboriginal Corporation RNTBC (**YAC**) hold the Yindjibarndi’s native title rights and interests in the Moses land in trust for the Yindjibarndi people. Nicholson J had published his substantive reasons for that determination on 3 July 2003 in which he held, relevantly, that the Yindjibarndi held non-exclusive native title rights over the Moses land: *Daniel v State of Western Australia* [2003] FCA 666.
3. Three sets of respondents took an active role in the trial of this proceeding, namely, the first respondent, the **State** of Western Australia, the second respondent, FMG Pilbara Pty Ltd, Fortescue Metals Group Ltd, and The Pilbara Infrastructure Pty Ltd which are all members of the Fortescue Metals Group (together **FMG**), and the sixth respondent, Phyllis Harris (née Todd), Lindsay Todd and Margaret Todd (I will refer to the three individuals collectively as “**the Todd respondents**”). Companies in the Rio Tinto mining group, **Hamersley Exploration** Pty Ltd and **Robe** River Mining Co Pty Ltd (**the Rio parties**), as well as Hancock Prospecting Pty Ltd and Georgina Hope Rinehart (**the Hancock parties**), and **Yamatji** Marlpa Aboriginal Corporation participated in the settling of the agreed issues in dispute before the trial. All of those parties, except Yamatji, adopted substantively the same position on those issues as the State. Yamatji submitted, but did not dispute any of the matters for which the applicant contended.
4. There are six substantial issues that must be decided, namely:
5. Have the Yindjibarndi proved that they are entitled to a native title right to control access (or exclude others), equivalent to a right of exclusive possession, over so much of the claimed area in which no extinguishing, or partially extinguishing, act has occurred (**the exclusive possession issue**)?
6. Were any of **miscellaneous licence** 47/47 or six **exploration licences**, E47/54, E47/473, E47/474, E47/475, E47/585 or E47/1349, “a permission or authority … under which the whole or any part of the land and waters in the area is to be used … for a particular purpose” within the meaning of s 47B(1)(b)(ii) so as to extinguish native title rights and interests over the land and waters any such licence covered (**the extinguishment issue**)?
7. Have the Yindjibarndi established that one or more members of the claim group occupied, at the time that the claimant application was filed on 9 July 2003, each of the Yandeeyara **Reserve** 31428 (within the meaning of s 47A(1)(c) of the *Native Title Act*)and four parcels of unallocated Crown land (**UCL**) (within the meaning of s 47B(1)(c)) (**the occupation issue**)?
8. If yes to issue 1, are the Yindjibarndi precluded from obtaining a determination of native title that they have a right of such exclusive possession because of the 2005 and 2007 determinations that they had only a right of non-exclusive possession over the Moses land (**the abuse of process issue**)?
9. Are the Todd respondents members of the Yindjibarndi (**the Todd issue**)?
10. To what other native title rights and interests are the Yindjibarndi people entitled and how should the native title holders be described (**the relief issue**)?
11. The applicant and the State initially agreed that, in the final determination, the description the “Yindjibarndi people” would sufficiently describe the group of persons who hold the common or group rights comprising native title. However, in final submissions the Yindjibarndi sought that their composition be described by reason of their descent from 27 apical ancestors.

## The structure of these reasons

1. I will explain the background to this proceeding, including what Nicholson J and the Full Court relevantly decided in making the 2005 and 2007 determinations. I will then deal with each of the six issues in turn. Before doing so, I should indicate that I propose to make findings of fact based on my having seen and heard the witnesses, most of whom gave evidence in September 2015 on country or in Roebourne. The remaining witnesses gave evidence in Perth in September 2016, including the expert anthropologists called by the Yindjibarndi, **Dr** Kingsley **Palmer**, and by the Todd respondents, **Professor** David **Trigger**. I do not propose, however, to catalogue or summarise every item of evidence since the role of a trial judge is to find the material facts, stating reasons for matters that are contentious.

## The claimed area

1. The claimed area comprises some areas over which there are current pastoral and mining leases as well as other areas, comprising the Reserve and other unallocated Crown land. The pastoral leases are held by lessees of stations called **Coolawanyah** (that extends over the north-western boundary of the claimed area into the Moses land), **Mount Florance** (that also extends, to the east of Coolawanyah, over the mid-part of the northern boundary into the Moses land), **Hooley** (that is to the east and north-east of Mount Florance) and **Mulga Downs** (that is to the south-east of Mount Florance and extends over the southern boundary into Banjima country). The claimed area also extends in the north-east over the Mungaroona Range Nature Reserve 31429, the creation of which, the Yindjibarndi accept, extinguished native title in accordance with the decision in *Western Australia v Ward* (2002) 213 CLR 1.
2. The mining interests are held by FMG, the Hancock parties and the Rio parties. FMG has an operating iron ore mine, known as the **Solomon Hub** mine, located in UCL 7 within the claimed area. That is near a sacred site and fresh water spring that the Yindjibarndi call **Bangkangarra** and that FMG has named “Satellite Spring”.
3. The State and (except as to the Reserve and an adjacent UCL) FMG argue that ss 47A(2) and 47B(2) of the Act do not apply to preserve native title rights and interests of the Yindjibarndi over the area covered by the Reserve, the UCLs, or miscellaneous licence and the six exploration licences. There is also a narrow set of issues as to whether native title in various locations in the claimed area has been extinguished by, *first*, the miscellaneous licence, and, *secondly*, any or all of the exploration licences.
4. Reproduced below is a map that enables an understanding of the physical locations of the claimed area (enclosed in red), the Moses land to its north (enclosed in purple), the land and waters in the Eastern **Guruma** consent determinations that the Court made in 2007 and 2012 (enclosed in light blue to the south, on the west of the claimed area) (*Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365; *Hughes on behalf of the Guruma People (No 2) v State of Western Australia* [2012] FCA 1267), and the land and waters that the Court determined as those of **Banjima** people in 2014 (enclosed in light blue to the south, on the east of the claimed area) (*Banjima People v State of Western Australia* *(No 3)* [2014] FCA 201 per Barker J; *Banjima People v State of Western Australia* (2015) 231 FCR 456 per Mansfield, Kenny, Rares, Jagot and Mortimer JJ).



## The 2005 and 2007 determinations

1. In the proceeding that resulted in the 2005 determination, Nicholson J heard three separate, overlapping claims, the *first* was a combined claim made by both the **Ngarluma** people and the Yindjibarndi people, the *second* was a claim, that his Honour described as the Yaburara Mardudhunera claim, in respect of land and waters to the north of the Moses land and that has no present relevance (*Daniel* [2003] FCA 666 at [99]-[103]), and the *third* was a claim made by a group that called itself the “**Wong-Goo-TT-OO**” (**WGTO**)applicant.
2. Nicholson J decided that the Ngarluma people had non-exclusive native title rights and interests in the northern part of the Moses land, that the Yindjibarndi had non-exclusive native title rights over the southern part (down to the boundary that is contiguous with the claimed area) and that they both shared non-exclusive rights over an area in the middle. In the 2007 determination, the Full Court made some variations to the 2005 determination, which are not material for present purposes.
3. Relevantly, after the appeal, the 2007 determination, that the Full Court made, provided in pars 4 and 7:

4. The native title rights and interests:

(a) **do not confer possession**, occupation, use and enjoyment of land or waters on the native title holders **to the exclusion of others**; and

(b) are not exercisable otherwise than in accordance with and subject to traditional laws and customs for personal, domestic and non‑commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

…

7. Subject to paragraphs 4 and 8 to 15 inclusive, the Yindjibarndi People have the following **non-exclusive native title rights and interests** in relation to the [Moses land]:

(a) A right to access (including to enter, to travel over and remain);

(b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);

(c) A right to camp and to build shelters (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;

(d) A right to fish from the waters;

(e) A right to collect and forage for bush medicine;

(f) A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, goanna, kangaroo, emu, turkey, echidna, porcupine, witchetty grub and swan but not including dugong or sea turtle);

(g) A right to forage for and take flora (including timber logs, branches, bark and leaves, gum, wax, Aboriginal tobacco, fruit, peas, pods, melons, bush cucumber, seeds, nuts, grasses, potatoes, wild onion and honey);

(h) A right to take black, yellow, white and red ochre;

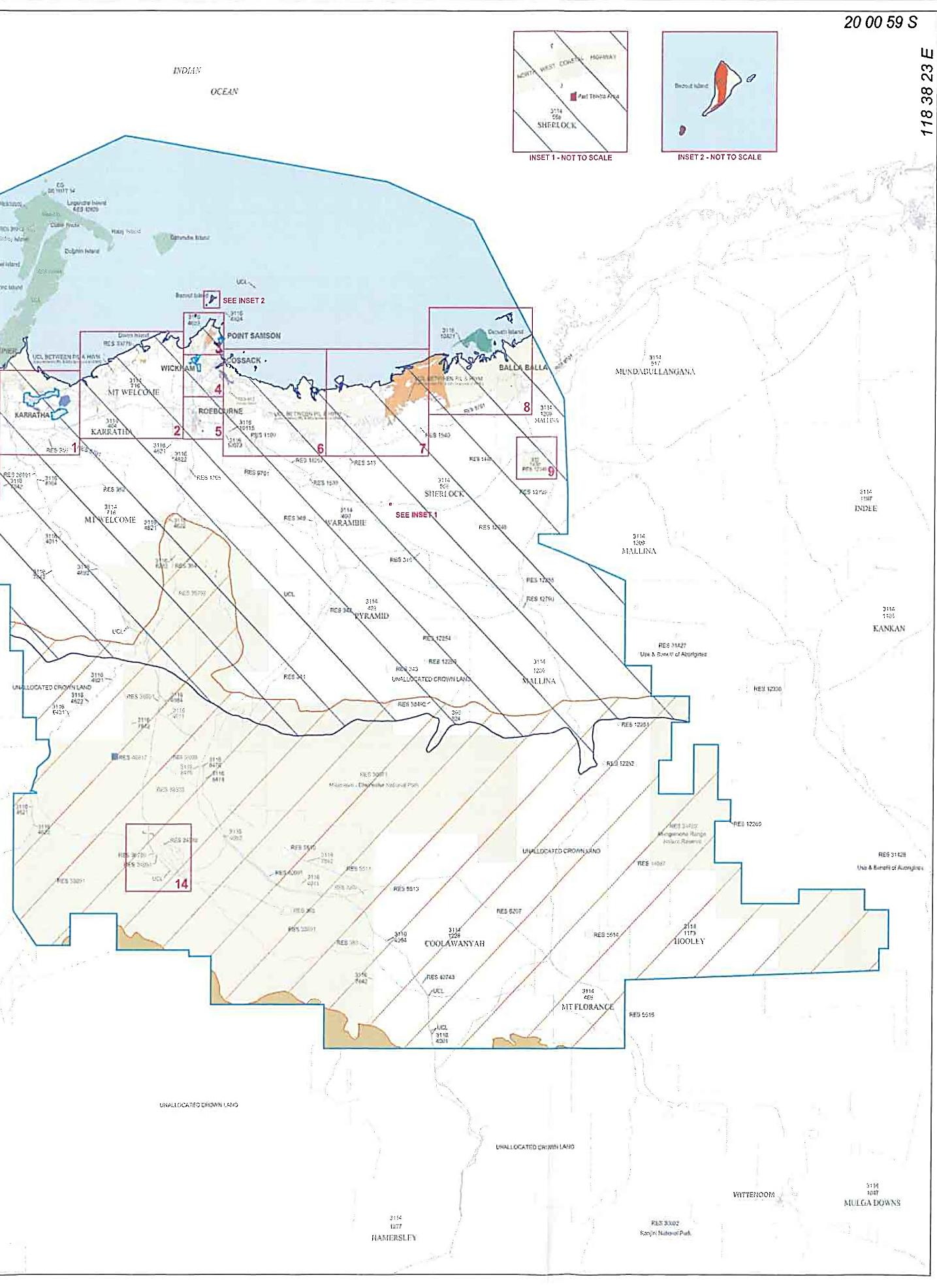
(i) A right to take water for drinking and domestic use;

(j) A right to cook on the land including light a fire for this purpose;

(k) **A right to protect and care for sites and objects of significance in the [Moses land]** (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area **and warn against behavior which may result in harm, but not including a right to control access or use of the land by others**).

(emphasis added)

1. The final form of the Moses land determined by the Full Court and delineation of areas of non-exclusive native title rights is, relevantly, in the portion of the map reproduced below, the orange hatching indicating the Yindjibarndi area and the blue hatching, the Ngarluma area, with the shared area shown at the intersection of the hatchings.



1. However, the 2007 determination did not include any rights for the Yindjibarndi to control access to, or use of, land and waters in, or to take or use, for commercial purposes, the resources of, the claimed area.
2. All of the parties that participated in the trial, together with Yamatji, the Rio and Hancock parties, agreed that the Yindjibarndi had the following non-exclusive native title rights in the land and waters in the claimed area in the amended agreed statement of issues filed on 28 August 2015, based on the 2007 determination (**the non-contentious rights**):
   1. the right to access and move about the area (including to enter, travel over and remain);
   2. the right to hunt in the area (including fish, shell fish, crab, oysters, goanna, kangaroo, emu, turkey, echidna, porcupine, witchetty grub and swan, but not including dugong or sea turtle);
   3. a right to fish in the area;
   4. a right to camp upon and within the area, to build shelters there (including boughsheds, mias and humpies) and to live temporarily thereon as part of camping or for the purpose of building a shelter;
   5. a right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
   6. a right to take black, yellow, white and red ochre; and
   7. a right to take water for drinking and domestic use.
3. The Yindjibarndi claimed several other rights, some of which elaborated the language of some of the non-contentious rights. The respondents who were active at the trial did not accept that any elaboration of the language in which the Yindjibarndi expressed the rights that they claimed in this proceeding, including, critically, a right to control access and or to exclude others, could differ in substance or be more expansive than their rights as settled in pars 4 and 7 of the 2007 determination. The opposition had two foundations, *first*, the 2007 determination had the legal effect of precluding the Yindjibarndi asserting an entitlement to, or obtaining, any determination that they had any native title rights and interests different to those decided in the contested trial and appeal that had produced the binding and conclusive judicial order being the 2007 determination, and, *secondly*, if the first foundation failed, the Yindjibarndi had to prove the existence of any additional rights.
4. The first foundation of the opposition is the nub of the abuse of process issue. As a matter of common sense, if the Yindjibarndi are entitled to a determination that they have the right to control access to the claimed area, that will entitle them to a determination that they have a right equivalent to exclusive possession, which in turn will equate to the full rights of ownership of an estate in fee simple: *Banjima* 231 FCR at 468-473 [27]-[40]; *Ward* 213 CLR at 64-65 [14].
5. The key finding that, relevantly, Nicholson J made in determining the Yindjibarndi’s claim before him was, in respect of the right to control access, as follows (*Daniel* [2003] FCA 666 at [292]):

Such evidence as there is as set out on this matter in Appendix B establishes only that within Yindjibarndi land and Ngarluma land some Yindjibarndi first [sic] applicants claim the right to control access to identified portions of Yindjibarndi land. **My impression of the evidence was that while there is evidence of surviving practice to seek permission to enter land considered to be Ngarluma or Yindjibarndi land, when that occurs it is a matter of respect rather than in recognition of a right to control. There is no exercise presently of this aspect of right claimed.** (emphasis added)

1. In Appendix B to his Honour’s reasons he said (*Daniel* [2003] FCA 666 at [1318], [1319]):

1318 Woodley King identified himself as Ngurrara for Millstream area (T 297). He said that only the right people can speak for Yindjibarndi country (T 288). **He said that old people had said that ‘Aboriginal coming from other area’ must seek permission from the local Ngurrara. A non-Yindjibarndi person would need the permission of the Yindjibarndi Jindawurrina ‘mob’ to settle in that area** (T 225) **or to take part in ceremony under the control of the Yindjibarndi** (T 165). Dora Solomon said that if the government wanted to build something at Buminji-na they would need to consult Woodley King. He would speak with the other Yindjibarndi people (T 1040-41). …

1319 Elsie Adams testified to needing Cheedy’s permission to enter and camp on Hooley (T 379). Cheedy Ned testified that he ‘speaks for’ Hooley, and would tell anyone asking about Millstream to talk to Woodley King (T 1231). Any Yindjibarndi person not from Hooley would need his permission to build a house or forage there (T 1233-1234). Pansy Cheedy said if the government wished to develop something on Hooley station they should speak to the person ‘who is closer to … belongs to, the land’. She named her sister Sylvia Cheedy, her father, Cheedy Ned. They in turn should talk to all the other Yindjibarndi people (T 1379-80). (emphasis added)

1. In the time since Nicholson J characterised this evidence of a “practice” of seeking permission as “a matter of respect rather than in recognition of a right to control”, Full Courts have developed the law, commencing with the reasoning of French, Branson and Sundberg JJ in *Griffiths v Northern Territory* (2007) 165 FCR 391 esp at 428-429 [127].
2. For the moment, in order to set the context in which the exclusive possession and abuse of process issues arise here, it suffices to refer to their Honours’ finding that “if control of access to country flows from spiritual necessity because of the harm that ‘the country’ will inflict upon unauthorised entry, that control can nevertheless support a characterisation of native title rights and interests as exclusive”. They continued (165 FCR at 429 [127]):

The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community. **If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation.** The status of the appellants as gatekeepers was reiterated in the evidence of most of the indigenous witnesses and by the anthropological report which was ultimately accepted by his Honour. We would add that it is not necessary to exclusivity that the appellants require permission for entry onto their country on every occasion that a stranger enters provided that the stranger has been properly introduced to the country by them in the first place. Nor is exclusivity negatived by a general practice of permitting access to properly introduced outsiders. (emphasis added)

1. The evidence before me, as I will discuss below, provided a detailed explanation about why a non-Yindjibarndi or a stranger, called a “**manjangu**”,needed permission to enter Yindjibarndi land. That explanation was consistent with the concept of spiritual necessity giving rise to a right of exclusive possession.
2. The WGTO applicant comprised persons who, Nicholson J found, claimed, relevantly, to have native title in some land and waters that the WGTO applicant asserted they shared with the Yindjibarndi. As a result of an amendment on 6 August 1998, the WGTO applicant consisted of, among others, one of the Todd respondents, Phyllis Harris, and her sister **Myline Todd** (*Daniel* [2003] FCA 666 at [34]). The WTGO applicant asserted that its native title in the Karratha (or Thaluntha) area, which included an archipelago now called “the Burrup”, derived “through cognatic descent from the families of Jack Hicks and his wife Charlotte (Wittingbung)”: *Daniel* [2003] FCA 666 at [34], [104]-[107]. The WGTO name was not a traditional name of any group of Aboriginal people, but rather it was a name that the persons comprising the applicant making that claim (as at the final hearing, being Betty Dale, **Tim Douglas**, **Wilfred Hicks**, **Dallas** **Hicks**, Ernie Ramirez and Cane Hicks) had chosen for the purpose of those proceedings: *Daniel* [2003] FCA 666 [50]. It is not necessary to describe how the WGTO applicant claimed that they had native title over any Yindjibarndi land and waters or how those rights and interests were shared (cf. *Daniel* [2003] FCA 666 at [78]-[83]).
3. The Todd respondents are related to Wilfred Hicks. Relevantly, Nicholson J found that although they claimed as WGTO, each of Tim Douglas, Wilfred and Dallas Hicks acknowledged themselves as Ngarluma and the Ngarluma accepted that they had that status: *Daniel* [2003] FCA 666 at [246]. His Honour found that the “Hicks family have Yindjibarndi ancestry” and that “[i]f, however, they have rights as Yindjibarndi persons, it as [sic] part of the overall connection of the Yindjibarndi with Yindjibarndi country and not through their personal connection”: *Daniel* [2003] FCA 666 at [509]. He explained that the Hicks family claimed to be Ngarluma and claimed native title rights through both the genealogical line of their father, who was Yindjibarndi, and their mother, a Ngarluma person whose rights coincided with those of the Douglas family: *Daniel* [2003] FCA 666 at [1452].
4. As explained in the evidence before me, persons who have one Yindjibarndi and one Ngarluma or other indigenous parent can elect once for all whether they become part of the people of either parent. Nicholson J found that there was “considerable confusion among the [WGTO] applicants as to the actual structure of the genealogy”. He noted that the Hicks claimants before him claimed native title through their father, Fred Hicks, their mother, Molly Hicks, and their paternal grandmother, **Charlotte Hicks** (née **Lockyer**). (For consistency, I have referred to her below, usually, as Charlotte Lockyer.) His Honour said, but did not make a finding, that: “It is asserted that Jack Hicks’ mother was **Winningbung**, a full blood Aboriginal, and that Charlotte Hicks’ mother was Mikibung” and that both Jack and Charlotte “were said to be Yindjibarndi”. He noted that two witnesses had said that Fred Hicks was Yindjibarndi. His Honour found that Molly Hicks and her mother, Rosie Clifton, were Ngarluma: *Daniel* [2003] FCA 666 at [1453].
5. In the event, Nicholson J dismissed the **WGTO claim**. He also held that the relevant native title claim group could be described by their language group rather than by criteria such as descent from apical ancestors: *Daniel v State of Western Australia* (2004) 138 FCR 254 at 267 [53]. The 2005 determination defined, in terms that the Full Court approved on appeal, the Yindjibarndi people as “Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi people as, members of the Yindjibarndi language group”.
6. A central question in the Todd issue is whether, on the evidence adduced in these proceedings, one or both of the mothers of Charlotte Lockyer or her husband, Jack Hicks, was Yindjibarndi.
7. On 15 May 2017, after I had reserved my decision on 14 September 2016, YAC filed a **revised native title determination application** in respect of the 2007 determination under s 61(1) of the Act in proceeding WAD 215 of 2017. There, YAC seeks orders that, in effect, would give it exclusive, rather than non-exclusive, native title over the Moses land.

## The legislative scheme

1. The *Native Title Act* contains several provisions that are relevant to the consideration of whether the Yindjibarndi’s claim for a determination of native title that includes a right to control access to, or exclude others from, the claimed area and the abuse of process issue based on that claim’s apparent inconsistency with the 2005 and 2007 determinations. Those provisions include:

**4 Overview of Act**

*Recognition and protection of native title*

(1) This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.

…

**10 Recognition and protection of native title**

Native title **is recognised, and protected**, in accordance with this Act.

**11 Extinguishment of native title**

(1) **Native title is not able to be extinguished contrary to this Act.**

…

**13 Approved determinations of native title**

*Applications to Federal Court*

(1) An application may be made to the Federal Court under Part 3:

(a) for a determination of native title in relation to an area for which there is no approved determination of native title; or

(b) **to revoke or vary an approved determination of native title on the grounds set out in subsection (5).**

…

*Variation or revocation of determinations*

(4) If an approved determination of native title is varied or revoked on the grounds set out in subsection (5) by:

(a) the Federal Court, in determining an application under Part 3; or

(b) a recognised State/Territory body in an order, judgment or other decision;

then:

(c) in the case of a variation – the determination as varied becomes an ***approved determination of native title*** in place of the original; and

(d) in the case of a revocation – the determination is no longer an approved determination of native title.

*Grounds for variation or revocation*

(5) For the purposes of subsection (4), the grounds for variation or revocation of an approved determination of native title are:

(a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or

(b) that **the interests of justice require the variation or revocation of the determination**.

*Review or appeal*

(6) If:

(a) a determination of the Federal Court; or

(b) an order, judgment or other decision of a recognised State/Territory body;

is subject to any review or appeal, this section refers to the determination, order, judgment or decision as affected by the review or appeal, when finally determined.

…

**61 Native title and compensation applications**

*Applications that may be made*

(1) The following table sets out applications that may be made under this Division to the Federal Court and the persons who may make each of those applications:

….

| Applications | | |
| --- | --- | --- |
| Kind of  application | Application | Persons who may make application |

|  |  |  |
| --- | --- | --- |
| Revised native title determination application | Application, as mentioned in subsection 13(1), for revocation or variation of an approved determination of native title, on the grounds set out in subsection 13(5). | (1) The registered native title body corporate; or  (2) The Commonwealth Minister; or  (3) The State Minister or the Territory Minister, if the determination is sought in relation to an area within the jurisdictional limits of the State or Territory concerned; or  (4) The Native Title Registrar. |

…

**80 Operation of Part**

The provisions of this Part apply in proceedings in relation to applications filed in the Federal Court that relate to native title.

…

**82 Federal Court’s way of operating**

*Rules of evidence*

(1) The Federal Court is bound by the rules of evidence, **except to the extent that the Court otherwise orders**.

…

**86 Evidence and findings in other proceedings**

(1) **Subject to subsection 82(1), the Federal Court may**:

(a) **receive into evidence the transcript of evidence in any other proceedings before**:

(i) **the Court**; or

(ii) another court; or

(iii) the NNTT; or

(iv) a recognised State/Territory body; or

(v) any other person or body;

**and draw any conclusions of fact from that transcript that it thinks proper**; and

(b) receive into evidence the transcript of evidence in any proceedings before the assessor and draw any conclusions of fact from that transcript that it thinks proper; and

(c) **adopt any** recommendation, **finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i)** to (v).

(2) Subject to subsection 82(1), the Federal Court:

(a) must consider whether to receive into evidence the transcript of evidence from a native title application inquiry; and

(b) may draw any conclusions of fact from that transcript that it thinks proper; and

(c) may adopt any recommendation, finding, decision or determination of the NNTT in relation to the inquiry.

(emphasis added)

**Division 2 – Key concepts: Native title and acts of various kinds etc.**

**223 Native title**

*Common law rights and interests*

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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

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

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

*Hunting, gathering and fishing covered*

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

*Statutory rights and interests*

(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression ***native title*** or ***native title rights and interests***.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

*Subsection (3) does not apply to statutory access rights*

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

*Case not covered by subsection (3)*

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

(a) in a pastoral lease granted before 1 January 1994; or

(b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

…

**225 Determination of native title**

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

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

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

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

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

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

Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

(italic bold emphasis in original)

1. Relevantly, for the purposes of s 82(1) of the *Native Title Act*, s 91(1) of the *Evidence Act 1995* (Cth) provides:

**Exclusion of evidence of judgments and convictions**

91(1) Evidence of the decision, or a finding of fact, in an Australian … proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

1. Importantly, s 8(1) of the *Evidence Act* provides that that Act “does not affect the operation of the provisions of any other Act”. And, s 9(1) preserves the operation of an Australian law (including a law of the Commonwealth) so far as that law “relates to a court’s power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding”.

## Assessment of evidence as to laws and customs

1. The adducing and assessment of the evidence of individuals as to the existence, continuity and observance of traditional laws acknowledged and traditional customs observed must take account of several factors, in addition to those ordinarily applicable in a court’s resolution of issues of fact. *First*, the indigenous inhabitants of Australia did not have any written record of their history, laws or customs. Accordingly, those matters passed down orally from indigenous generation to generation, and recordings in such contemporaneous written records that European settlers or others made of their interactions with, or observations of, indigenous people. *Secondly*, indigenous societies did have forms of social organisation, in at least some of which, among other matters, one or more individuals in a community or group had principal responsibility for interpreting or possessing knowledge of the traditional laws and customs. As with any situation involving human recollection of a particular fact (including the content of traditional laws or customs passed down orally over generations within not just the wider society but a family unit), there will be differences in recollections, perhaps compounded by their recitation in discrete groups, so that to expect complete coherence in individual accounts of those matters today would be unrealistic. Indeed, it would be contrary to the lived experience of life. *Thirdly*, indigenous peoples are very often no longer living on their country or able, continuously, to observe their traditional lives. Rather, European settlement brought about substantial dispossession of most indigenous societies from not only their traditional land and waters, but, in some instances, of the individual members from each other. In those circumstances, the Australian common law must make appropriate allowances for practical adaptation of traditional laws and customs, as well as the potentially differing understandings of individuals within a claim group about their content and contemporaneous acknowledgment or observance.
2. Gleeson CJ, Gummow and Hayne JJ discussed some of these matters in construing the definition of native title in s 223(1) of the Act in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422 at 443-445 [43]-[48], with the agreement of McHugh J at 468 [134].
3. The State and FMG argued that the differences in accounts of individual witnesses as to the pre-sovereignty laws and customs and their contemporary acknowledgment and observance should lead to a finding that the Yindjibarndi had failed to prove that they had, or continue to have, a right to control access to the claimed area so as to establish a determination that they have exclusive possession of that part of their traditional land and waters.
4. Ultimately, as with any other litigation involving disputed facts, the party seeking to establish a positive finding in his, her or its favour must satisfy the Court, in accordance with s 140(1) of the *Evidence Act*,that the case has been proved on the balance of probabilities. In doing so, the Court can take into account the nature of the asserted claim, the subject matter of the proceeding and the gravity of the case alleged (see s 140(2)). Here, it is germane that the Yindjibarndi claim a right of exclusive possession of land and waters that has significant consequences for them, the State, FMG and the public generally. Gleeson CJ, Gummow and Hayne JJ also discussed these matters in *Yorta Yorta* 214 CLR at 444-447 [45]-[56].
5. In the present case, there is no doubt that the Yindjibarndi comprise a society that continuously have acknowledged laws and observed customs that have united them since before European settlement or British sovereignty. (I will use the expression “**sovereignty**” to refer to the time at which any native title rights and interests that the common law then recognised (and are now capable of recognition) had to exist or be possessed under the Yindjibarndi’s traditional laws and traditional customs.) That is the necessary conclusion from the findings of Nicholson J that underpinned the Court’s power to make the 2005 and 2007 determinations in favour of the Yindjibarndi. All active parties in this proceeding accept that the Yindjibarndi’s rights and interests that also apply in the claimed area are no less extensive than those comprised in the 2007 determination.
6. The evidence adduced at the trial satisfied me, as I will explain below, that the Yindjibarndi acknowledge laws and observe customs that have united, and continue to unite, them as a society continuously since before sovereignty.
7. An important instance of that acknowledgment and observance is that the Yindjibarndi observe the defining ritual of making uninitiated (mostly young) males pass formally into manhood by “going through the [Birdarra] law” in an annual ceremony. The secret men’s evidence given at Bangkangarra during the hearing comprised a portion of that ceremony. That included a performance of dancing and singing portions of the **Bundut** (or Burndud) in a language that is no longer spoken in the Pilbara. The Bundut is not a secret men’s song, unlike other evidence given on that occasion. The participants understood and explained in the confidential hearing the spiritual and other significance of the dances and songs that they performed. The use of now no longer spoken language in such a ceremony can be compared to the use in many nations, including Australia, in the Roman Catholic church of Latin rituals until the mid-20th century when services were permitted in the domestic language.

# (1) THE EXCLUSIVE POSSESSION ISSUE

## Introduction

1. The applicant, the State, FMG, the Rio parties, the Hancock parties and the Todd respondents filed statements of their contentions. In those, FMG, the Rio parties and the Hancock parties substantively adopted the position of the State, with the exception of the abuse of process issue, that only the State and FMG pursued. The statements of contention and the agreed statement of issues, read together, identified the following admitted facts, namely that:

* the Yindjibarndi constitute a society that has continued to exist, since before the assertion of sovereignty in 1829, as a body of persons united in and by its acknowledgment and observance of a body of traditional laws and customs under which they possess native title rights and interests;
* the Yindjibarndi’s native title rights and interests are held by them as communal rights and interests and **it is unnecessary to establish connection on a subgroup or estate basis**;
* the Yindjibarndi have a connection with the claimed area within the meaning of s 223(1)(b) of the Act;
* members of the Yindjibarndi language group occupied and used the claimed area, as of right, under a body of laws that they acknowledged and customs that they observed, and they possessed rights and interests in relation to, and had a connection with, the claimed area;
* the Yindjibarndi have continued, substantially uninterrupted since sovereignty, to acknowledge and observe a body of traditional laws and customs under which they possess, as a group, rights and interests in relation to their traditional land and waters, including the claimed area and the Moses land (collectively **Yindjibarndi country**), and by those laws and customs have a connection with Yindjibarndi country;
* rights and interests in relation to Yindjibarndi country are gained primarily by cognatic descent, under the traditional laws and customs as presently acknowledged and observed by the Yindjibarndi;
* the Yindjibarndi consider that Yindjibarndi country, including the claimed area, is redolent with spirituality, commemorated by senior male members through mytho‑ritual traditions, and, in particular, their unique **Birdarra law**;
* the right to rehearse the spirituality of Yindjibarndi country (including, of course, the claimed area) and manage its geographic and physical manifestations rests primarily with those Yindjibarndi qualified to do so;
* the exercise of rights to use Yindjibarndi country requires knowledge of the country and its resources;
* under traditional laws and customs as presently acknowledged and observed, a person who does not belong to Yindjibarndi country and cannot assert rights to it, is identified by use of the word “manjangu”;
* the Yindjibarndi language is a common point of identity reference for those Yindjibarndi individuals who claim native title rights and interests in the claimed area;
* persons identifying as Yindjibarndi, in general (I have used the qualification “in general” because the State and FMG do not admit that each and every Yindjibarndi person acknowledges and observes the Birdarra), acknowledge and observe the mytho‑ritual religious observance called Birdarra;
* the observance of the Birdarra includes singing the Bundut, which is a series of songs and accompanying exegesis that is performed in connection with male rituals;
* the Yindjibarndi understand that, *first*, the Bundut relates directly to Yindjibarndi country, including the claimed area, by associating the various subjects of the songs with named places in the countryside, and *secondly*, the singing of those songs unites a singer with the part of the country that is the subject of the songs in such a way that the country can “feel” the singer, and the singer can “feel” the country and keep it alive;
* much of the information about the Birdarra and associated rituals is esoteric and its dissemination is restricted to ritually qualified men. Generally, women do not discuss any matters relating to the Birdarra;
* the Yindjibarndi continue to practice the Birdarra law (that they sometimes call “the Law” or “initiation”) and commonly do so at the “Woodbrook Law Ground”, near Roebourne, where many Yindjibarndi now reside.

1. The statements of each active party’s contentions identified the issues in dispute and formed the basis on which the parties prepared their evidence for the trial. On the second day of the hearing on country I rejected the attempts of the State and FMG to cross-examine witnesses, that the applicant called, on matters that those two parties had admitted in their contentions. The disallowed line of questioning sought to challenge, in particular, the admitted fact that it was unnecessary for the Yindjibarndi to establish connection on a subgroup or estate basis. That was because all active parties had admitted that, *first*,the Yindjibarndi held their native title rights and interests communally and, *secondly*, “it is unnecessary to establish connection on a subgroup or estate basis”: *TJ (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)* [2015] FCA 1358. Nonetheless, as will appear below, the State and FMG structured some of their arguments around evidentiary issues relating to the existence or exercise of some rights or interests based on subgroups or estates. The applicant’s witnesses’ evidence in chief had been prepared on the basis of the admission that it was unnecessary to establish connection on a subgroup or estate basis.
2. There is no dispute that, even though most Yindjibarndi now live outside the claimed area, Nicholson J’s finding, that they had “remarkably maintained a strong sense of connection to their lands” that remained unbroken, also applied in respect of the claimed area (*Daniel* [2003] FCA 666 at [421]-[422]). I am in no doubt, from the whole of the evidence before me, that this deep sense of connection continues to be true of the Yindjibarndi’s relationship to their country, of which the claimed area forms part. While this finding addresses, in part, s 223(1)(b) of the *Native Title Act*, that is not, however, sufficient of itself to establish the existence or formal expression of any native title rights and interests that the Yindjibarndi may have in the claimed area beyond the admitted existence of the non-exclusive rights in the 2007 determination. In *Ward* 213 CLR at 64-65 [14], Gleeson CJ, Gaudron, Gummow and Hayne JJ said:

As is now well recognised, the connection which Aboriginal peoples have with “country” is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* [(1971) 17 FLR 141 at 167], Blackburn J said that: “the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, **it is a religious relationship … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole**”. It is a relationship which sometimes is spoken of as having to care for, and being able to “speak for”, country. **“Speaking for” country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture.** The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. **The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.** The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer. Nor are they reduced by the requirement of the NTA, now found in par (e) of s 225, for a determination by the Federal Court to state, with respect to land or waters in the determination area not covered by a “non-exclusive agricultural lease” or a “non-exclusive pastoral lease”, whether the native title rights and interests “confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others”. (emphasis added)

1. Their Honours held that the question whether s 223(1)(a) is satisfied, in any given case, is one of fact requiring the identification of, *first*, the asserted traditional laws and customs and, *secondly*, the rights and interests in relation to land and waters that are possessed under those laws and customs. They recognised that answering that question “may well depend upon the same evidence as is used to establish connection of the relevant peoples with the land and waters”, since the requisite connection under s 223(1)(b) must be “by those laws and customs” (*Ward* 213 CLR at 66 [18]). They emphasised that s 223(1)(a) and (b) provide that the traditional laws and customs, and not the common law, are the source of any native title rights and interests (213 CLR at 66-67 [19]‑[21]).
2. Recognition of a law or custom of one indigenous people by another indigenous people in relation to seeking permission to enter, or conduct activities (such as hunting) on, land or waters, and the spiritual or other purpose or consequence of seeking or failing to have that permission, can demonstrate the normative effect of the law or custom: *Banjima* 231 FCR at 473 [40] per Mansfield, Kenny, Rares, Jagot and Mortimer JJ.

## Some historical background

1. Nicholson J gave detailed consideration to the historical background that related to and affected the three separate claims and evidence before him. He made the following findings in *Daniel* [2003] FCA 666 at [192]-[201] that were not in dispute and that I adopt, together with his Honour’s findings at [152]-[190], under s 86(1)(c) of the *Native Title Act*:

192 The Ngurawaana Group Inc. which succeeded in having an alcohol rehabilitation community set up at Daniels Well, formerly part of the Millstream Pastoral lease was established in 1983 by Yindjibarndi elders, led by Woodley King. In 1982 that lease had been purchased by the State and led to the creation of the Millstream – Chichester National Park in 1984.

193 On 28 September 1983 John Peter Pat died of closed head injuries in the juvenile cell of the police station lock up in Roebourne, aged almost seventeen. He had been assaulted to varying degrees by arresting police officers who were later acquitted of his manslaughter. He became for Aboriginal people nationwide a symbol of injustice and oppression. International media attention focussed both on his death and the conditions in Roebourne. (These statements come from the Report of the Inquiry into the Death of John Peter Pat by the Royal Commission into Aboriginal Deaths in Custody, 1991, p 1-2). The Pat family are members of the first applicants’ claim group and identify as Yindjibarndi. The Commissioner found that Roebourne’s Aboriginal people, including some Ngarluma people, had redefined their places of belonging in terms of the stations so that station life to some extent allowed the continuation of traditional social relations and a certain maintenance of autonomy (p 280). He said the impact of the mining boom had changed Roebourne from the administrative and commercial centre for the region into a neglected backwater (at p 283).

194 The Harding Dam was opened in 1985. Aboriginal people active against it brought about the establishment of the Ngurin Mirlimirli Maya Resource Centre (‘the Ngurin Centre’) in Roebourne in 1985, becoming the focus for politically active Aborigines. Its membership was drawn from Roebourne, Woolshed and Ngurawaana. Yindjibarndi was spoken at the meetings. In the same year an Aboriginal Medical Service (‘Mawarnkarra’) was established in Roebourne.

195 Roebourne therefore became the major centre for the claim areas’ Aboriginal population, leading to social, political and cultural change there. Dr Green wrote of these changes:

‘*The move into Roebourne contributed to the emergence of politically influential incorporated Aboriginal organisations which have directed community action into areas of social and cultural concerns, such as alcohol rehabilitation, land acquisition and the preservation of sites of significance. The acquisition of pastoral leases, such as the Mt Welcome station, and concerns over particular interests in Bumingina (the former Tablelands police station), the Millstream aquifer and the Harding River (Dam) are among the issues that continue to engage Aboriginal people located in Roebourne.*’ (Green).

196 In 1989 the State Equal Opportunity Commission examined local government services in Western Australia. It found significant inequalities in the distribution of funds and services among, on the one hand, Karratha, Dampier, Hearson Village and Wickham and, on the other, Roebourne (Pat Report, p 293).

197 The historical record shows Aboriginal populations in each of the claim areas numbering in the vicinity of 300 – 400 throughout the first half of the 20th Century. Roebourne’s Aboriginal population increased from 476 in 1965 to 1200 in 1985 and included many more children.

198 The historical record also shows that, with the advent of station life and of enclosures, stocking and a different land use, there were consequent impacts on plant and animal life which significantly reduced the opportunity for Aboriginal people to live on their land. The establishment of government ration stations, issuing food and blankets, in the early 20th Century both nurtured indigent Aborigines and contributed to their isolation from the country. Police action up to the 1940s in returning Aborigines to stations where they had work had the same effect.

**IMPACTS OF THE LAW**

199 Likewise the historical record discloses the impact of the law on Aborigines in Western Australia and hence in the claim areas. The content of that law in the 19th Century was influenced by the policies of the Imperial Government to Aborigines as reflected in its ‘Instructions as to the office of Governor’ to the first Governor Stirling in 1831 and his earlier Proclamation in 1829. These sought to equate Aborigines and Europeans before the law. However:

‘*Practical objections to this ideal almost immediately obtruded and in the following century the goal almost receded from view in the usage of legislation which was enacted to deal with the Aborigines. The keynote of policy became their protection from themselves, by shielding them from responsibility and imposing rigid personal controls.*’

(Report of the Royal Commission into Aboriginal Affairs by His Honour Judge Furnell, July 1974, p 20)

200 By mid-century legislation had been introduced to protect Aborigines in relation to matters such as pearl fishing and their access to land upon the grant of a pastoral lease (34 Vic. No 14 of 1871 and Land Act Regulations 1887 respectively). The *Aborigines Protection Act 1886* (WA) established the Aborigines Protection Board. On the *Constitution Act 1890* coming into force it withheld control of Aborigines from the self-governing legislature, although seven years later it was vested in the Western Australian Government (61 Vic, No 5 of 1898). That control was strongly asserted by the *Aborigines Act 1905* (WA) and the *Aborigines Act Amendment Act 1936* (WA) authorising removal of children and providing for other controls over Aboriginal people. **Writing in 1941, Hasluck described the 1936 Act as having given the Aboriginal ‘a legal status that was more in common with that of a born idiot than any other class of British subject’.** (Hasluck, pp 160-161). In 1974 the Royal Commission found of the same Act (at 23) that it:

‘… **did more than any other to emphasise the second-class citizenship status accorded to Aborigines and it imposed restrictions and controls upon them which would not have been tolerated by any other section of the community**, even though many of these provisions were intended to be protective in nature. The effect of them was to make the Aborigines … resentful of authority, particularly the police and the Department itself, and either belligerently anti-social or dejectedly apathetic.’

The historical records show such removals continuing until as late as 1946. Marriages of non-Aboriginals to female Aborigines required permission. The *Natives (Citizenship Rights) Act 1944* (WA) **allowed Aborigines to claim citizenship but on the basis they gave up tribal associations**. **The State legal regime** had therefore moved from a form of benevolent protection to one which **had discouragements to maintenance of Aboriginal connection with the land through traditional laws acknowledged and customs observed**. (See E Russell, ‘A History of the Law in Western Australia’, *University of Western Australia Press*, p 313–325).

201 The establishment of the Commonwealth of Australia in 1901 also brought with it a legal regime with distinctive impact on Aborigines. From 1901 until 1967 the federal Constitution excluded ‘Aboriginal natives’ from population counts. Pensions or allowances were not payable to Aborigines with more than one-half of Aboriginal blood. Voting eligibility for Aborigines did not commence federally until 1962 and in the State until 1971. (emphasis added)

## The exclusive possession issue – the facts

1. **Michael Woodley** is a senior lawman, called a **tharngungarli** or **tharngu** in Yindjibarndi, because he is one of the most knowledgeable in the Birdarra law. He is the grandson of **Woodley King**, a respected Yindjibarndi elder as Nicholson J found (*Daniel* [2003] FCA 666 at [192] in the quotation above and [1442]), and is now a Yindjibarndi elder in his own right. Michael Woodley gave detailed and reliable evidence of Yindjibarndi law and custom in both their historical and contemporary forms. He spent more than 20 years learning about Yindjibarndi culture from his grandfather, Woodley King, with whom he lived on the Moses land at Ngurrawaana, after finishing primary school in Roebourne. Michael Woodley’s grandfather was principally responsible for his education after primary school together with other male and female Yindjibarndis.
2. In June 2000, Michael Woodley and his wife **Lorraine Coppin** established **Juluwarlu** to collect, record, document, publish and broadcast the language, history and culture of the Yindjibarndi people.
3. Michael Woodley learnt from “the old Yindjibarndi Law Bosses” and old Yindjibarndi women the ceremonies, songs and stories for Yindjibarndi, which sites and areas in Yindjibarndi country had significance because of cultural beliefs, the **galharra** relationship rules, the ancient language used in law ceremonies and the dreaming meditation, called **Buyawarri**, that Yindjibarndi “use to receive the knowledge from our country”.
4. Galharra is a system of rules that is the most important part of the Birdarra law. It is used to divide all things Yindjibarndi, animate and inanimate, into four groups: **banaga, burungu, garimarra and balyirri**. Thus, not only do people have a galharra, sometimes referred to in the evidence as “a skin” or “section”, but so do all things, including animals, plants and places where water is, as well as the sun, moon and stars, fire, wind and water.
5. Galharra dictates how one person in a group must behave in relation to all people and things in both that group and each of the other three. That is because, in Michael Woodley’s words:

Galharra is the centre of everything; it tells each of us what we must do and what we must not do in our relationships with each other and in our relationships with our country and its resources.

1. Galharra contains rules as to whom a Yindjibarndi can marry and whom he or she must avoid, for whom they must care or by whom they must be cared for, their roles and responsibilities at ceremonies and to, or by whom, deference is due. When a child is born, he or she will have a galharra group that cannot be the same as that of either parent. In turn, the child will have to marry a spouse with another galharra that is ascertained by following the system of rules. A fundamental aspect of galharra is the system of rules, called **nyinyadt**, for sharing resources in Yindjibarndi country. Michael Woodley said that nyinyadt “is the social fabric of Yindjibarndi … it is a social contract under which every Yindjibarndi person is entitled to share in the bounty of Yindjibarndi country and prosper”. If a Yindjibarndi does not comply with, or will not acknowledge, nyinyadt, “they become cursed by the country … and it is a death warrant. A slow and painful death follows to demonstrate what happens to greedy and selfish individuals who challenge or go against nyinyadt”.
2. Michael Woodley explained that the Birdarra law is a system of cultural beliefs and values that includes:

* Yindjibarndi country is “a sacred domain inhabited by the spirits of our old people and by **Marrga** … powerful creative spirit beings who gave form to everything that is Yindjibarndi in the … creation times …”;
* **Minkala** (the Yindjibarndi name for God) gave the Birdarra law to the Marrga, whom Minkala sent to Earth to create the Pilbara, as it is today, and to bring law to the **Ngaardangarli** (being the Pilbara Aborigines);
* after a time, the Marrga foresaw their own passing and they gathered together all of the Ngaardangarli at Gumunha (also known as Gregory’s Gorge), who then all spoke a common language (now preserved in the songs in the Bundut), were of one group and had no responsibility for any particular law or part of the country. At this gathering the Marrga “divided the Ngaarda into different groups and put each group into a domain”. The Marrga gave each group its language and law, commanded the respective group to speak for their domain in their particular language and to look after their domain in accordance with the given law for it;
* Yindjibarndi country is the domain that the Marrga created for the Yindjibarndi people. That domain includes all the Moses land and the claimed area;
* neighbouring Ngaardangarli groups refer to the Birdarra law and the Bundut (which are exclusive to the Yindjibarndi) as “thurdunha” (the big sister, or “sitting on top”, of all other law). In contrast, Yindjibarndi do not use that expression, but instead refer to their respective neighbour’s law as the “top” law. Michael Woodley explained that in this way, “we each show respect for each other’s law”;
* the Marrga (being creation spirits) still live in Yindjibarndi country “along with the spirits of our old people; and … they watch us always to make sure we look after our country [in] the proper way, in accordance with the Birdarra Law”. There are pictures of the Marrga throughout Yindjibarndi country carved in rocks and painted in caves and rock shelters to serve as reminders that the Marrga are still there and watching to make sure the Yindjibarndi look after their country;
* under the Birdarra law:

if we look after our country [in] the proper way, our country must look after us and provide for us; this is the promise of Minkala (God), which was told to us by the Marrga. However, if we break the Birdarra Law, or **allow others to break it*,* we suffer; our people get sick or die, or the country dries up and we can’t get what we need to go on living**. (emphasis added)

1. Michael Woodley explained the spiritual connection that the Yindjibarndi have with their country in the following way:

Yindjibarndi people, Yindjibarndi language and Yindjibarndi country (and all that is within, from both past and present) are not different things, but related parts of one thing called “Yindjibarndi”, which came into existence in the Ngurranyujunggamu. I do not feel or see myself as something that is separate and different from Yindjibarndi country because **my spirit comes from my country** and is always connected to it. It’s the same for all Yindjibarndi. **This is why, if Yindjibarndi country is hurt because the Birdarra Law is not followed, Yindjibarndi people suffer. The Yindjibarndi people were commanded by the Marrga to look after Yindjibarndi country, in accordance with the Birdarra Law, and we are held accountable for everything anyone does in Yindjibarndi country.** (emphasis added)

1. I am satisfied, having considered all of the evidence, that this explanation of spiritual connection reflects both important traditional laws, that the Yindjibarndi acknowledged, and traditional customs, that they observed, at the time of sovereignty and continue to acknowledge and observe today. The explanation neatly captures the essence of the relationship of the Yindjibarndi to their country and their spiritual obligation, embedded in their traditional laws and customs, to protect that country, including from the presence and activities on it of strangers (or manjangu) unless the stranger(s) first obtain(s) permission from Yindjibarndi people.
2. In addition, I am satisfied that, if a stranger were free to enter Yindjibarndi country without permission, under those Yindjibarndi normative laws and customs that have continuously applied over the same time period, he or she could “hurt” the country by violating the Birdarra law, even if unintentionally; for example, by entering a sacred or restricted place, or taking something, such as a resource or animal, from the country. And, those laws and customs thus require the Yindjibarndi to protect their country from a manjangu gaining access to it or its living or inanimate resources without permission of a Yindjibarndi elder.
3. Moreover, I am satisfied by all of the evidence that the Yindjibarndi have continuously (since before sovereignty) acknowledged traditional laws and observed traditional customs relating to the presence, role and power of the spirits of the Marrga and “old people” in and over Yindjibarndi country.
4. Michael Woodley explained that Yindjibarndi country is the **ngurra** or home of the Yindjibarndi people. There are 13 areas, also called ngurras, into which Yindjibarndi country is divided, and each ngurra is itself divided by a **wundu** (being a watercourse) that gives the ngurra its name. Each ngurra is divided into four parts, one for each of the galharra groups, the banaga and burungu on one side of the watercourse and the garimarra and balyirri on the other. The divisions also have importance for ceremonial activities.
5. Ngurra is the home of the **Ngurrarangarli**, being the human beings from the ngurra. Under the Birdarra law, the Yindjibarndi believe that the spirits of the Ngurrarangarli come from, belong to, and ultimately return after an individual’s death to, their ngurra. Michael Woodley said that even when Yindjibarndi people are separated from their ngurra through their daily activities, “our spirits remain connected to our ngurra”. He said that each ngurra had its own spiritual energy that was very powerful. He also said that each ngurra held the spirits of ancestors who had belonged to it and those spirits watched over the **ngurrara** (meaning country owner) “to make sure we are following our law. **If we do, they look after us and help us; if we don’t, they can grab us and hurt us**”.
6. Each ngurra has its own sacred site or sites, called a **thalu**, where the Yindjibarndi perform cultural ceremonies. For example, the Yindjibarndi believe that Manggurla thalu, which is close to Bangkangarra, is a fertility site accessible to both men and women for increasing the number of children. They perform a ritual there for that purpose. Michael Woodley’s grandfathers taught him how to perform the ritual, which he has since done on about two occasions. Moreover, whenever he visits the locale, he either goes to that thalu directly, or points it, and its significance, out to the other Yindjibarndi men and women whom he is with to teach them. In addition, when taking young Yindjibarndi men to learn secret men’s business, such as occurs at Bangkangarra, the older men continue to show the younger ones sites, like thalus, and explain their importance.
7. Other thalus are used for collection of ochre (yarna) and sacred stones (gandi), or for healing (**mowan**), or propagation of honey (marliya). Indeed, as Michael Woodley said “[t]here are thalu for everything in Yindjibarndi country”. He said that it was the duty of the senior Yindjibarndi lawmen, including himself, to visit different parts of Yindjibarndi country regularly to perform thalu ceremonies to “let the country know we are still here, that we haven’t forgotten our country, and that it should not forget us”. Michael Woodley’s grandfathers also taught him the correct ritual to perform for the relevant site on these visits. He has visited, among other places, the claim area every year to perform these rituals since he was taught them.
8. A lawman must be the correct galharra to work or perform rituals at any particular thalu and he must be painted up with local ochre. He must ask the Marrga at the site for permission to break a branch or leaves off a tree to use in brushing the thalu from side to side while calling out to the country in Yindjibarndi language. The Yindjibarndi believe that by working the various thalus the senior lawmen protect and control all creatures in Yindjibarndi country, such as fish in the rivers and birds, as well as bush foods and medicines. Michael Woodley collects ochre regularly from a number of sites in the claim area.
9. The Mount Florance and Coolawanyah pastoral leases straddle part of the boundary between the Moses land and the claimed area. The leases include, principally (around their centre), a flat plain (**Yawarnganha**) that is within the claimed area, and lies between the Hamersley Range (**Gambulanha**) to the south and the Chichester Range (**Birdarrdamra**) to the north.
10. The past and current pastoral lessees of that area have respected the Yindjibarndi’s continuing practice of their traditional laws and customs on the pastoral lessees’ land and waters. The Yindjibarndi make arrangements with the pastoral lessees to ensure that their visits or activities do not clash with pastoral activities. When on the pastoral lease areas, the Yindjibarndi in the past have, and now continue to, camp, hunt, fish, collect bush tucker, bush medicines and perform religious ceremonies.
11. Michael Woodley explained that Yawarnganha has particular importance for the Yindjibarndi. That is because it is the only area in Yindjibarndi country where, *first*, sacred trees called **wirndamarra** grow and, *secondly*, they can hunt emu for their **yulbirriri thurru** ritual. He said that the wood from wirndamarra is used to make certain sacred objects that identify Yindjibarndi people with their law and country “so [that] no other group can steal our lands”. The yulbirriri thurru ritual is performed by grandfathers with their newly initiated grandsons. The grandson must hunt for an emu on the Yawarnganha plain and once he has one, he must take it to a yulbirriri thurru area, chosen by his grandfather, that surrounds the mouth of a watercourse that flows out of the Hamersley Range (Gambulanha) into the Yawarnganha, near the base of the escarpment. The Yindjibarndi name for the escarpment, **Gumbayirranha**, means “a face-to-face reflection of each other”. The ritual requires the young man to show his face for the first time to the face of Gambulanha.
12. The Yindjibarndi believe that when they look face to face at Gambulanha they reflect one another or, in Michael Woodley’s words:

the Range and its knowledge is the Yindjibarndi and his knowledge – it’s like looking into a mirror and seeing a true reflection of yourself and all the fine features of your face **that you must care for and protect**: a head that holds the key to the all Yindjibarndi knowledge; a mouth that speaks and sings to you; an eye looking over and seeing everything; an ear that hears everything that the birds, plants, animals and the *ngurrara* are saying. And a brain that controls all Yindjibarndi movements on country and responds by activating all sorts of unanswerable events that Yindjibarndi put down to natural chain of events. A similar experience can happen at a site called Gambajuju [which is near, but to the north of, Bangkangarra within the claim area].

The *yulbirirri thurru* ritual is carried out where the waters flow out of Gambulanha for the young man’s safety, **it allows him to be seen by the spirits of our country, so that the religious knowledge can find him, without the risk of being grabbed by them**. To this end the grandfather teaches his grandson how to cook the emu on hot stones and then covers his body with the emu oil. **The *yulbirrirri thurru* ritual makes the young man and country one, so that he can receive the knowledge and be accepted by all the elements of the country as a *birirri*** (man).

The Yawarnganha plain is named after the hot stones that are used to cook the emu; and these stones can be found only in the river along the Mangudunha – this is a hunting and gathering ground and is like a cause-way located between the Range and the Fortescue River. (emphasis added)

1. **Angus Mack** explained that there were places in Yindjibarndi country, including numerous ones in the claimed area, that were dangerous. For example, he said that Jilinjilin, near Mt Parsons (in the vicinity of the northern boundary of the claimed area toward its centre was dangerous because there were spirits there, although he went on to say “**there are spirits everywhere. There’s no particular place that has no spirits**”. If a manjangu entered Yindjibarndi country without permission, he said that the spirits “can come there and … do bad things with them”. Angus Mack said that the consequence could be serious harm and that the spirits “could cripple you” and “hit your body” from the inside:

because **what they do, spirits, they take your soul**. **They lock it up in the country.** That’s what I meaning by you will deteriorate somewhere else, at town, or … you can go from here good but … if manjangu come into Yindjibarndi country, and they go, **the spirit will grab their spirit - will grab the spirit and … the person wouldn’t know that**. You will go back to … where you come from … **you will slowly deteriorate and pass away**. **That’s how it does that spiritually.** And … the buyawarri, the dream, well a lot of people … experienced it. (emphasis added)

1. He said that he learnt this when he “went through the law because you need to know that … to be … a lawman … to look after those sites”. Angus Mack also said that if a manjangu first sought permission, then the Yindjibarndi would perform a ceremony to ascertain the person’s intentions and whether he or she were genuine and did not wish to harm or cause a threat to them or their country.
2. Angus Mack said that if a manjangu came onto Yindjibarndi country without permission and took, for example, a kangaroo, then he or she would be punished by one or both of the spirits or a lawman (who may have been informed of the visit or activity by the spirits). He said that the lawman gets his power from the spirits who know the person who entered or acted without permission. He gave confidential evidence, which I accept, about his knowledge of an occasion when a senior lawman had punished a manjangu who came onto Yindjibarndi country without permission. I found that evidence, which was not challenged, compelling as to the significance to Yindjibarndi of their spiritual beliefs.
3. Angus Mack also explained that neighbouring Pilbara indigenous peoples, such as the Banjima, Guruma, Eastern Guruma and Nyiyiparli, observe (and traditionally observed in the past) similar traditional laws and customs in respect of when, for example, a Yindjibarndi wishes to access their country and when any member of those other peoples wants to access Yindjibarndi country. That was consistent with the observations of **Prof** **Radcliffe-Brown** and Dr Palmer to which I refer at [90]-[95] below. I infer that this observance has existed since before sovereignty.
4. Angus Mack said that, if a person failed to seek permission in the correct manner, “back in the day you would get speared or punished by tribal punishment”. He said:

**Today we still carry the Law**, we don’t go helping ourselves to other people’s country because it’s the Law that was handed down by the Marrga to us Yindjibarndi people. **We don’t go in other people’s country because there are rules that we don’t go into other people’s country. You feel the rules in your *wirrart* (soul), it changes and tells you, “I’m in somebody else’s *ngurra*, somebody else’s country.”** That’s how you feel inside, like “I’m doing the wrong thing here,” and your own *wirrart* will tell you, “**I’m breaking the Law here**”. (emphasis added)

1. **Middleton Cheedy** said that, in 1959, he and his family had been forced to move off Coolawanyah Station into the old Aboriginal Reserve at Roebourne, so that he and his siblings would go to school. After the move, he recalled hearing that a Ngarluma man had taken timber from Yindjibarndi land without asking permission from Yindjibarndi elders and, subsequently, the man became very sick and died. Middleton Cheedy said that the elders knew that the man’s sickness and death had been caused by “the spirits of the ngurra” because he had taken the timber without permission. As he said, “we don’t do it in the physical way now – in the tribal way – but there are spirits in the land that … would punish … people … They would make them sick” or drive them insane.
2. Moreover, many of the Yindjibarndi witnesses explained that they knew, in their heart or had a sensation, when travelling, if they were no longer on Yindjibarndi country. As Middleton Cheedy put it, “My heart would tell me … I would feel uncomfortable when I’ve stepped into somebody else’s living room … my heart would be saying to me … Step back. Step back. You’re standing in somebody else’s living room without permission, without invitation”. He had used the living room analogy earlier to explain his understanding of the importance of seeking permission. He said that the understanding of where the boundaries of Yindjibarndi country were “is instilled in us” and that Yindjibarndi are taught the boundaries by reference to landmarks of named ranges and rivers.
3. **Berry Malcolm**, the widow of Woodley King, a Yindjibarndi elder, explained that her parents and grandparents had taught her that she had to look after Yindjibarndi country and where its boundaries were. She said that her “old people”, including her grandparents, had also taught her that if she went onto a neighbouring people’s country she had first to ask permission from an elder who would say if she could go to places, and then they would go with her and show her around. However, as she said, if people just pass through in cars, they do not have to ask. **Rosemary Woodley** also said that, under Yindjibarndi law, a person had to ask permission if they were going to stay or do something on the land, but it was not necessary to seek permission if the person was just driving through Yindjibarndi country.
4. Lorraine Coppin explained the spiritual importance of a manjangu’s need to seek permission before entering onto Yindjibarndi country in this way:

Well, we believe in Yindjibarndi culture, and it’s always been passed down to us traditionally, always been talked about around the camp fire **that the country is alive. It’s got spirits on there. You know, you don’t respect it the way that you get taught, you get harmed, ... We believe that the country’s alive, … we got a responsibility to it**.

So what could happen to them, these people who don’t ask? --- Oh those previous elders discuss today that some of them will get harmed spiritually because we believe … when we say **the country’s alive, there’s a lot of spirits in the country**, so … when **we do get harm, they attack us spiritually so – and some of the elders explain how we get attacked spiritually** … they take our spirit, ... they make us – cripple us a bit, stuff like that. (emphasis added)

1. She said that her elders had told her that this is what happened “if they [scil: strangers] disrespect the country”, even though she had no personal experience of being asked for permission.
2. **Bruce Woodley** explained his role as a mowan in relation to the spirits as follows:

**If you don’t ask permission, you can get sick and the spirits can chuck something spiritual on your back that you take back to your own country.** You will be in pain and agony. You will have to look for a *mowan* man to get the thing out of your back. If you don’t find *mowan* man you will get weaker and weaker and you could pass away. **I am a spiritual man and some people have come to me to ask me to get the bad spiritual powers out of their back.** (emphasis added)

1. **Wayne Stevens**, a Guruma man, **Ricky Smith**, a Ngarluma man and **Archie Tucker**, a Banjima man, were from three neighbouring indigenous peoples. They each confirmed the existence of the traditional and current spiritual necessity, in both their own people’s, and their understanding of Yindjibarndi, laws and customs, to seek permission to enter upon both Yindjibarndi country and their own respective countries. Wayne Stevens encapsulated this when he said:

I was taught that people from other Aboriginal groups should ask us before coming onto our country. What I mean is that … Gurama should be asked by Yindjibarndi **and Yindjibarndi should be asked by Gurama before the[y] go to the other group’s country to get something**. Banjima should ask Gurama too. **Strangers to country should ask when they are going on to other groups’ country. It is the way for all people of the Pilbara. We all know this rule and respect it.** (emphasis added)

1. He said that if a stranger went onto someone else’s country in the Pilbara “it’s like … you’re trespassing”, and the “**spirit of that country**”could cause“**bad things [… to] happen to him**”. He said of his experience, which only involved non-Yindjibarndi persons who had not complied with the customary law of seeking permission to go onto another people’s country, “they’re not here to tell that story. They’re actually not here. Another one’s in the madhouse”.
2. Ricky Smith is married to Rosemary Woodley,who is Yindjibarndi and an aunt of Michael. Ricky Smith obtained his first dogging contract (killing dingoes for station owners) in 2002, when he and his wife travelled to the eastern part of the claimed area to **Yitimanara** (or Yirdimanarra), a location on Hooley Station at the south-western corner of the Reserve near the southern boundary of the claimed area. I have described this as “area 4” in more detail at [159] below.
3. Rosemary Woodley said that old **Yiirdi Whalebone** had been born at Yitimanara and had talked about it a lot. Rosemary Woodley had heard that there was a spring at Yitimanara. She said that when she and Ricky Smith first arrived there in 2002, she saw old stone buildings, date palms and “the spring on the top. I didn’t know there was a *yinda* (permanent pool) down the bottom. I forgot to call out to the spirits because I was so excited. After we had lunch I could feel that there was something following us”, which she believed was a bad spirit. She said that thing ceased following them when they stopped near a sacred rock in the Chichester Range. She believed that the rock scared the bad spirit away.
4. Her husband corroborated that account, saying that “we both got troubled and felt like something big was following us”. He said that it was “a spirit [that] made us feel uneasy”. Ricky Smith said that they had not realised that there was a permanent watering hole there and they had not performed the proper ceremony of talking to the country, and “when you go to the pool, grab a water [sic] and blow and say you come to the country and you’ve been talking to … Yindjibarndi people [and] that they allow you to go to country or Banjima country or Ngarluma country”. Ricky Smith said that he had been taught that before, but it applied “to anybody who want to go into another people’s [country]” under the traditional laws and customs of the Pilbara and “right through the Desert” and that if one went “to someone else’s country **and I don’t ask the permission to go there, you get hurt or sick**”.
5. Archie Tucker, as a Banjima man, was a traditional owner of Banjima country in respect of which the Banjima people hold the exclusive rights to control access and to exclude others, as Barker J determined in *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1 and as the Full Court affirmed in *Banjima* 231 FCR 456. In his younger years, Mr Tucker worked all over Yindjibarndi country with Yindjibarndi old people and elders. He worked by himself, dogging and travelling between 1992 and 2002 around Hamersley, Mt Brockman, Mulga Downs, Coolawanyah, Hooley and Mount Florance Stations, while living and working off the land. He habitually asked Yindjibarndi elders for permission to go to places on their country.
6. Archie Tucker went through the Banjima **Wallijingha** law. He had two sons, Lloyd and Eustace. Lloyd went through the Birdarra law because his mother’s mother was Yindjibarndi, whereas Eustace went through the Wallijingha law. Mr Tucker said that a boy’s family decides where their son or sons will go through the law and that sending boys to law grounds outside their country is an important way in which Aboriginal groups around the Pilbara build relationships between family and communities. He said that it is a strict rule for Yindjibarndi, Banjima and other indigenous peoples around the Pilbara that the details of men’s law cannot be spoken about in front of, *first*, men who have not themselves been through the law and, *secondly*,women.
7. Archie Tucker said that he had been taught by his “old people that I have to ask the right elders before going onto neighbouring Aboriginal groups’ country”. They had also taught him that “whitefellas” and people from other Aboriginal groups should ask permission from Banjima people before coming onto their country. He knew the boundary between Banjima and Yindjibarndi country. He said that he had asked a number of Yindjibarndi elders for permission to go on their country in the 1990s when he was dogging and that, in giving permission, they had told him where the special places are. He said that because the Yindjibarndi knew him, “they know I will not harm any sites and I will respect their country and not take anything that I don’t need”.
8. Archie Tucker’s witness statement became an exhibit without his being required for cross‑examination. I infer that his evidence that the Yindjibarndi knew that he would not harm any sites, would respect their country and not take anything that he did not need reflected his own understanding of the purpose for which the Yindjibarndi, as well as the Banjima and other Pilbara peoples, required strangers to seek prior permission to enter upon their country. That purpose has existed since before sovereignty and continues to exist to ensure *first*, protection from the traditional (but no longer practised) physical enforcement of each people’s territorial control by death or injury, *secondly*, the continuing spiritual consequences to a person entering without permission (such as the instances to which I have referred above) and, *thirdly*, the protection of the country and its special places.
9. In my opinion, Archie Tucker’s evidence reinforced the importance of a manjangu, such as him, seeking permission from a Yindjibarndi elder before entering their country because of their role as protectors or guardians of their land and waters and their capacity to communicate with the spirits in order to ascertain whether the manjangu should be permitted to enter and what he or she should be permitted or forbidden to do while on Yindjibarndi country.
10. The many other Yindjibarndi witnesses gave evidence of the need for a manjangu to seek permission from a Yindjibarndi before entering, or carrying out activities on, Yindjibarndi country and of the spiritual damage occasioned by a failure to obtain permission. These included Stanley Warrie, Middleton Cheedy, Rosemary Woodley, Tootsie Daniel, Kevin Guiness, Mavis Pat, Berry Malcolm, Judith Coppin (who, however, only gave evidence about the need to seek permission if going to another people’s country) her daughter, Lorraine Coppin, and Bruce Woodley. For example, Charlie Cheedy said that if a manjangu “just go in, ‘mucking around’ they might go to a place where they are not allowed to go and they might get killed by the spirits”. He said that the person could encounter “bad spirits, they call them **mabarn**, in the country. There’s a little bit of spirits in country they can harm people” by making them sick. He also gave evidence of the need for strangers to country, as he would be, to seek permission if they want to enter other people’s country, such as Banjima country.
11. I am of opinion that the evidence to which I have referred above reflected not only the Yindjibarndi’s past (since before sovereignty) and present acknowledgment of their traditional laws and observance of their traditional customs in the claimed area and throughout Yindjibarndi country (including the Moses land), but also the Yindjibarndi’s profound sense of relationship with, and duty to protect, their land and waters.
12. I am satisfied that, under those laws and customs, the Yindjibarndi in the past did not permit a manjangu (stranger) to enter on or to exploit any of the land and waters without a Yindjibarndi elder having first given permission to, and then introduced, the stranger, if the traditional laws and customs permitted him or her to be there at all, to the spirits in the particular place and taken steps to protect the stranger from any harm.
13. Indeed, in his early article (A.R. Brown, ‘Three Tribes of Western Australia’ (1913), vol xlii, *Journal of the Royal Anthropological Institute* 143 at 146), on which FMG relied, Prof Radcliffe-Brown made observations about local and tribal organisation and customs of the Kariera [scil: **Kariyarra**] tribe, which he described as occupying a territory of 3,500 to 4,000 square miles (or about 9,000 to 10,400 square kilometres) from the coast inland, with neighbours of the “Injibarndi” [sic] to the south and the “Ngaluma” [sic] to the west of the Sherlock River. Prof Radcliffe-Brown said of the Kariera that, internally, a member of a local group within the Kariera tribe could not even hunt or collect vegetable products, without permission, on the country of another (internal) local Kariera group, on pain of death, with the possible exception where a man was in pursuit of a kangaroo or emu that had crossed a boundary. In only the latter situation did it appear that the man might continue the hunt and kill the particular animal on the other group’s or tribe’s country without a sanction for such a trespass. Prof Radcliffe-Brown wrote:

**The importance attached to this law seems to have been so great that offences against it were very rare.** In the early days of the settlement of the whites in the country of this **and neighbouring tribes**, the squatters made use of the natives as shepherds, and I have been told on several occasions that **they found it impossible to persuade a native to shepherd the sheep anywhere except on his own country**. (emphasis added)

1. It is safe to infer that Prof Radcliffe-Brown’s reference to “neighbouring tribes” included the Yindjibarndi. The “respect” which the “shepherds” exhibited for the country of their neighbours reflected a regional law or custom that, ordinarily, trespass or entry onto the country of a tribe or local group not one’s own was likely to be punished by death or spiritual harm.
2. Dr Palmer’s expert report considered Prof Radcliffe-Brown’s writings and later criticisms of those, including Prof Radcliffe-Brown’s choice of anthropological terminology, such as “group”, “horde” and “tribe”, to describe the socialised ways in which indigenous people were organised. However, Dr Palmer’s research, including from his own extensive experience and earlier fieldwork in the Pilbara, led him to conclude that, at the time of sovereignty:

**The ability to exclude others by means of capital penalty denotes, in my view, a system of exclusive rights to the country of the country group.** Those not members of the country group, by reference to customary principles of recruitment could be excluded or annihilated. (emphasis added)

1. In his oral evidence, Dr Palmer accepted that the descriptions, “country group” or “language group”, in that sentence, did not precisely convey that a country or language group or tribe could absorb others by marriage, where the traditional laws and customs, such as those of the Yindjibarndi, practised exogamy (i.e. a man taking a wife from outside his own group or tribe). He suggested that sometimes this could include an aggregation of local groups.
2. Leaving aside, for the moment, the issues relating to the Todd respondents (with which I deal in issue (5) below), I accept Dr Palmer’s evidence as to the Yindjibarndi’s traditional laws and customs as at sovereignty. His report and oral evidence were well reasoned and supported his conclusions.
3. Dr Palmer said that in his experience, based on many years work in his field, “it’s **a very real fear that people have that there will be supernatural consequences for breaking the normative system** … I don’t underestimate the strength of that belief in this [Yindjibarndi] ethnography. **It is of fundamental importance**”. I accept that evidence and am satisfied that it reflects the normative system that has existed, and the Yindjibarndi and their neighbours have observed, since before sovereignty. It reflected not only the substance of the confidential evidence of Angus Mack, but also the numerous other Yindjibarndi witnesses’ explanation of the spiritual importance of a manjangu needing to seek permission to come onto, or conduct activities on, Yindjibarndi country. That requirement to seek permission is also present in the apparently complementary, or congruent, system of belief of neighbouring Pilbara people’s. It has a normative importance as a fundamental element of their traditional laws and customs.
4. The State tendered some short passages from the transcript of the hearing before Nicholson J, including the following evidence of Allery Sandy, given on 6 October 1999, as to her understanding of the Yindjibarndi law that a manjangu (in the particular question, “the Government”) should ask permission before entering Yindjibarndi country. Consistent with the evidence before me, she said and, pursuant to s 86(1)(a) of the *Native Title Act*, I accept:

I think so because respect … of the land. There are things that you don’t know is in the land, and **you need to confront it to the elders** “Oh is it safe to go into this country” **because there are spirits living out here. Don’t know what sort of spirit they are**. (emphasis added)

1. The State and FMG sought to portray the requirement for a manjangu to seek permission as follows from the cross-examination of Charlie Cheedy:

It’s a respect thing. --- It’s a respect.

**So if somebody wants to go onto Yindjibarndi country it’s showing respect to the Yindjibarndi. --- That’s right.**  (emphasis added)

1. The State and FMG argued that notwithstanding the body of evidence to which I have referred, the requirement that a stranger seek permission before entering Yindjibarndi land was a mere matter of “respect” or courtesy, rather than a requirement of traditional and currently acknowledged Yindjibarndi law. They also contended that in today’s world, not everyone, and particularly not all indigenous non-Yindjibarndi persons, sought permission before entering Yindjibarndi country. They submitted that, in some way, these circumstances demonstrated that the Yindjibarndi laws and customs either traditionally, since before sovereignty, or as they are now acknowledged and observed, did not reflect an actual right of the Yindjibarndi to be asked for, or the continuing practice of a recognised and enforced requirement for a manjangu to seek, permission before entering or conducting activity on Yindjibarndi country.
2. I reject that argument. *First*, in one sense, as the State and FMG contended, the Yindjibarndi’s requirement, under their traditional laws and customs, that a manjangu seek permission from a Yindjibarndi before entering, or carrying out an activity on, Yindjibarndi country reflects a mark of “respect”. But, that argument only begs a question “respect of what?” and fails to address the Yindjibarndi’s spiritual beliefs in relation to their country. One example occurred when the Court sat at Bangkangarra to take secret men’s evidence. At the outset, Michael Woodley and Middleton Cheedy led a procession of all the persons who attended on that occasion. As the procession walked towards the **jinbi**, a permanent rock water hole fed by a freshwater spring, the Yindjibarndi men kept calling out in their language. Michael Woodley said that it was a cultural norm for them to “call out to country” every time they came to their country. He referred to an analogy that Middleton Cheedy had used in his evidence, on the day before, 8 September 2015, of a person ringing a door-bell or knocking on a door to let the occupant of a dwelling house or apartment know that he or she was there and wanted (permission) to enter. Michael Woodley said that:

And **what that does is let the spirits in, in the area know that Yindjibarndi people are coming** and we coming, … **to visit you**. We also tell them that if we coming with kids, we say we’re bringing the kids here and **we don’t want you to harm them. If we’re bringing strangers as, as we’re with you guys, we say ‘we, we bring manjangu and we don’t want you to harm them’ as well. But it is more, you know, letting the country know that Yindjibarndi is coming, coming to country and more welcoming us to country, and for the county to Yindjibarndi**. (emphasis added)

1. *Secondly*, at no point in the State’s or FMG’s cross-examination of any of the Yindjibarndi witnesses did the cross-examiner put to him or her that “respect” had a meaning that was divorced from the Yindjibarndi’s belief that, in substance, they had the authority to grant or withhold permission, whether or not acting as gatekeepers or protectors of their country, in accordance with their laws and customs. Nor did the cross-examiner identify to the witness the meaning of “respect” for which the State and FMG contended, which appeared to be the sense in which Nicholson J used that word in *Daniel* [2003] FCA 666 at [292] (see [19] above), namely in contradistinction to a right to control access.
2. *Thirdly*, Charlie Cheedy explained his understanding of the expression “respect” soon after the exchange at [97] above, as:

Some people who no longer have it in there, and **they don’t show that respect**, they just take it upon themselves to come in, do whatever they want to do, and then leave again. --- That’s right.

Yes. --- **It’s like ... me coming into your yard when you’re not there and taking your pick and shovel, taking it next door to my yard and start weeding the grass. And you get home, and you’re not going to like that, are you? You stole my pick and shovel. It’s the same**; that’s what’s happening today, you know? (emphasis added)

1. As he said, the failure to obtain permission before entering Yindjibarndi country showed the same lack of “respect” for proprietary rights as the dual acts of trespass to land and goods and theft that he gave in his example. That “respect” is also a fundamental value of the common law as Mason CJ, Brennan, Gaudron and McHugh JJ exemplified in *Coco v The Queen* (1994) 179 CLR 427 at 435, drawing on the great English common law case of *Entick v Carrington* (1765) 2 Wils 275 at 291 [95 ER 807 at 817], when they wrote:

Every unauthorized entry upon private property is a trespass, **the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right** [*Entick v Carrington* (1765) 2 Wils 275 at 291 [95 ER 807 at 817]; *Halliday v Nevill* (1984) 155 CLR 1 at 10, per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 639, per Mason CJ, Brennan and Toohey JJ; at 647 per Gaudron and McHugh JJ. See also *Colet v The Queen* [1981] 1 SCR 2 at 8; (1981); 119 DLR (3d) 521 at 526]. (emphasis added)

1. In *Entick* 2 Wils at 291 [95 ER at 817] the Court of King’s Bench said, in denying the power of one of the King’s Secretaries of State to issue a warrant to enter and search a person’s premises where no statute conferred such a power:

our law holds **the property of every man so sacred**, that no man can set his foot upon his neighbour’s close without his leave; **if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law**. (emphasis added)

1. While the common law regarded this as a vindication of a right of personal or real property, the indigenous peoples of Australia had the generally different relationship to domains of land and waters that Gleeson CJ, Gaudron, Gummow and Hayne identified in *Ward* 213 CLR at 64-65 [14] (see [42] above) and French, Branson and Sundberg JJ explained in *Griffiths* 165 FCR at 428-429 [127] (see [21]-[22] above). French CJ, Hayne, Kiefel, Gageler and Keane JJ said in *Western Australia v Brown* (2014) 253 CLR 507 at 522 [36]:

It is important to recognise that particular considerations apply to the identification of native title rights and interests. In examining the “intersection of traditional laws and customs with the common law” [*Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46]] (or, in this case, the intersection with rights derived from statute), it is important [*Ward* (2002) 213 CLR 1 at 92 [85]] to pay careful attention to the content of the traditional laws and customs. It is especially important not to confine [*Ward* (2002) 213 CLR 1 at 95 [95]] **the understanding of rights and interests which have their origin in traditional laws and customs “to the common lawyer’s one‑dimensional view of property as control over access”**. (emphasis added)

1. The “respect thing” that Charlie Cheedy understood was the requirement, under the traditional laws acknowledged and the traditional customs observed by Yindjibarndi people in the past and now (and, as he understood them, in other Pilbara people’s laws and customs), to seek permission from a Yindjibarndi, as a gatekeeper, before entering Yindjibarndi country. The imperative need to show that “respect” is and was a native title right or interest, under Yindjibarndi law and custom, broadly equivalent to the common law concept of trespass to land (and trespass to goods, if things be taken from the land and waters such as ochre or animals). That understanding demonstrated that the need to show such “respect” under Yindjibarndi laws and customs was in the nature of a real proprietary right equivalent to the common law right of exclusive possession, as did the ancient normative consequence that a transgression was punishable by death or spiritual harm. The Yindjibarndi had and continue to have a normative responsibility to care for and protect their country from unauthorised access to it by a manjangu.
2. And, as **Stanley Warrie** said, in respect of the non-exclusive possession and extinguished areas in the Moses land and in claimed area, “when you’re under the white man law, you’re … free to go wherever you want to. … And it is a free country then. **But our laws still stand the same**”. He said that Aboriginal people still followed their law and culture even though “the white man law” had affected the way that Aboriginal laws are respected. He said, “But there’s still respect between Aboriginal people … But the white man doesn’t respect Aboriginal people’s laws”. Nonetheless, if a stranger came onto Yindjibarndi land (regardless of the position under “the white man law”) without permission, that would break the Yindjibarndi law. However, in the present day, the Yindjibarndi themselves could not harm such a person physically, by, for example, spearing him or her, because “the white man’s law’s in place. We can’t do anything like that”. Stanley Warrie explained (as did Middleton Cheedy, see at [71] above) that nowadays “you can’t kill anybody, because you get in gaol now”, but that “if I had my way, I would deal with him in my own law”.
3. That accords with what Mansfield, Kenny, Rares, Jagot and Mortimer JJ said in *Banjima* 231 FCR at 466 [21]-[22] namely:

It would be accurate to say that the Banjima People had no capacity whatsoever to enforce their laws and customs against Europeans because, until *Mabo No 2* [175 CLR 1], native title was not recognised in Australia. **Moreover, Europeans stood outside the universe of traditional laws and customs.** As noted in *Griffiths* [165 FCR 391] at [127]: “traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people.” In other words, it is the Banjima People and other indigenous people that matter, not people who stand outside the relevant frame of reference.

**It follows that the conduct of Europeans in not seeking permission and not heeding the spiritual dangers of Banjima country or respecting sacred or religious sites created in the Dreaming says nothing about the acknowledgment and observance by Banjima and other traditional societies of Banjima traditional laws and customs.** (emphasis added)

1. The State and FMG contended that the evidence did not establish that the Yindjibarndi currently observe the ritual practised in earlier times of **binja** or **binjimagayi** whereby a manjangu announced his or her presence at the boundary of Yindjibarndi land by means of a smoke signal, following which elders would speak to the stranger to ascertain his or her galharra or if and how the person was related to the Yindjibarndi.
2. In approaching the evaluation of the Yindjibarndi people’s case it is important to bear in mind the significant admissions by all active respondents, including the State and FMG, that I have set out at [16] and [40]-[41] above, the fundamental premise of which is that the Yindjibarndi possess a suite of non-exclusive native title rights and interests over the claimed area that, in any event, should be reflected in a determination of native title. The admissions necessarily narrowed the issues for trial, albeit that they did not relieve the applicant from satisfying its onus to translate those admissions, together with the whole of the evidence, beyond the proof of facts necessary for a consent determination into facts sufficient to support a final determination of exclusive native title as sought.
3. A necessary factual underpinning of the 2007 determination, that, I am satisfied independently, the evidence in this trial also establishes, is that the Yindjibarndi people possessed, at sovereignty and now, native title rights and interests recognised by the common law within the meaning of s 223(1) of the *Native Title Act* that are at least no less than those recognised by the 2007 determination. And, for the reasons I have given, I am satisfied that those rights and interests include a right to control access equivalent to the right of exclusive possession in respect of the claimed area.
4. I find that, in the ordinary course, a manjangu must seek permission from a Yindjibarndi elder or elders to enter and carry out activity for a particular reason on Yindjibarndi country. As Michael Woodley said, how that permission is sought now “depends on the circumstances” and “[a]ll family has special connection to all Yindjibarndi country” with no difference at all between them.
5. It is understandable that those manjangu in the wider community of the townships, like Roebourne, where the diaspora of Pilbara Aboriginals now live, may tend to approach Yindjibarndi elders known to be associated with a particular locale on Yindjibarndi country to seek permission. Depending on the nature of the request, the elder or elders to whom the request for permission is made may consult a wider group of Yindjibarndi elders before deciding on the request.
6. I accept Michael Woodley’s evidence (being of a very senior Yindjibarndi lawman) as correctly explaining the substance of the traditional and current Yindjibarndi law and custom of considering a request by a manjangu for permission to enter and carry out activity on Yindjibarndi country. He said that in the old days, before sovereignty, the manjangu would light a fire to let the tharngu (I infer, through whomever in the group in that locale saw the signal) know that they were coming and the tharngu, as the most knowledgeable lawman in that ngurra, would ascertain who the manjangu were and what they intended to do.
7. If those intentions appeared to be worthy, the old people would perform a ritual (binjimagayi) to work out how the manjangu’s relationship system fitted into the galharra system. If there were any doubt about his or her intentions, the tharngu would require that the manjangu perform the binja ritual in order to test their character. If the manjangu failed to perform the binja ritual in the proper way, they could be asked to do it again or sent away. The use of these rituals ensured that the Yindjibarndi fully accepted the manjangu, to whom they granted permission, “as related visitors to our community and country”. And, as Michael Woodley added, the manjangu “then had fathers to watch over them and guide them in Yindjibarndi country to make sure they were safe from spiritual dangers”.
8. FMG contended that the only inference available on the evidence was that there had been a substantial interruption, since sovereignty, of the customs to speak for country that could not be related back to, or explained as an acceptable adaptation of, the custom as it existed before sovereignty. FMG’s argument centred upon its assertions that, *first*, some members of the claim group had not given consistent evidence as to who had the right to speak for particular ngurra within Yindjibarndi country and, *secondly*, there was a lack of correlation between the evidence and the pleaded case.
9. FMG argued that, *first*, there were gaps and inconsistencies in the Yindjibarndi people’s evidence that made it impossible to identify a body of law and custom that supported the claimed right of exclusive possession, *secondly*, the evidence of current practice was not relevantly traditional, having regard to the anthropological evidence and, *thirdly*, the evidence did not correspond sufficiently to the applicant’s pleaded case. Essentially, FMG argued that the applicant had not come up to proof of the asserted right to control access. I reject those submissions for the reasons I have given and give below.
10. Next, FMG argued that there was a variety of opinions and assertions about who could speak for country, that were not internally coherent. It submitted that it could not be concluded that the Yindjibarndi, as a whole, acknowledged and observed a body of traditional laws and customs as to who could speak for country and that Michael Woodley’s account was not corroborated by other witnesses. Additionally, FMG sought to phrase and analyse each Yindjibarndi witness’ separate explanation of his or her understanding of how permission ought be sought and given, much as if each witness was answering a question in a university law examination.
11. I reject FMG’s submission. Each witness gave an explanation in his or her own words, sometimes in a way that illustrated the witness’ understanding of the appropriate response to a particular factual situation, as opposed to reciting the words of a statute. Contrary to FMG’s argument, the fact that some witnesses expressed a different, or apparently different, understanding from what I have found does not establish that the applicant had failed to prove its case. Not all witnesses are necessarily as accurate, articulate or precise as all others.
12. In any event, *first*, there was a clear consensus among Stanley Warrie, Charlie Cheedy, Middleton Cheedy, Rosemary Woodley, Tootsie Daniel, Angus Mack, Esther Pat, Berry Malcolm, Lyn Cheedy, Pansy Cheedy and Bruce Woodley, which was acknowledged by manjangu, such as Ricky Smith and Wayne Stevens, that all Yindjibarndi elders can speak for country. *Secondly*, I am satisfied that a senior lawman, such as Michael Woodley, is better able than others, with whose evidence his account may conflict, to articulate the relevant law or custom, as he did. *Thirdly*, there are now more limited occasions on which a manjangu needs to seek, or has sought, permission, and it was usually by persons who already had established ties to Yindjibarndi, such as in the cases of each of Ricky Smith, Wayne Stevens and Archie Tucker.
13. FMG’s argument sought to derogate from its earlier admission, in common with all of the active respondents’ pleaded contentions, that the Yindjibarndi’s native title rights and interests are held by them as communal rights and interests and it is unnecessary to establish connection on a subgroup basis (see [41] above). That admission made it unnecessary for the purposes of the proceedings for the Yindjibarndi to prove that any subgroup had or exercised the communal rights and interests in some particular way. The Yindjibarndi led evidence on the basis of that admission. Of course, there were variations of expression by various Yindjibarndi witnesses of how, and from whom, a manjangu should and could seek and obtain permission to enter and carry out activity on Yindjibarndi country. FMG relied on those variations in support of its argument. However, I am satisfied that Yindjibarndi elders had and continued to have authority under the traditional laws acknowledged and customs observed pre-sovereignty and today to give a manjangu permission to enter and carry out specific activity on Yindjibarndi country.
14. Before sovereignty, the manjangu would have to meet with the elders at the point on the boundary of Yindjibarndi country where both were. Obviously, in former times only the Yindjibarndi in the immediate vicinity of the manjangu would be able to speak for country in the area where the stranger wished to enter. That, equally obviously, was necessitated because there were then no modern forms of communication and the Yindjibarndi elder or elders in the locale would know how to assess the intentions of the manjangu and to speak for that area, being aware of the sacred and dangerous sites and being able to introduce the manjangu to the spirits in the locales where he or she was permitted to go. But, where a major gathering, such as law time (when uninitiated males were to go through the Birdarra law), occurred, all or a great part of the tribe would gather and more elders could, and would, be involved in deciding whether to allow the manjangu to enter and carry out activity on Yindjibarndi country.
15. Having seen and heard the Yindjibarndi witnesses giving evidence, I am satisfied that it is still the case that an elder can speak for all Yindjibarndi country and grant the manjangu permission to enter and carry out activity on it. That is because the elders were and are aware of the spiritual nature and dangers of the land and waters. Ordinarily, the request will be of a straightforward nature, such as the presence on country to carry out a dogging contract and to take sustenance resources while doing so. And, those elders with a present familial connection to particular land and waters can be expected to be approached for permission, not as a form of some seigneurial right that they, as individuals, possess, but, as I understood the evidence, a matter of practical convenience. That was the sense in which I took statements such as the following:

* by Rosemary Woodley:

The right to speak for country comes through your family. My family could speak for Millstream, Garliwinjinga (B7) to Ganjingaringunha (G8) **and all of Yindjibarndi country**. My father always spoke up **for his country** and I am following him by leaving it up to Bruce and Michael, who are senior men, to speak for our family. (emphasis added)

* by Middleton Cheedy:

The Cheedy’s [sic] are ngurrara for all Yindjibarndi country.

1. Rosemary Woodley’s brother, Bruce Woodley said:

When any big decisions are getting made about Yindjibarndi country, like mining, the Yindjibarndi have to come together and **make decisions about our country together in times when our land is being threatened**.

When we first started to talk with Andrew Forrest in about 2007, he wanted to build the Solomon mine he just wanted to know about the one family that speaks for the area where he wanted to build that mine.  **But that is not the way Yindjibarndi people make decisions about their country. He needed to talk with all the elders who are the traditional owners not just one family for that area.** (emphasis added)

1. Michael Woodley said that, traditionally, important decisions affecting Yindjibarndi country were made by the **nyambali** (or “chief law boss for Yindjibarndi”) and all the tharngu sitting or meeting together as one body. However, he said that in about the last 20 years this had changed to “more democratic processes of decision making”, where important decisions affecting Yindjibarndi country are made by consensus at a community meeting of the Yindjibarndi people at which the nyambali and tharngu provide advice and guidance.
2. As Gleeson CJ, Gummow and Hayne JJ (with the agreement of McHugh J) held in *Yorta Yorta* 214 CLR at 456 [86]-[87], an applicant for a determination of native title must establish that the observance of the law and customs on which the claim group relies, as the source of the native title rights interests claimed in the relevant area, “have continued substantially uninterrupted since sovereignty”. It is critical that there be substantial continuity in the observance and acknowledgment by the claim group and their ancestors of the normative rules that ground the native title rights and interests claimed. And, those rights and interests must, at sovereignty, have been ones that the common law then recognised: *Yorta Yorta* 214 CLR at 446-447 [52]-[56], 453-454 [77]-[79]. Their Honours said (*Yorta Yorta* 214 CLR at 456-457 [89]):

In the proposition that acknowledgment and observance must have continued substantially uninterrupted, **the qualification “substantially” is not unimportant. It is a qualification that must be made in order to recognise that proof of continuous acknowledgment and observance, over the many years that have elapsed since sovereignty, of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement.** Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end **it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs**. (emphasis added)

1. The gradual evolution of law and custom, by adaptation and change, within a traditional system of laws and customs ordinarily will not entail that the society or group within which those laws and customs existed has ceased to acknowledge or observe the traditional laws and customs. Any society of human beings, over time, must adapt and change its social structures, including its laws and customs, to current or more modern conditions when changes in or to earlier conditions and circumstances occur. In doing so, the society can retain a coherence with its traditions, and remain recognisable, or it can transform radically.
2. The French Revolution and its sequels radically transformed the society, its laws and customs in France at the time that they occurred. The new laws and customs later evolved over the succeeding centuries. The Revolution itself marked a rupture with the past, absolutist monarchical system of government. However, on the other side of the English Channel, the United Kingdom gradually evolved, through its existing institutions, a system of government that no doubt is different from that of the late 18th century, but remains today linked intrinsically to the traditional laws acknowledged and customs observed in that earlier time. In the same way, all societies must adapt to the exigencies of the time, such as war, drought, famine, changes in technology, or a changing climate.
3. In our own time, over the last 20 years the lives of most people on the planet have been transformed by the invention and continual development of mobile phones, the internet and Wi-Fi that have made instantaneous communication not only possible, but a commonplace, in most of the world. These technological developments, and their dissemination to people at all levels of societies, have resulted in changes in social behaviours or customs, and sometimes laws. In the 19th century, western Europeans wrote letters that were delivered by a government post office, in an analogous way to today’s text message, post on Facebook, tweet on Twitter or photographic event shared on Instagram or Snapchat. Probably within a decade, most of those forms of communication will also have been eclipsed.
4. The law cannot be blind to the forces of social adaptation and change in assessing whether an indigenous people **substantially** (*Yorta Yorta* 214 CLR at 456-457 [89])continue to acknowledge traditional laws and observe traditional customs. No doubt a mobile phone call or text message is different from a smoke signal as a means of conveying that one person wants to discuss a matter with another, such as seeking permission to come onto the other’s land. However, both the use of telephony and smoke have and fulfil the same purpose, which is to seek and obtain permission, from a person with authority to grant it, for the manjangu to enter and conduct activity on Yindjibarndi country in accordance with traditional law and custom. There is no difference in substance between those means of communicating.
5. Traditional law and customs can have adapted or changed in the period since sovereignty conformably with the continuing efficacy of the native title rights and interests that those laws and customs evince. In *Yorta Yorta* 214 CLR at 455 [83] Gleeson CJ, Gummow and Hayne JJ said (McHugh J agreeing at 468 [134]):

What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult). **The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?** (bold emphasis added, italic emphasis in original)

1. The State and FMG argued that the non-use of smoke signals and a particular form of questioning used to elicit the manjangu’s galharra relationship meant that the traditional law and custom of seeking and granting permission to enter Yindjibarndi country no longer existed and, therefore, the contemporary means of obtaining permission was not traditional. I reject that argument for the reasons I have explained. It elevated the form of communication over the substance of the purpose for the communication and what the Yindjibarndi elder(s) needed to be asked and to ask before he, she or they could be in a position to grant or withhold permission. The evidence demonstrated that the substance of the process of communication to seek and obtain permission remains a continuing and integral aspect of Yindjibarndi law and custom, including, in the unlikely event (given that those indigenous persons who usually seek to enter and conduct activity on Yindjibarndi country are already well known) that it is not known, the galharra relationship of the manjangu.
2. I am of opinion that such changes and adaptations, as the evidence reveals have occurred since sovereignty to the traditional laws and traditional customs, relating to a manjangu seeking permission from Yindjibarndi to access or conduct activity on Yindjibarndi country have not affected the essential normative character of those laws and customs or their observance at the present time. The right to control access that the Yindjibarndi assert is, in substance, the same as they have possessed continuously since before sovereignty under their traditional laws and customs.
3. The current position is as Michael Woodley explained in his oral evidence. The manjangu should approach a senior elder, the nyambali or a tharngu or another law boss to seek permission, and the Yindjibarndi has or have to be confident that the stranger is being straightforward and trustworthy and will not harm or do anything wrong to the country. If they are not comfortable with that person:

we can sense it, and … we do the ceremony … and he’s not fulfilling his part of … the binjimagayi ceremony, then he won’t be allowed in … he just won’t be trusted.

1. Michael Woodley said that now that most elders had passed away, in speaking for country:

we’re getting very short on elders. So, what we try and do now is … to rely on several elders to have … the final say **because they have the knowledge and wisdom for all Yindjibarndi country**. (emphasis added)

1. The importance of the grant of permission is that this ensures that the Yindjibarndi can, *first*, ensure that they protect their land and waters from persons who should not enter them or particular places on themand, *secondly*,provide the manjangu with protection from the spirits when he or she is on Yindjibarndi country.
2. Moreover, in my opinion, the Yindjibarndi’s evolvement of a more democratic or involved decision-making process, in which the roles of the nyambali and tharngu have altered from them deciding together on a major matter or course of action to now providing advice and guidance to the broader community, has not altered the substantial acknowledgment and observance of their traditional laws and customs or the essentially spiritual or religious relationship of the Yindjibarndi to their country: cf. *Yorta Yorta* 214 CLR at 455 [82]-[83], 456-457 [88]-[89]. Rather, that evolution can be seen as a response to the intrusion into Yindjibarndi society of the incidents of the *Native Title Act* itself (such as ss 251A and 251B), and the wish of others, particularly mining companies, to exploit resources found on traditional land and waters. The presence of a large mine not only has a physical impact on the shared land and waters of an indigenous society that is unlike the kinds of activities that their traditional laws and customs ever contemplated, but it also promises that community the potential for financial rewards that can relate the indigenous people to their coextensive presence as a part of the broader, modern Australian society.
3. For the reasons I have given, I reject FMG’s argument that there was an insufficient correlation between the evidence and the Yindjibarndi’s pleaded case. Moreover, that argument ignored FMG’s own pleaded admission that the right to rehearse the spirituality and manage the geographical and physical manifestations of Yindjibarndi country, including the claimed area, rested with those ritually qualified to do so. And I reject FMG’s submission that the Yindjibarndi’s pleading, that a manjangu should not access and use Yindjibarndi country, including the claimed area, “without the permission of appropriate Yindjibarndi persons who can speak for that country”, had not been made out, for the reasons I have given.
4. Since the Yindjibarndi no longer live on their country, it is hardly surprising that the smoke signal has fallen into desuetude. But its purpose, to establish that a manjangu wished to enter Yindjibarndi country (no doubt to avoid the traditional risk of death for doing so without permission), is now fulfilled by direct communication of the desire and reasons to do so either in person or by telephone, as, for example, Tootsie Daniel explained, or by contacting the offices of one of the corporations that Yindjibarndi have established, such as YAC or Juluwarlu.
5. The normative requirement to seek permission has adapted to the change of circumstances brought about by, *first*, the displacement from their country, principally to Roebourne, of the bulk of Yindjibarndi people where they live alongside many, similarly displaced, communities of their ancient neighbours and, *secondly*, the advent of modern means of communication. And, because many persons from the various indigenous peoples in the Pilbara in Roebourne know one another, they are likely also to know their genealogies and, I infer, their galharra too. Thus, it is probable that there is now not usually any need to establish those matters (because they are already known) when a manjangu seeks permission to enter or carry out activity on Yindjibarndi land.
6. Rather, the manjangu still needs to establish that his or her reason to enter or carry out activity is one that the Yindjibarndi elder whose permission is sought considers will not harm the country or offend the spirits or occur on a site to which the spirits would not permit the manjangu (or perhaps others) to access. That aspect of the requirement to seek permission, namely, ascertaining the good faith and purpose of the manjangu and the appropriateness of what he or she wishes to do on the relevant part of Yindjibarndi country having regard to its spiritual properties, has remained to the present time as a normative law and custom that the Yindjibarndi have acknowledged and observed since before sovereignty: *Yorta Yorta* 214 CLR at 455 [83].
7. However, as witnesses like Stanley Warrie and Middleton Cheedy explained, “white man law” prevented the Yindjibarndi from enforcing their traditional right to exclude persons from their country by physical force. In simple terms, unless a determination of native title confirms a right of exclusive possession on them, the statute and common law does not allow an indigenous people to use physical force to remove a person who would be a trespasser if the Yindjibarndi had a right of exclusive possession.
8. The only way in which it is legally possible for indigenous peoples who do not presently have a legally enforceable right to exclusive possession of land and waters to exclude a stranger is through the traditional law and customs of requiring the stranger to seek permission to enter and carry on activity on those lands and waters and giving effect to their spiritual belief in the power of the country and a mowan to harm those who enter it without that permission. The power of the mowan was convincingly explained by Angus Mack in his confidential evidence, and in the evidence I have quoted from Bruce Woodley at [76] above. Tootsie Daniel said:

I have been told that in the old days, if you wanted to visit someone else’s country, you would have to go to their border and send up smoke signals. This would let the people know that a stranger wanted to come on their land. The local people would then send someone out to meet you. **These days you will just ask the elders when you see them after you get there, rather than beforehand.**

If people do not let us know they are coming onto country **they will get hurt** **or sick by a *mowan garra* (magic man). He can heal and he can harm with his special powers, by making them sick, they might lose weight, get a temperature get diabetes or just die. The *mowan garra* will point his bone at them and they will wither away (*ngarlumarli*).**

If a neighbour came onto land and took things off country, **spirits will follow him back home and tell him that he shouldn’t be doing that and to take the things back that he took without asking**.

You have to leave everything on country. The men can take things to use for a ceremony, women can take food. You can only take things you are going to use.

If someone does something wrong, they will call a meeting and put him in a punishment ring. An elder from his family will give him a hiding and growl at him. (bold emphasis added)

1. I also reject the State’s argument that the **wutheroo** and associated rituals are distinct from the requirement for permission and that these also merely signify “respect” as an aspect of mere politeness or civility.
2. The wutheroo is a ceremony or ritual that the Yindjibarndi and manjangu must perform. It is linked to informing the spirits present at, and giving a blessing to the spirit or thing that made, a particular permanent waterhole. For example, there is a permanent waterhole at Bangkangarra, at which I heard the secret men’s evidence. It is named after the **bangka**, a mythical sand goanna who made that waterhole. Michael Woodley said that the Yindjibarndi believe that, at the creation of time, the Bundut was sung throughout the country as the landscape, together with the bangka, was created. Then, as the Bundut was sung “it then told the bangka where to … travel on country and where to come”. The bangka travelled along the route of the Bundut to Bangkangarra where it remained. The “bangka dug a hole here then and made this pool for us, made this permanent pool … we sing about him … in … that song we sung … [just] now … that’s part of the [B]undut cycle”.
3. Michael Woodley explained, on that occasion, one purpose of the wutheroo was as follows:

Well a wutheroo is always …when you going into an area where there’s water. And there’s permanent water. **You have to give blessing back … to the thing that made the permanent water.** Obviously the country is the one that gave us this, this land – won’t say the country – the creation spirits and the Marrga and with the development it gave the bangka that responsibility or that role, **so what we’re doing with the wutheroo is again giving thanks to country, thanks to the bangka, thanks to the bundut, thanks to the creation spirits, thanks to our Minkala**. (emphasis added)

1. He also said that if Yindjibarndi did not perform a wutheroo for a manjangu who went to a waterhole, that person would be in danger because “the spirits in the country … wouldn’t be viewing him in the same way that [they] viewed the ngurrara, the Yindjibarndi”. His grandfather, Woodley King, told Nicholson J on 24 September 1999 that the performance of the wutheroo was “our law, that water can hear. And men and women in the water can hear, hear what they’re [scil: the person(s) blowing the water] meaning”. He said that it was a way of saying that the person “belong[ed] to their country”, and that the wutheroo had to be done when someone, including ngurrara for that country, wanted to fish (at Deep Reach Pool).
2. Likewise, the manjangu must be with Yindjibarndi at some sites. The Yindjibarndi will call out to the spirits to let them know they are there and, where appropriate, with a stranger, and that they mean no harm. The traditional and present importance of calling out to country for the Yindjibarndi was also illustrated by the evidence of Rosemary Woodley and Ricky Smith to which I have referred at [79]-[81]. So, Michael Woodley said, the purpose of calling out to country is to let the spirits in the area know that Yindjibarndi people are coming to visit them, and if they are coming with children or manjangu, to tell that to the spirits and to say “we don’t want you to harm them”. He added that “it is more … letting the country know that Yindjibarndi is … coming to country and more welcoming us to country, and for the country to Yindjibarndi”. Similarly, Berry Malcolm said:

When you come onto country you have to call out to the spirits and tell them the Yindjibarndi family you are from or if you are from another group, who your family is.

1. Dr Palmer concluded that at the time of sovereignty the Yindjibarndi possessed a right to exclude strangers from their country by persuasion or force, on pain of death, that amounted to a system of exclusive rights to that country. He opined that that right was part of a congeries of rights exercised only by those who had a customary connection to the country accepted by all participants in the “country group” according to the normative system that regulated rights to country. He concluded that both that system and those rights would have been exercised by the apical ancestors or their forebears who were in possession of portions of the claimed area at the time of sovereignty. I accept that evidence. It accords with the findings that I have arrived at independently. I consider that Dr Palmer’s report and evidence were soundly prepared and reasoned.

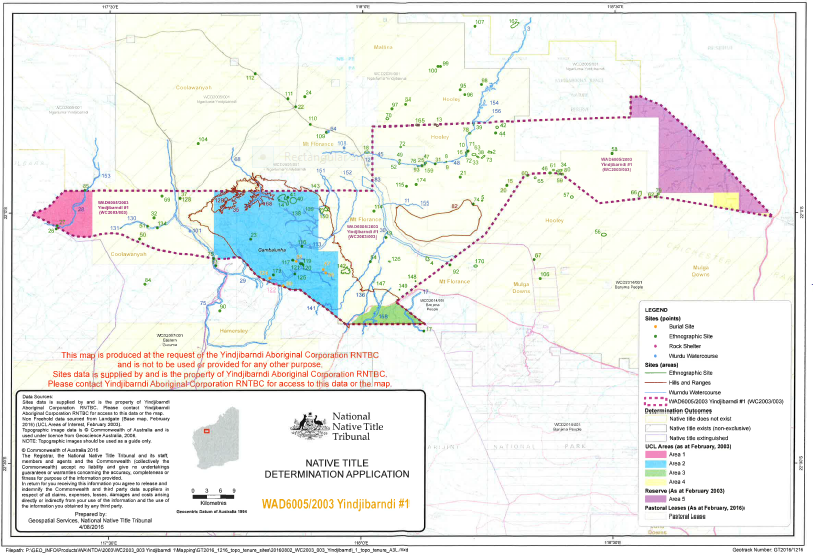
## Conclusion

1. I am satisfied that, on the evidence before me, the Yindjibarndi continue to acknowledge their traditional laws and observe their traditional customs that have existed since before sovereignty that a manjangu must seek and obtain permission from an elder before entering on Yindjibarndi country or carrying out activity there (except if the person is simply driving through).
2. Moreover, that conclusion is supported by the evidence of Dr Palmer, which I accept. He concluded that the Yindjibarndi had the right to exclude others who are not Yindjibarndi “and are consequently identified as manjangu”, but he also found that they had abandoned the pre‑sovereignty right to put a trespasser to death.
3. Accordingly, I find that the Yindjibarndi have the exclusive right to control access to Yindjibarndi country and, in particular, to the claimed area.

# OVERVIEW – THE EXTINGUISHMENT AND OCCUPATION ISSUES

1. The extinguishment and occupation issues arise under ss 47A and 47B of the *Native Title Act*. In order for the each of ss 47A(2) and 47B(2) to operate, so as to preserve native title on particular parts of the claimed area, the Yindjibarndi must establish, *first*, that none of the miscellaneous licence and each of the six exploration licences is a permission or authority under which the whole or any part of the land and waters covered by the particular licence “is to be used … for a particular purpose” within the meaning of s 47B(1)(b)(ii) and, *secondly*, one or more members of the claim group occupied particular land and waters at 9 July 2003 within the meaning of ss 47A(1)(c) or 47B(1)(c).
2. During the preparation for the final hearing the parties co-operated in identifying and narrowing the issues in dispute concerning the parts of the claimed area in respect of which native title, *first*, had been extinguished completely, *secondly*, had been affected so as to leave extant the Yindjibarndi’s non-exclusive native title rights and interests and, *thirdly*, was uncertain and required resolution. In the event, the third category narrowed to two substantive issues, *first*, the extinguishment issue (that is centred around the effect on native title of each of miscellaneous licence 47/47, that relates to a railway line that passes through a small corridor in the south-west of one area between two UCLs, and the effect of each of exploration licences E47/54, E47/473, E47/474, E47/475, E47/585 and E47/1349 (**the** **six exploration licences**)), and, *secondly*, the occupation issue (in respect of areas of unallocated Crown lands or UCLs and also the Reserve. I will deal with the extinguishment issue first, considering the miscellaneous licence and then each of the six exploration licences, before turning to the occupation issue.
3. The Yindjibarndi claim that ss 47A and 47B operate to attract the non-extinguishment principle to the following five areas:
   1. **under s 47A:**  Yandeeyara **Reserve** 31428 that is located at the extreme east of the claimed area;
   2. **under s 47B:** four sets of UCL parcels, namely:
      1. **area 1**, a parcel of about 81.93km² at the extreme west of the claimed area, that included **Garliwinjinha**, near the southern boundary of the claimed area, where much of the on country hearing took place;
      2. **area 2**, a parcel of about 457.71km² that extended over the centre of the claimed area, and included Bangkangarra and the Solomon Hub mine;
      3. **area 3**, a parcel of about 42.7km² that is located to the east and south of area 2 on the southern boundary of the claimed area;
      4. **area 4**, a parcel of about 20.51km² immediately to the south of the Reserve near the eastern end of the claimed area.

The five areas are depicted on the map below:



1. **Area 1** comprised UCLs 13, 14, 15, 17, 22 and 24 at the extreme west of the claimed area. Area 1 is located to the west of the Coolawanyah pastoral lease (or station) which forms its eastern boundary. Most of the on country hearing occurred at Garliwinjinha (also referred to as **Garliwinji**) that is located on a watercourse near the middle of the southern boundary of area 1. The watercourse flows (in the wet season) north-east up to the northern boundary of area 1. The State’s cartography depicted UCL 17 forming a triangle at the western edge of area 1. UCL 17 had a boundary with UCL 13 that ran north–south across the whole of area 1, and UCL 17 also extended to the northern and southern boundaries of area 1. On the east, UCL 13 was bounded by UCL 22, with a boundary that appears to have been created by a creek, road or other landmark that is apparently the watercourse identified as GE 1123646. UCL 22 extended to the north across to the eastern boundary of area 1. UCL 22 has a straight horizontal southern boundary above UCL14. However, about halfway down the eastern boundary of UCL 22 and area 1, there is UCL 15, that is a small rectangular incursion into UCL 22 that also has a horizontal southern boundary above UCL 14. Wholly within UCL 15, and about in the middle of the eastern boundary of area 1, is a small irregular portion that is UCL 24.
2. **Area 2** comprised UCLs 6 and 7, that are separated by the Tom Price Railway Road and the railway. Area 2 lies between the Coolawanyah and Mount Florance pastoral leases. FMG’s Solomon Hub mine is located on UCL 7 within Area 2. The State’s cartography depicted UCL 7 as occupying virtually all of area 2 except for its extreme south‑west corner where the railway (that occupies the land covered by the miscellaneous licence separates it from UCL 6. UCLs 6 and 7 abut the Coolawanyah pastoral lease on their western boundaries and the Mount Florance pastoral lease abuts the eastern boundary of UCL 7. The boundary with each pastoral lease runs north–south across the entire claimed area, between its northern and southern boundaries, and the two pastoral leases on its western and eastern sides. The State’s topographical map depicts Mt Margaret (879 metres) in the north of UCL 7 and the Hamersley Range as covering most of UCLs 6 and 7. A significant number of valleys and watercourses appear on that map in area 2.
3. It was necessary to use four-wheel drive vehicles over hilly terrain, that was difficult to access, to arrive at the location of the hearing on country that occurred at Bangkangarra. Bangkangarra was in the vicinity of the Solomon Hub mine and was reached using the access road. The mine could also be seen from some spots in the vicinity of and at Bangkangarra.
4. **Area 3** comprised, relevantly, UCLs 1, 2, 7, 8, 9, 10, 11, 18 and 23 as well as water 1. Area 3 is south of the Mount Florance pastoral lease. During the course of the hearing, the applicant accepted that it could not establish any occupation in relation to two other UCLs (UCLs 3 and 5, that formed a road) that are located on the perimeter of the northern boundary of area 3. UCLs 8, 9, 10, 11, 18, 19 and 23 are islands within a watercourse, that is water 1. That watercourse bisects area 3 to create UCL 1 on its western side and UCL 2 on its eastern side. Each of UCLs 1 and 2 cover area 3 down to its southern boundary. UCL 2 extends to the eastern boundary of area 3. The northern boundaries of UCLs 1 and 2 are formed by the road (comprising areas of UCL 3 and 5 to which s 47B does not apply) that forms the southern boundary of Mount Florance pastoral lease. The State’s topographical map depicts area 3 as comprising part of the Hamersley Range that runs east–west across its southern part. That map also depicts the Fortescue River and its valley in which the river flows from the south to the north. It appears that the river may be where water 1 is located.
5. **The Reserve and area 4:** Area 4 comprised UCL 4 at the extreme eastern side of the claimed area (following the reduction in the claimed area effected consequent on the filing of the further amended claimant application that the applicant filed on 1 May 2017). It lies to the east of the Hooley pastoral lease and immediately to the south of the Reserve. The State’s topographical map of the claimed area and the aerial photography show that the West Yule and **Cockeraga** Rivers flow south to north through the Reserve and the Cockeraga River also appears to flow through UCL 4. The two Rivers flow through wide valleys in the Chichester Range that cover the Reserve and UCL 4. The **Mungaroona** Range also is in the northern portion of the part of the Reserve that lies in the claimed area.

## The legislative scheme

1. The provisions of the Act that are critical to the resolution of both the extinguishment and occupation issues are as follows:

**47A Reserves etc. covered by claimant applications**

*When section applies*

(1) This section applies if:

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

(b) when the application is made:

(i) a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or

(ii) the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and

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

*Prior extinguishment to be disregarded*

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

(a) the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii); ….

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

…

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

*When section applies*

(1) This section applies if:

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

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

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

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

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

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

*Prior extinguishment to be disregarded*

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

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

# (2) THE EXTINGUISHMENT ISSUE

## The miscellaneous licence – the statutory scheme

1. As at 9 July 2003, when the claimant application was filed, the following statutory provisions applied in respect of the issues relating to the miscellaneous licence:

(a) the *Mining Act 1978* (WA) provided:

**91. Grant of miscellaneous licence**

(1) Subject to this Act, and in the case of a miscellaneous licence for water to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act, the mining registrar or the warden, in accordance with section 42 (as read with section 92), **may, on the application of any person, grant in respect of any land a licence, to be known as a miscellaneous licence, for any one or more of the purposes prescribed**.

(2) A person may be granted more than one miscellaneous licence.

(3) **A miscellaneous licence shall** –

(a) be in the prescribed form; and

(b) **authorise the holder to do such matters and things as are specified in the licence.**

…

**94. Terms and conditions**

(1) A miscellaneous licence is subject to the terms and conditions prescribed.

…

**94A Grant of mining tenement on land in a miscellaneous licence**

(1) Sections 18, 23, 27, 43 and 76 do not prevent another mining tenement from being marked out, applied for or granted in respect of land that is the subject of a miscellaneous licence.

(2) Notwithstanding section 43 or 76, **if another mining tenement is granted in respect of land that is subject to a miscellaneous licence the other mining tenement and the miscellaneous licence apply concurrently with respect to that land**.

(b) the *Mining Regulations 1981* (WA) provided:

**41. Covenants and conditions**

**Every miscellaneous licence shall contain and be subject to the following covenants and conditions that the licensee shall** –

(a) pay the rents due under the licence at the prescribed time and in the prescribed manner;

(b) **continuously use the licence for the purpose for which it was granted**;

….

**42B. Prescribed purposes for grant of miscellaneous licence**

For the purposes of section 91(1), a miscellaneous licence **may be granted for the use of land for one or more of the following purposes** –

...

(n) any other purpose directly connected with mining operations approved by the Director General of Mines. (emphasis added)

## The miscellaneous licence

1. The *Iron Ore (Robe River) Agreement Act 1964* (WA) allowed Robe, being one of the Rio Tinto parties, to make any application for the construction and operation of a railway from its West Angelas Iron Ore Project at Robe River to its wharf on the coast (see cl 9(1)(c) of the First Schedule to that Act).The Director General of Mines gave the following approvals to Robe under reg 42B(n) of the *Mining Regulations* in respect of its construction and operation of a railway:

* On 2 October 1998:

To conduct all necessary activities for the design, planning and **construction of a railway** pursuant to the provisions of the *Iron Ore (Robe River) Agreement Act 1964*.

* On 27 October 1998:

To conduct all necessary activities for the design, planning, construction, **operation and maintenance of a railway** and all associated infrastructure in connection with mining operations pursuant to the provisions of the *Iron Ore (Robe River) Agreement Act 1964*. (emphasis added)

1. On 28 September 2001, the Minister (by a delegate) granted the miscellaneous licence to Robe for a term of 21 years. The miscellaneous licence contained, relevantly, conditions 3 and 4, which included:

3. The terms and conditions contained within:

a. Statement No. 000514 issued by the Minister for the Environment on 28 June 1999 and entitled “Statement that a proposal may be implemented (pursuant to the provisions of the Environmental Protection Act 1986) – West Angelas Iron Ore Project – Shires of East Pilbara, Ashburton and Roebourne”; and

b. the approval by the Department of Environmental Protection on 13 August 2001 of the referral dated August 2001 under Part IV of the Environmental Protection Act 1986 and Section 1.3 of State No. 000514.

4. **The area of the licence to be reduced as soon as practicable after construction, to a minimum for safe maintenance and operation of the railway line.** (emphasis added)

1. **Ministerial Statement** No. 000514 referred to in condition 3a was made on 28 June 1999 by the Minister for the Environment and headed, “Statement that a proposal may be implemented (pursuant to the provisions of the *Environmental Protection Act 1986*)” for the West Angelas Iron Ore Project. The proposal set out in the Ministerial Statement included:

The development of an iron ore mine at Deposits “A” and “B”, … construction of a rail line … as documented in schedule 1 of the is statement.

1. The Ministerial Statement provided that the proposal to which the report of the Environmental Protection Authority in Bulletin 924 related, relevantly, “may be implemented subject to the following conditions and procedures …”. The Ministerial Statement required the proponent, in cl 1-1, to “implement the proposal as documented in schedule 1 of this statement”. Schedule 1 stated that the proposal consisted of four main components, the third of which was “the construction of a rail line”, being a single standard gauge railway line. Schedule 1 provided that this “construction will involve:

* temporary and permanent access roads;
* borrow pits to source fill material;
* one or two quarries to provide stone for ballast and concrete aggregates; and
* construction camps.”

1. The railway line, as constructed, passes between UCLs 6 and 7 in area 2 within the corridor provided for in the miscellaneous licence.
2. I should note that, in final address, FMG had argued that the miscellaneous licence had been granted pursuant to reg 42B(b), that prescribed a permitted purpose of use of land as “a tramway”. In the course of preparing these reasons, I invited further submissions and evidence on whether a railway could be a tramway for the purposes of reg 42B(b). I had regard to the limited uses, in s 132(1)(k) of the *Mining Act*, of the expressions “tramways, railroads”, as subjects over which the Mining Warden’s Court had jurisdiction under that section, and “railway” in reg 97 of the *Mining Regulations* which created an offence for obstruction of a railway. In addition, the ordinary and natural meaning of “tramway” is substantively different to that of “railway” or “railroad”, as are their legal meanings: cf. *Tottenham Urban District Council v Metropolitan Electric Tramways Ltd* [1913] AC 702 at 713 and 720-721 per Lord Moulton, with whom Viscount Haldane LC and Lord Shaw of Dunfermline agreed.
3. In the event, the State filed affidavit evidence by David Crabtree, a senior public servant, that all parties accepted. That established that the Director General of Mines had approved, in October 1998, under reg 42B(n), the two purposes set out at [162] above that supported the grant of the miscellaneous licence for the purpose of Robe constructing and operating the railway.

## The miscellaneous licence – the applicant’s submissions

1. The applicant argued that the miscellaneous licence was not a “permission or authority … under which … a part of the land or waters in the area is to be used … for a particular purpose” within the meaning of s 47B(1)(b)(ii) of the *Native Title Act*. The applicant contended that the miscellaneous licence did not require the land which it covered to be used for the particular purpose for which it had been granted. It contended that a miscellaneous licence did not provide a restriction preventing land over which it had been granted being used for other purposes than that specified in the conditions of the miscellaneous licence: that is, the miscellaneous licence did not prevent other or concurrent uses. That was, the applicant submitted, because s 94A of the *Mining Act* permitted another mining tenement to be granted in respect of land that is the subject of, and in certain cases (in s 94A(2)) to operate concurrently with, a miscellaneous licence.
2. The applicant also argued that there was no obligation for the holder of a miscellaneous licence actually to use the land that it covered. It contended that the requirement of reg 41(b) of the *Mining Regulations* that the holder of the miscellaneous licence continually use it for the purpose for which it was granted should be read analogously with the Full Court’s construction of s 63 of the *Mining Act* (that deemed every exploration licence to have a condition that the holder “will explore for minerals”) in *Banjima* 231 FCR at 496 [108] and *Tucker (on behalf of the Banjima People) v Western Australia [No 2]* (2015) 328 ALR 637 at 647-648 [33] per Mansfield, Kenny, Rares, Jagot and Mortimer JJ.

## The miscellaneous licence – consideration

1. I reject the applicant’s argument. The terms of the miscellaneous licence and the statutory basis for its grant under the *Mining Act* and *Mining Regulations* were distinct from those applicable to exploration licences granted under the same legislation. *First*, the purpose of exploration of the land the subject of an exploration licence can be achieved without the licence specifying the whole or any identified part of a parcel of land that must be used for the purpose: *Banjima* 231 FCR at 496 [108], 497 [112]-[114]. Rather, the Full Court explained (at [112]), an exploration licence operated as “[a] mere permission or authority to enter and be upon land or waters coupled with a discretionary power to determine when, and in what particular way and at what place that permission or authority might be exercised”. While the licensee had to explore for minerals, an exploration licence did not require the whole or any identified part of the lands and waters to which it applied to be used for a particular purpose, or the particular purpose of exploration for minerals. The satisfaction of that condition could be achieved by the licensee’s discretionary choice to explore in as small or large an area within the licensed land and waters as it chose, without using any other part of the land and waters: *Banjima* *(No 2)* 328 ALR at 647-648 [33].
2. Here, in contrast, the purposes approved by the Director General of Mines under reg 42B(n) in October 1998, pursuant to which the miscellaneous licence was granted, were the construction and operation of a railway from its Robe River mine to Robe’s wharf for loading its iron ore onto ocean-going ships. Conditions 3a and 4 in the miscellaneous licence reflected the two purposes approved under reg 42B(n) in October 1998.
3. Condition 3a in the miscellaneous licence incorporated the Ministerial Statement. The Ministerial Statement required, as a condition, the proponent, Robe, to implement the proposal for the Iron Ore Project to which it related by, among other steps, the construction of a rail line. The miscellaneous licence contained a covenant and condition by force of reg 41(b) of the *Mining Regulations* that the licensee (here, Robe River) “shall … continuously use the licence for the purpose for which it was granted”.
4. Condition 4 of the miscellaneous licence required the area, to which the licence applied, to be contracted, as soon as possible after construction, “to a minimum for the safe maintenance and operation of the railway line”. Moreover, condition 4 thereafter authorised the use of only so much land and waters as was the “minimum for the safe maintenance and operation of the railway line”.
5. Therefore, the purpose for which the land and waters within area 2 (that were covered by the permission or authority conferred by the miscellaneous licence) was to be used, was specifically the minimum corridors of land necessary, *first*, to construct, and then for the safe maintenance and continuous operation of, the railway line.
6. While s 94A of the *Mining Act* permitted another licence to be granted under that Act that operated concurrently with the miscellaneous licence, a second licence could not supervene or interfere with the purpose, or, in this case, purposes (of construction and then continuous operation of the railway line), for which the miscellaneous licence had been granted. For example, a mine could be excavated under the railway line or exploration could occur on the surface where the line was without necessarily, or in a practical way, interfering with, or preventing, the safe maintenance and operation of the railway line. In the circumstances, the existence of a concurrent licence (were there such a licence) would not negate or detract from the use for the particular purposes of the construction, and subsequent safe maintenance and operation, of the railway line.
7. Accordingly, the particular purposes for which the miscellaneous licence was granted covered the whole of the land corridor that bisects UCLs 6 and 7 over which the railway line is constructed and operated. There was no suggestion or evidence that that land corridor exceeded the minimum area for the safe maintenance and operation of the railway line as it exists or that the railway line is not operating continuously, consistently with the purposes for which the miscellaneous licence was granted.
8. It follows that the miscellaneous licence is a permission or authority within the meaning of s 47B(1)(b)(ii) and thus is excluded from the operation of s 47B. Accordingly, s 47B(2) does not apply to the small area of the land and waters covered by that licence. The parties did not address whether non-exclusive native title rights and interests in that corridor have ceased to subsist and, subject to any submissions to the contrary, I would infer that they continue to exist.

## The six exploration licences

## The statutory scheme

1. As at 9 July 2003, when the claimant application was filed, the following statutory provisions applied in respect of the issues relating to exploration licences E47/54, E47/473, E47/474, E47/475 and E47/585. The *Mining Act* provided:

**57. Grant of exploration licence**

(1) Subject to this Act the Minister may on the application of any person and after receiving a recommendation of the mining registrar or the warden in accordance with section 59, grant to that person a licence to be known as an exploration licence **on such terms and conditions as the Minister may determine**.

…

**63. Condition attached to exploration licence**

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

…

(b) will fill in or otherwise make safe to the satisfaction of the State Mining Engineer all holes, pits, trenches and other disturbances to the surface of the land the subject of the exploration licence which are –

(i) made while exploring for minerals; and

(ii) in the opinion of the State Mining Engineer, likely to endanger the safety of any person or animal; …

…

**63AA. Conditions for prevention or reduction of injury to land**

(1) On the granting of an exploration licence, or at any subsequent time, the Minister may impose on the holder of the licence reasonable conditions **for the purpose of preventing or reducing, or making good, injury to the natural surface of the land** in respect of which the licence is sought or was granted, or injury to anything on the natural surface of that land or consequential damage to any other land.

…

(3) A condition imposed in relation to a licence under this section –

…

(b) whether or not so endorsed, on notice of the imposition of the condition being given in writing to the holder of the licence shall for all purposes have effect as a condition to which the licence is subject. (emphasis added, citations omitted)

1. In addition:

* s 58(1)(b) required an application for an exploration licence to be accompanied by a statement specifying, among other matters, the proposed method of exploration and the details of a proposed program of work;
* s 66 conferred authority on the holder of an exploration licence, while it remained in force, subject to the *Mining Act* and in accordance with any conditions to which the licence was subject, to enter the land the subject of the licence to carry out exploration activities, including such operations as excavating and digging pits, trenches or holes.

1. As at 18 May 2012, when exploration licence E47/1349 (**the 2012 licence**) was granted, the *Mining Act* had been amended to include s 63(aa) which relevantly provided that the holder of an exploration licence:

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

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

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

1. There also are two issues under the *Native Title Act* relating to the failure of the State to notify the applicant on 16 November 2011 that the State considered that the proposed act of granting the 2012 licence was an act attracting the expedited procedure. Relevantly, the *Native Title Act* provided at 16 November 2011:

**24OA Future acts invalid unless otherwise provided**

**Unless** a provision of this Act provides otherwise, **a future act is invalid to the extent that it affects native title**.

…

**29 Notification of parties affected**

*Notice in accordance with section*

(1) **Before the act is done, the Government party must give notice of the act in accordance with this section.**

*Persons to be given notice*

(2) The Government party **must give notice to**:

(b) …

**(i)** **any registered native title claimant** (also a ***native title party***); and

Note: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of ***registered native title claimant*** in section 253.

…

in relation to any land or waters that will be affected by the act;

…

*Acts attracting the expedited procedure*

(7) **The notices under this section may include a statement that the Government party considers the act is an act attracting the expedited procedure.**

…

**32 Expedited procedure**

(1) **This section applies if the notice given under section 29 includes a statement** that the Government party considers the act is an act attracting the expedited procedure (see section 237).

*Act may be done if no objection*

(2) **If the native title parties do not lodge an objection** with the arbitral body in accordance with subsection (3), **the Government party may do the act**.

*Kinds of objection*

(3) **A native title party may**, within the period of 4 months after the notification day (see subsection 29(4)), **lodge an objection** with the arbitral body against the inclusion of the statement.

…

**227 Act affecting native title**

An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise. (bold emphasis added, bold italic emphasis in original)

1. In addition, s 28(1) provided that, subject to the Act, an act to which Subdiv P of Div 3 of Pt 2 applied (in which ss 29 and 32 were), was invalid to the extent that it affected native title, “unless, **before it is done**, the requirements of”, relevantly, s 28(1)(c) were satisfied, namely:

(c) subsection 32(2) (which applies if no objection is made **after the giving of a notice that the act attracts the expedited procedure**) allows the act to be done. (emphasis added)

## The provisions of the six exploration licences

1. Ryan **Slevin**, FMG’s geographic information systems officer, calculated that the exploration licences covered a total of about 7065 ha or 70.65 km2 in area 1.
2. **Exploration licence E47/54 (the 1982 licence):** This licence commenced on 18 December 1982 and had been extended so that it remained current to 17 December 2014, on the evidence in the mining tenement **register search** under s 103F(4) of the *Mining Act*. The 1982 licence appears to affect a small portion in the north-west corner of area 1. It was held by Hamersley Exploration, one of the Rio parties, and covered a total of 112.5 km2, most of that being outside the claimed area. The register search recorded only one continuing condition from the commencement of the original grant on 18 December 1982, namely condition 1, with all other conditions endorsed on the licence having commencing dates of 23 January 2007. Condition 1 provided:

All topsoil being [sic] removed ahead of mining operations [sic] and stockpiled for replacement **in accordance with the directions of the Mining Engineer - District Inspector of Mines**. (emphasis added)

There was no evidence that any directions had ever been made under condition 1 of the 1982 licence.

1. **Exploration licences E47/473, E47/474 and E47/475 (the 1989 licences):** These licences all commenced on 22 August 1989 and were extended so that they remained current to 21 August 2014, based on register searches. The 1989 licences appeared to affect:

* **as to E47/473:** UCLs 13 and 17 in area 1, and covered a total of 124.7 km2, most of which was outside the claimed area;
* **as to E47/474:** UCLs 14 and 22 in area 1, and covered a total area of 96.8 km2 some of which was outside, and to the east of, area 1 and some to the north of the claimed area;
* **as to E47/475:** part of UCL 7 for about ⅔ of its width from the eastern and southern boundaries up to about ¾ of its height towards its northern boundary in area 2, and covered a total of 118.9km2. The balance of the northern part of area 2 above E47/475 was covered by E47/585. Mr Slevin calculated that these two exploration licences covered about 16,126 ha or 161.26 km2 of area 2.

1. Each of the 1989 licences was held by Hamersley Exploration. From their issue on 22 August 1989, each of these three licences, and from its issue on 26 June 1992, **exploration licence E47/585** (**the 1992 licence**), contained a condition 5 that provided (with an amendment to change the title for the approving official after 12 August 2005 and, in E47/585, the use of the expression “surface disturbance” in lieu of “surface clearance”):

**Unless the written approval** of the District Mining Engineer, Department of Mines, **is first obtained**, the use of scrapers, graders, bulldozers, backhoes or other mechanised equipment **for surface clearing or the excavation of costeans is prohibited**. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations. (emphasis added)

1. There was no evidence of any written approval under condition 5 for any of the 1989 licences.
2. **The 1992 licence:** The 1992 licence commenced on 26 June 1992 and, as I have noted in relation to E47/475, it covered an area to the north of that licence in area 2. It was also held by Hamersley Exploration. As noted above (at [187]), it contained a condition 5 that was in substantially similar terms to condition 5 in the 1989 licences. Again, there was no evidence of any written approval under condition 5 of the 1992 licence.
3. **Exploration licence E47/1349 (the 2012 licence):** This licence had a term of five years that commenced on 18 May 2012. The 2012 licence appears to cover at least in part some of the Coolawanyah pastoral lease to the south of E47/474. Since there was a serious issue concerning it, I have assumed that it may also have affected other land and waters in respect of which the Yindjibarndi would have their native title preserved under s 47B(2) unless FMG could establish both its validity and its nature as an authority or permission within the meaning of s 47B(1)(b)(i).
4. The 2012 licence was held by FMG Pilbara Pty Ltd. It contained two conditions (including condition 4 in the same terms as condition 5 in the 1992 licence) that were indistinguishable from those in the other five exploration licences and those considered in *Banjima* 231 FCR at 490 [83], 497-498 [112]-[117]. The register search for the 2012 licence issued on 17 July 2014 showed that the application for the exploration licence had been received on 13 January 2004. The register search showed that the licensee had exceeded the minimum annual expenditure of $20,000 in each of the 2013 and 2014 years by spending, respectively, $27,389 and $40,505 on exploration activities. Again, there was no evidence that any written approval had ever been given under condition 4 of the 2012 licence.
5. There are three substantive issues in relation to whether the 2012 licence extinguished native title. *First*, whether the grant of that licence was valid notwithstanding the failure of the State to give the applicant notice under ss 29(2)(b)(i), (7) and 32 of the *Native Title Act* that the proposed act of granting the licence may have attracted the expedited procedure under s 32 of that Act. That question arises because ss 24OA and 28 had the effect that, ordinarily, a failure to comply with ss 29 and 32 of the Act rendered a future act invalid to the extent that it affected native title. *Secondly*, whether the grant of the 2012 licence is a valid future act or other interest for the purposes of s 225(d) of the *Native Title Act* and, if so, how it should be recorded in the determination of native title. And, *thirdly*, whether, having regard to the Full Court’s decision in *Banjima* 231 FCR at 497 [114], the 2012 licence was a licence to which s 47B(l)(b)(ii) applied on the basis that, as the applicant contended, it was in general terms and did not require the land and waters to which it applied to “be used for public purposes or for a particular purpose”.

## Are any of the 1982, 1989 and 1992 licences within s 47B(1)(b)(ii)?

1. FMG argued that each of the 1982, 1989 and 1992 licences (collectively **the five licences**) was a permission or authority under which the whole or part of the licensed land “is to be used for … a particular purpose” within the meaning of s 47B(1)(b)(ii) of the *Native Title Act* so that the preservatory effect of s 47B(2) did not apply. FMG contended that the expression, “is to be used” in s 47B(1)(b)(ii), “import[ed] the need to identify an intention to use the land for the requisite purpose” objectively. It submitted that the reasoning in *Banjima* 231 FCR 456 concerning the exploration licences granted in that case after 2006 was distinguishable because:
2. s 63(aa) of the *Mining Act* was not enacted until 2006 and did not apply to the five licences;
3. in its respective form at the time of grant of each of the five licences, the *Mining Act* proceeded on the opposite basis, namely in ss 58(1)(b), 63(b) and 66 (which contemplated that the licensed land would be disturbed as the licensee would have the obligation, under s 63(b), of filling and making safe land affected by its activities, and the licensee, under s 66, subject to the Act and conditions in the licence, could enter the land and undertake activities that would disturb the ground, including by use of machinery);
4. in the case only of the 1992 licence, s 63AA (which was inserted into the *Mining Act* in 1991) authorised the Minister to impose conditions for the purpose of preventing, reducing or making good any injury to the surface of the licensed land, but that documents in evidence revealed that the 1992 licence (E47/585) was treated as a combined project with exploration licence E47/475;
5. in the case of the 1982 licence, no condition operated as at 9 July 2003 to constrain the licensee’s authority to remove top soil under ss 63 and 66, except for condition 1 (see [185]) which required directions from a Departmental official;
6. in the case of each of the 1989 and 1992 licences, while each contained condition 5 that was similar to the condition considered in *Banjima* 231 FCR 456, that case was distinguishable because, *first*, s 63(aa) had not been enacted prior to 2006, *secondly*, condition 3 in each licence required that all costeans (being pits or trenches sunk through surface deposits to locate a vein of ore and ascertain its extent) and other surface disturbances caused by exploration activity had to be made good to the satisfaction of a Departmental official and, *thirdly*, there was no condition permitting exploration by aerial survey.

## Consideration

1. I reject FMG’s argument that s 47B(2) did not apply to the land and waters covered by the five licences.
2. None of the five licences created a permission or authority under which the whole, or any part, of the licensed land or waters “is to be used … for a particular purpose”. The licences did not provide that the land and waters that they covered be used by the licensee for any purpose at all. Rather, each of the five licences gave the licensee permission or authority to be on the licensed land and to do limited exploratory activity. None of the five licences gave any permission or authority that required any particular part of the licensed land, let alone the whole, to be used for a particular purpose: *Brown* 253 CLR at 529 [63]. Each of the five licences gave the licensee an option to come onto, and do limited exploration on, one or more parts of the land, if and when it chose to do so. But the licensee had no obligation to enter the land or conduct any exploration activity under the licence, notwithstanding that the licence might be liable to forfeiture or cancellation if the licensee did not to do some work in respect of some part of the licensed land. And, the licensee had no right to exclude the Yindjibarndi or anyone else from any part of licensed land.
3. Therefore, the five licences did not require that the whole or any part of land and waters be used for a particular purpose. The grant of a permission or authority to explore land does not burden the land with a **requirement** that it be explored. As Wilcox, French and Weinberg JJ held in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 at 495 [188]:

The words “is to be used” import the need to identify some intention **to use the subject land** for the requisite purpose or purposes. (emphasis added)

1. I am of opinion that the terms of each of the five licences, when granted, did not import any intention that the whole of the licensed land would be used for exploration or that any identified part of it would be so used. For these reasons, none of the five licences required any part of the licensed land to “be used for public purposes or for a particular purpose” or fell within s 47B(1)(b)(ii): *Banjima* 231 FCR at 497 [114].
2. In addition, the 1982 licence required directions by a Departmental officer to undertake any top soil removal or mining activity. In final address, senior counsel for FMG conceded that, as at 9 July 2003, there was no evidence of a work program for the 1982 licence and he identified no evidence of any direction or approval under condition 1 of the 1982 licence. Accordingly, I am not satisfied that, as at 9 July 2003, any direction existed under which top soil could be removed for mining operations under the 1982 licence. Therefore, the 1982 licence did not provide for any part of the land and waters to be used for a particular purpose.
3. Each of the 1989 licences and the 1992 licence also contained condition 5 that operated, as s 63(aa) later did, to prohibit the licensee from creating any surface disturbance without approval by a Departmental officer. Condition 5 of each of the 1989 and the 1992 licences was indistinguishable from the condition in the exploration licences that the Full Court considered in *Banjima* 231 FCR at 490 [83], 497-498 [112]-[117]. The Full Court held that those licences did not amount to a permission or authority under which the land and waters to which they applied were “to be used for public purposes or for a particular purpose” within the meaning of s 47B(1)(b)(ii) of the *Native Title Act* and accordingly, s 47B(2) operated to preserve native title rights and interests in those lands and waters.
4. FMG argued that some work plans were in evidence so as to show a permission under these four licences. However, the documents on which it relied for this purpose were historic and not current as at 9 July 2003. For example, one was an application for the extension of exploration licence E47/585 dated 17 June 1998 in which the licensee recommended undertaking further work and noted previous work. The document on its face was not an approval and did not refer to any past approval. Rather, the document was an application to extend the licence “based on the need to maintain adequate tenement coverage for further evaluation and possible future exploitation of these resources”. It contemplated that the licensee might recommend some reconnaissance mapping and outcrop sampling “along the NW trending valleys in the SE part of E47/585” and “Drill testing [of] the above if considered significant”.
5. All that FMG could point to in the evidence were notations by the licensee (Hamersley Exploration) of work that they had done when applying for an extension of one of the 1989 or 1992 licences. Those self-notations could not, of themselves, amount to a prior written approval by a Departmental officer of the work. The lack of evidence of any such prior written approval is important because it entails that the licence itself did not provide a permission or authority for any particular locale on any land or waters to be used for a particular purpose under s 47B(1)(b)(ii). A licensee reporting its activity under an exploration licence, after the event, does not satisfy the statutory requirement in s 47B(1)(b)(ii) or the terms of condition 5 of the 1989 and 1992 licences or condition 4 of the 2012 licence: *Banjima* 231 FCR at 497-498 [112]-[117].
6. Since FMG did not even tender any such approval under the 2012 licence, of which it was the licensee, it is safe to find that none of the 1982, 1989, 1992 or 2012 licences had such an approval.
7. In my opinion, the material on which FMG relied does not provide a basis to find that the whole or any part of land or waters the subject of any of the six exploration licences “is to be used for … a particular purpose”.

## The validity and effect on native title of the 2012 licence

1. On 18 April 2008, the State gave the applicant a notice under s 29(2) of the *Native Title Act* of the proposed grant of an exploration licence that became the 2012 licence. However, that notice did not include a statement that the State, as the “Government party”, considered that the act (of the proposed grant) was an act that attracted the expedited procedure under s 29(7).
2. On 16 November 2011, the State gave a further notice to certain persons, but, crucially, not to the applicant as the relevant native title party, that stated that under s 29(7), the State “considers the act is an act attracting the expedited procedure”.
3. The State accepted that its failure in November 2011 to give the applicant a notice under s 29(2) that included a statement that the State considered the act (being the proposed grant of what became the 2012 licence), to be an act that attracted the expedited procedure, so that it could be granted if the Yindjibarndi did not lodge an objection under s 32(2) within four months of the notification day (i.e. on or after 16 March 2012), may have affected the validity of the grant on 18 May 2012 of the 2012 licence itself.
4. The questions that require resolution are whether the grant of the 2012 licence:
   1. was valid to affect native title despite the State’s failure on 16 November 2011 to give notice under ss 29(7) and 32 to the applicant that it considered that the act of the proposed grant attracted the expedited procedure (**the validity question**);
   2. created rights that were inconsistent with the Yindjibarndi’s claim to exclusive possession of the land and waters covered by the licence (**the inconsistency question**)?

## The State’s and FMG’s submissions

1. The State conceded that it was arguable that its failure in November 2011 to notify the applicant under s 29(2)(b)(i) that it considered that the proposed act of granting, what became, the 2012 licence, attracted the expedited procedure, was invalid to the extent that it affected native title by force of ss 24OA and 28.
2. However, FMG argued that the State’s initial notification on 18 April 2008 of the act, being the proposed grant of the 2012 licence, satisfied, once for all, the procedural requirements of s 29 of the *Native Title Act*. FMG contended that the State’s subsequent consideration leading to its notice issued in 2011, that that act was one attracting the expedited procedure, did not affect the fundamental character of the original notification of the “act” for the purposes of s 29. Thus, FMG submitted, the Yindjibarndi had received a valid notice in April 2008 of the “act” and that gave them, once for all, the notice of the proposal to grant the exploration licence which the statute required be given in s 29.
3. FMG argued that the State’s subsequent categorisation of the “act” as one attracting the expedited procedure was not a matter in respect of which s 29 required a further notice to be given to the applicant, or, if s 29 did, the failure to give that notice did not affect the validity of the 2012 licence once granted. FMG contended that if the State had failed to comply with s 29 in 2011, and assuming that the grant was a future act, the *Native Title Act* did not provide that that failure would result in the invalidity of this exploration licence. Next, FMG noted that no party contended that an exploration licence had any extinguishing effect on native title. But, FMG submitted, to the extent of any inconsistency, the 2012 licence prevailed over native title.

## The validity question

1. I am of opinion that, to the extent that the 2012 licence affects any exclusive native title rights and interests of the Yindjibarndi, ss 24OA and 28(1)(c) have the effect of rendering that licence invalid. I reject the State’s and FMG’s contrary argument.
2. *First*, the statutory purpose of permitting a notice under s 29 of the *Native Title Act* to include a statement, in accordance with s 29(7), that the Government party considers that the act is one attracting the expedited procedure was to engage the operation of s 32. Section 32(2) and (3) provided that if the native title parties, here the Yindjibarndi, did not lodge an objection with the arbitral body within four months, then the Government party had authority to do the act. In other words, had the State’s notice of 16 November 2011 been given to the Yindjibarndi, the Yindjibarndi would have had a right, by force of s 32(2), to lodge an objection that would have prevented the grant of the 2012 licence. The structure of s 32 is to give native title parties a right to object and, thus, prevent the Government party acting (here, to grant the 2012 licence) four months after giving a notice under s 29(7). The State’s failure to give the notice under s 29(7) to the Yindjibarndi in November 2011, *first*, deprived the Yindjibarndi of the right under s 32(3) to lodge an objection with the arbitral body “against the inclusion of the statement” and, *secondly*,precluded the State from acting, as it did, under s 32(2) to grant the 2012 licence.
3. Nothing in the *Native Title Act* provided that, for the purposes of ss 24OA and 28(1)(c), the 2012 licence would be valid to the extent that it affected the Yindjibarndi’s native title. The use of the word “may” in s 29(7) did not give a Government party a discretion to comply with the essential requirement to give native title parties the notice to which s 32 entitled them, once the State decided that it considered that the act in fact attracted the expedited procedure so that they could exercise their right to lodge an objection under s 32(3) before the Government party did the proposed future act. Rather, the word “may” in s 29(7) meant that a notice given under s 29(1) would be valid if it also included, where the Government party first incorporated, in a notice of an act, a statement that it considered that that act attracted the expedited procedure. In other words, “may” in s 29(7) was facultative.
4. However, when ss 29(7) and 32 are read together with ss 24OA and 28(1)(c), it is apparent that if, initially, or once at some later time after giving a notice under s 29 that did not include a statement in accordance with s 29(7), the Government party considered that an act attracted the expedited procedure, it had to give a notice under s 29 that contained a statement in accordance with s 29(7). Such a notice would enable the native title party to exercise its right, under s 32(3), to lodge an objection against that statement and, by doing so, postpone the power of the Government party to do the proposed act until the objection process in the arbitral body prescribed in s 32 had run its course.
5. Indeed, s 28(1)(c) provided that the act of granting the 2012 licence would be invalid to the extent that it affected native title “unless, before it is done, the requirements of [s 28(1)(c)] are satisfied …”, namely, that no objection is made under s 32(2) “after the giving of a notice that the act attracts the expedited procedure”. Since the Yindjibarndi did not get the s 29(7) notice, s 28(1)(c) did not “allow[ ] the act to be done” so as in any way to affect native title.
6. Here, the State’s failure to give the Yindjibarndi notice in November 2011 in accordance with ss 29(7) and 32 of its proposal to utilise the expedited procedure, rendered the 2012 licence wholly invalid pursuant to ss 24OA and 28(1)(c), to the extent that the 2012 licence affected the Yindjibarndi’s native title: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390‑391 [93] per McHugh, Gummow, Kirby and Hayne JJ.

## The inconsistency question

1. In the event that this conclusion is wrong, or the 2012 licence does not affect the Yindjibarndi’s native title, I have also considered the inconsistency question.
2. The inconsistency question involves a narrow dispute as to how the interests created by the 2012 licence, if valid to affect native title, should be expressed in a determination of native title in accordance with s 225 if, as I have found, the Yindjibarndi have native title rights and interests equivalent to exclusive possession over the available claimed area. However, if the 2012 licence covers other land and waters in the claimed area outside areas 1, 2, 3, 4 or the Reserve, it is common ground that the Yindjibarndi have non-exclusive native title rights and interests over the licensed area to the extent that no extinguishment has occurred and those rights and interests are congruent at least with those in the 2007 determination.
3. French CJ, Hayne, Kiefel, Gageler and Keane JJ held in *Brown* 253 CLR at 521 [33]-[34], 522 [37] that it is necessary to make an objective comparison between the native title rights and interests held by a claim group at the date of the creation of the legal rights granted by, or under, a potentially conflicting interest such as here, the 2012 licence. The High Court held that the way in which the non-native title party has or will exercise his, her or its rights is not relevant. Rather, the question of inconsistency between the rights of the non-native title party and those asserted by the claim group must be analysed objectively based on the nature and content of the two sets of rights to determine whether or not the rights themselves are inconsistent (*Brown* 253 CLR at 523 [38], [40], 524 [43], 526 [51]).
4. Here, the exploration licence granted its holder the right to enter and re-enter the land the subject of the licence by force of s 66(a) of the *Mining Act*. However, the licence did not confer any immediate right on the licensee to disturb the surface of, or to excavate on, any part of the licensed area. That is because s 63(aa) (set out at [181] above) operated to prohibit the use of surface clearing or disturbance equipment to explore for minerals on the licensed land until the Minister or a prescribed official (for simplicity, I will refer below only to the Minister as having the power) first approved in writing a program of work that the licence permitted.
5. In addition, the 2012 licence itself required, by condition 4, which was relevantly identical to condition 5 of the four other exploration licences (set out at [187] above), the licensee to seek and obtain the approval of a Departmental Official (an officer of the Department of Mines, in this case, the Environmental Officer) before the licensee had any legal authority to engage in those activities. As the Full Court held in *Banjima* 231 FCR at 497-498 [112]-[117], the rights of a licensee granted by an exploration licence, to which s 63(aa) and condition 4 applied, as was the case with the 2012 licence, did not have the effect of necessarily interfering with the continued existence of native title rights and interests over the licensed land.
6. Moreover, s 63(aa) conferred a discretionary power on the Minister to approve a work program. The existence of such a power suggests that a person in possession or occupation of, or with native title rights and interests in, the licensed land may have a right to be heard before the Minister can grant any approval under s 63(aa). That is because the expression “ground disturbing equipment” conveys that a relevant consideration for the exercise of the power to grant, withhold, or impose conditions on, an approval of a work program is the potential for any disturbance adversely to affect the land concerned and or the interests of persons, including the holders of native title rights and interests, with rights or interests in the land: cf. *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39‑40 per Mason J, with whom Gibbs CJ and Dawson J agreed.
7. In other words, the licence conferred on its holder a right to seek the Minister’s approval, in the exercise of the discretion conferred by s 63(aa), to use ground disturbing equipment in a particular program of work in a prescribed form, but the licensee had no right to that approval. In substance, all that s 63 and the 2012 licence authorised the licensee to do, at the time of its grant, was to enter and be upon the land and waters the subject of the licence and to look at and take samples of anything that could be examined without mechanical assistance for the purpose of exploration: *Banjima* 231 FCR at 497 [113].
8. That right (if validly created to affect native title) did not interfere with or derogate in any way from any non-exclusive native title rights and interests of the Yindjibarndi. As the High Court held in *Brown* 235 CLR at 527‑528 [57] in respect of the mineral leases there in issue:

**The mineral leases did not give the joint venturers the right to exclude any and everyone from any and all parts of the land for any reason or no reason.** The joint venturers were given more limited rights: to carry out mining and associated works anywhere on the land without interference by others. **Those more limited rights were not, and are not, inconsistent with the coexistence of the claimed native title rights and interests over the land.** (No party submitted that any distinction should be drawn between the several native title rights and interests that were claimed.) That the rights were not inconsistent can readily be demonstrated by considering the position which would have obtained on the day following the grant of the first of the mineral leases. **On that day, the native title holders could have exercised all of the rights that now are claimed anywhere on the land without any breach of any right which had been granted to the joint venturers. That being so, there was not then, and is not now, any inconsistency between the rights granted to the joint venturers and the claimed native title rights and interests.** (emphasis added)

1. The position is *a fortiori* in the case of non-exclusive native title rights and interests affected by the 2012 licence. It gave the licensee no right to exclude anyone from licensed land and no right to use ground disturbing equipment since that right could only be conferred by a Ministerial approval in writing under s 63(aa). No such approval was in evidence.
2. For these reasons, there would be no inconsistency between the Yindjibarndi’s non-exclusive native title rights and interests and the rights of FMG under the 2012 licence.
3. The State suggested, and the applicant agreed with, the following wording, that I find is appropriate, to reflect this conclusion in the determination of native title that I will ultimately make:

(a) to the extent that [the rights under the licence] are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the rights under the licence continue to exist in their entirety, but have no effect in relation to the native title rights and interests to the extent of the inconsistency during the currency of the [licence]; and otherwise,

(b) the existence and exercise of the [rights under the licence] do not prevent the doing of any activity done under and in accordance with the native title rights and interests and this determination, and the doing of such activities prevails over the exercise of any [rights under the licence] to the extent of inconsistency with those rights.

1. Because the grant of rights under the 2012 licence (if validly created to affect native title) did not extinguish any non-exclusive native title rights and interests, and was not otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise on the basis of my findings above (and *Brown* 253 CLR 507), the act of grant, as a matter of fact in the circumstances, did not “affect native title” to the extent it was non-exclusive within the meaning of s 227 of the *Native Title Act*, and, accordingly Div 3 of Pt 2 of the Act did not apply (s 24AA(1)): see too *The Lardil Peoples v State of Queensland* (2001) 108 FCR 453 at 473 [59] per French J, 486 [114] per Dowsett J, and 476 [70] per Merkel J agreeing with both judgments.

## Conclusion

1. For these reasons, none of the six exploration licences met the exclusionary criterion in s 47B(1)(b)(ii) and the 2012 licence was invalid to the extent that it affected native title by force of ss 24OA and 28(1)(c): cf. *Banjima (No 2)* 328 ALR at 647-648 [33]-[35].
2. Although it is not necessary to decide this question, the non-extinguishment principle in s 238 would preserve the Yindjibarndi’s native title rights and interests in the parts of areas 1, 2 and 3 if, contrary to my findings, any of the six exploration licences was one “under which the whole or a part of the land and waters in the area is to be used … for a particular purpose” within the meaning of s 47B(1)(b)(ii). It would be a very odd result to suggest that the owner of a freehold interest lost his, her or its right to exclusive possession of real property merely because an exploration licence, with the features of any of the six exploration licences, existed for a limited time and operated in a limited way over that property. Any inconsistency created by the permission or authority to explore licensed land under the relevant exploration licence, would not destroy any of the native title rights and interests. That is because s 238(2), (3) and (4) and, when the licence expires, (6) and or (7), provide that native title “continues to exist in its entirety” and the interference, at best, would operate only temporarily during the currency of, and only to the limited extent necessary to give effect to, the rights of the licensee under the relevant licence.

# (3) THE OCCUPATION ISSUE

1. The State submitted that, in relation to each of areas 1, 2, 3 and 4 and the Reserve, the Yindjibarndi had not established, in accordance with ss 47B(1)(c) and 47A(1)(c) respectively, that one or more members of the native title claim group occupied each area at the time when the application was filed. FMG supported the State’s argument in respect of areas 1, 2 and 3, but made no submissions about area 4 and the Reserve.
2. The State admitted, as it earlier had in the proceeding in *Banjima (No 2)* 305 ALR at 187 [1127], that the Reserve (some of which was also in Banjima country) was held directly for the benefit of Aboriginal peoples, so as to satisfy the requirements of s 47A(1)(b)(ii). That was because, although the vesting of the Reserve under s 33 of the *Land Act 1933* (WA) extinguished native title, the grant of lease 353382 under the *Aboriginal Affairs Planning Authority Act 1972* (WA) fulfilled the requirements of s 47A(1)(b)(ii) of the *Native Title Act*. Accordingly, the Reserve was held for the benefit of Aboriginal peoples. However, the State contended that the Yindjibarndi had not established, in accordance with s 47A(1)(c), that one or more numbers of the Yindjibarndi native title claim group occupied the Reserve when the claimant application was filed on 9 July 2003.
3. I will consider below the facts relating to each of areas 1, 2 and 3 before considering, together, those relating to the Reserve and area 4.

## Occupation – evidence of activities in areas 1 to 4 and the Reserve

1. There is a permanent spring or jinbi at Garliwinjinha (which, in the evidence as reflected in these reasons is also called “Garliwinji”) which is in UCL 13. Garliwinjinha wundu (creek) runs from Garliwinjinha in the south through the centre of area 1 to the north. There is a significant body of evidence that, both before and after the claimant application was filed in 2003, numerous Yindjibarndi visited and camped at Garliwinjinha jinbi on a regular basis. On those camping visits, they also then went to other places within area 1 to search for and obtain ochre, to hunt and fish, and to light fires for the rejuvenation of the country. Michael Woodley said that he had gone, and still goes, there every year, because he is ngurrara and went there:

with my kin for ceremonial purposes and we also camp and hunt there … **it is my spiritual home and I belong there**. I do not see or feel myself as something separate from Garliwinji – I am a reflection of it; **so I look after Garliwinji; and Garliwinji looks after me**. (emphasis added)

1. Importantly, in 2003, Michael Woodley visited Garliwinji in the dry season. He went there on one of several trips in 2003 to the claimed area (**the 2003 visits**) that he made with Ned Cheedy, Alec Ned, Darcy Hubert, Cherry Cheedy, Yiirdi Whalebone, Bridget Warrie, Angus Mack, the late Thomas Jacob and Lorraine Coppin (**the 2003 visitors**).
2. **Ganjingaringunha** is on a creek that flows through area 2 and has a jinbi near the creek and the middle of the western half of area 2 (in UCL 7). **Wirlumarra** is on the western boundary of area 2 and is on a creek that runs to the west of that boundary before intersecting with area 2 at the site of a permanent spring, Wirlumarra jinbi. **Jajuwirdi** is located on the Coolawanyah pastoral lease to the west of area 2 near the northern boundary of the claimed area and the railway line. **Buthurrungunha**, or Pigeon Camp, is located to the east of area 2 on the Mount Florance pastoral lease on or near the Fortescue River. Bangkangarra is in the eastern half of area 2, near the Solomon Hub mine.
3. During the 2003 visits, Michael Woodley said that he and the 2003 visitors also went to Wirlumarra and Jajuwirdi on the same visit as that to Garliwinji. He said that on another 2003 visit, the 2003 visitors travelled around the Hooley pastoral lease area. He said that on the Hooley pastoral lease, they visited areas on the Moses land, relevantly, the areas in the eastern half of the claimed area, and travelled across to near where area 4 is. Michael Woodley also said that on this visit the 2003 visitors then went back to the south-west to Buthurrungunha (or Pigeon Camp) to the east of area 2, and thence to Bangkangarra in area 2.
4. Michael Woodley, Thomas Jacob and Angus Mack visited the same places on a separate trip in 2003, this time to collect the ochre and sacred stones needed for law business. Michael Woodley said that from 2000 he and others took Yiirdi Whalebone (see [80] above), once or twice a year to Ngurrbanha, her birthplace, which is in area 4, near to Yitimanara where they camped. He said that Yiirdi Whalebone was then an old lady and an elder and that she taught him the song and dance for the place that would be performed at a corroboree. He explained that they camped because “[y]ou can’t just visit a place and then leave it” and that they ranged out from the campsite following along Yitimanara Creek, fishing, hunting and walking.
5. He said that he had only once been to the eastern end of the original claimed area, but that this visit occurred in about 2004 or 2005, after this proceeding commenced. On that occasion, Michael Woodley said that he and others went there with Ned Cheedy who told them that the original eastern boundary, near the Cockeraga River, was drawn too far to the east, and went beyond Yindjibarndi country. (The transcript used the spelling “Kokarada”, but I infer that the correct spelling is “Cockeraga”, the name of the river which runs south‑north through the eastern part of the Reserve.) Hence, the applicant revised the eastern boundary, bringing it a little west, by amending the claimant application which was filed on 1 May 2017.
6. Stanley Warrie visited the claimed area regularly from 2000, including in 2003, in company with Michael Woodley, Lorraine Coppin and others from Juluwarlu. Stanley Warrie described how they collected ochre, and made and painted boomerangs. He said they travelled along a track from Garliwinji wundu (i.e. the creek) to Wirlumarra wundu (which is on the Coolawanyah pastoral lease). They also travelled along an old dogger’s track from Camp Anderson, which is on or near Wirlumarra wundu, to areas on the Coolawanyah pastoral lease on the Moses land, then north-east to the Mount Florance pastoral lease, then into area 2 to Pigeon Camp and Ganjingaringunha, collecting wood for the boomerangs and ochre. Stanley Warrie said that they collected the ochre from the areas which he visited because it was brighter, and that the group also hunted and killed kangaroos, emus and goannas. He described how, for most of his life, he and other Yindjibarndi men had engaged in such activities on both the Moses land and the claimed area.
7. Charlie Cheedy (born in 1976) gave similar evidence of making regular visits to the same three sites. He said:

I started going to Garliwinjinha …, Ganjingaringunha … and Wirlamurra … when I was a kid and then when I started my own family. After I got married in 1994, I took my own kids. I also took my sister-in-law’s kids. Now I take my grandkids to these places. **We go hunting for emu and kangaroo, camp out there where I teach them how to cook meat properly in the traditional way, whether it is kangaroo, emu, turkey or porcupine. I always tell them the Yindjibarndi names of the places, plants and animals we see.** (emphasis added)

1. Charlie Cheedy also collected sacred stones and ochre regularly for Birdarra law purposes from Jimarndanha, a site on the Hooley pastoral lease near the western boundary of the Reserve. He used a four-wheel drive to get there. He also visited Ganjingaringunha in area 2 regularly. Charlie Cheedy said that he usually made such visits with a group. On the last occasion he visited Ganjingaringunha to collect sacred stones and ochre, he was in the company of Michael Woodley, Stanley Warrie, his late grandfather, Thomas Jacob and others.
2. Angus Mack described how one day in 2003 he, Michael Woodley, Thomas Jacob and Wayne Stevens went on a day trip to Garliwinjinha spring or jinbi. While driving from Roebourne they saw two emus at Thunggawarnha, which is on the Moses land. They shot the emus and continued driving along the Roebourne–Wittenoom Road before turning off north of area 1, and then drove along a four-wheel drive track under power lines to “the start of the Garliwinjinha creek”, which is either on the Moses land or area 1 near its northern boundary. They then drove south along an old dogger’s track following the creek within area 1 to Garliwinjinha spring and cooked the emus in a ground oven they made.
3. Angus Mack also said that every year since 1998, he went with Michael Woodley and (during his life) Thomas Jacob to collect sacred stones (**gandi**) for Birdarra law ceremonies from Yindjibarndi country. He said that they collected such stones from a wundu (creek) or from white rocks found at Garliwinjinha and Ganjingaringunha wundu. He said that there are good yellow and red rocks at Wirlumarra. He said that he and Michael Woodley always went each year (and I find in 2003) to a hill to the east of Wirlumarra, just south of Hugh Bluff, a landmark well within UCL 7, and hence area 2, to collect those gandi.
4. Because Garliwinjinha is Kevin Guiness’ ngurra, derived from his father’s heritage, he has always visited, camped, fished and hunted around there at least three times each year since 1989, as well as at Wirlumarra, Ganjingaringunha (on one occasion), and the Mulga Downs, Coolawanyah, Mount Florance and Tambrey pastoral leases. I accept his evidence that this included at least three visits that he made to those places in 2003. He has always collected sacred stones (gandi) and ochre on such visits to the claimed area. On these regular trips, including in 2003, Kevin Guiness went to area 3 hunting for plain and hill kangaroos around the Mount Florance pastoral lease. He said that:

The reason I always go camping hunting and fishing on the areas around Mount Florance, Hooley, Coolawanyah, Mulga Downs and Garliwinjinha … is **because it is all my country**, Yindjibarndi country. These places are in the [claimed] area and are my *ngurra*. (bold emphasis added)

1. In 2002 and 2003, after his father passed away, Kevin Guiness went with his wife and grandchildren regularly to Hooley Creek (to the east of area 2), Garliwinji and to in and around both Hamersley Gorge and Rio Tinto Gorge, that he variously called, Gatharramunha, that is in area 3. They went swimming and fished for fresh water perch (millunjun) in Gatharramunha. They cooked the fish and, importantly, as he said:

**We felt we had to go to country at that time to connect up with the country and the spirits in the country** because my dad passed away. **I believe that my dad and mum’s spirit is back there in my Yindjibarndi country.** (emphasis added)

1. Mavis Pat was born on Mount Florance Station or Yiraiy-na. She and her family regularly camped there and at Wirlumarra, Hooley Creek (which is in the north and centre of the claimed area) and Garliwinji.
2. Berry Malcolm explained that there is a Bundut ground at Garliwinjinha. She said there is a “night spring” there, namely a spring which fills at night, and that the kangaroos like to go there to drink. She stated that the word “jinby” means night spring. She and her late husband (Woodley King) would go camping on Yindjibarndi country whenever they could, before he passed away in August 2002. They hunted and cooked goanna, plain and hill kangaroo, emu and bush turkey. She has collected bush tucker and bush medicines on Yindjibarndi country over most of her life and still does. She regularly visited Garliwinjinha and Ganjingaringunha with Woodley King in the 1980s and 1990s. Her old people had told her, before she was 17, that Garliwinjinha “is your country”. Her parents and grandparents told her to “look after our country”, expressly mentioning Garliwinjinha and Ganjingaringunha. She said:

My husband was always strong for talking up for his country. He talked about the rest of the Yindjibarndi country that wasn’t claimed in the Ngarluma Yindjibarndi claim in the 1990s. So we made that Yindjibarndi #1 claim [i.e. this proceeding] because the first claim didn’t cover all our country and **that wasn’t right because that is my abijee’s [husband’s] country where he was born where he went through the Law. It should have been claimed before**. (emphasis added)

1. Lorraine Coppin (born in 1972) had been visiting sites on Yindjibarndi country, including the claimed area, since she was a young child. She said that in about 1987 or 1988 Woodley King had taken her and Michael Woodley hunting in Garliwinjinha and that she and her husband had returned there every year since then to hunt, gather foods and “check[ ] out our country”. She said that Garliwinjinha was “a very special place and Old Woodley [King] liked to go there and tell us about the different sites there”. She described trips to Garliwinjinha in 2000, 2001 and 2002 with numerous Yindjibarndi elders. She said that in 2003 she, her husband and others made a flora and fauna trip to record information for a book and that they went around the Hooley pastoral lease, Gartharrmunha (which she described as Rio Tinto Gorge, in the vicinity of area 3) and Ganjingaringunha (which is near the centre of area 2).
2. Bruce Woodley (born 1954) was Woodley King’s eldest child. He said that his father used to take him to Garliwinjinha in the 1960s. He described Garliwinjinha as a traditional hunting and ceremonial ground and that he and his father would fish there. He said that that area “is very spiritual country”. Although he did not give evidence of visiting the claimed area in 2003, his evidence exemplified the particular importance of the Garliwinjinha area to Yindjibarndi people.
3. Rosemary Woodley has lived at Ngurrawaana, on the Moses land, since the late 1980s when her father, Woodley King, and others established it. As discussed above ([at 79]-[80]), she and her Ngarluma husband, Ricky Smith, had dogging contracts, *first*, in 2002 and 2003 and, *secondly*, in 2007 to 2010. While performing those contracts, they camped on Yindjibarndi country, avoiding camping on pastoral stations, and lived off the land, hunting and gathering traditional food. She said, “[w]e went everywhere all around the [claimed area] and checked up on country and connect[ed] with our country”. Her husband corroborated that evidence saying:

When I was dogging I went all around areas in the [claimed] area including Mount Florance, Coolawanyah, Mulga Downs, Hooley, Bangkangarra, Ganjingaringunha, Yitimanara, Winyjuwarranha, Roy Parson’s Gorge and near Garliwinjinha. Rosemary was with me on all my dogging trips. During the school holidays we would take our grandkids.

1. Roy Parsons Gorge is located near the centre of area 2 along the northern boundary of the claimed area. **Winyjuwarranha** is on the Hooley pastoral lease. Rosemary Woodley said that when she and her husband were at Yitimanara they went further east to Cockeraga River that now forms the eastern boundary of the claimed area. She also said that she and her husband had travelled to the bottom of the Mungaroona Range. That range runs north-west to south-east parallel to, but north of, the Chichester Range and enters the part of the Reserve in the claimed area in its north-western corner, well away from the Hooley pastoral lease but north of Yitimanara. Thus, Rosemary Woodley camped and lived off the land, travelling over much of the Reserve and area 4. However, her evidence was not precise as to when she did so, namely whether it was in the period of the first or second dogging contracts: i.e. 2002 to 2003 or 2007 to 2010. I cannot infer precisely when that occasion was. However, I am also mindful that the witnesses were seeking to recall events that had occurred over a decade before they prepared their witness statements. Hence, it would be unrealistic to expect exact precision. Rosemary Woodley also said she and her husband took Yiirdi Whalebone to Yitimanara in 2004 and on other occasions they took their grandchildren there. I infer that on those occasions they also camped there and lived off the country.

## Occupation – The State’s and FMG’s submissions

1. The State and FMG argued that the applicant’s evidence was insufficient to establish occupation of the Reserve or any of areas 1, 2, 3 and 4 for the purposes of ss 47A(1)(c) and 47B(1)(c). They contended that the evidence relied on by the applicant was about trips or visits to places in or near the claimed areas, and that such activities were not of a quality to demonstrate the assertion of “being established” over the particular areas in issue, as required by the Full Court in *Moses* 160 FCR at 200 [216] and referred to by the Full Court in *Banjima* 231 FCR at 495 [104], 501-502 [128]. The State submitted that the absence of “traditional activities” during some of these trips meant that the various individual Yindjibarndi were not asserting native title or possessory rights over the claimed area. FMG submitted that occupation of an area required something more than mere use of, or visitation to, the relevant area. The State and FMG also argued that the applicant’s evidence was not of a sufficient quality to establish occupation. They contended that this was because the evidence was limited, imprecise and generalised, and largely related to activities that were not contemporaneous with the filing of the application.
2. FMG further submitted that the applicant’s evidence was largely about the existence of native title rights of use, rather than actual occupation by physical presence or activity. It contended that proof of occupation was distinct from proof of legal possession or the subsistence of native title rights, and required physical presence. FMG cited *Moses* 160 FCR at 198 [209]‑[211] and *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 at 162 per Priestley JA, with whom Cripps JA agreed at 166, in support of its argument.
3. The State cited *Moses* 160 FCR 148 as authority for the proposition that, where there was no direct evidence of occupation of a particular area, evidence of activities in nearby areas could be sufficient to establish occupation where that evidence reasonably supported the inference of persons “being established” over the particular area. However, the State argued that the Court should exercise caution when drawing inferences to support a finding of occupation. Similarly, FMG submitted that occupation of an area could be inferred from evidence of activity in its vicinity, but that the relevant test was whether it was reasonable to draw the inference itself on the balance of probabilities, as outlined by Spigelman CJ in *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at 275-276 [84]-[88].
4. The State and FMG contended that the applicant’s evidence of visits or trips to a site or sites within the claimed area was not capable of supporting an inference of occupation over each entire area in areas 1, 2, 3 and, in the case of the State, area 4 and the Reserve. The State submitted that the test in *Moses* 160 FCR at 202-203 [228] and 203 [231] required a determination whether activities at one site could reasonably be inferred to have been carried out over the whole of the relevant area. It submitted that, here, it could not be inferred that persons had visited or “occupied” other parts of each larger area or engaged in greater activity or done so frequently. That followed, it argued, because of each large size of each relevant area, its rugged and remote topography, and the inaccessibility of certain sites. The State submitted that the Court could only take into account evidence of spiritual connection if it involved some physical use of the land, at least by implication.
5. FMG submitted that while evidence of persons residing at a location combined with proof of traditional use of a contiguous area allowed the inference of occupation of that contiguous area to be reasonably drawn, as in *Alyawarr* 145 FCR 442 and *Banjima* 231 FCR 456, these authorities were distinguishable here because, in this case, the Yindjibarndi sought an inference of occupation based only on evidence of persons visiting, rather than residing at, particular locations near to those areas.

## Occupation – consideration

1. I reject the arguments of the State and FMG.
2. All of the applicant’s witnesses’ statements, that became exhibits, included grid cross references that were not part of their evidence. I have omitted those references in passages that I have quoted in these reasons. The references were to the large map of many Yindjibarndi sites known in the claimed area that became exhibit A in the trial. I have used those map references as broad indicators to assist my understanding of the approximate location of areas to which witnesses referred in a generalised way, such as by reference to a pastoral lease or station or a creek. I have also used other maps in evidence, such as those that became part of exhibit FMG6, to relate the evidence of the location of the various UCLs with the evidence of the witnesses or other evidence. The boundaries between the UCLs in areas 1, 2, 3 and 4, the Reserve and the various pastoral leases, of course, reflected surveyed cadastral boundaries. Those cadastral boundaries are plotted on maps in evidence, but the oral and witness statement evidence of the indigenous witnesses showed no consciousness of Yindjibarndi (or other peoples’) country being so neatly divided. However, I am comfortably satisfied that the Yindjibarndi witnesses knew the ambit of Yindjibarndi country, as well as the location and importance of the various sites that they described in their evidence.
3. There is no doubt, from the evidence, that in 2003 numerous Yindjibarndi were on their country and in the claimed area at, and also in the vicinity of, Garliwinji in area 1, Bangkangarra and Ganjingaringunha in area 2, in the case of Kevin Guiness and his family, in area 3, and in the case of Rosemary Woodley, area 3 around the Mount Florance pastoral lease, Yitimanara in area 4 and, I infer, the Reserve. I have made specific findings as to occupation below (at [289]-[302]).
4. At no point in cross-examination did the State, or FMG, suggest to any of the applicants’ witnesses that he or she was conscious of where a UCL boundary was or where a pastoral lease boundary ended when the witness described his or her visit to, or activity in the vicinity of, a named place in any of areas 1, 2, 3 and 4 or the Reserve. Instead, the State and FMG submitted that the evidence was insufficient to demonstrate that one or more of the Yindjibarndi occupied “the area” referred to in s 47A(1)(c), in the case of the Reserve, or in s 47B(1)(c), in the case of areas 1, 2, 3 and 4.
5. I reject that argument. Although she did not give this evidence in relation to activities in 2003, Tootsie Daniel expressed the nature of the relationship between the Yindjibarndi and their country as follows:

Before 1999 I went to where the Solomon mine is now with (all deceased) my late husband, Kenny Jerrold, my dad Jack Moses, and Gilbie Warrie. We went there for the day to look at the ngurra. **The old people all said this is our ngurra. It is Yindjibarndi country. It was a very special place for them.**

**The old people started to sing a jowi song because they were happy to be back on country. It was a song about going back home**. It was a beautiful song and it brought tears to my eyes. The flowers were in bloom and it was during the cold time. A jowi is a traditional song given to a man or woman when they are visiting on country. **A jowi is given to them by the spirits of the ngurra who are happy to see the people are back on country.** At a plain near Buminji we stopped on the way back and we got a turkey, a plainy and a hill kangaroo. We took them back to Roebourne and shared them out amongst the families. We always share the food when we go out on country and have had a good hunt.

**You fall in love with the country and you might spend a night out there. The spirits of the land will come to you and sing a song. The spirits give you a jowi song. Once you get the song, the song will stay with you and in the morning you can get up and sing it and teach it to other people.**

On the last day of the Ngarluma-Yindjibarndi hearing [before Nicholson J] I sat around the fire with my brother and late husband and **we asked the spirits for a jowi**. **We talked to the spirits before we went to sleep.** That night my husband got up and made a fire early because we were leaving. He asked “did anyone get a jowi?” I said “yeah I got a jowi” but no one else did. It was about the judge coming to do native title on Yindjibarndi country. I did not sing it to the court because the judge had left and everything was over. (emphasis added)

1. The activities of those Yindjibarndi who were in areas 1, 2, 3 and 4 and the Reserve were the very activities they regarded as spiritually essential and by which they maintained their physical and spiritual connection with, and cared for, their country. They did not remain sedentary in one place. Sometimes they camped, but they also ranged out to hunt, fish or to find resources, such as ochre or wood. Game does not simply appear, as does food when one goes to the local shop. Often one has to search or roam over a relatively wide area to find and hunt wild animals. Moreover, visits to particular locations, such as Garliwinji, had a significance for the Yindjibarndi, because it had a connection to a ngurra for a larger area. One or more Yindjibarndi regularly (including in 2003) visited places within areas 1, 2 and 3 in purposeful journeys that reflected their exercise of their traditional native title rights to, and in, that country.
2. In order to visit Bangkangarra and the nearby fertility thalu in area 2, it is necessary to traverse a considerable part of area 2 over rugged country. When Yindjibarndi visited those sites, they performed a wutheroo and called out to the spirits because that was necessary, as Rosemary Woodley and Ricky Smith were reminded, by their initial omission to do so when they visited Yitimanara in 2002. Each ritual is essential and integral to the maintenance of the relationship between the individual Yindjibarndi, any manjangu whom he or she wishes to introduce, and the spirits who are present at the location in or on Yindjibarndi country.
3. I am of opinion that the evidence of regular maintenance of the witnesses’ spiritual connection to Yindjibarndi country by the visits to it and the exercise of traditional rights, rites and practices, amounted to occupation of each of areas 1, 2, 3 and 4, as well as the Reserve, by one or more Yindjibarndi within the meaning of ss 47A(1)(c) and 47B(1)(c). That is because each such visit evinced substantively the individual Yindjibarndi visitor’s exercise of their traditional (and possessory) rights over not just the particular named place where they camped or attended, but also over both any on country routes that they used to get there and the whole of the surrounding locale where they believed the spirits with whom (or which) they were communicating were: *Banjima* 231 FCR at 495 [104]-[105]. Having regard to the whole of the evidence, I am also satisfied that one or more Yindjibarndi was or were “established” in each of areas 1, 2, 3 and 4 and the Reserve in the sense explained in *Moses* 160 FCR at 200 [216].
4. Symbolism is a feature of every human society. Attendance at ceremonies or places of significance gives each of us, as human beings, a sense of occasion and presence in a wider experience. As I understood the evidence of the Yindjibarndi about their relationships with their country and its spirits, they attached genuine symbolic significance to their visits to their country. For them, each visit not only involved the exercise of the traditional rights but also the performance of their duty to care for, and not forget, their country. And they had to perform that duty with a degree of symbolism, particularly because of the historic reality of their physical dispossession from their country by European settlement. Many of the Yindjibarndi witnesses spoke of their **need** to visit, regularly, their country. That need to visit, camp and carry out activities reflected their spiritual and emotional connection to their country and their duty to care for it under the Birdarra law (see e.g. [52]-[53], [146]-[147], [246] above). The visits and activities were manifestations of the possessory rights (and traditional rights to control access) that Yindjibarndi people had over their country in accordance with the traditional laws they have acknowledged, and the traditional customs they have observed, continuously since sovereignty: *Banjima* 231 FCR at 495 [104]-[105].
5. I am of opinion that one or more members of the Yindjibarndi claim group occupied or were “established in” areas 1, 2, 3 and 4, as well as the Reserve, within the meanings of ss 47B(1)(c) and 47A(1)(c) for the reasons below.
6. In *Banjima* 231 FCR at 494-495 [97]-[105], 501-502 [128], 504-505 [138]-[139], Mansfield, Kenny, Rares, Jagot and Mortimer JJ considered the meanings of “occupy” and “the area” as used principally in s 47B(1)(c), but also in respect of the same wording in s 47A(1)(c) (see at 495 [103] and [105]). The Full Court did not decide, and noted (231 FCR at 495 [103]) that in *Moses* 160 FCR at 199 [214], Moore, North and Mansfield JJ too had not decided, what the expression “the area” as used in ss 47A(1)(c) and 47B(1)(c) meant. Rather both Full Courts proceeded on the assumption that the expression “the area” as used in those subsections “speaks [of] the ‘particular area in relation to which it has been concluded that, but for the section, native title rights would be extinguished’”.
7. However, in *Banjima* 231 FCR at 493-494 [92]-[101] the Full Court noted that the expression “the area”, as used in both ss 47A(1) and 47B(1), may be used either generally in those sections, as it is elsewhere in the *Native Title Act*, to refer to the whole of the area the subject of the claimant application for a determination of native title or, in parts of ss 47A and 47B, such as subsection (1)(c) in each section, in relation to the more limited geographical area to which the preservatory effect of each of ss 47A(2) and 47B(2) applies.
8. Importantly, the Full Court in *Banjima* 231 FCR at 495 [104] held that the question of whether some activity amounts to occupation within the meaning of ss 47A(1)(c) and 47B(1)(c) is a factual one, dependent on the evidence in each case. Moreover, the Full Court explained in *Moses* 160 FCR at 199-200 [215] that it would adopt the following criteria as its general approach to assessing whether the requirement that “one or more of members of the native title claim group occupy the area” ss 47A(1)(c) or 47B(1)(c) had been satisfied, namely:

It is largely a matter of common sense, but is founded upon the words of ss 47A and 47B in their context and as considered in the authorities:

(1) to “occupy” an area for the purposes of ss 47A and 47B of the NTA involves **the exercise of some physical activity or activities in relation to the area**;

(2) to “occupy” an area does **not require the performance of an activity or activities on every part of the land**;

(3) to “occupy” an area does not necessarily involve consistently or repeatedly performing the activity or activities over part of the area;

(4) to “occupy” an area does not require constant performance of the activity or activities over parts of the area; **it is possible to conclude that an area is occupied where there are spasmodic or occasional physical activities carried on over the area**;

(5) to occupy an area at a particular time does not necessarily require contemporaneous activity on that area at the particular time; **it is possible to conclude that an area of land is occupied in circumstances where at the time the application is made there is no immediately contemporaneous activity being carried on in the area**;

(6) the fact of occupation does not necessarily entail a frequent physical presence in the area; for example, the storage of sacred objects on the area or the holding, from time to time, of traditional ceremonies on the area may constitute occupation for the purposes of the NTA: see, eg *Rubibi Community v Western Australia* (2001) 112 FCR 409 at [182];

(7) evidence to establish occupation need not necessarily be confined to evidence of activities occurring on the particular area; **it may be possible to establish that a particular area is occupied by reference to occupation of a wider area which includes the particular area**: *Risk* [2006] FCA 404 at 890;

(8) occupation need not be “traditional”: *Rubibi (No 7)* [2006] FCA 459 at [84];

(9) **whether occupation has been made out in a particular case is always a question of fact and degree**. (emphasis added)

1. At common law, a person can occupy a very large expanse of land because he or she has an ownership or leasehold interest in that land: *Moses* 160 FCR at 200 [216]. The owner or lessee can stay or live at a homestead on a pastoral station. He or she need not visit every hectare, including inaccessible terrain, to be able to assert his or her common law rights as owner or lessee or occupier over the whole expanse. The common law, with its concern to protect proprietary interests, does not require a person who has legal rights in, or in respect of, real property to exercise those rights physically over every part of the terrain before the common law will grant, at least a person with the right to exclusive possession, remedies to exclude others with no lawful right to be on any part of the real property, no matter how remote it may be from where the person lawfully in possession resides or makes use of the land.
2. Here, the *Native Title Act*, in ss 47A and 47B, requires, once the pre-conditions in ss 47A(1) and 47B(1), respectively, are satisfied, the recognition of pre-existing native title rights and interests. Whether the activities relied on by an applicant for a determination of native title under s 225 amount to occupation of, or establishment over, an area for the purposes of each of ss 47A(1)(c) and 47B(1)(c) is necessarily a question of fact and degree: *Moses* 160 FCR at 200 [215(9)]. But the Act is predicated, in ss 10, 11 and 223(1)(b), on an understanding that the relationship between indigenous people and their country inheres in how their traditional laws and customs establish their rights and interests over or in respect of, and their connection to, a particular expanse of land and waters, regardless of cadastral boundaries superimposed by State or Territory Governments over that expanse. A main object of the Act, in s 3(a), is “to provide for the recognition and protection of native title”. And, the Preamble to the Act states:

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, **where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect**.

**It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented.** (emphasis added)

1. The concept conveyed by the Parliament’s use of the word “occupy” in ss 47A(1)(c) and 47B(1)(c) cannot be divorced from the balance of those sections and, in particular, the preservatory effect of ss 47A(2) and 47B(2) in respect of a claim group’s native title over the relevant land and waters. The Act defines “native title” in s 223(1) and, critically, s 223(1)(b) incorporates the essential integer that the claim group, by the traditional laws acknowledged and the traditional customs observed, “have a connection with the land or waters”.
2. In this proceeding it is common ground that the Yindjibarndi have non-exclusive native title rights and interests over the whole of the land and waters in the claimed area, except where native title has been extinguished. However, that position does not deal, of itself, with whether ss 47A or 47B apply to affect the non-extinguishment of those native title rights and interests over each of the Reserve and areas 1, 2, 3 and 4. Therefore, it is necessary for the Yindjibarndi to prove that some particular activity was of a sufficient nature and degree that it amounted to one or more Yindjibarndi occupying the, or some part of the, area concerned at the relevant time. As *Moses* 160 FCR at 199 [215(5)] recognised, there need not be exact contemporaneous occupation at the date on which the claimant application is filed in the Court.
3. The importance of connection in considering issues involving the question whether and, if so, to what extent native title exists in any particular factual scenario cannot be gainsaid. Thus, in discussing the question whether a past governmental act created rights or interests that were inconsistent with native title rights, Gleeson CJ, Gaudron, Kirby and Hayne JJ said in *Yanner v Eaton* (1999) 201 CLR 351 at 372-373 [37]-[38]:

But in deciding whether an alleged inconsistency is made out, **it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land**. As Brennan J said in *R v Toohey; Ex parte Meneling Station Pty Ltd* [(1982) 158 CLR 327 at 358], “**Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights**” but “[t]raditional Aboriginal land is not used or enjoyed only by those who have primary spiritual responsibility for it. Other Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land or may be entitled to exercise some usufructuary right with respect to it”.

**Native title rights and interests must be understood as what has been called “a perception of socially constituted fact” as well as “comprising various assortments of artificially defined jural right**” [K Gray and S F Gray, “The Idea of Property in Land”, in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15, at p 27]. And **an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land**. Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, “You may not hunt or fish without a permit”, **does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing**. (emphasis added)

1. I am of opinion that the way in which indigenous people maintain or express their connection with their traditional land and waters can be relevant, and possibly decisive, in determining whether, at any particular point in time, one or more of those people occupy any, or how much of any, relevant land and waters. Moore, North and Mansfield JJ referred in *Moses* 160 FCR at 199-200 [215]-[216], as they said, to a non-exhaustive description of matters so as to reflect a common sense approach to decide whether one or more members of a claim group “occupy” an area for the purposes of ss 47A(1)(c) and 47B(1)(c).
2. It must be firmly borne in mind that the word “occupy” in that context is used with respect to the question of whether ss 47A(2) or 47B(2) operate in a particular factual and statutory scenario to require the recognition of native title where other interests (namely those specified in ss 47A(1)(b) and 47B(1)(b)) in particular land or waters do not exist.
3. The purpose of each of ss 47A and 47B is not to protect some notionally pre-existing Crown interest in land and waters, but rather to ensure that, provided that the criteria in ss 47A(1) and 47B(1) are met, whatever the Crown had done that might otherwise have extinguished native title in respect of the land and waters since sovereignty, must be disregarded for all purposes under the Act, as ss 47A(2) and 47B(2) provide, “in relation to the application” referred to in ss 47A(1)(a) and 47B(1)(a).
4. When a person has a holiday or business trip and stays in a hotel room, he or she, as both a matter of common sense and law, “occupies” the room during the period of the stay, even while he or she goes out of it to enjoy the locale or attend to the business purpose. In such a situation, the activity of occupation is casual and convenient.
5. In my opinion, in contrast, a deliberate visit to, and the conduct of activity on, land that “reflect[s] connection with the land” of a spiritual, cultural or social kind by one or more members of a claim group can amount to him, her or them occupying that land, as well as a wider area of land to which the claim group, by its traditional laws and customs, has a connection, within the meaning of ss 47A(1)(c) and 47B(1)(c): cf. *Yanner* 201 CLR at 372‑373 [37]-[38].
6. In addition, each of ss 47A(1)(c) and 47B(1)(c) requires only a very limited temporal period of the requisite occupation, namely “when the application is made”. There is no requirement that the period of occupation be of any particular duration, before or after, the statutory criterion of the time when the claimant application was made. As *Moses* 160 FCR at 199 [215(5)] made clear, that did not necessarily require the member or members of the claim group, the evidence of whose presence or activity is relied on, to engage in contemporaneous activity on that particular time (i.e. the day that, or “when”, “the claimant application is made”).
7. The activities of the various Yindjibarndi that I describe below, in my opinion, not only expressed each person’s spiritual, cultural and social connection on the relevant occasion(s) with the whole of Yindjibarndi country, but also with the locations and the surrounding locale at which the activities or visits occurred within that country, sufficient to amount to occupation for purposes of ss 47A(1)(c) and 47B(1)(c). As Angus Mack said, the Yindjibarndi believe “there are spirits everywhere” (see [66] above). The Yindjibarndi’s spiritual duty, under the Birdarra law, was to care for their country and that included communicating with and respecting the spirits (see e.g. [96], [99], [142], [145]-[147], [246] above).
8. The activities and visits of which the Yindjibarndi witnesses gave evidence involved, inherently, their observance of their traditional customs by which they had a connection with the land and waters concerned. The deep spiritual, indeed emotional, need that motivated the witnesses’ visits and activities in the circumstances in evidence, amounted to their being “established over” the broader areas so as to amount to occupation. The visits and activities were not casual trips, such as a tourist might make to places of interest. Rather, the evidence satisfied me that the visits and activities were essential expressions of the Yindjibarndi witnesses’ needs and duties to visit and care for their country. That is how and why they derived the deep spiritual satisfaction, indeed joy, expressed by, for example (but not limited to), Tootsie Daniel or Michael Woodley in the passages of their evidence I have quoted in [262] and [53], dealing with their obligations under the Birdarra law, as well as in [65] above.
9. In *Narrier v State of Western Australia (No 2)* [2017] FCA 104 at [20]-[21], [31] Mortimer J held that the “area”, for purposes of s 47B(1)(a), is the land and waters identified by the applicant as that to which s 47B(2) applies. With respect, I am unable to agree with her Honour. The word “area” as used, differentially, in s 47B(1) and (2) is a statutory concept that applies to land and waters to which the statutory preservation reflected in s 47B(2), but also in ss 4(1), 10 and 11, applies. The Act, in s 4(1), “provides that native title cannot be extinguished contrary to the Act”. The Court’s function is to make a determination of native title under, and in accordance with, s 225 based on the evidence and the general and statute law. In the end result, the only area that the applicant selects under the Act is the whole of the land and waters identified in an application filed under ss 13(1) and 61.
10. The Court has a duty to decide what is the legal status of all land and waters within that area. If, as usually happens, the applicant claims a large area that includes freehold and leasehold land and waters, the Act requires that findings be made as to whether native title has been extinguished. And, similarly, the Court must determine whether native title has been extinguished or not, based on the jurisdictional fact of whether s 47B(1) applies to a particular area, regardless of how any party chooses to define or assert about it. Native title cannot exist or be extinguished otherwise than in accordance with the Act. That issue may be usefully assisted by the applicant pointing to a discrete portion of land and waters within the wider area claimed in the claimant application with a view to seeking a factual finding that s 47B or s 47A applies to it. Likewise, the State or Territory Government or another person may say that the “area” is defined by cadastral, Torrens or old system title boundaries. But, the question that the Court must determine, of whether native title has been extinguished, is not, and cannot be, decided based on how any party defines any particular land or waters in a native title claimant application. The Full Court discussed this issue in *Banjima* 231 FCR 456 and other authorities to which I have referred above.
11. In my opinion, the Court is not constrained to limit its consideration to whether the applicant establishes a claim over all that it contends for under ss 47A or 47B. Rather, the Court can find as a matter of fact and degree that one or more members of a claim group occupied a portion, but not all, of land and waters in “an area” that is in dispute in the proceedings, to which s 47B(2) will apply: cf. *Moses* 160 FCR at 199-200 [215]-[216].
12. Often, in claimant applications, there will be large parcels of Crown land to which one or other of ss 47A and 47B potentially can apply. If, for example, a mining lease had been granted over a small portion of a larger parcel of Crown land that had a cadastral definition having clear metes and bounds with a particular UCL (or other description in the nomenclature of States and Territories other than Western Australia), the mining lease may be a permission or authority for the land to be used for a particular purpose, within the meaning of s 47B(1)(b)(ii), so that the particular land to which it applies is excluded from the application of s 47B. However, it would not follow that s 47B did not apply the beneficial application of s 47B(2) to the balance of that parcel of Crown land. Rather, s 47B(1)(b)(ii) operates to exclude from that beneficial operation only the land and waters covered by the relevant permission or authority, or other governmental act.
13. I also reject FMG’s unelaborated argument that the word “occupy” as used in ss 47A(1)(c) and 47B(1)(c) should be construed as Priestley JA construed that word, when used in a different statute, in *Daruk* 30 NSWLR at 162, using only common law concepts. The word “occupy” as used in ss 47A(1)(c) and 47B(1)(c) has been construed by the authorities in the Full Court of this Court which I am bound to apply, as I have sought to do.

## Occupation – specific findings

1. **As to area 1:** I am satisfied that the visits to Garliwinjinha and its vicinity by Yindjibarndi in 2003 were sufficient to establish that one or more members of the claim group occupied the whole of area 1 for the purposes of s 47B(1)(c) at the time that the claimant application was filed. Indeed, as Angus Mack explained (see [243] above), on one visit he, Michael Woodley and Thomas Jacob, with their Guruma friend, Wayne Stevens, traversed area 1 from the north along Garliwinji creek to travel south to the spring at Garliwinji. That traverse occurred in Yindjibarndi country as a natural and otherwise unremarkable manifestation of Yindjibarndi people exercising their traditional right, subject to any spiritual restraints, to be and engage in activities anywhere on their country, including area 1.
2. Garliwinji is on the southern boundary of area 1, adjacent to Eastern Guruma country to its south. When other Yindjibarndi such as Kevin Guiness, Charlie Cheedy and Michael Woodley described their visits there in 2003, they were not with anyone (except on the one occasion that Angus Mack described when Wayne Stevens accompanied them) who could give them permission to hunt or gather outside Yindjibarndi country. There is no suggestion that any of them went, or conducted traditional activities, outside Yindjibarndi country except, perhaps, to access that country. I find that the hunting and gathering that occurred in 2003 was over a sufficiently broad expanse of area 1 as to amount to occupation of the whole of that area. And, although neither visited area 1 in 2003, both Berry Malcolm and Bruce Woodley explained that presence at Garliwinji or Garliwinjinha involved “looking after our country” and that the area “is very spiritual country”.
3. I am satisfied that the evidence of each of Michael Woodley, Stanley Warrie, Angus Mack, Charlie Cheedy and Kevin Guiness about his own individual visit or visits to Garliwinji or Garliwinjinha and the activities of himself, and the other persons, which he described, during 2003, amounted to sufficient occupation of, or establishment in, the whole of area 1 for the purposes of s 47B(1)(c). Indeed, each visit and the activities, as described, amounted to each individual expressing his or her connection to that particular locale’s land and waters as an integral part of their own spiritual needs and duties in accordance with Yindjibarndi traditional laws and customs that arise in respect of both of the locale and the, wider, Yindjibarndi country. And the same was also an assertion of the very native title rights and interests that the Yindjibarndi claim should be made in a determination of native title in these proceeding. The same reasoning is equally apposite to establish that one or more Yindjibarndi occupied areas 2, 3 and 4 and the Reserve in 2003 on the basis of my findings below.
4. **As to area 2:** I am satisfied that the visits to area 2, including to Bangkangarra, Ganjingaringunha and Wirlumarra, including Wirlumarra creek which flows across, or is near, the south-western corner of area 2, by Yindjibarndi in 2003 were sufficient to establish that one or more of the members of the claim group occupied the whole of area 2 for the purposes of s 47B(1)(c) at the time that the claimant application was filed.
5. *First*, the three locations are some distance from each other and two, Bangkangarra and Ganjingaringunha, are well within the perimeters of area 2. The visitors had to pass over considerable parts of area 2 in order to arrive at each of those two sites, being a domain that they regarded as Yindjibarndi, or their country, in any event. Moreover, Bangkangarra is not the only important Yindjibarndi site in its vicinity. It is close to the fertility, or Manggurla, thalu.
6. *Secondly*, the visits were part and parcel of the numerous witnesses’ exercise of their understanding of essential incidents of traditional Yindjibarndi culture such as the collection of sacred stones, camping, hunting and fishing on a regular, deliberate, basis by each of those witnesses separately from the others. Kevin Guiness visited Wirlumarra regularly over the years with his family, and particularly in 2003, as well as visiting Ganjingaringunha in 2003. He collected sacred stones and ochre, hunted and camped in order to “connect up with the country and the spirits in the country” (see [245]-[246] above).
7. Angus Mack, Charlie Cheedy, Michael Woodley and Lorraine Coppin all described visits to one or more of these sites (Bangkangarra, Wirlumarra and Ganjingaringunha) during 2003 as part of their regular cycle of visiting and caring for their country. When Yindjibarndi visit places on their country to care for it, they establish themselves, and exercise dominion, over not only the particular place but the whole surrounds so as to connect with their country and its spirits.
8. Similarly, Rosemary Woodley “went all around areas in the [claimed] area” with Ricky Smith in 2002 and 2003 including in area 2 while carrying out their dogging contracts. Importantly, their visits to areas 2 and 4, and, I infer, the Reserve, were not made in performance of the dogging contract because that contract related to the pastoral stations, not Crown land. Their visits to the areas to which ss 47A and 47B applied were in the nature of a personal, not commercial, visit by Rosemary Woodley, as a Yindjibarndi, exercising or engaging in traditional Yindjibarndi rights and customs in accordance with her people’s traditional law and customs.
9. **As to area 3:** I am satisfied that Kevin Guiness’ and his family’s regular visits to area 3, including Hamersley Gorge, in 2002 and 2003 were sufficient to amount to occupation of area 3 for the purposes of s 47B(1)(c) at the time that the claimant application was filed. I have already described the essentially spiritual quality of those visits and their extent (see [245]-[246] above). They lived off the country and connected with its spirits at those times. That had the character of him, and his family, establishing themselves, and the exercise by them of traditional Yindjibarndi rights, over area 3: *Banjima* 231 FCR at 495 [104]-[105].
10. Contrary to the submissions of the State and FMG, that evidence is sufficient. Each of ss 47A(1)(c) and 47B(1)(c) provide that activity of just one member of the claim group may amount to occupation of an entire area. Kevin Guiness’ visits with his family were not one‑off, isolated events. They were expressions of his traditional right, as well as his spiritual and emotional need, as a Yindjibarndi, to be on, to commune with the spirits of, his country and to engage, on that country (including when he was in area 3 with his family), in the traditional rights that the Yindjibarndi have to camp, hunt, fish and gather there.
11. **As to area 4 and the Reserve:** I am satisfied that Rosemary Woodley occupied area 4 and the Reserve in 2002 and 2003 when she and Ricky Smith camped and lived off the land at and near Yitimanara, which is on the boundary between area 4 and the Reserve. The exercise of the traditional Yindjibarndi rights to camp on and live off the resources of Yindjibarndi country is sufficient to amount to occupation. They did not make a fleeting visit. Indeed, by camping at Yitimanara and living off the country for the period necessary to carry out the dogging work on the neighbouring Hooley and Mulga Downs pastoral leases, she was occupying the land and its surrounds.
12. As I have noted (at [251]-[252] above), the evidence of Rosemary Woodley and Ricky Smith has limitations as to the times of her visits and the extent of the domain over which they ranged during any particular visit to area 4 and the Reserve in order to live off the land while they were there, having regard to the very large size of that domain. However, Rosemary Woodley clearly regarded Yitimanara as a site of spiritual significance for her as a Yindjibarndi, including because of what Yiirdi Whalebone had told her about it. She and her husband took their family there, including four of their grandchildren. Both she and her husband said that when they were dogging they went everywhere on Yindjibarndi country, including the claimed area, and they took Yiirdi Whalebone to Yitimanara in 2004.
13. There is no precise basis on which to find an exact time when Rosemary Woodley and her husband went across to the Cockeraga River, at the extreme east of the Reserve, on the occasion that they entered the Reserve at its north near the foot of the Mungaroona Range. However, their evidence of their enthusiasm to range over Yindjibarndi country when they were on it provides a sound basis for the inference, that I draw, that on their visits in 2002 and 2003 to Yitimanara, they camped and ranged over a substantial part of area 4 and the Reserve: *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; *Seltsam* 49 NSWLR at 276 [88]. It may be that their activities on these visits in 2002 and 2003 included visiting the Cockeraga River or the north of the Reserve but, even if it did not, I am satisfied that in that period, for the purposes of ss 47A(1)(c) and 47B(1)(c), Rosemary Woodley occupied and established herself over both area 4 and the Reserve by the other activities there in which she engaged at that time.
14. In addition, I am satisfied that Michael Woodley and the other Yindjibarndi who accompanied him on visits to Yitimanara and Ngurrbanha in the period during 2002 and 2003 also exercised Yindjibarndi native title (possessory) rights and established themselves over area 4 and the Reserve. As he said, not only did they camp on this part of Yindjibarndi country then, but they ranged out from their campsites, on each occasion, following Yitimanara Creek to fish, hunt and walk. Those visits and activities were sufficient to amount to those Yindjibarndi occupying area 4 and the Reserve for the purposes of ss 47B(1)(c) and 47A(1)(c).

# (4) THE ABUSE OF PROCESS ISSUE

1. There are three principal questions that arise in relation to the abuse of process issue, namely, whether *first*, the State and FMG should be granted leave to amend their statements of contentions to raise expressly a contention that the Yindjibarndi cannot be permitted to assert or claim that they have a right to exclude others from, or control access to, the claimed area on the basis that such an assertion or claim is directly contrary to the findings of Nicholson J in *Daniel* [2003] FCA 666 and, so, amounts to an abuse of process, *secondly*, as FMG, but not the State, argued, s 86 of the *Native Title Act* should be construed so as to preclude the use of evidence or findings in earlier proceedings, here evidence given to, and any findings of, Nicholson J in *Daniel* [2003] FCA 666 and *thirdly*, the claim that the Yindjibarndi have a right to exclude others from, or control access to, the claimed area is an abuse of process, or as FMG, but not the State, put is precluded by an issue estoppel arising from the findings in *Daniel* [2003] FCA 666.

## Procedural history relating to the abuse of process issue

1. The claimant application, when filed on 9 July 2003, claimed, in Sch E, that the Yindjibarndi (being the applicant) had a native title right and interest in relation to the claimed area that comprised: “(1) The right to possess, occupy, use and enjoy the area as against the world”. They have maintained that claim ever since.
2. On 9 July 2014, McKerracher J made case management orders, including orders that:

* the Yindjibarndi file and serve a statement of contentions by 11 July 2014;
* the **participating** (or active) **respondents**, which included the State and FMG, each file a statement of contentions by, in the State’s case, 11 August 2014, and, in the case of each other participating respondent, 30 August 2014;
* the parties participating in the proceeding confer and file an agreed statement of issues in dispute by 29 September 2014.

1. I have summarised aspects of the respective statements of contentions as filed pursuant to his Honour’s orders, and subsequently amended, at [16], [40]-[41] above. Relevantly, the Yindjibarndi put a contention that:

16. Under traditional Yindjibarndi law and custom as presently acknowledged and observed, persons who do not belong to the country and cannot assert rights to it are identified by the use of the word “manjangu”. Such persons are **strangers and should not access and use Yindjibarndi country**, including the [claimed area], **without the permission** of appropriate Yindjibarndi persons who can speak for that country. (emphasis added)

1. In response, the State put its contention that:

12. As to paragraph 16, the [State] admits the first sentence but does not admit the second sentence. In particular, the [State] **does not admit that the Yindjibarndi people possess any native title rights of exclusive possession in the [claimed area]**, including any right to grant or deny permission to access and use any part of that area. (emphasis added)

1. In par 5 of its contentions, FMG expressly adopted the State’s contention 12 set out above (at [307]).
2. On 20 October 2014, the parties filed the agreed statement of issues in dispute. It recorded that the parties agreed that one issue in dispute was whether the Yindjibarndi “hold any native title rights and interests in the [claimed area] which are additional to or different from those determined to exist in respect of the rest of Yindjibarndi country by Moore, North and Mansfield JJ [in the 2007 determination], as particularised in the Schedule”. The schedule to the agreed statement of issues in dispute relevantly identified the present issue as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| **Claimed right** | **Relevant determined right(s) (*Moses* 2007)** | **Respondents’ position on claimed right** | **Issue(s) in dispute, or potentially in dispute** |
| (l) **The right to control access of others to the area** except such persons as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; | N/A | **Not accepted** | Whether, **as a matter of fact and law, the Applicant has any right to control access to the claim area**. |
| (m) The right to visit, care for, conserve and maintain places and objects of importance within the area and protect them from physical harm; | (k) A right to protect and care for sites and objects of significance in the Yindjibarndi Native Title Area [i.e. the Moses land] (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm, **but not including a right to control access or use of the land by others**). | Accepted, **on the basis that the right does not include any right to control access** to any place, and is otherwise the same in substance as the determined right. | **Potentially**, whether, as a matter of law, **a non-exclusive right** to care for, conserve and maintain places and objects of importance **can include a right to control access**. |

(emphasis added, footnotes omitted)

1. The rights in agreed issues (l) and (m) above were the only ones in the schedule to the agreed statement of issues that directly raised a question about a right to control access.
2. In addition, the participating parties identified that they were at issue in relation to the Yindjibarndi’s claimed rights in (n), (o), (p) and (q) to take and use resources, other than minerals and petroleum, from the claimed area, including flora, fauna, soil, sand, stone, flint, clay, gravel and ochre.
3. The reason why “N/A” appeared in the second column of agreed issue (l) was that the Yindjibarndi did not challenge in the appeal in *Moses* 160 FCR 148 the parts of the 2005 determination that reflected Nicholson J’s finding that they had only non-exclusive rights and interests in the Moses land (see [19] and [20] above).
4. On 22 October 2014, the Yindjibarndi filed Dr Palmer’s expert report that stated at [414]:

Thus the system of rights to country, as I [i.e. Dr Palmer] have set them out here, is “exclusive” and that the Yindjibarndi possessed the right to exclude others who are not Yindjibarndi and are consequently identified as manjangu.

1. On 31 July 2015, I heard the State’s interlocutory application for an order that the Yindjibarndi give better and further particulars, based on the witness statements that the Yindjibarndi had served earlier in July 2015. During the course of argument the State explained that it proposed to argue at the final hearing, set down to commence on country on 7 September 2015, that the Yindjibarndi were estopped from seeking, or would be engaging in an abuse of process if they sought to claim, an exclusive right to control access to the claimed area.
2. I questioned how that could occur, given that no such issue had been set out in the State’s contentions or the agreed issues which had merely not admitted the existence of the asserted native title right. That led to the State filing its interlocutory application that sought leave to amend its statement of contentions by, relevantly, adding the following to par 12 (set out in [307] above):

The [State] contends further that if and to the extent these statements of Yindjibarndi law and custom are said to (a) reflect the same laws and customs as apply in the [Moses land], and (b) sustain native title rights of exclusive possession in the [claimed area], then these statements amount to an abuse of process by reason of re‑litigation of issues decided against the Yindjibarndi people in *Daniel* (see also [22]-[27] below).

1. The State then set out contentions, in proposed new pars 22-27, as to what it asserted was an abuse of process by relitigation of the finding that Nicholson J had made in *Daniel* [2003] FCA 666 at [292]. It contended that the Yindjibarndi could not assert, whether by leading evidence or otherwise, that they held exclusive native title rights in the claimed area on the basis of the same laws and customs as those that exist in relation to the Moses land and that to do so would amount to an abuse of process by relitigating the exclusive possession issue that Nicholson J had determined against them.
2. On 11 August 2015, FMG filed its interlocutory application seeking leave to amend its contentions by adding nine new paragraphs that, in substance, contended that:

* the findings in *Daniel* [2003] FCA 666 determined that the rights identified in (m), (n), (o), (p) and (q) in the schedule to the agreed issues were non-exclusive and applied to laws and customs observed by the Yindjibarndi on all Yindjibarndi country, including both the Moses land and the claimed area;
* the applicant had given notice that the Yindjibarndi proposed to tender, pursuant to s 86(1)(a) of the *Native Title Act*, evidence given in the proceedings before Nicholson J at the then forthcoming hearing before me;
* the Yindjibarndi had filed Dr Palmer’s expert report that opined that they had the right to exclude others from Yindjibarndi country based on, among other matters, evidence given on that issue in the proceedings before Nicholson J;
* the applicant had filed evidence and advanced contentions in this proceeding that asserted that they had the right to exclude others from Yindjibarndi country, including the claimed area;
* s 86(1)(a) and (c) did not permit the Court to draw conclusions of fact or adopt findings from earlier proceedings, namely the hearing before Nicholson J and his Honour’s judgment in *Daniel* [2003] FCA 666, that were, or were intended to be used contrary to, or departed from, his Honour’s findings that the Yindjibarndi did not have the right to control access;
* alternatively, if s 86(1) did permit such a course, were the Yindjibarndi to do so, that conduct would be an abuse of process and hence they ought be precluded from being able to rely on the earlier findings and evidence for that purpose;
* the effect of the Yindjibarndi’s statement of contentions and proposed evidence (as at 11 August 2015) in substance was to seek to have determined differently, by this proceeding, essentially the same issue, as to their having the right to exclude others from Yindjibarndi country, that Nicholson J decided adversely to the Yindjibarndi, and that conduct involved an abuse of process.

1. Kenneth Green, FMG’s solicitor, said, in his affidavit of 11 August 2015 in support its interlocutory application, that until 9 July 2015 he was unaware that “the applicant disputed that the issues in dispute in this proceeding include issues of potential abuse of process flowing from [the] effect of findings in *Daniel v Western Australia* [2003] FCA 666”. However, Mr Green did not identify where the agreed issues or contentions had raised “the issue[ ] in dispute [of] potential abuse of process”.
2. I am not satisfied that, prior to 9 July 2015, any suggestion of abuse of process or issue estoppel had been identified by any respondent as an actual or potential issue for resolution at the trial. I had understood during the directions and case management hearings held after 11 May 2015, when I first dealt with the proceeding after it entered my docket, until 31 July 2015, that the State’s non-admission in par 12 of its contentions, that FMG had adopted in par 5 of its contentions (see [307] and [308] above), was intended merely to put the Yindjibarndi to proof of the facts to establish their asserted exclusive right, and did not raise any issue of abuse of process or issue estoppel.
3. On 12 August 2015, when the State’s and FMG’s interlocutory applications to amend came before me, I suggested to the parties that those applications should be argued at the time of final address when the issues would be clear and that, by then, the evidence would be on and the uses to which the Yindjibarndi wished to put that evidence would be explained. The State and FMG did not suggest that they would suffer any prejudice or would have conducted this proceeding differently (other than that they and, as I have noted, all participating respondents, probably would have entered into a consent determination on the same terms as the 2007 determination). I made that suggestion because I considered that the interlocutory applications raised substantive issues and that it was not appropriate, less than a month before the on country hearing was to begin on 7 September 2015, to attempt to deal with and determine those issues. No party suggested that this course would lead to any prejudice. Indeed, the applicant, the State and FMG accepted that this was a convenient course.
4. I was also concerned at that time that, on 11 August 2015, Wintawari Guruma Aboriginal Corporation RNTBC (**WGAC**) had filed another interlocutory application, that was listed before me on 12 August 2015, in which WGAC sought to be joined as a party to this proceeding under s 84(5) of the *Native Title Act*. WGAC asserted that it had an overlapping claim over much of the claimed area and, in particular, area 2, including the Solomon Hub mine. I considered that it was essential to hear, and if possible determine, that interlocutory application before the on country hearing since, if I were to have granted it, that hearing would have to be vacated. In the end, I fixed WGAC’s interlocutory application for hearing on 25 August 2015.
5. Next, on 18 August 2015, WGAC filed its own application for a revised determination of native title over an asserted area that overlapped with the claimed area in these proceedings. I made that application returnable also on 25 August 2015.
6. On 25 August 2015, I dismissed both applications by WGAC on the bases that *first*, WGAC, as a prescribed body corporate, had no capacity or authority under the *Native Title Act* to take proceedings, to assert native title rights and interests in respect of any land or waters, outside the area the subject of the determination in the order of the Court appointing it as trustee of native title in respect of that determined area and, *secondly*, each of WGAC’s applications was an abuse of process: *Wintawari Guruma Aboriginal Corporation RNTBC v State of Western Australia* (2015) 238 FCR 428.
7. As I have noted at [29] above, on 15 May 2017, YAC filed its revised native title determination application.

## Leave to amend sought by the State and FMG – The Yindjibarndi’s submissions

1. The Yindjibarndi argued that the State and FMG should not be allowed to amend their statements of contentions to raise the abuse of process issue. The Yindjibarndi contended that granting the belated interlocutory amendment applications to enlarge the issues, that had been raised just prior to the beginning of the trial, could cause substantial prejudice to the Yindjibarndi’s witnesses and the Yindjibarndi people more generally. They submitted that they had prepared for the trial and incurred significant expense on the basis that the non-admission of a right to exclude others had put them only to proof of that right, but the non-admission had not amounted to an assertion that the claimed right was not open to be proved at all. They pointed to the delay of the State and FMG in raising the abuse of process issue, the lack of any sufficient explanation for that delay and the strain on witnesses having to prepare for and give evidence on the exclusive possession issue that could not be compensated by any order for costs.

## Leave to amend – consideration

1. I am of opinion that it is in the interests of justice to grant leave to the State and FMG to amend their contentions as they sought. I have come to that position despite the unsatisfactory non-admissions of the State and FMG of the Yindjibarndi’s contention that they had a native title right to control access to Yindjibarndi country. Those non-admissions by the State and FMG failed to raise any question, or consequence, of any inconsistency between the non-exclusive native title rights and interests in pars 4(a) and 7(k) of the 2007 determination, so far as those left unaltered the 2005 determination’s provisions that gave effect to Nicholson J’s finding that the Yindjibarndi did not have the right to control access to Yindjibarndi country: *Daniel* [2003] FCA 666 at [292].
2. The failure of the State and FMG to include an express contention that, by seeking a determination that they had the right to control access to Yindjibarndi country in this proceeding, the Yindjibarndi would be relitigating an issue that Nicholson J had found against them, until after all of the Yindjibarndi’s evidence in chief had been served and the trial was about to commence, is both inexplicable and was not explained. That failure seriously compromised the achievement of the overarching purpose of the Court’s civil practice and procedure provisions prescribed in Pt VB of the *Federal Court of Australia Act 1976* (Cth).
3. Moreover, the absence of any substantive explanation as to why the State and FMG had not raised this significant issue squarely in their contentions and the agreed issues, ordinarily would be decisive against permitting them to raise it when they did, very shortly before the hearing was to commence: cf. *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 214-215 [100]-[103], esp at [103] per Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 323 [56]-[57] per French CJ, Kiefel, Bell, Gageler and Keane JJ; *Tamaya Resources Ltd (In Liq) v Deloitte Touche Tohmatsu* (2016) 332 ALR 199 at 226-227 [152]-[160] per Gilmour, Perram and Beach JJ.
4. However, as Gummow, Hayne, Crennan, Kiefel and Bell JJ observed in *Aon* 239 CLR at 213 [98], the paramount purpose of provisions like Pt VB of the *Federal Court Act* is a just resolution of the proceedings, but as understood in light of the purposes and objectives set out in provisions like s 37M.
5. Here, it was possible to deal in final address, without the need for additional evidence, with argument on the substance of the new issues that the State and FMG raised. The new issues did not involve only a dispute over private rights but they concerned significant public rights as to land title and the status of a prior determination of native title, as it could affect a subsequent application for a, and the actual, determination of native title by the same native title claim group. Those issues raised matters of public importance in the administration of the *Native Title Act* and in respect of the certainty of determinations of native title and land tenure under that Act.
6. I had had regard to the important concerns of the Yindjibarndi that, if the State’s and or FMG’s arguments were accepted, and the present claim for exclusive possession of the claimed area were found to be an abuse of process, *first*, needless and very real stress would have been imposed on many witnesses, for whom the ordeal of the public exposition of their personal connection to Yindjibarndi country could not be gainsaid, and, *secondly*, the very large cost of producing the detailed written evidence of those witnesses at the hearing and argument on that evidence. Had I found that there was an abuse of process in the Yindjibarndi claim for the exclusive right to control access, I would have asked for submissions as to why I ought not to have ordered each of the State and FMG to pay the Yindjibarndi’s costs of the preparation of all their evidence on that question, other than, perhaps, Dr Palmer’s initial version of his report that was filed on 22 October 2014, two days after the filing of the agreed statement of issues.
7. In essence, had the State and FMG raised their abuse of process contentions properly at the outset of the case management by McKerracher J, if not before, and had that contention been upheld, the only real issues precluding a consent determination of non-exclusive native title reflecting the 2007 determination were the Todd issue and, possibly, the extinguishment and ss 47A and 47B issues. Other than the Todd issue, in such a context, it is likely that the two types of tenure issues would have been consensually resolved. Thus, the Yindjibarndi would not have had to incur a very large proportion, probably in the order of over 80%, of their costs of preparing for and conducting the hearing had the State and FMG brought the abuse of process contention to the fore promptly so that it could have been resolved before all of the consequentially unnecessary steps had been undertaken. The Yindjibarndi may well have been able to argue for their wasted costs to be paid on an indemnity basis in those circumstances.

## Abuse of process – FMG’s submissions on s 86(1)

1. FMG argued that s 86(1) of the *Native Title Act* did not permit the Yindjibarndi to tender or rely on portions of the transcript of the hearing before Nicholson J in order to seek a finding contrary to his Honour’s adverse finding on the issue of their right to exclude others from, or control access to, the claimed area. It contended that, because s 86(1)(c) permitted the Court only to adopt findings of any court (including, relevantly, Nicholson J in *Daniel* [2003] FCA 666 and the 2005 and 2007 determinations), s 86(1)(a) also did not permit the Court to receive or use evidence from other proceedings to arrive at a finding or decision contrary to what the earlier court had found or decided.

## Abuse of process – construction of s 86(1)

1. **As to s 86(1) of the *Native Title Act*:** I reject FMG’s argument as to the operation of s 86(1)(a). *First*, s 86(1)(a) of the *Native Title Act* creates a statutory discretion enabling the Court to receive into evidence the transcript of evidence in any other proceeding (such as those before Nicholson J) “and draw **any** conclusions of fact from that transcript that it thinks proper”. There is no express statutory constraint on that discretion apart from its being subject to s 82(1) that, in turn, provides that the Court is bound by the rules of evidence “except to the extent that Court otherwise orders”. As Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ held in *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421:

It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

1. *Secondly*, FMG’s posited constraint lacked any plausible formulation of an alternative legal meaning for the ordinary and natural meaning of s 86(1)(a): *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 338 [34]-[35] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ. *Thirdly*, the words “that it thinks proper”, which attach to the Court’s power to draw any conclusions, cannot be confined to findings that are consonant with earlier findings.
2. *Fourthly*, s 13(1)(b) permits this Court to vary or revoke an earlier determination of native title. In doing so, the Court is likely to examine, as evidence, what witnesses had testified in the proceeding giving rise to the determination of native title that is the subject of the application for variation or revocation. It would be contrary to the evident purpose of the grant of jurisdiction to make an order on an application under s 13(1)(b), to construe s 86(1)(a) as preventing the receipt into evidence of the transcript of evidence in the earlier proceeding, which may require the Court to vary or revoke the earlier determination, in light of subsequent events or the interests of justice (see s 13(5)).
3. *Fifthly*, s 86(1)(c) is expressed differently to s 86(1)(a). That is because s 86(1)(c) gives the Court a discretion, relevantly, to adopt any previous finding, decision or judgment. The discretionary power to adopt such finding, decision or judgment allows, but does not compel, the Court to use the earlier finding, decision or judgment so that it becomes its own adopted reasoning. That discretion entails that the Court can adopt certain earlier findings, but come to different findings on other matters found, decided or ordered in the earlier proceeding. This result is consistent with the power of a trial judge or jury to accept or reject all or a part of the evidence of a witness in making findings of fact.
4. *Sixthly*, the relevance, in a subsequent proceeding, of a transcript of evidence in an earlier proceeding, and its use in the subsequent proceeding, cannot be constrained in the way that FMG asserted s 86(1)(a) operates, namely, only to bolster or support the finding in the earlier proceeding or to support its argument of the existence of an issue estoppel or abuse of process. Often a court will use evidence to make a finding that resolves an issue in favour of the party who ultimately loses the proceeding. The winning party has no right to appeal against mere findings, as opposed to orders, and only then if the orders adversely affect that party. FMG’s argument never engaged with how its posited constraint on the operation of s 86(1)(a) would apply to that evidence and its use in the subsequent proceeding. The fallacy of FMG’s argument can be seen in Dixon J’s lucid explanation in *Blair v Curran* (1939) 62 CLR 464 at 531-533 of how an issue estoppel arises from a finding of fact or law. A finding that was not both necessary and determinative of the actual decision cannot create an issue estoppel, however deliberate and considered that finding is. As Dixon J said (*Blair* 62 CLR at 532):

The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, **for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order**.

**Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established.** Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of Coleridge J. in *R. v. Inhabitants of the Township of Hartington Middle Quarter* [(1855) 4 E. & B. 780, at p. 794 [119 E.R. 288, at p. 293]], the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. **Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.** (emphasis added)

1. *Last*, the applicant here, and the Yindjibarndi, do not have standing to apply under s 61(1) of the *Native Title Act* to vary the 2007 determination (as the operative determination of native title pursuant to s 13(6)). Thatis because there is now a registered native title body corporate that holds the Moses land on trust, namely YAC, and only it, as statutory trustee for the Yindjibarndi, can make that application on their behalf. YAC is not a party to this proceeding but has now filed an application under ss 13(1)(b) and 61(1) for a revised determination in respect of the Moses land.
2. As the considerations to which I have just referred show, the statutory scheme in the *Native Title Act* envisages a departure from the usual conduct of *inter partes* litigation. So much is apparent from the express powers conferred on the Court, *first*, in s 13(1)(b), to vary or revoke an earlier determination if a ground under s 13(5) is established in subsequent litigation and, *secondly*, to order, under s 82(1), that the rules of evidence, including s 91(1) of the *Evidence Act*, do not apply, so that it may receive into evidence a transcript of evidence in earlier proceedings and use that to draw any conclusions of fact that it thinks proper (s 86(1)(a)), as well as adopting any earlier recommendation, finding, decision or judgment of the Court or certain other persons or bodies (s 86(1)(c)). Moreover, s 8(1) of the *Evidence Act* provided that that Act did not affect the operation of the provisions of any other Act. Accordingly, the Court’s power to dispense with the rules of evidence under s 82(1) of the *Native Title Act* can operate despite the provisions of the *Evidence Act*.
3. The discretions conferred in s 86(1)(a) to admit and to use, in later proceedings, a transcript of evidence of earlier proceedings involving other issues, land and, possibly, parties, cannot be constrained by unexpressed implications or limitations that s 86(1)(a) does not provide in terms: *Shin Kobe Maru* 181 CLR at 421. Ordinarily, any individual item of evidence will be evaluated in the context of the whole of the evidence relevant to that issue, often including evidence as to the credibility or reliability of the evidence concerned. Accordingly, s 86(1)(a) does not operate as FMG contended.

## Abuse of process – the State’s and FMG’s submissions

1. Both the State and FMG argued that the alleged abuse of process consisted in the Yindjibarndi seeking here inconsistent findings of their native title rights and interests, as to their right to exclude others from Yindjibarndi country, from those that Nicholson J had found and that the 2005 and 2007 determinations had concluded. FMG adopted the State’s arguments and added further ones on this contention.
2. The State contended that the Yindjibarndi relied in this proceeding on the very same laws and customs on which they had relied before Nicholson J. Indeed, the State noted, the Yindjibarndi’s amended statement of contentions asserted, the subsequently admitted, facts that the Yindjibarndi consisted of a society that had continued to exist, since before sovereignty in 1829, as a body of persons united in and by its acknowledgment and observance of traditional laws and customs under which they possess native title rights and interests. The State argued that since Nicholson J had found, as reflected in the 2005 and 2007 determinations, that the Yindjibarndi did not have the right to exclude others, it must follow that under those laws and customs, the Yindjibarndi cannot now contend in this proceeding for an inconsistent finding, namely, that they do have the right, as I have found above, to exclude others from Yindjibarndi country. The State argued that the Yindjibarndi’s claim for a finding of the right to exclude amounts to the category of abuse of process in which the Court’s procedures are sought to be used in a way that would bring the administration of justice into disrepute, following *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15] per Gleeson CJ, Gummow, Hayne and Crennan JJ.
3. In essence, the State contended that the Yindjibarndi were seeking to relitigate the issue of exclusive possession that Nicholson J had determined against them. It argued that the Yindjibarndi were the same native title claim group in both proceedings and could not claim that their laws and customs were different, or operated differently, in this proceeding from the findings in *Daniel* [2003] FCA 666 and the 2005 and 2007 determinations, based on *Walton v Gardiner* (1993) 177 CLR 378 at 392-393 per Mason CJ, Deane and Dawson JJ and *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25] per French CJ, Bell, Gageler and Keane JJ.
4. The State contended that, if *Griffiths* 165 FCR 391 had changed the law (a proposition which the State did not appear to accept had been the case), the Yindjibarndi had not applied, in the nine years since that decision, under s 13(1)(b) of the *Native Title Act* to vary the 2007 determination to recognise a right to exclude others in respect of the Moses land. The State noted that there was limited evidence put before Nicholson J as to the presence and effect of spirits on Yindjibarndi country, but, the State accepted, that evidence was not put as supporting a right to exclude, that the Full Court subsequently identified in *Griffiths* 165 FCR 391.
5. FMG argued that a determination of native title under s 225 of the *Native Title Act* operated as a decision *in rem*, as Drummond J had held in *Wik Peoples v State of Queensland* (1994) 49 FCR 1 at 8D-E (in respect of the provisions of the Act in their form before the Parliament enacted, in 1998, amendments to deal with, among other matters, issues arising from the decision of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1). FMG relied on the preclusive effect of a judicial decision as preventing a person bound by it, in the position of the Yindjibarndi here, relitigating an issue of fact or law decided against the person in later proceedings, as explained in Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata* (3rd ed, Butterworths, London, 1996) at [15]-[19]. (FMG did not explain how it could rely on a *res judicata* when it was not a party in *Daniel* [2003] FCA 666 and the claim the subject of this proceeding, namely that the Yindjibarndi had native title to the claimed area, could not have merged in the earlier judgments.)
6. Next, FMG relied on *Dale v Western Australia* (2001) 191 FCR 521 at 554 [110]-[111] to support (in a more orthodox way) its contention that the Yindjibarndi’s claim to exclusive possession in this proceeding was an abuse of process because, by bringing that claim, they sought to relitigate the contrary findings in *Daniel* [2003] FCA 666.
7. FMG argued that *Griffiths* 165 FCR 391 did not effect a change in the law and that, even if it did, this was not a proceeding of a kind in which it would be appropriate to allow the Yindjibarndi to seek different findings of fact under ss 223 and 225 of the *Native Title Act*. FMG submitted that Nicholson J had considered aspects of the spirituality of both Ngarluma and Yindjibarndi land in *Daniel* [2003] FCA 666 at e.g. [1324], [1334], [1339], [1344], [1347], [1371], [1382], [1552], [1650] and [1667]. FMG argued that his Honour found that some recognition should be given in the 2005 determination about those matters, but not so as to reflect any right of the Yindjibarndi to exclude others from the Moses land. FMG submitted that the conclusion of Lord Keith of Kinkel, in *Arnold v National Westminster Bank PLC* [1991] 2 AC 93 at 110G-111C, that a change in the law, by a decision of the House of Lords, occurring after a decision that created an issue estoppel between parties on a rent review clause, enlivened an exception to the principle of finality of an issue estoppel, did not apply here because Nicholson J had made findings of fact not law. FMG noted that in *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 258, Brennan J had expressed doubts as to the reasoning of the English Court of Appeal, that the House of Lords subsequently upheld in *Arnold* [1991] 2 AC 93. FMG contended that, in any event, because Nicholson J had found that the Yindjibarndi’s traditional laws and customs, as a matter of fact, did not give them a right to exclude others from Yindjibarndi country, any change in the law wrought in *Griffiths* 165 FCR 391 was of no present consequence to that finding of fact.

## Abuse of process – consideration

1. It is important to appreciate that a determination of native title under s 225 is essentially declaratory of what the Court has found to be the factual and legal position as to what interests exist in the determination area, including in which part or parts native title exists, and, if it does, who hold, and what are, the native title and other rights and interests. A determination under s 225, and an application under s 13(1), do not themselves, or in some other way, initiate a process to create or extinguish native title or other rights or interests.
2. Any native title rights and interests that exist are rights and interests that the processes under the Act will cause to be *recognised* in a determination under s 225. That is because ss 4(1), 10 and 11(1) provide that, *first*, the *Native Title Act* recognises and protects native title and, *secondly*,native title cannot be extinguished contrary to the Act: *Yorta Yorta* 214 CLR at 453 [75]-[76] per Gleeson CJ, Gummow and Hayne JJ, McHugh J agreeing at 467 [127]-[128], 468 [134].
3. Thus, a determination under s 225, such as the 2005 and 2007 determinations, not only does not, but it cannot, extinguish native title. Rather, a determination of native title under s 225 is a statutory form of declaratory order that has the purpose of identifying the rights and interests of all persons that exist in land and waters in the determination area. A claimant application that is made to the Court under ss 13(1) and 61(1) of the Act seeks a determination of native title under s 225 in accordance with the Act. The determination under s 225 that the Court makes in resolving the controversy raised in a claimant application involves, and is confined strictly to, what Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ held, in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188, was “a classical instance of the exercise of judicial power”, namely:

the making of binding declarations of right by way of adjudication of disputes about rights and obligations arising from the operation of the law upon past events or conduct.

1. Such a determination must “recognise” or declare that, for example, a freehold title, granted before the *Racial Discrimination Act 1975* (Cth) commenced, extinguished native title because, as Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ explained in *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 at 131 [58], a grant of freehold title extinguishes, rather than suspends, native title rights and interests. That is because the grant of freehold is inconsistent with the subsistence of any residual native title rights and interests.
2. In contrast to the grant of an interest in land or waters, a determination, under s 225, does not create or extinguish any rights or interests. Rather, it “recognises”, in a formal order of the Court made in the exercise of its judicial power, currently existing titles, rights and interests in land and waters in the determination area including, but not limited to, native title rights and interests. If a determination under s 225 is made, s 55 requires the Court to make concurrently, or as soon as reasonably practicable thereafter, separate determinations as to whether the native title is to be held on trust, and, if so, by whom, under s 56 and ancillary matters referred to in s 57.
3. Moreover, an order making a determination of native title “has an indefinite character which distinguishes it from a declaration of legal right as ordinarily understood”: *Ward* 213 CLR at 71-72 [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. They explained that this “indefinite character reflects the requirement for the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land implicit in the definition of ‘native title’ in s 223(1) of the [*Native Title Act*]”. Their Honours also highlighted the importance of the requirement in s 225(b) for a determination to state the nature and extent of native title rights and interests in relation to the determination area, adding (213 CLR at 82-83 [51]-[52]):

Where, as was the case here in relation to some parts of the claim area, native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.

**It is necessary to recognise that the holder of a right, as against the whole world, to possession of land, may control access to it by others and, in general, decide how the land will be used.** But without a right of possession of that kind, it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants’ statement of alleged rights might suggest, it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters. (emphasis added)

1. **As to issue estoppel:** FMG accepted that I was bound to reject its issue estoppel argument by reason of the decision in *Dale* 191 FCR 521. Moreover, I am of opinion that FMG cannot rely on a finding in the proceedings before Nicholson J, to which it was not a party or a privy to a party, as creating an issue estoppel in this proceeding. Issue estoppel requires, as Dixon J said in *Blair* 62 CLR at 531, in a passage that French CJ, Bell, Gageler and Keane JJ described as a classic expression of the primary consequence of its operation (*Tomlinson* 256 CLR at 517 [22]):

[a] judicial determination directly involving an issue of fact or of law [that] disposes once for all of the issue, **so that it cannot afterwards be raised between the same parties or their privies**. (emphasis added)

1. *Dale* 191 FCR 521 involved an attempt by the WGTO group to relitigate their dismissed claim. Moore, North and Mansfield JJ explained in *Dale* 191 FCR at 539-540 [89]-[93] that there are numerous difficulties in conceptualising how issue estoppel can operate in proceedings under the *Native Title Act*, especially when the subsequent proceedings do not involve only all parties that were parties to the earlier proceedings from which the issue estoppel is said to arise.
2. This is the case here. This proceeding concerns, in addition, different land and waters, being the claimed area, not the Moses land, in respect of which different persons are parties, including FMG, and have actual or claimed rights and interests different from those of the parties to the proceedings the subject of the 2005 and 2007 determinations. Moreover, the State deliberately (and, in my opinion, correctly) has not asserted that an issue estoppel precludes the Yindjibarndi from litigating their claim here that they have right to exclude others from the claimed area.
3. **As to abuse of process:** I am of opinion that in the particular circumstances of this matter it is not an abuse of the process of the Court for the Yindjibarndi to litigate their claim of a right to control access to, or exclude others from, the claimed area, despite the apparent inconsistency of that claim with pars 4(a) and 7(k) of the 2007 determination and Nicholson J’s factual findings that underpinned those paragraphs.
4. Of course, the inconsistency between the non-exclusive rights in the 2007 determination and the right, which I have found proved, to control access to, or exclude others from, the claimed area raises a *prima facie* conflict between two judicial determinations of the native title rights and interests of the Yindjibarndi people over Yindjibarndi country. That country comprises the Moses land, where the Yindjibarndi’s rights are non-exclusive, and the parts of the claimed area where their rights include the right to exclude others. In ordinary circumstances, an inconsistency of that nature would be decisive in attracting a conclusion that a determination in this proceeding, that the Yindjibarndi have that exclusive right, would constitute an abuse of process on the basis that the subsequent determination, if made, “would … bring the administration of justice into disrepute among right-thinking people”: *Walton* 177 CLR at 393 per Mason CJ, Deane and Dawson JJ citing from Lord Diplock’s speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536C-D.
5. However, a determination under s 225 of the *Native Title Act* has the “indefinite character” that Gleeson CJ, Gaudron, Gummow and Hayne JJ described in *Ward* 213 CLR at 71-72 [32]. In addition, it also has the statutory characteristic that it may be revoked or varied under s 13(1)(b), not only because of the occurrence of subsequent events that have caused the original determination no longer to be correct (s 13(5)(a)), but also because, critically, on the ground in s 13(5)(b) that “the interests of justice require the variation or revocation of the determination”. The ground for variation or revocation in s 13(5)(b) is both protean in nature and substantive. It is available as an alternative to, and its use is not conditional on, the occurrence of subsequent events. Of course, in assessing the interests of justice, the Court is exercising a judicial discretion and must therefore act judicially. But the subject matter, scope and purpose of the criterion of “the interests of justice” must be considered in light of the whole of the Act and the facts, matters and circumstances that the Court has before it in considering the proposed variation or revocation: *The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49 per Stephen, Mason, Murphy, Aickin and Wilson JJ.
6. In addition, as Allsop CJ, Marshall and Mansfield JJ noted in *Western Australia v Fazeldean (No 2)* (2013) 211 FCR 150 at 156 [34] “litigation under the *Native Title Act* is not ordinary private *inter partes* litigation”. They explained that the issues in litigation under the Act involve the public interests of both the Government(s) of the jurisdiction(s) in which the land and waters are claimed in the proceeding, as well as of the native title claim group which seeks to vindicate “rights of a communal nature based on occupation and a physical and spiritual connection between land and people that has endured for possibly millennia”. And, their Honours noted that the result could affect not only the present but past and future members of the claim group. Of course, the private rights of other persons with, or with a claim to, interests in land and waters for which a determination under s 225 is sought, will often also be involved (211 FCR at 156-157 [34]-[35]).
7. It has been only 25 years since the High Court decided, in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, that the radical title that the Crown acquired when it claimed sovereignty over parts of Australia did not extinguish native title. That decision led to the enactment of the *Native Title Act* and amendments to it have now brought about the position that the law will recognise the native title rights and interests of persons or a claim group who, by a normative system based on their traditional laws and customs, had and continue to have particular rights and interests in land and waters: cf. *Yorta Yorta* 214 CLR at 440-441 [33]-[38] per Gleeson CJ, Gummow and Hayne JJ, McHugh J agreeing at 467 [126]-[128]. Gleeson CJ, Gummow and Hayne JJ also said (214 CLR at 442 [40]):

the fundamental premise from which the decision in *Mabo [No 2]* proceeded is that **the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters**. And of more immediate significance, the fundamental premise from which the *Native Title Act* proceeds is that **the rights and interests with which it deals (and to which it refers as “native title”) can be possessed under traditional laws and customs**. Of course, those rights and interests may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer [[*The Commonwealth v*] *Yarmirr* (2001) 208 CLR 1 at 38 [13]]. The rights and interests under traditional laws and customs will often reflect a different conception of “property” or “belonging” [cf *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[20], per Gleeson CJ, Gaudron, Kirby and Hayne JJ and *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 272, per Blackburn J. See also *Ward* (2002) 213 CLR 1 at 64-65 [14]]. But none of those considerations denies the normative quality of the laws and customs of the indigenous societies. **It is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener** [cf *In re Southern Rhodesia* [1919] AC 211 at 233-234, per Lord Sumner]. (emphasis added)

1. Over the course of the last 25 years, the Courts have developed a body of law as to what native title rights and interests in land or waters are recognised by the common law of Australia, in accordance with s 223(1) of the *Native Title Act*, and what factors are relevant to prove that, by the traditional laws acknowledged and the traditional customs observed by a claim group, they have or do not have a connection with the land or waters or a legal entitlement to the recognition and enforcement of any native title where it exists.
2. Experience has shown that it is not unusual for a claim group of an indigenous people to make a claimant application for a determination of native title in respect of only part of their traditional land or waters and later to bring another claimant application for different part, or the balance, of the land or waters. As in this case, the evidence and, sometimes, the nature of the claimed rights and interests in the two proceedings may be different. For example, if the only interest in particular land and waters that the Crown had created since sovereignty were a pastoral lease, a determination under s 225 that native title existed over those lands and waters necessarily could only recognise the existence of non-exclusive native title rights and interests.
3. That is because the grant of the pastoral lease would have created rights and interests of the lessee that were inconsistent with the previously existing exclusive native title rights and interests over the determination area. However, of itself, the determination that the claim group only had non-exclusive native title rights and interests over the pastoral lease, could not create a reason, in separate proceedings, to preclude the claim group from asserting, or the Court determining under s 225, that exclusive native title rights and interests existed over neighbouring land and waters, if it were established that no other inconsistent right or interest had been interposed since sovereignty between those native title rights and interests and the Crown’s radical title.
4. In other words, a determination under s 225 expresses a conclusion about rights and interests that exist over particular land and waters, but does not express any necessarily binding conclusion about the general rights and interests (including native title) of any persons with particular rights and interests in land and waters other than those the subject of the determination. A person who held a freehold title, or was the lessee of a pastoral lease referred to in a determination under s 225, could not be precluded, by force of that determination, from asserting different real property rights and interests in respect of other land and waters outside the determination area. The function of a determination under s 225 is to express a legal conclusion about the actual rights and interests of all persons concerned, including, but not limited to, any native title that exists in only land and waters the subject of the determination.
5. Indeed, the provisions of Div 6 of Pt 2 of the *Native Title Act*, and in particular ss 55-57, evince the legislative purpose that once a determination is, or is about to be, made that native title exists, namely an approved determination of native title, the Court must also determine how and by whom the native title is held, namely by a new legal person, being a prescribed body corporate, as trustee, or by the claim group as common law holders of the native title. But, the determinations under ss 55, 56, 57 and 225 do not identify, for example, any traditional laws or customs of the claim group. Rather, those determinations express what the native title rights and interests are that the common law, as affected by the Act, recognises to exist in the particular land and waters. Native title rights and interests may continue to exist over other land, even though they cannot be recognised by the common law in accordance with the Act, because they are inconsistent with an intervening governmental act that extinguished native title in respect of particular land and waters.
6. Thus, a non-exclusive determination does not determine, necessarily, the content of the traditional laws and customs of a claim group so as to deny or preclude their recognition as supporting a claim to exclude others from, or control access to, different land or waters in respect of which no partial extinguishment had occurred. That is so, even though the earlier determination had found that the claim group had only non-exclusive rights over all the land or waters in its determination area because there had been partial extinguishment. Accordingly, there would be no necessary inconsistency between two determinations of native title over different land and waters where the same claim group had exclusive rights over one determination area, but only non-exclusive ones over another. The inconsistency, in such a case, would arise not because of a difference in the claim group’s acknowledgment and observance of their traditional laws and customs by which they had a connection with the land or waters in the two separate determination areas, but because of the governmental acts creating partial or complete extinguishment of native title in one of the areas but not in the other.
7. It is also not difficult to envisage a situation where an earlier determination of native title recognised that the claim group had exclusive native title rights and interests but a new party, with an interest in land or waters, only in the second claimant application determination area, succeeds in proving that the claim group did not have any exclusive native title rights or interests that were possessed under the traditional laws acknowledged or customs observed by them. Such a situation might arise where the rights or interests found in the first proceeding are found, in the second proceeding, either not to have existed or to have ceased to be exercised: cf. *Yorta Yorta* 214 CLR at 455 [83]-[84]. A new party, such as FMG, who was not involved in the earlier determination would be free to prove that the former was wrong or that the claim group no longer exercised the critical native title rights or interests necessary to ground an exclusive right. And, if that occurred, it would be open to a government party or the Native Title Registrar to the first determination to apply under s 13(1)(b) to revoke or vary it.
8. The inherent power of a superior court of record (or implied power of an inferior court) to prevent the misuse of its procedures or processes is necessary so that the Court can safeguard the administration of justice: *Batistatos* 226 CLR at 266 [12]. There Gleeson CJ, Gummow, Hayne and Crennan JJ said that (226 CLR at 265 [9]):

What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues.

They cited (at 266-267 [14]), with approval, what Gaudron J had said in *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75, including the following:

there is no very precise notion of what is vexatious or oppressive or what otherwise constitutes an abuse of process. Indeed, the courts have resisted, and even warned against, laying down hard and fast definitions in that regard [See, eg, *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 242-243, 246-247, and the cases there cited]. That is necessarily so. **Abuse of process cannot be restricted to ‘defined and closed categories’** [*Hamilton v Oades* (1989) 166 CLR 486 at 502, citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 and *Tringali v Stewardson Stubbs & Collett Pty Ltd* [1966] 1 NSWR 354. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 25-26, 47-48, 74; *Walton v Gardiner* (1993) 177 CLR 378 at 393-395; *Rogers v The Queen* (1994) 181 CLR 251 at 255, 285-286] **because notions of justice and injustice, as well as other considerations that bear on public confidence in the administration of justice, must reflect contemporary values and, as well, take account of the circumstances of the case** [See *Dietrich v The Queen* (1992) 177 CLR 292 at 328-329, 364]. That is not to say that the concept of ‘abuse of process’ is at large or, indeed, without meaning. (emphasis added)

1. As her Honour said, the question of whether there is an abuse of process involves considerations of justice and injustice, public confidence in the administration of justice, contemporary values and the particular circumstances of the case. In addition, in a case like the present, both historical circumstances and the statutory context will require consideration.
2. I am of opinion that both the matters referred to in the Preamble to the *Native Title Act* (which forms part of that Act: see s 13(2)(b) of the *Acts Interpretation Act 1901* (Cth)) and the Act’s provisions, including ss 13(1)(b), (4), (5) and 86(1), provide an important context in which to assess whether it is an abuse of process for the Yindjibarndi to claim, in the application in this proceeding, a determination that gives effect to my findings that the Yindjibarndi have native title rights and interests to exclude others from, or to control access to, parts of the claimed area, including where ss 47A(2) and 47B(2) operate.
3. It is important to appreciate that the grounds for an application to revoke or vary an approved determination of native title in s 13(5) include not only that subsequent events have occurred that cause the determination no longer to be correct, but also that the interests of justice require such a variation or revocation.
4. The interests of justice can be engaged because a subsequent proceeding for a determination, using, in part, evidence or findings from earlier proceedings pursuant to s 86(1)(a) and or (c), show that the earlier determination was not correct when it was made. After all, that must be a consequence that the express words of s 13(5)(b) contemplate. That follows because that provision empowers the Court to make an order revoking or varying the earlier determination even though nothing, within the meaning of s 13(5)(a), has occurred **subsequently** to cause it to be incorrect.
5. It follows that s 13(1)(b) is a statutory exception to the general law principles of *res judicata*, issue estoppel and abuse of process. Ordinarily, a final order cannot be revoked or varied except on appeal or, in the case of other Federal Courts, by the High Court under s 75(v) of the *Constitution*, even if a superior court of record made the order without jurisdiction: *Burrell v The Queen* (2008) 238 CLR 218 at 224-225 [19]-[22] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ.
6. Absent a statutory provision, once a court makes a final order (leaving aside situations in which the slip rule applies to accidental slips or omissions), it has no power to reopen that order. Yet, that power is expressly conferred on this Court under s 13(1)(b) of the *Native Title Act* in respect of approved determinations of native title, which include determinations by the High Court (s 13(7)).
7. This raises the question of what it is that the State and FMG allege is the abuse of the process of the Court involved in the Yindjibarndi pursuing, in this proceeding, a determination that they have the right to exclude others from, or to control access to, land or waters in the claimed area in which there has been no act of partial or complete extinguishment of their native title rights and interests. The *Native Title Act* itself is structured on the basis that, by reason of the power to revoke or vary an approved determination of native title, such a determination is not necessarily final, even though, ordinarily, it will be.
8. Relevantly, the Full Court decided *Griffiths* 165 FCR 391 on 22 November 2007, nearly three months after another Full Court had made the 2007 determination in *Moses* 160 FCR 148 on 27 August 2007. The State and FMG did not suggest that any evidence that the Yindjibarndi led in the proceedings before Nicholson J was inconsistent with, or contradictory of, the additional evidence that that they adduced at the trial in this proceeding. Rather, the evidence and argument before Nicholson J proceeded on an understanding of the facts and law that did not address the Full Court’s development or exposition of the law in *Griffiths* 165 FCR at 428-429 [127]-[128]. There French, Branson and Sundberg JJ said (at 429 [127]):

**It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is “their country”.** If control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, **that control can nevertheless support a characterisation of the native title rights and interests as exclusive** … It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, **would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the appellants effectively to exclude from their country people not of their community**. **If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have, in our opinion, what the common law will recognise as an exclusive right of possession, use and occupation.** (emphasis added)

1. It is apparent that Nicholson J approached his crucial finding on the basis that the Yindjibarndi claimed an exclusive right to bar access, as appears from the critical passage in his Honour’s reasons in *Daniel* [2003] FCA 666 at [292], which I set out again (including his Honour’s heading to that portion of his reasons), namely:

(m) **CONTROL ACCESS, ACTIVITIES, RESOURCES, IMPROVEMENTS, OTHER GROUPS**

‘*A right to control (i) access, (ii) activities, including rituals and ceremonial activities, (iii) the taking of resources and (iv) the creation or destruction of improvements (v) other people from different groups from making decisions about the area or use of the area or from imparting any traditional knowledge concerning the area (i.e, in effect a right to speak for and about the area and make decisions about use of the country)*’

*(i) access*

292 Such evidence as there is as set out on this matter in Appendix B establishes only that within Yindjibarndi land and Ngarluma land **some Yindjibarndi** first[sic] **applicants claim the right to control access to identified portions of Yindjibarndi land**. My impression of the evidence was that while there is evidence of surviving practice to seek permission to enter land considered to be Ngarluma or Yindjibarndi land, **when that occurs it is a matter of respect rather than in recognition of a right to control. There is no exercise presently of this aspect of right claimed**. (bold emphasis added)

1. His Honour, no doubt in dealing fairly with the way in which the evidence and argument was put, framed his reasoning in terms of the exercise of a right to control access by the seeking of permission. However, as *Griffiths* 165 FCR at 428-429 [127]-[128] later explained, a native title right to control access, based on the Yindjibarndi’s traditional laws and customs, could also be found on the basis that I have done earlier in these reasons. His Honour’s finding did not negate or deny the existence of a spiritual or gatekeeper dimension to the assertion of an exclusive right: indeed, that dimension was not in issue or articulated before Nicholson J in the way in which *Griffiths* 165 FCR 391 subsequently identified would support a determination of, effectively, a native title right and interest equivalent to exclusive possession.
2. I have found that the Yindjibarndi (and for that matter their indigenous neighbours) have since before sovereignty continuously acknowledged their traditional laws and observed their traditional customs that required a manjangu to seek permission to enter or conduct activity on Yindjibarndi country. That normative requirement has existed and continues to exist in order that the Yindjibarndi can ensure that they protect their land and waters from manjangu and because of the belief of both the Yindjibarndi, and their indigenous neighbours, in the spiritual powers that can affect manjangu who enter Yindjibarndi (or other neighbouring Pilbara peoples’) land and waters without permission. While the right to kill or harm a trespasser is no longer exercised, the Yindjibarndi’s belief in their role as spiritual gatekeepers has remained undiminished since before sovereignty. The latter role, of gatekeeper, is an exercise of a right to control access to land and waters understood in a common law proprietary sense.
3. Nicholson J saw the surviving practice as “a matter of respect rather than in recognition of a right to control” (*Daniel* [2003] FCA 666 at [292]) and found that there was no present “exercise … of this aspect of the right claimed”. The “exercise” of a right to control access based on the Yindjibarndi’s role, under their traditional laws and customs, to act as gatekeepers to their country is conceptually different to the concept underpinning the “respect” that his Honour found. Yet, had his Honour been invited, as *Griffiths* 165 FCR 391 subsequently established, to consider that, what he termed, the “surviving practice” of “respect” reflected the importance that that those indigenous people who showed that “respect” attached to the ability of the Yindjibarndi to open the spiritual gates, it is possible, indeed probable, that his Honour would have come to the same findings as I have.
4. Often a subsequent change in the general, or statute, law will not permit the reopening of past judicial decisions because of the importance of the common law principle of finality. In *Arnold* [1991] 2 AC 93, the House of Lords considered whether the doctrines of *res judicata*, issue estoppel or abuse of process should preclude parties reopening a final decision of Walton J as to the construction of a rent review clause in a lease with a term of many years that provided for regular rent reviews, where subsequent decisions, including appellate ones, endorsed a different construction (see [1991] 2 AC 102B-103D). Lord Keith (with whom Lords Griffiths, Oliver of Aylmerton, Jauncey of Tullichettle and Lowry agreed) said (at 110D-E) that:

I consider that anyone not possessed of a strictly legalistic turn of mind **would think it most unjust** that a tenant should be faced with a succession of rent reviews over a period of over 20 years all proceeding **upon a construction of his lease which is highly unfavourable to him and is generally regarded as erroneous**. (emphasis added)

1. His Lordship said that, were the tenant held to the erroneous construction of the clause in the subsequent rent reviews, “abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to reopen the disputed issue” (at 110G). He endorsed the reasons of Sir Nicolas Browne-Wilkinson V-C (the trial judge in *Arnold v Nat-West Bank plc* [1989] Ch 63) when he said ([1989] Ch at 70-71):

In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, **the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts**. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case. (bold emphasis added, italic emphasis in original)

1. In *O’Toole* 171 CLR at 258 Brennan J described Browne-Wilkinson V-C’s reasoning as “rest[ing] on an uncertain foundation”. However, their Lordships and Brennan J were dealing with the general law power (or, more accurately, lack of power) of a court subsequently to reopen a point decided by a final judicial order binding the parties or their privies in respect of their legal rights. That situation is distinct from that which obtains under the *Native Title Act* by reason of the statutory power to revoke or vary an approved determination under s 13(1)(b) on a ground in s 13(5), particularly s 13(5)(b).
2. In *Dale* 191 FCR at 544-548 [112] Moore, North and Mansfield JJ cited with approval what French J had said in *Spalla v St George Motor Finance Ltd (No 6)* [2004] FCA 1699 at [59]-[70] concerning the public policy considerations underpinning the doctrines of *res judicata*, issue estoppel and abuse of process, including (at [68]) passages from the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.
3. In my opinion the following passage from Lord Bingham’s speech (at 31C-E) reflects considerations apposite here and is congruent with the reasons of Gaudron J in *Ridgeway* 184 CLR at 74-75 that Gleeson CJ, Gummow, Hayne and Crennan JJ approved in *Batistatos* 226 CLR at 266-267 [14] and that I have set out at [370] above:

It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. **That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. (emphasis added)

1. Of course, his Lordship expressed that reasoning in relation to a party seeking to litigate a point that could have been, but was not, advanced in earlier litigation. In one sense, that situation is similar to the position here (because of the possibility that, had the Yindjibarndi presented the case that they made in this proceeding to Nicholson J, his Honour may have found that they had exclusive, rather than non-exclusive, native title in respect of the Moses land), but, of course, does not apply to the possibility of inconsistent findings.
2. Nonetheless, in all of the circumstances, including YAC’s revised native title determination application, together with the statutory scheme of the *Native Title Act*, including the Preamble and the power under s 13(1)(b) to revoke or vary an approved determination of native title, I am of opinion that the Yindjibarndi are not engaged in an abuse of process in seeking to vindicate in this proceeding their right to control access that I have found. For these reasons I will allow the Yindjibarndi to rely on their unextinguished native title right to control access despite its potential inconsistency with Nicholson J’s finding in *Daniel* [2003] FCA 666 at [292] and the 2007 determination, particularly since that inconsistency can be cured by the new proceeding under s 13(1)(b) in respect of the earlier findings and the 2007 determination.

## Conclusion

1. For these reasons, I reject the arguments of the State and FMG that the Yindjibarndi’s litigation of their claim to exclude others from, or control access to, the claimed area amounts to an abuse of process. Indeed, it is a proper use of the Court’s processes.

# (5) THE TODD ISSUE

## Introduction

1. The Todd issue arose in a context that involved a deep and unfortunate internal division that emerged relatively recently within the Yindjibarndi people over whether, and, if so, on what terms, they should co-operate with FMG developing and operating what is now the Solomon Hub mine. On one side were those opposed to co-operating with FMG, who had a voting majority within YAC (which held the Moses land on trust, under the 2005 and 2007 determinations) led by Michael Woodley, while on the other side were the minority within YAC, who, with FMG’s financial support, established Wirlu-Murra Yindjibarndi Aboriginal Corporation (**WMYAC**) in 2010. Notably, so far as appeared in the evidence before me, prior to the Todd respondents becoming involved in the circumstances that I describe below, all the members of both YAC and WMYAC, many of whom were members of both corporations, were Yindjibarndi and recognised each other as Yindjibarndi. That is because each of YAC and WMYAC had a rule requiring that, to be a member of the respective corporation, a person had to be Yindjibarndi.
2. This proceeding has involved earlier stages in the battle to control both YAC and those who comprise the applicant. The Todd respondents are part of a large family who would be entitled to be admitted as members of YAC if the Todd respondents succeed in establishing that they are Yindjibarndi persons. Indeed, the votes of the Todd respondents’ family members would be likely to be decisive in bringing about a change of control of YAC and the claim group, as the WMYAC members have attempted, unsuccessfully, to do in the past.
3. As **Ken Sandy**, a director of WMYAC, said (and I find), that corporation has a very close relationship with FMG. He explained that FMG has not yet entered into an agreement with the Yindjibarndi people over the Solomon Hub mine. WMYAC was formed by Yindjibarndis who disagreed with YAC’s decision not to enter into a form of agreement that FMG had proposed. He agreed that the members of WMYAC had tried to get control of YAC on a number of occasions but had failed to get sufficient votes.
4. Ken Sandy denied that the real reason why WMYAC has allowed the Todd respondents and their family to become members and supported their acceptance as Yindjibarndi was because the Todds would support WMYAC’s position in respect of FMG’s proposed agreement. Ken Sandy also asserted that he did not know that WMYAC was paying the Todd respondents’ legal fees in this proceeding. I do not accept that evidence.
5. FMG has an obvious and legitimate commercial interest in supporting both WMYAC, directly, and, through it, indirectly, the Todd respondents. Indeed, prior to McKerracher J ordering on 14 October 2014 that the Todd respondents be joined as respondents (*Jacob v State of Western Australia* [2014] FCA 1106), while his Honour’s decision was reserved, FMG had raised a contention in its amended statement of response to the applicant’s statement of contentions filed on 26 September 2014, that “any list of apical ancestors should include the person, Nibbin (also known as Miggibung)”.
6. Subsequently, I found that FMG had orchestrated, to a considerable degree, the convening of a meeting of the Yindjibarndi claim group and voting procedures in an attempt, under ss 251B and 66B of the Act, to replace the applicant with four directors and other members of WMYAC and to authorise and direct the proposed replacement applicant to consent to a determination of native title in this proceeding “like” that in the 2007 determination – i.e. one with only non-exclusive native title rights and interests: *TJ v Western Australia* (2015) 242 FCR 283.
7. In his reasons, Nicholson J found (*Daniel* [2003] FCA 666 at [509]), in relation to the determination of the rights and interests that became the subject of the 2005 determination, and (at [1452]-[1453]), in relation to the WGTO claim (being made by the persons whom his Honour called “the third applicant”), as follows:

509 … **The Hicks family have Yindjibarndi ancestry**. For the first respondents it is submitted that they brought no evidence of continued connection to Yindjibarndi country. **If, however, they have rights as Yindjibarndi persons**, it as [sic] part of the overall connection of the Yindjibarndi with Yindjibarndi country and not through their personal connection.

…

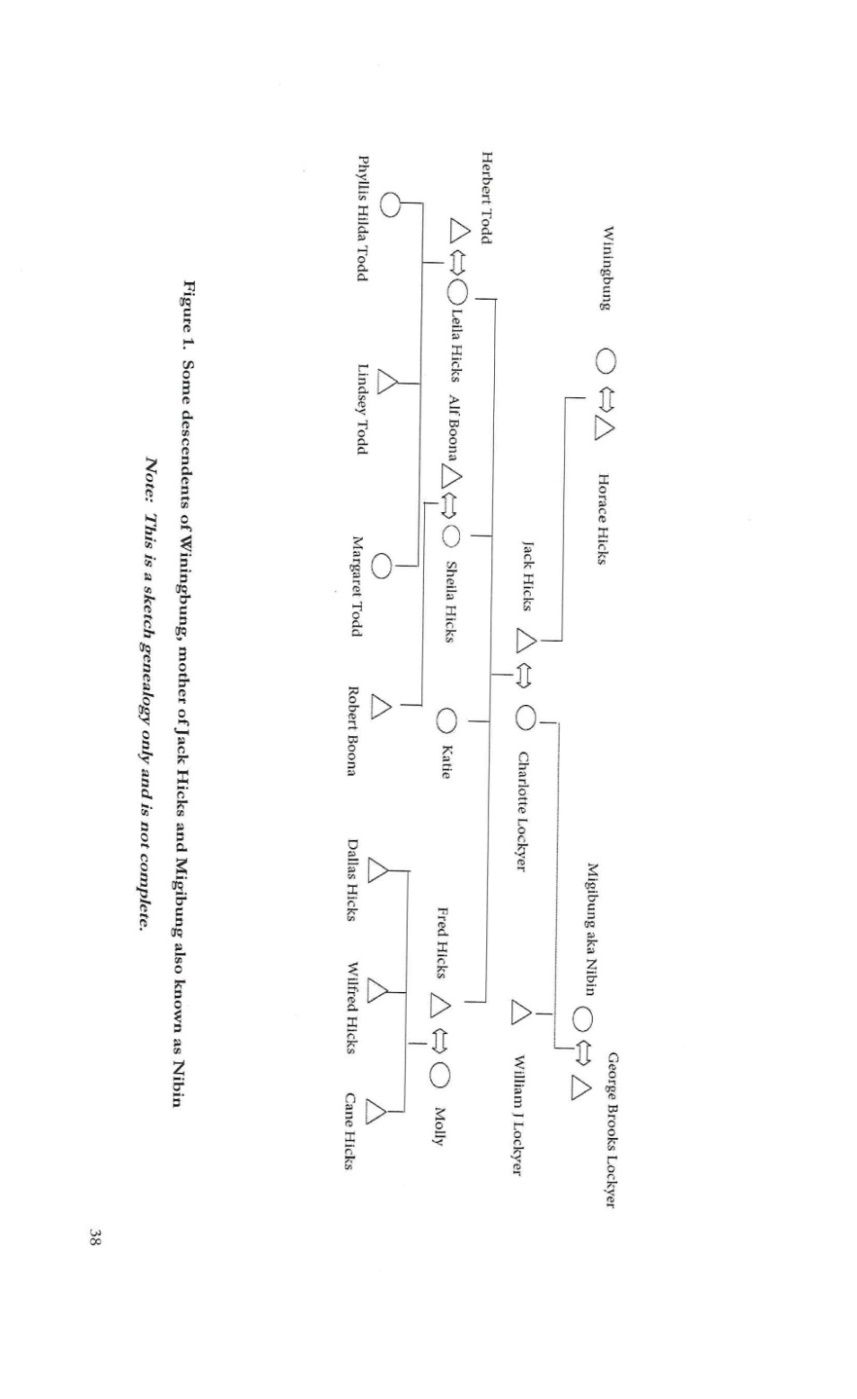
1452 **The Hicks family claim to be Ngarluma**, and claim native title rights through both the genealogical line of **their father, who was Yindjibarndi**, and their mother, a Ngarluma person whose rights coincide with those of the Douglas family.

1453 The Hicks claimants claim native title rights through their father, Fred Hicks, and their mother, Molly Hicks (nee Thomas). Fred Hicks is descended from his father, Jack Hicks and his mother Charlotte Hicks (nee Lockyer). **It is asserted that Jack Hicks’ mother was Winningbung, a full blood Aboriginal, and that Charlotte Hicks’ mother was Mikibung. There was considerable confusion among the third applicants as to the actual structure of the genealogy.** Jack Hicks and Charlotte Hicks were said to be Yindjibarndi. Pansy Hicks (N) and Thomas Mowarin (N) said Fred Hicks was Yindjibarndi (at T 1628; 2588). Molly Hicks was Ngarluma, as was her mother, Rosie Clifton. Rosie Clifton’s mother was Woodbrook Mary. Molly Hicks’ sister was Alice Douglas, mother of the Douglas claimants. (emphasis added)

1. The Todd respondents ultimately propounded an argument that they were Yindjibarndi, based on their descent from each maternal parent (Winningbung and **Nibbin**) of their grandparents, **Jack Hicks** and **Charlotte Hicks** (neé **Lockyer**).

## The anthropological evidence

1. Dr Palmer and Prof Trigger discussed one anthropological problem with cognatic systems (i.e. ones based on descent from a common ancestor), such as those that the Yindjibarndi and, seemingly, other neighbouring Pilbara peoples, used. That problem was that from the time of birth, a person grew up with a responsibility for, and knowledge about, a ngurra (in the Yindjibarndi legal and customary system) or other local area where the person lived. However, the person could marry someone from another local Pilbara people and their children could inherit rights in or in respect of each parent’s country. At some stage, a child with one Yindjibarndi parent must choose or elect, once for all, whether to follow Yindjibarndi law and customs and Yindjibarndi language, or the law and customs of his or her other parent and in times past, when each Pilbara people spoke their own distinctive language, that parents’ language. Yet, if the child “followed” the non-Yindjibarndi parent, the child may still retain some rights to speak for the country or ngurra of his or her Yindjibarndi parent. In that situation, Dr Palmer said that in his experience, the child, with those inherited rights, could defer to a more senior person from the country who was a member of the Pilbara people whom the child had elected not to follow.
2. This potential duality or, in subsequent generations, plurality of rights to speak for two or more countries or locales associated with different peoples, can create a classificatory difficulty in identifying the sole claim group to which a person belongs, if the person is born in a cognatic system that also recognises residual or incidental rights to speak for country in another claim group’s territory. Hence, the possible ambiguity in the anthropological evidence as to the identification of a country or language group as a conclusive means of classifying who, in a cognatic system, is or is not a member of the group.
3. The ability of a person to speak for, or to be associated with, more than one country, has the potential to create genealogical uncertainty in ascribing, on imperfect historical materials, a specific membership of one, chosen or recognised, language or country group to which a particular individual actually belonged in his or her lifetime. As I understood their evidence, both Dr Palmer and Prof Trigger recognised this difficulty in their efforts to trace and ascribe a genealogical result for the questions of whether either or each of Nibbin or Winningbung was Yindjibarndi. In each instance, Prof Trigger felt the evidence pointed to an affirmative answer, whereas Dr Palmer saw the evidence as inconclusive.
4. Dr Palmer produced the simplified but helpful sketch genealogy for the Todd respondents below:



## Winningbung – historical background

1. Jack Hicks’ mother was called Winningbung or Winnie. In his will dated 18 January 1888, Henry **Horace Hickes** [sic], a sheep farmer and grazier of Spring and Kuigiugie Stations, left £1,000 to “my said natural child and reputed son commonly known as Johnny Hickes”. Horace Hickes died at Roebourne on 30 January 1888, soon after making his will. Johnny Hickes appears to have changed the spelling of his surname to “Hicks” and adopted “Jack” as his first name, which was not explained by any evidence. However, an article in *The Northern Times* of 12 August 1922 described shearing going on at “Cooyapooya … with a native shearing team. There are 10 on the board with Jack Hicks as the ‘rep’”.
2. On 20 October 1945, **Lila Hicks** (later, Lila Todd) declared before a police constable that she was 26-years-old and had been born at “**Cooya-Pooya**” **Station**. She declared that she was living in Roebourne with Herbert Todd as his wife, although they were not then married, and they then had no children. Lila Hicks was the mother of each of the Todd respondents. Their father **Herbert Todd** was also known as **Billy Barlow**.
3. The anthropological evidence cast some further light on the historical written evidence. In an expert anthropological report by **Rory O’Connor** for the WGTO claim, that was not itself in evidence, but which both Prof Trigger and Dr Palmer, cited in their reports, Mr O’Connor said:

Jack Hicks’ father was Horace Hicks, the pastoralist at Spring Station near Cooya Pooya. His mother was Winnie also known as Winningbung ….**Winnie was a full-blood Aboriginal woman from the Maitland who was born before European contact and who went to Spring Station with Horace Hicks when he moved there from the coast**. (emphasis added)

1. Spring Station was an outcamp of, or connected with, Cooya Pooya Station. **Michael Robinson**, another anthropologist who gave evidence before Nicholson J, also prepared reports on which both Dr Palmer and Prof Trigger drew that, but for scattered pages of one report made in 1999, were not in evidence before me. Mr Robinson placed Cooya Pooya Station as being located near to the boundary between Ngarluma and Yindjibarndi country and added that “many people identify it as Yindjibarndi land”, although Mr Robinson did not cite any source for that latter quoted statement. Prof Trigger assumed that at least part, and probably all, of Cooya Pooya Station was in Yindjibarndi country based on Mr Robinson’s, unsourced assertion, but accepted that people from that Station could be regarded as half Ngarluma, half Yindjibarndi. Dr Palmer had relied more on Prof Radcliffe-Brown’s work that had identified Cooya Pooya Station, or “Kuiapuia”, as located in Ngarluma country.
2. In my opinion, Mr O’Connor’s statement that Winningbung moved with Horace Hicks from the coast to Spring Station suggests, and I find, that she was not a Yindjibarndi. That is because Yindjibarndi country was not on the coast. The Maitland River is a long watercourse that extends to the coast and flows from inland into Ngarluma country. Thus, if Winningbung were from “the Maitland”, she came from country that was either Ngarluma or of another coastal people, through which the Maitland River flowed closer to the coast. In his evidence to Nicholson J, Wilfred Hicks said that his father (Fred Hicks, who was one of Jack Hicks’ sons) had told him that Winningbung “was from the Maitland area”, while Cane Hicks (who was a brother of Wilfred) gave evidence that she was from the Cossack-Roebourne area, which is on the coast. Wilfred Hicks, however, said that he was not suggesting that Winningbung was from part of the Maitland River within Yindjibarndi country. He said, “I’m not saying that she was Yindjibarndi. I am saying I was told that Jack was Yindjibarndi”.
3. From my reading of the transcript of his evidence to Nicholson J, Wilfred Hicks appeared to have inferred that Jack Hicks was Yindjibarndi because he was born on Yindjibarndi country. However, of itself, birth on Yindjibarndi country does not make a person Yindjibarndi, so that if Jack Hicks were a Yindjibarndi, there is no evidence of how he became one. And, I consider that it is likely that Prof Radcliffe-Brown and Dr Palmer were correct to state that Cooya Pooya Station, Jack Hick’s birthplace, was in Ngarluma country. Robert Boona, another grandson of Jack Hicks, told Nicholson J that his grandfather was not an Aboriginal. It may be that he was confusing Jack Hicks with his great-grandfather, Horace Hickes, but, however that may be, he shed no light on the genealogy of Winningbung.

## Nibbin – historical background

1. The father of Charlotte Lockyer was another grazier, George Brookes Lockyer, and her mother was called Nibbin or “Miggiebung” (which is also spelt at various parts of the evidence as “Migibung” or “Miggibung” and by Nicholson J in *Daniel* [2003] FCA 666 at [1453] as “Mikibung”). I will use “Nibbin” to describe this person in these reasons. She is the same person referred to in FMG’s contentions (see [395] above).
2. Charlotte Lockyer married Jack Hicks. Her son, **Fred Hicks**, was the informant for her death certificate after she died, aged 67, on 20 May 1947. Fred Hicks gave his mother’s place of birth as “Tableland”, Western Australia, her father’s name as “William” Lockyer, her father’s occupation as station owner and her mother’s name as “Miggiebung”. It may be that Fred Hicks confused his mother’s brother, **William**, with that of their father, George Brookes Lockyer. But Prof Trigger, the Todd respondent’s expert anthropologist, referred to an earlier report by Mr O’Connor in which Mr O’Connor recorded that George Lockyer appeared to have liked being called “Bill”. That is likely to explain why Fred used “William” as his grandfather’s name on Charlotte’s death certificate.
3. Both Dr Palmer and Prof Trigger agreed that “Tableland(s)” was often regarded as a geographic area, that included a large part of Yindjibarndi country, that stretched from east of Wittenoom (which was in Banjima country), west to the headwaters of the Fortescue River and extended to the north above and to the south (into Guruma country) below those landmarks. The word “Tableland(s)” could also refer to a police station and ration depot area with the Aboriginal name “Buminji‑na” which is around Tambrey Station in Yindjibarndi country.
4. Both experts also agreed that there was no documentary record that related to the place of birth or country or language group of Nibbin or her daughter, Charlotte Lockyer, beyond the ambiguous use of “Tableland” as her place of birth in Charlotte’s death certificate. Prof Trigger said that if Nibbin had connections to both Ngarluma and Yindjibarndi lands, in the sense that I have explained above, it would have been possible for her daughter, Charlotte, to have told her descendants that she could have gone either way. Dr Palmer explained that it was more difficult to trace the relationships of a person to a particular indigenous people, merely from the place of a person’s birth alone because of how the impact of white settlers on the indigenous inhabitants began to disturb their customary occupation of their country. Both experts agreed that oral histories of genealogical connection were relevant for this purpose.
5. In his evidence to Nicholson J, Wilfred Hicks said that Charlotte Lockyer’s galharra skin was “Kariyarra”, and he continued:

Her children, well Fred goes in Yindjibarndi. He’s a kariyarra too in galharra … If I follow my father I will be in that galharra. But if I follow my mother, I’m balyirri. That’s why I’m saying I’m going milingga, I’m covered.

1. Wilfred Hicks could only name “three main” skin groups as kariyarra, balyirri, and burungu; but he knew that there was another one. However, as he acknowledged shortly after, Kariyarra was also the name of another Aboriginal people.
2. In my opinion, Wilfred Hicks’ lack of familiarity with the names of the four galharra groups (see [49] above) and his erroneous inclusion of Kariyarra as a skin group, suggest that he correctly recalled that Charlotte Lockyer was Kariyarra, but confused her being of the Kariyarra language or country group with her being that “galharra”. Likewise, he said that if he followed his mother his galharra would change, as it would if he followed his father. That indicates that he was confused between electing to follow the language or country group of one parent rather than another, a choice open to Yindjibarndi and other Pilbara peoples, with having a “right” to choose a different one of the four skin groups within the galharra system to the one that a child necessarily acquires at birth based on the galharras of his or her parents.
3. Nicholson J found that each of Wilfred Hicks and his brother Dallas acknowledged themselves as Ngarluma and that that was accepted by the first applicants (being the combined Ngarluma and Yindjibarndi applicants). Their mother, Molly Hicks, was Ngarluma: *Daniel* [2003] FCA 666 at [246], [1453].
4. Robert Boona told Nicholson J that his grandmother Charlotte was Yindjibarndi but, when he was asked with what group Charlotte identified, he testified, “My grandmother, she was a Mardudhunera and a Thalanji”, that is, as he said, a “Mardudhunera Thalanji”. That evidence indicates that he thought that Charlotte may have had rights to follow both Yindjibarndi or Thalanji (another Pilbara people) or Mardudhunera, and that she chose the latter. Alf Boona was Sheila Hicks’ husband and she was one of Charlotte Lockyer’s daughters. Alf Boona was Mardudhunera. Dr Palmer said that Mardudhunera country extended to portions of the Tablelands.
5. Cane Hicks, Wilfred’s brother, said that their father, Fred Hicks, had stated that “he could be Kariyarra, Yindjibarndi, Ngarluma and Mardudhunera, and two other language[s] from the Onslow district”.
6. Fred Hicks was employed at Karratha Station as evidenced in a work permit dated 3 July 1944 that was an exhibit before Nicholson J. His Honour found that Karratha Station was in Ngarluma country and that domain extended to the seaside (*Daniel* [2003] FCA 666 at [1286], [1556], [1625], see too at [95]). That is confirmed by a map Dr Palmer prepared in his report in this proceeding showing the location of a number of significant places in Yindjibarndi country, including the claimed area, and its surrounds. Nicholson J noted that CM Straker’s reports in 1893 had referred to a close association between those working at Karratha Station and the Mardudhunera at Mardi, which also appeared from other evidence before his Honour (*Daniel* [2003] FCA 666 at [1374], [1377], [1383], [1491]).

## The Ngarluma township consent determination

1. Charlotte Lockyer was included in the list of apical ancestors put forward in the Ngarluma **township** applicationin the proceeding (WAD 165 of 2008) filed on 31 July 2008 on behalf of the Ngarluma people. That application resulted in a consent determination made by McKerracher J on 21 December 2015 over township areas on the coast: *Samson on behalf of the Ngarluma People v State of Western Australia* [2015] FCA 1438. Wilfred Hicks and others on behalf of the WGTO group and the Yamatji Marlpa Aboriginal Corporation were the third respondents and a Pansy Hicks was one of the persons comprising the applicant in that proceeding. His Honour’s consent determination described the native title holders in schedule six, consistent with the description approved by the Full Court in *Moses* 160 FCR 148, namely, “the Ngarluma People, being those Aboriginal persons who recognise themselves as, and are recognised by other Ngarluma People as, members of the Ngarluma language group”.
2. As Prof Trigger recognised, if Charlotte Lockyer were an apical ancestor for the Ngarluma people, that would indicate that, even if she had Yindjibarndi ancestry through Nibbin, Charlotte had elected finally to follow a Ngarluma, and not Yindjibarndi, language group identity and that election would preclude her descendants from now advancing a claim to being Yindjibarndi based on cognatic descent from her.

## The evidence of the Todd respondents

1. The three Todd respondents, whom McKerracher J ordered be joined as parties, were **Lindsay Todd** and two of his sisters, **Margaret Todd** and **Phyllis Harris** (neé Todd). They claimed that they are Yindjibarndi. Initially, they applied to be joined as respondents under s 84(5) of the *Native Title Act* based on their affidavits, each sworn on 30 January 2014, in which they asserted in identical terms that their mother, Lila Hicks, was the daughter of Charlotte Lockyer who, in turn, was the daughter of Nibbin. Each asserted in those affidavits that their mother, Lila, had told them that Nibbin was a Yindjibarndi woman and that they are descended directly through their maternal line (Charlotte and Lila) as Yindjibarndi.
2. Apart from disclosing that their father was Billy Barlow, and that he was also known as Herbert Todd, they said no more about him in their affidavits of 30 January 2014. They also asserted there that other Yindjibarndi persons recognised them, and their large family, as Yindjibarndi and annexed a letter dated 17 December 2013 on the letterhead of WMYAC signed by five witnesses who gave evidence, **Bruce Monadee**, **Sylvia Allen**, Berry Malcolm, **Diana Smith** and **Jimmy Horace**, as well as by three others, May Adams, Maudie Jerrold and Anne Jacobs. That letter recounted that its signatories:

* were senior members of the Roebourne Aboriginal community;
* had detailed knowledge of the families that made up the Yindjibarndi community;
* remembered Fred Hicks, Lila’s brother, whom they said was a Yindjibarndi man, and stated that Fred Hicks had married a Ngarluma woman, Molly Thomas, who, with their eight children and Lila’s six children, all “are part of the Yindjibarndi community”; and
* included some of those signatories (not further identified) who remembered Charlotte Hicks (née Lockyer) and her brother, George Lockyer, who were Yindjibarndi.

1. As explained below, when Berry Malcolm gave evidence she said that she had never heard anyone suggest that the Todds or their ancestors were Yindjibarndi. I accept her evidence and I place no weight on that letter’s contents because, for the reasons that I give below, it did not reflect the knowledge or state of mind of any of its five signatories, including her, who gave evidence.
2. When Lindsay Todd (born in 1950) gave evidence in his witness statement dated 23 July 2015, that he verified at the trial on 12 September 2015, he explained his heritage quite differently from the account in his affidavit of 30 January 2014. He said that his mother never mentioned what Aboriginal language group Charlotte (his grandmother who had died in 1947, three years before he was born) had identified with or “whether she was Ngarluma or Yindjibarndi”. Instead, he stated that his mother had told him that her father, Jack Hicks, came from the Tableland, that Jack’s mother was a full-blood Aboriginal woman and his father a white station owner. He said that he never heard any other stories about his grandparents. He said that his mother’s grandmother was Nibbin and his first cousin, **Nellie Connors**, whose mother was the sister of his mother (Lila), had told him, after he swore his 30 January 2014 affidavit, that Charlotte was Ngarluma, while Nibbin was Yindjibarndi.
3. In contrast, each of Lindsay Todd’s sisters, Phyllis Harris (born in 1948) and Margaret Todd (born in 1952) who gave oral evidence on 6 September 2016, a year after their brother, said that their mother, who had died in 1995, told her that both she (Lila Hicks) and her great-grandmother, Nibbin, were Yindjibarndi.
4. The reason that the hearing of the balance of the trial did not occur in early March 2016, as I had ordered at the conclusion of the hearing in Roebourne on 13 September 2015, was that in the meantime some persons who claimed to be acting on behalf of the Eastern Guruma people filed an overlapping claim. I dismissed that proceeding as an abuse of process, *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2016] FCA 553, on 10 March 2016 and subsequently, on 25 July 2016, Gilmour J refused leave to appeal: *Hughes on behalf of the* *Eastern Guruma People v State of Western Australia (No 3)* [2016] FCA 840.
5. Phyllis Harris also said that her mother told her that Charlotte, her grandmother, was Yindjibarndi. In her examination in chief, Phyllis Harris added that her mother had told her that Charlotte had been born “up in the Tablelands” and her mother (Lila) was born at Spring Station. However, she later admitted that she only learnt this shortly before giving evidence when she saw Charlotte’s death certificate.
6. Margaret Todd said in her witness statement that her mother never gave her any details about Charlotte. However, in examination in chief, Margaret Todd said that her mother had told her, when she was about 12 or 13 years old, that she (Lila) was Yindjibarndi, that her grandmother was too, and that her great-grandmother, Nibbin, came from Yindjibarndi country.
7. Phyllis Harris said that her cousins, Nellie and **Doreen Connors**, who were Ngarluma, had told her about three or four years earlier that Charlotte was Ngarluma. But, Phyllis Harris said that this could not be correct since her mother (Lila) had told her that Charlotte was Yindjibarndi, and those cousins followed their father’s side, not their mother’s (Ida Connors), who was Lila Hicks’ sister. I find that Phyllis Harris had that conversation with Nellie and Doreen Connors when the latter informed her of the Ngarluma township application and that Charlotte Hicks was listed in that application as an apical ancestor of the Ngarluma people. Phyllis Harris sought to explain her assertion that her mother had told her, and she believed, that Charlotte was Yindjibarndi by the following evidence that I do not accept:

Oh Nellie did mention it but … I was told that she – she can go two ways … [m]y grandmother, Ngarluma or Yindjibarndi. Well, that’s what the group can go, two ways, either they can go Yindjibarndi or – I mean, Ngarluma or Yindjibarndi.

1. Phyllis Harris could not recall who told her that Charlotte could “go” both Ngarluma and Yindjibarndi. Lindsay Todd said that Nellie Connors told him that Charlotte Lockyer was Ngarluma and that Nibbin was Yindjibarndi.
2. In cross-examination, Lindsay Todd said that he thought that Charlotte was Ngarluma because she was a Lockyer, “so that’s why we went actually in … mum[’s], then my grandfather’s side … Jack Hicks”. He said that his mother had told him only once, before he was a teenager, that she was Yindjibarndi, but that no other close members of his family, including his sister Phyllis, knew that, and that Yindjibarndi people had never told him or his family that information either. He said that his sisters only found out that they were Yindjibarndi “[w]hen they actually got the paperwork … [w]ithin the last two, maybe three, years”. He could not say why he had not told them, if he knew, that their mother was Yindjibarndi. But he asserted that he considered himself to be Yindjibarndi through his mother. I do not accept that his mother ever told him that she was Yindjibarndi.
3. Phyllis Harris said that her sister, Margaret Todd, had shown her papers like a family tree, that had come from a registry in Perth that showed that Jack Hicks was Yindjibarndi. Phyllis Harris said that Margaret (Todd) had shown her the document in about 2000, while the WGTO claim was current. Margaret Todd asserted that the document came from her sister, Myline, and “was just little bits and pieces, but I’ve seen Charlotte’s name up on the top, but that’s about it”. She said that she still had the document at home in a cupboard, “[b]ut it wasn’t like a family tree … It was just saying where they worked … where your mother was born and all that”. In cross-examination, Margaret Todd said that she knew nothing about the possibility that (her grandfather) Jack Hicks might be Yindjibarndi until WMYAC did research. That explained why she had made no mention of that matter in her affidavit of 30 January 2014 in support of the joinder of the Todd respondents.
4. The “family tree” or other papers were not tendered by the Todd respondents. I find that neither Phyllis Harris nor Margaret Todd saw this material until sometime after each swore her affidavit of 30 January 2014. I do not accept the evidence of Phyllis Harris or Margaret Todd about the contents of any such documents or that they had any of the supposed knowledge of Jack Hicks’ language group or heritage that they professed to have.
5. Phyllis Harris said that she did not know if Charlotte’s father, George Lockyer, was a white man. In my opinion this evidence is consistent with the impression that I formed that Phyllis Harris did not discuss with, and was not informed by, her mother or father any of her family heritage and that she reconstructed her evidence based on information that she has obtained after her parents died. Phyllis Harris admitted that her parents did not talk much, or teach her, about Aboriginal culture when she was growing up, which Margaret Todd said, in her witness statement, was also the case for her.
6. Because each of Phyllis Harris and Margaret Todd said nothing about Jack Hicks having any Yindjibarndi connection in their affidavits of 30 January 2014, in support of their application for joinder, I find that each of them had no knowledge of any possible basis of him being Yindjibarndi or having any Yindjibarndi heritage. I infer that the document or documents themselves comprising the supposed family tree or related material would not assist the case of the Todd respondents were it or those to be adduced in evidence: *Jones v Dunkel* (1959) 101 CLR 298.
7. I do not accept that, if her mother discussed her lineage with her, despite the constraints of “citizenship” that applied while the Todd respondents were growing up in the 1950s and early-to-mid 1960s, neither Phyllis Harris nor her mother discussed both sets of grandparents, as opposed to just the female ones. It beggars belief that the natural curiosity of a child would not have expanded the discussion to cover who were her grandparents and great‑grandparents, if her mother and father had thought it wise to discuss the topic of their Aboriginal heritage, discussion of which their “citizenship” substantively discouraged (cf. *Daniel* [2003] FCA 666 at [200] set out at [45] above).
8. Lindsay Todd said that his father was Kariyarra, his parents were married and had citizenship cards. He said that his family lived in the town area of Roebourne, west of the Harding River, and that the Aboriginal people lived on a reserve across the river. He said that the “[c]itizenship right meant that you had to act as white people … and you had no contacts with the, well, I’d hate to say it, full bloods”. Lindsay Todd explained that the segregated, legally mandated, social structure of that time meant that when he was a child, his parents could not teach him Aboriginal language and the family could not associate with the Aboriginal population. He said that he went to the “European” school and the Aboriginal children went to a separate, segregated school. Nicholson J also described that legal impact in *Daniel* [2003] FCA 666 at [200] which is set out at [45] above.
9. However, as a child Lindsay Todd had limited, but cautious, interaction with children from the reserve, such as swimming together at the river. His mother also took him out from time to time into the bush around the Roebourne area, but she never took him into Yindjibarndi country.
10. Margaret Todd said, and I accept, that when she was growing up, “I couldn’t mix with the white kids because I was Aboriginal”. She said that she used to visit the old Yindjibarndi people on the old reserve including Bruce Monadee’s mother, Lorna Walker and Dan Daniels, who had the nickname “Bicycleman”, who would take her across the reserve to play cards. She said when her parents found out about those visits, her father would tell her off and her mother told her that she could get in trouble with the policeman. She said that her cousin, May Lockyer, had told her that her (May Lockyer’s) mother was Yindjibarndi but that she (May) followed her Guruma father.
11. Lindsay Todd said that Wilfred Hicks, his first cousin, identified both as Ngarluma and Yindjibarndi. Wilfred’s father, Fred Hicks, was a brother of Lila, Lindsay Todd’s mother. Lindsay Todd said in his evidence in chief that the source of Wilfred’s Yindjibarndi heritage was from Fred and his Ngarluma heritage was from Wilfred’s mother, Molly. Lindsay Todd said that several years earlier he had been part of the WGTO claim and that its name had been made up by Wilfred to propound an overlapping claim in the north-western part of the Moses land. He said that people in the WGTO claim were Ngarluma and Yindjibarndi and that Wilfred had put some members of his family, including himself (Lindsay), into that claim. He said that that Wilfred “ran the show, and we just made up the numbers”, and asserted that he (Lindsay) never identified himself as part of a WGTO tribe or went to meetings of the claim group or with lawyers or got any feedback about the WTGO claim. He said that he had fallen out with Wilfred because of what had happened with that claim (which Nicholson J dismissed without prejudice to the WGTO claimants making another claim as Ngarluma or Yindjibarndi people (*Daniel* [2005] FCA 536 in order 24)). Lindsay Todd claimed that his country was around Millstream (which was within the Moses land in the 2007 determination) because he understood that was where his mother’s family came from and that he had done some activities on country. He claimed that about two years before giving evidence he had camped in the claimed area with two of his sisters. He said that the sons of his sister Myline went through Yindjibarndi law at Woodbrook in late 2014.
12. Margaret Todd asserted that when her mother took her to Woodbrook or Millstream, Lila Hicks would “rub … behind our ears” something from “a tree that smel[t] like Eucalyptus”. She and Lindsay Todd said that their parents had taught them to squirt water from their mouths and to speak to the country when they went to Millstream. However, Phyllis Harris, the eldest of the three Todd respondents, did not give evidence of such visits with, or teaching by, either of their parents. I do not accept this evidence of Margaret Todd or Lindsay Todd.
13. Lindsay Todd said that he first heard about the combined Ngarluma and Yindjibarndi claim (heard by Nicholson J) while he lived in Perth. That claim had been lodged in 1994, but he was not able to give an exact time of when he learnt of its existence. He said that he did not believe that he had been included in that claim, but had not taken any steps to find out about it, even when he came back to Roebourne on holidays. In fact, he was included as a member of the WGTO claim group.
14. He had heard about the present proceeding sometime after he returned to Roebourne in 2005. He agreed that, if he had been mixing with Yindjibarndi people, he would have heard about this claim, but he had done nothing to assert a Yindjibarndi identity, until shortly before he became interested in asserting such an identity when he applied in February 2012, unsuccessfully, to become a member of YAC. He then applied to become a member of WMYAC, which he knew had been formed by a number of dissatisfied members of YAC and that WMYAC was a supporter of the Yindjibarndi people entering into an agreement with FMG over the Solomon Hub mine, which is in the centre of the claimed area.
15. Phyllis Harris said that she and Margaret Todd applied together for membership of both YAC and WMYAC after asking Allery Sandy, Sylvia Allan and Bruce Monadee. Phyllis Harris said that the three elders all said, “Yes, you are Yindjibarndi”. She denied that she had not thought of herself as Yindjibarndi before making the applications for membership, yet could not explain why she had not acted earlier to join the Yindjibarndi claim in the proceedings before Nicholson J or this proceeding. Moreover, each sister had no understanding that the Todd respondents’ statement of contentions did not admit or deny the Yindjibarndi’s claim to exclusive possession of the claimed area. Phyllis Harris said that why she wanted to be a member of this claim was that, “I just want to prove that I am Yindjibarndi. That’s all I want to prove. … I just want to be known – recognise[d] as a Yindjibarndi person”. Her sister, Margaret Todd, said that their late brother, Terence, “always said we were Yindjibarndi” and wanted his siblings “to stand up for being Yindjibarndi”, and that was “what we are now doing by becoming respondents to [this] claim”. In her witness statement, Phyllis Harris said:

Our (Todd) family used to be involved in the [WGTO] claim. But that didn’t mean we weren’t still Yindjibarndi.

1. I asked her what she understood that her family claimed in the WGTO case and what land it concerned. She said that her family there was claiming to be Yindjibarndi and that they thought at the time that the claim was over Yindjibarndi land, but she found out later that the claim was for the “sea-side” land. She said that:

“we just finished – pulled out of the [WGTO] because we was getting … no feedbacks. We didn’t know what was going on with the land.

1. Margaret Todd said that “Wong-Goo-TT-OO” was just a name for the claim that her cousins, Wilfred, Cane and Dallas Hicks, had made up and that both Ngarluma and Yindjibarndi people were in that claim group. She said that “[w]e were there as Yindjibarndi people” but that, after a time, “there were disputes about where money was going. We never got any information, so we pulled out”. She said that when she had asked “for [a] bit of money for something, he said there was no money”. I infer that the “he” was Wilfred Hicks. She said that she was identifying with Yindjibarndi indigenous heritage when making the WGTO claim and then gave this evidence:

HIS HONOUR: So was that over Yindjibarndi land? --- That was bit on Ngarluma, I think. Ngarluma land. …

Can you just explain to me how, if you were making a Yindjibarndi claim you were doing it over Ngarluma land? --- Well, some of it was and some was on Yindjibarndi country.

Right. --- Because after a while – I think we were on Yindjibarndi then, after a while, Wilfred started getting a little greedy and started stepping that boundary, and this is where we found out, after being in there for five to six years, that we decided to leave the – leave that group.

1. Later she said that she never saw any maps of the WGTO claim land.
2. Lindsay Todd said that the Todd family was a very large family that could bring a significant voting block of, between 25 and 30, votes which, he said, might provide a sufficient margin to enable the current dissident faction within YAC to create a majority to vote in favour of YAC entering into an agreement with FMG. He knew that all of his legal fees were being paid by WMYAC, of which he was a member, and that WMYAC strongly supported entering into an agreement with FMG over the mining of the Solomon Hub mine. Margaret Todd said that she did not know who was paying the Todd respondents’ legal bills until she had heard Lindsay Todd, when giving evidence at Roebourne, say that WMYAC was. Phyllis Harris said, and I accept, that WMYAC had volunteered, without her or her brother or sister asking, to pay their legal fees.

## Assessment of the Todd respondents’ evidence

1. I have taken into account how difficult it is in such cases, particularly where the Hicks/Todd family, as “citizens”, had to deny their Aboriginal heritage and relationships and also were prohibited from mixing with other Aboriginal people, for them to be able to trace and establish their indigenous genealogy. Parents who were “citizens”, like Herbert Todd and Lila Hicks, no doubt sought to take advantage of what at the time may have been understood as the “privilege” of citizenship to give their children, like the Todd respondents, the potential advantages of an education in the school where the European children attended. Now, all that persons in the position of the Todd respondents can do is to search through what they can find to trace their background with the scraps of information that they have been able to assemble. The human tragedy is that, although the Todd respondents undoubtedly have indigenous ancestry, they appear to have lost the ability to identify accurately, and connect fully with, their heritage or to enjoy the benefit of inclusion as part of a claim group in a determination of native title. Indeed this seems to have been part of the difficulty that led to Wilfred Hicks and others putting forward the WGTO claim rather than being in a position to join with, or be accepted by, either the Yindjibarndi or Ngarluma claim groups in the proceedings before Nicholson J.
2. Having seen and heard each of the Todd respondents, I think that it is fair to say that they were somewhat overwhelmed by having to give evidence. I have tried to allow for this in assessing their evidence. However, I formed the view that they are not reliable witnesses in respect of what they claimed to have been told about having Yindjibarndi heritage by their mother, Lila Hicks, or by others when they were young. I accept Lindsay Todd’s evidence that their mother never told him which language group Charlotte identified with or whether she was Yindjibarndi or Ngarluma and that he had never heard any other stories about his grandparents. I do not accept his two sisters’ evidence that their mother told them that either Charlotte or Nibbin was Yindjibarndi.
3. I also have had regard to the difficulties which the constraints of “citizenship” imposed (so inappropriately with the benefit of hindsight) on their parents telling each of the Todd respondents anything about their indigenous heritage which could have an adverse impact on the parents’ decision to seek and maintain citizenship. In my opinion, it is unlikely that the Todd respondents’ parents, or even their mother alone, discussed only part of their ancestry, being that derived from Charlotte Lockyer and Nibbin, with only Phyllis Harris and Margaret Todd, but never with Lindsay Todd, and yet said nothing at all to her daughters or son about the ancestry from their father’s heritage.
4. Accordingly, I do not accept the evidence of Lindsay Todd, Phyllis Harris or Margaret Todd that they have any knowledge that is relevant to establishing their claim to be Yindjibarndi.

## The evidence of the claim group members about recognition of the Todd respondents as Yindjibarndi

1. Many of the applicant’s witnesses gave evidence that, although they knew, or knew of them, they had never heard of Lindsay Todd, Phyllis Harris and Margaret Todd or their family members being, or claiming to be, Yindjibarndi before they sought to join YAC in late 2011.
2. Tootsie Daniel (born in 1953) is Yindjibarndi, but her late husband, David Daniel, was Ngarluma. She said that her late husband’s uncle, Jacob Scroggin, had told her, when she was living in the old reserve at Roebourne, that Billy Barlow (aka Herbert Todd) was “a brother for Reggie Scroggin”, who was sometimes called “Reggie Barlow”. She said that “Reggie and Bill shared a mother. Jacob and Reggie were Ngarluma”.
3. Tootsie Daniel recalled that David Daniel is shown in a 1993 documentary film (that was an exhibit for the purposes of proving his statement set out below in this paragraph), titled *Exile and the Kingdom*,speaking at Munni Munni to Jamie Todd, the then young son of the late **Terry Todd**, a brother of the Todd respondents. Munni Munni is in Ngarluma country. The scene in the documentary depicts David Daniel speaking to two young boys, and, as he addresses one of the boys, who is not wearing a shirt, he says:

You see this country here, never mind you’re [half-caste], but your grandfather belongs to this country; **he’s Ngarluma; so that makes you Ngarluma**. This sort of country you’ve got to look after. This is your history because of your grandfather. He’s a Ngarluma … (emphasis added)

1. David Daniel gave evidence about his family before Nicholson J, and told his Honour, on 2 November 1999, that Wilfred Hicks “was part of our group before he took it in his mind to form another group”. When he was asked: “As far as you know, what Aboriginal tribe or group does Wilfred belong to?”, David Daniel responded: “He belong to Ngarluma and Yindjibarndi, one of them two.” That apparently ambivalent answer may reflect what Nicholson J said in *Daniel* [2003] FCA 666 at [1453] about Wilfred Hick’s parents, Fred Hicks and Molly Hicks, namely that Fred was the child of Jack and Charlotte Hicks who “were said to be Yindjibarndi” and “Molly Hicks was Ngarluma”. Thus, David Daniel may have thought that Wilfred Hicks may have been able to elect to choose to follow the language or country group of one of his parents. However, David Daniel’s ambivalent answer in the trial appears to be inconsistent with his unqualified assertion to Jamie Todd, some years earlier, that his grandfather, Jack Hicks, was Ngarluma, although it left open the possibility that his (Jack’s) mother, Winningbung, was or could have been Yindjibarndi. It may also be that David Daniel’s ambiguous answer in his evidence either was a recognition that Wilfred was making such an ambiguous assertion in his evidence or the answer may have been an example of avoidance.
2. I am of opinion that David Daniel’s statement in the film is more likely to be correct. It occurred before any native title claim had been commenced. He was giving his knowledge of the young boy’s country or language group identity that could only derive directly from that of his parents (however their other ancestors may have identified, given the ability of Yindjibarndi to elect once for all to follow one or other parent’s country or language group).
3. Rosemary Woodley (born in 1959) said that she knew the Todd respondents and their siblings when she was growing up in Roebourne. She thought that their father, Billy Barlow, was a Kariyarra, but said that she did not know their mother and that no old people talked about where their mother was from. She said that she never heard that the Todd respondents were Yindjibarndi. Importantly, she stated that the elders “will tell you when you are growing up how you are related to everyone around the Pilbara”. She said that the knowledge of how families connect to oneself and other Yindjibarndi, even if one did not know every member personally, was “part of us knowing how we fit into the galharra”.
4. While he was growing up in Roebourne, Angus Mack (born in 1972) never heard anyone in his family mention that the family that included the Todd respondents was Yindjibarndi.
5. Charlie Cheedy said that he talked to Sean Todd, one of the sons of Myline and Terry Todd, about going through the law. Charlie Cheedy sent Sean Todd to Jimmy Horace. He said that Sean Todd went through the law at Woodbrook in 2014. There was no evidence as to how any decision to permit Sean Todd and his two brothers to go through the law occurred, who made the decision or why. However, Myline Todd’s application for membership of YAC was one of those in the dispute that I deal with below at [490]-[503].
6. Kevin Guiness (born in 1966) knew the Todd respondents when growing up, but he never heard before 2010 any old people, or others, tell any stories that the Todd family were Yindjibarndi. Kevin Guiness’ sister, Esther, married (but later separated from) Richard Todd, whose mother, Phyllis Harris, is one of the Todd respondents. Kevin Guiness never heard Richard Todd say that he was Yindjibarndi or that he was from any other Aboriginal group.
7. Mavis Pat was born in about 1948 on Mount Florance Station. She left there in the early 1960s and attended the segregated school for Aboriginal students in Roebourne. She remembered Lila Hicks and Billy Barlow. In 1963 she went to the new school which was not segregated. Her younger sister, Esther Pat (born in 1960), said that no one ever said that the Todd family was Yindjibarndi when she lived at the old reserve in Roebourne and that “if they were family, we would have known about it. Our elders always made sure we knew who was who, so we knew who we could marry and how everyone fitted in with each other’s families”. Like many witnesses, she did not know the galharra of the Todd respondents.
8. Berry Malcolm (born in 1952) knew the Todd respondents, their siblings, parents, and Lila Hick’s sister, Sheila, but had not heard them, or anyone else, say that they were Yindjibarndi. She did not know them to be Yindjibarndi and said that none of the old people on the old reserve at Roebourne had ever mentioned that the Todd family was Yindjibarndi. Berry Malcolm said that her late husband, Woodley King, never talked about to what Aboriginal group the Todd family belonged. She gave no evidence, and was not asked, about WMYAC’s letter of 17 December 2013 on which her name and signature appeared. I accept her evidence where it is inconsistent with that letter. As will appear, the letter did not accurately reflect the knowledge of its other four signatories who gave evidence, namely, Sylvia Allan, Diana Smith, Bruce Monadee or Jimmy Horace.
9. Judith Coppin (born in 1957) said that, when she was growing up, the Todd respondents and their siblings “were like white kids” and would say that their parents had told them that they were not allowed to play with her when they were all in the park near the Harding River. Judith Coppin’s daughter, Lorraine Coppin (born in 1972), also knew the Todd respondents but, because they lived in the town and not in the old reserve or the subsequently built integrated Aboriginal housing called “**the Village**”, she thought that they were “whitefellas”. Lorraine Coppin said that her father, Ross Walker, whose mother was Yindjibarndi, followed his Ngarluma father. Her father told her that Molly Hicks was Ngarluma. Lorraine Coppin knew that Wilfred Hicks was a cousin of the Todds and that Fred Hicks was a child of Charlotte Lockyer. Molly Hicks’ sister married Peter Yugardi, who was related to the Coppins and who was Ngarluma. Lorraine Coppin was not aware of the Todds having any Yindjibarndi connection.
10. As mentioned earlier, Lorraine Coppin and her husband, Michael Woodley, began Juluwarlu in 2000 to document and record Yindjibarndi history, including family trees. She had worked at the Aboriginal and Torres Strait Islander Commission Land Council in Roebourne as a trainee bookkeeper when Wilfred Hicks was also working there. Lorraine Coppin said that Wilfred Hicks “always said he was Ngarluma”. She knew that his father (Fred Hicks) was the brother of Lila Hicks, the mother of the Todd respondents. She said that from a young age every child in the old reserve at Roebourne, whether Yindjibarndi, Ngarluma, Banjima or Guruma, was taught “who our family was because … the galharra system … plays a part there where you get taught who your aunties are, you know, your mother-in-laws, or who all the boys you’re supposed to marry [are] …”. This knowledge is also relevant and important to Yindjibarndi because of the traditional Yindjibarndi laws and or customs of avoidance relationships, where for example, a husband cannot be in the same place as, or have eye contact with, his mothers-in-law, being a collection of his wife’s mother and her sisters.
11. Lyn Cheedy (born in 1970) is Yindjibarndi and is married to Arnold Lockyer, who is Ngarluma and he is a descendant of William J Lockyer (Charlotte’s brother). When she gave evidence, she was the chairperson of YAC. She knew the Todd respondents but had never known them to be Yindjibarndi. She said her husband’s family was descended from Nibbin, who, she also said, was Ngarluma. She knew that two of Nibbin’s children, Charlotte Lockyer and William J Lockyer, were named as apical ancestors of the Ngarluma township claimants on the application that resulted in the consent determination in *Samson* [2015] FCA 1438.
12. Lyn Cheedy said that her old people had told her that Jack Hicks was Ngarluma. Her late mother, Cherry, told her that the children of Jack Hicks and Charlotte Lockyer, namely Fred Hicks, Shelia Boona and Lila Hicks, were Ngarluma. She said that in the late 1990s she had supper on most days with Cheedy Ned, her stepfather, her mother and late sister, Rosie, and that both Cheedy Ned and her mother would say, when discussing the WGTO claim, that there was no such tribe and that “the Hicks line is Ngarluma through Jack Hicks and Charlotte Lockyer”.
13. In particular, Lyn Cheedy said that when she was growing up the old people “always told me where our country is, who Yindjibarndi families are and that I was from [a] Yindjibarndi family”. That evidence reflected the overall impression that I gained at the trial that, as an integral part of the Yindjibarndi people’s culture and tradition, the old people, or elders, passed on to the young cultural knowledge and the relationships that the Yindjibarndi families had internally: i.e. who was and who was not Yindjibarndi.
14. Lyn Cheedy said that it was only when the Todds sought to join the claim group for this proceeding that she first learnt that they were claiming to be Yindjibarndi. That surprised her because she knew that the “Todds” were included in the Ngarluma township claim through their descent from Nibbin. Some years earlier she had worked at the Mawarngarra Health Service where Margaret Todd also worked. Margaret Todd discussed with her that she (Margaret) was proposing to join the Kariyarra claim being made over an area to the north-east of Yindjibarndi country (i.e. to the north-east of the Moses land since the claimed area is to its south). Lyn Cheedy said that Margaret Todd told her that she was seeking to join that claim “through her dad, Billy Barlow. She did not mention that she was Yindjibarndi then”. I accept Lyn Cheedy’s evidence. I do not accept Margaret Todd’s evidence about that discussion, namely that “I never took it any further. It was just a talk and that was it”, if she was seeking, by that statement, to convey that the discussion was casual, as opposed to one involving her giving deliberate consideration to her entitlement or capacity to participate in the Kariyarra claim based on her knowledge of her father’s apical ancestors.
15. **Pansy** Cheedy **Sambo** was born in 1951 on Coolawanyah Station and is a sister of Middleton Cheedy and Lyn Cheedy. Their family moved to Roebourne in 1959. She knew the Todd respondents and their brother, Terry Todd, because from 1963 she was at the integrated school with them and in the same class as Margaret Todd. Pansy Sambo said that when her husband Reggie Sambo, a Ngarluma, met Terry Todd, he would greet Terry Todd, saying “hello to him, ‘Wantia Kariyarra man”’, and the latter would respond saying, “Hello … from the Kariyarra man”, as a usual form of greeting. Terry Todd’s home was across the road from the Sambo’s and this was part of friendly banter between the two men as neighbours. She never heard the old people, such as her mother or grandparents, speak of where the Todd family was from or of their galharra. She recalled the old people speaking about Billy Barlow as being from [Port] Hedland but never heard mention of Lila Hicks. Lindsay Todd also said that some people said that his father was Kariyarra.
16. Sylvia Allan is a sister of Bruce Monadee. She was born in 1942 near Hooley Station. She said that she attended the segregated school for indigenous children at Roebourne from when she was about nine years of age. I have not accepted her assertions of her knowledge that the Todd respondents had Yindjibarndi heritage for the following reasons, as well as for the reasons I explain below under the heading “The elders committee” at [490]-[503].
17. Sylvia Allan said, in her witness statement, that Charlotte Lockyer was Yindjibarndi and “was in Cooya Pooya Station. I saw her there when I was young. A lot of old people lived at Cooya Pooya”. She said that her parents lived on the old reserve at Roebourne. At the time Sylvia Allan gave evidence in Roebourne on 12 September 2015, the death certificate of Charlotte Lockyer was not in evidence. Indeed it was only tendered at the resumed hearing in Perth on 5 September 2016. If, as Sylvia Allan asserted, she had seen Charlotte Lockyer at Cooya Pooya, that had to have occurred before the latter’s death at Roebourne Hospital on 20 May 1947, at a time when Sylvia Allan was no more than five years old and was living at Hooley Station. While that is possible, I am not satisfied, having regard to her other evidence, that her asserted recollection of an event that could only have occurred while Sylvia Allan was a very young child, is accurate or reliable. I place no weight on it.
18. Moreover, in 1998, after the Ngarluma and Yindjibarndi filed the proceedings that culminated in the 2005 and 2007 determinations, there were big meetings of Yindjibarndi people that considered and decided who were to be the apical ancestors for the Yindjibarndi people in those proceedings. None of the names of Jack Hicks or Charlotte Lockyer or any of the Todd family were on the list of ancestors that the meetings decided would be the names of the ancestors from whom the Yindjibarndi claim group was descended. Sylvia Allan also participated in the authorisation meeting in 2003 that authorised this proceeding where, again, none of the Todd family or their ancestors were ever discussed as possible apical ancestors or members of the Yindjibarndi people.
19. Sylvia Allan gave this evidence, that I find to be the fact, that revealed the lack of knowledge of the Yindjibarndi elders and the wider Yindjibarndi community of any basis on which the Todd respondents or their family, could be members of the Yindjibarndi claim group:

MS JOWETT: [A]t the meeting before Nicholson J came … no-one at the meeting said anything about including the Todds did they? --- No, they wasn’t – **they wasn’t accept that time, the Todds family,** but I – because they come to be – they were Yindjibarndi. They was Yindjibarndi and they’ll always be Yindjibarndi, but they wasn’t in the meeting that time.

And did anyone at that meeting before Nicholson J came, did any person at the meeting say, “Oh, the Todds should be included”? --- **No, no-one say, no-one, no-one.**

And then again, in 2003 when this Yindjibarndi 1 claim was – there was a big meeting for that one … and everyone was agreeing to – to have this new claim, did anyone stand up at the meeting and say the Todds should be part of that claim? --- **No, they wasn’t accept that time** we was in a – that time we was at the meeting.

No-one considered they were Yindjibarndi then? --- **No-one know they was Yindjibarndi**.

HIS HONOUR: I thought you told me you always knew they were Yindjibarndi? --- They always be Yindjibarndi.

So, why didn’t you have them included in those meetings? --- Because no-one – they was always to be Yindjibarndi **because the old Yindjibarndi people, all of the tribe they said they’re not Yindjibarndi**.

…

Did they talk about them at those meetings, back in – before Nicholson J came about the Todd family being Yindjibarndi, or did they not get mentioned? --- They wasn’t talking about that family when the Judge Nicholson time. … **Only that lately they came to know the Todds family they was Yindjibarndi** because I know they – **they didn’t tell me before the Judge Nicholson time. They didn’t tell me.** They was invited to the meeting but **nobody know they was Yindjibarndi, only me**. … And all the tribe. Yes, they said they’d be – they should be – to be Yindjibarndi claim.

Well, were you wanting to include all the people who were Yindjibarndi in the claim that you were asking Nicholson J to make a decision about native title in? --- Oh, yes, we was all Yindjibarndi.

**Well, how come you left the Todd – how come you left the Todds out?** --- Well, they **– people didn’t know they was Yindjibarndi.** Some people – well, other people, **the Yindjibarndis say they’re not Yindjibarndi.** (emphasis added)

1. The Todd respondents did not lead, or identify, any evidence to suggest that this evidence should be qualified or may have been mistaken. I find that, in both authorisation meetings for the proceedings before Nicholson J and me, the true position was as Sylvia Allan stated in her answer, namely, “the old Yindjibarndi people, all of the tribe said they’re not Yindjibarndi”.
2. Bruce Monadee (born in 1945) asserted in his witness statement that his family used to spend time with Lila Hicks and her family in Roebourne. He said that he knew Fred Hicks and Molly Hicks, spent nights with them and “[t]hey were like family”. He said, “I think they were distant family. They were Yindjibarndi”. He could not remember who Fred Hicks’ father was or what his country was, and thought that they were Yindjibarndi because they were related to him (Bruce Monadee) “through Yindjibarndi culture”, even though Bruce Monadee did not know whether Fred Hicks “was involved in doing Law”. Bruce Monadee asserted that Lila Hicks was Yindjibarndi but that her husband, Billy Barlow, was Kariyarra. He said that he remembered Lila’s children, that they “went to Roebourne school” and that they had chosen to follow their mother’s side as Yindjibarndi.
3. In his examination in chief Bruce Monadee said that when he was younger he had “nothing much” to do with Lila Hicks and she did not visit his family on the old reserve, because she was a “citizen” and it was “not allowed”. He said that his father and mother had told him that Lila Hicks was Yindjibarndi. He said that he went fishing and swimming with Lindsay Todd.
4. Bruce Monadee was a member of the applicant for the Yindjibarndi’s claim heard by Nicholson J. He agreed that no ancestor of the Todd family was included in the list of apical ancestors on that claim and that at that time the Todds were not thought of as being Yindjibarndi. He said that Lila Hicks and her family did not visit people on the old reserve or go to Yindjibarndi Birdarra ceremonies or funerals when he was younger or an adult. He knew nothing of her, or her family members’, galharra but asserted that, despite his knowing the galharra of all the Yindjibarndi community, “it was not in my place to ask” the Todd family members about their galharra. He did not know who were the ancestors of the Todd family or their ngurra.
5. I am not satisfied that Bruce Monadee’s evidence about Lila Hicks or the Todd family, including the Todd respondents, being Yindjibarndi is reliable and I place no weight on it. In my opinion, his actions and evidence in relation to their not being included in the proceedings before Nicholson J demonstrates that he never thought of the Todd family, including the Todd respondents, as being Yindjibarndi.
6. Ken Sandy (born in 1968) said that he remembered that Lila Hicks played cards with Aboriginal people in the Village. He did not know where the Todds were from but that since WMYAC “started, the elders have said they are Yindjibarndi. I agree with that”. He was a director of WMYAC. He said that elders like Sylvia Allan, Bruce Monadee, May Adams, Tim Douglas and Wilfred Hicks had told him that recently, at WMYAC, when the Todds sought membership of YAC. I have not accepted the evidence of Sylvia Allan and Bruce Monadee on this issue and the Todd respondents did not call any of the other persons or explain their absence. I infer that evidence from each of May Adams, Tim Douglas and Wilfred Hicks would not have assisted the Todd respondents’ case: *Jones v Dunkel* (1959) 101 CLR 298; *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at 412-413 [167] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
7. Ken Sandy said that he had never been told about the ngurra or ancestors of the Todds and he had no idea that they were Yindjibarndi before the elders at WMYAC told him. He had never seen them at Birdarra law ceremonies or funerals or gone on bush outings with them and other Yindjibarndi families.
8. Jimmy Horace (born in 1951) is a first cousin of Bruce Monadee and was a director of WMYAC. He was also a member of the applicant in the proceedings before Nicholson J. He said that he went to school with the Todds. He said that he used to go swimming with Lindsay Todd while they were at school. He knew that Billy Barlow was Kariyarra but he did not know if Lila Hicks was Yindjibarndi or where her country was. Jimmy Horace said that he accepted Lindsay Todd and his family as Yindjibarndi, even though Lindsay and his siblings had not gone through the Law. Jimmy Horace said that at Christmas 2014, three sons of Myline Todd went through Yindjibarndi Law at Woodbrook and he asserted that those three were Yindjibarndi.
9. Jimmy Horace said that a couple of years before he gave evidence, in September 2015, old Dorrie Wally told him that the Todd respondents are Yindjibarndi because he had “been asked to make sure to find out properly”. He said that she had also told him that Sheila Boona was Yindjibarndi.
10. Jimmy Horace was also a supporter of the Yindjibarndi entering into an agreement with FMG. He knew that the Todd family were strong supporters of WMYAC and the proposal to enter into the agreement with FMG for the Solomon Hub mine. Jimmy Horace agreed, in cross-examination, that the reason why the Todds had been accepted as members of WMYAC was to provide more votes in YAC in favour of entering into an agreement with FMG.
11. I allowed him to be asked in re-examination why he had supported their application to join WMYAC because counsel for the Todd respondents raised the possibility that Jimmy Horace’s answer may have been an example of gratuitous agreement or acceptance, as explained in the statement of cultural and customary concerns. In re-examination he said: “[t]hey ask us if they Yindjibarndi and we ask [scil: told] them yes, they are Yindjibarndi. That’s why we support them”.
12. Having considered the whole of Jimmy Horace’s evidence in its context, I am satisfied that the answer he gave in cross-examination was the truth (i.e. the reason that the Todds had been accepted as members of WMYAC was to provide its supporters with more votes in YAC). He alone spoke to Dorrie Wally, whose source of any knowledge, according to Jimmy Horace, was that the Boonas used to stop at Mardi Station where she lived. There was no evidence as to who Dorrie Wally was or of her capacity to provide any relevant information for the purpose of this proceeding. As counsel for the Todd respondents said in final address, Dorrie Wally was not Yindjibarndi. Jimmy Horace said that he spoke to Dorrie Wally in around 2013, after the Todd respondents had been admitted as members of WMYAC, and he did so to “find out properly” whether they were Yindjibarndi. I am not satisfied that Jimmy Horace or Dorrie Wally had any personal knowledge relevant to whether the Todd respondents were Yindjibarndi.
13. John Sandy (born in 1965) made a witness statement that I admitted, under s 63 of the *Evidence Act*, when in Roebourne on the basis that he was medically unable to attend to give evidence and it appeared that he was not required for cross-examination. He said that he remembered the Todd respondents, their siblings and parents, who were in Roebourne while he grew up, but that he did not speak to them. He asserted that even when he was “a kid I remember that family said they were Yindjibarndi”. Since he did not speak to them and gave no source for that assertion, I am not persuaded that the Todd family made such a statement. John Sandy also said that the:

Todds are now part of [WMYAC]. We accept them because the old people remember them and accept them as Yindjibarndi”.

1. Because I have not accepted the assertions by the “old people” called by the Todd respondents that the Todd respondents and their family were accepted as Yindjibarndi before the dispute that resulted in the formation of WMYAC, and John Sandy did not identify any old person or reason which any such person gave, I place no weight on his evidence.

## The elders committee

1. In 2010 or 2011 YAC cancelled the ongoing membership of about 27 persons. This led Eileen Sandy and Sylvia Allan to commence proceedings in 2011 in the Supreme Court of Western Australia against YAC and Stanley Warrie during the course of which four mediations occurred. The parties negotiated an agreement dated 31 July 2014 for the processing of applications for membership of YAC. The parties agreed to establish a subcommittee comprising **four elders**,Sylvia Allan and Diana Smith, as nominees of the persons associated with WMYAC, and Pansy Sambo (who was also a director of YAC) and Joyce Herbert, as nominees of the majority voting block in YAC. Each of those four women was a Yindjibarndi elder (**the elders committee**).
2. The agreement provided that the four elders would meet with **Robin Stevens**, who was an independent anthropologist engaged by the parties for the mediation, and the mediator, who was Justice Chaney of the Supreme Court, in Roebourne on 4 and 5 August 2014 to go through and complete the process of deciding which persons on an attached list of 128 names (**the 2014 list**) would be admitted to YAC. The 2014 list contained the names of persons whose applications for membership of YAC were outstanding as at 28 July 2014 and included the names of the Todd respondents and many of their relatives.
3. Importantly, the elders committee had met on earlier occasions and considered larger numbers of applications. I will deal with what happened at those meetings below. Joyce Hubert had suffered a recent death of her son and did not give evidence at the trial, but no party suggested that any adverse inference should be drawn because of her not giving evidence.
4. On 30 October 2013, an important meeting of the elders committee occurred. On that occasion Pansy Sambo and Joyce Hubert, on one copy, and Sylvia Allan and Diana Smith, on another copy, marked their views about the 198 names contained on the list that they had before them on that occasion (**the October 2013 list**). Critically, Sylvia Allan and Diana Smith marked the October 2013 list with a question mark against the names of Lindsay Todd, Margaret Todd and Phyllis Harris, together with 11 of their relatives, including Jamie Todd. Pansy Sambo and Joyce Hubert marked “no” against each of those names.
5. Each of Sylvia Allan and Diana Smith sought to explain why she had used the question marks for those 14 people on their separate copy of the October 2013 list. Sylvia Allan gave radically inconsistent evidence to her use of those question marks. She said that she had pre-existing knowledge that Fred Hicks, Lila Hicks and Charlotte Lockyer were all Yindjibarndi, “The Todds have always said they are Yindjibarndi. Lila talked Yindjibarndi”, and that “I have always though that” each of the three Todd respondents is Yindjibarndi.
6. Pansy Sambo said that during the meeting on 30 October 2013 as they were going through the October 2013 list, both Diana Smith and Sylvia Allan kept saying, “Oh I don’t know. I don’t know”, about the Todd family persons whose names they marked with a question mark.
7. Sylvia Allan explained that she (and Diana Smith) had written ‘N’ on the list against the names of her daughter, Lorraine Allan, and three of Lorraine’s children, her granddaughters, because they all followed Kariyarra. She could not explain in her evidence why she and Diana Smith used the question marks and suggested that Diana Smith might know. Diana Smith said in her evidence in chief that she and Sylvia Allan had put the question marks on the October 2013 list “until we got more details from the family side for Lindsay [Todd] and Margie [Todd] … [s]o, we went back to ask the families belong them, their relations … and **ask them more question[s] whether they are – the Todds are Yindjibarndis** … **so we get the right answer from them**”. Yet, about six weeks later, each of Sylvia Allan and Diana Smith signed the WMYAC letter of 17 December 2013.
8. In her evidence in chief, Diana Smith asserted that she knew Charlotte Lockyer, and had met her in Roebourne, despite the fact that Charlotte had died in 1947 two years before Diana Smith was born in 1949. Diana Smith was a sister of Berry Malcolm and the late Cherry Cheedy, who was the mother of Lyn Cheedy and Pansy Sambo. Diana Smith said that her mother, Topsy Malcolm, had told her that Nibbin and Charlotte came from the Tableland. I do not accept that evidence. Had Diana Smith been given that information by her mother, she would not have entered question marks on the October 2013 list in respect of the Todd respondents and their family. She knew that Arnold Lockyer, the husband of her niece, Lyn Cheedy, was descended from Nibbin and that he was Ngarluma. Diana Smith said that Nellie Connors, a first cousin of the Todd respondents, had followed her father and that they were Ngarluma (and that Nellie’s mother and Lila Hicks were sisters).
9. By 10 January 2014, when the elders committee met, Sylvia Allan and Diana Smith had changed their responses to the Todd respondents and their 11 relatives from the question marks that they had placed on the October 2013 list, to marking “N?” to signify “No agreement” between the members of the committee.
10. Next, on 27 February 2014, the solicitors for WMYAC, Integra Legal, wrote to the solicitors for the YAC to clarify the position of Sylvia Allan and Diana Smith at a meeting of the elders committee the previous day. Integra Legal are the solicitors who also act for the Todd respondents in this proceeding and whose fees for doing so are met by WMYAC. The letter attached lists setting out the “final views” of Sylvia Allan and Diana Smith on 239 applications and noted that Pansy Sambo and Joyce Hubert had worked from a different list, of 312 names, on the previous day. It sought a copy of that longer list. The lists attached to the letter signified the view of Sylvia Allan and Diana Smith that the nominations for membership of YAC of the Todd respondents and their family members: “should be accepted for membership and are Yindjibarndi”.
11. On 4 August 2014, the elders committee attended the mediation with Justice Chaney and Robin Stevens where all of them went through the 2014 list, being a list of 128 names on which Robin Stevens wrote “yes”, “no” or “undecided” to record the position ultimately reached, that his Honour then verified as a correct record. The applications of the Todd respondents and their family members were undecided at the end of the mediation except that one, Serena Todd, was rejected. That was because, Sylvia Allan said, she was following Kariyarra or Banjima.
12. I accept Pansy Sambo’s evidence that the reason she voted to reject the applications of the Todd respondents and their family members was because of:

my understanding from my learning from my old people was there was no clear say as to which nyirgan [place of birth] on country that they belong to which is in the Yindjibarndi country … [t]he ‘no’ was based on that because there was no clear indication as to whether their apical ancestor was Yindjibarndi or Ngarluma or Kariyarra.

1. I am comfortably satisfied that on 30 October 2013, when Diana Smith and Sylvia Allan first considered the applications of the Todd respondents and placed a question mark against their names and those of their family members in the October 2013 list, each of those two elders did not know a basis for considering whether the Todd respondents or their family members were or were not Yindjibarndi. In other words, neither elder had any personal knowledge that the Todd respondents and their apical ancestors had any basis for their claim to be Yindjibarndi. The use of question marks represented the state of each of their minds at that time, namely that they did not have any knowledge about the ancestry of the 14 Todd family members that justified them being admitted, as Yindjibarndi, to membership of YAC. I prefer the evidence of Pansy Sambo where it conflicts with that of Diana Smith and Sylvia Allan. It follows that the statement to the contrary, in WMYAC’s letter dated 17 December 2013 that bears the signatures of Sylvia Allan and Diana Smith, did not reflect any knowledge or belief that either of them had before 30 October 2013 that any of Charlotte Lockyer, George Lockyer, Billy Barlow and Lila Hicks and their children was Yindjibarndi.
2. Importantly at the time when this proceeding began in 2003, before the emergence of the political division in the Yindjibarndi that I have described, none of the elders, including those who gave evidence before me or others responsible for formulating the applicant’s claim, suggested that descendants of either Winningbung or Nibbin were Yindjibarndi. Moreover, in the proceedings before Nicholson J, some of those descendants (including the Todd respondents) propounded or were included in the separate WGTO claim.

## Do the Yindjibarndi recognise the Todd respondents as Yindjibarndi?

1. I prefer the evidence of the applicant’s witnesses to those called by the Todd respondents on the issue of whether the Todd respondents and their direct ancestors were, or were recognised as, Yindjibarndi. The witnesses called by the Todd respondents had no reliable basis for their assertions, and did not have any knowledge that Billy Barlow (aka Herbert Todd), Lila Hicks, the Todd respondents or their direct ancestors were, or were recognised as, Yindjibarndi. Each of those witnesses made those assertions in order to support the admission of the Todd respondents as voting members of the overall claim group, who, the witnesses expected, would be likely to support voting for entry into an agreement with FMG and not because of any genuine knowledge or belief, of each witness, in the truth of the assertions.
2. In my opinion, the Todd respondents were no doubt encouraged by the support that WMYAC and the elders associated with it, such as Sylvia Allan, Diana Smith, Jimmy Horace and Bruce Monadee, gave to them asserting that they were Yindjibarndi. The Todd respondents, through no fault of their own, had little, if any, knowledge of the language or country group or groups of which they may be members. After years of ignorance of knowledge of their ancestry and the lack of any language or country group which accepted them, or with which they identified, it is understandable that they would pursue their claim to be Yindjibarndi in this proceeding, paid for and supported as it was by WMYAC.
3. The true position among the Yindjibarndi people was manifested, as Sylvia Allan said, in the authorisation meetings in the late 1990s and early 2000s, that occurred years before the internal conflict over the proposed agreement with FMG, namely that “the old Yindjibarndi people, all of the tribe, they said they’re not Yindjibarndi”.

## Conclusion

1. I have made my findings on all factual aspects of the Todd respondents’ claim to be Yindjibarndi by considering the totality of the evidence, before arriving at the individual findings that I have made above in respect of the anthropological evidence, the evidence of each of the Todd respondents themselves and the evidence of members of the claim group.
2. The evidence of the traditional laws acknowledged and traditional customs observed by the Yindjibarndi people established that, *first*, mere birth on Yindjibarndi country cannot make a person, neither of whose parents is Yindjibarndi, a Yindjibarndi and, *secondly*, a child of parents one of whom is, and the other is not, Yindjibarndi, can elect, once for all, to follow the language or country group of the Yindjibarndi parent or the other parent. The Yindjibarndi had, and have, no law or custom of “naturalisation” for persons of two non-Yindjibarndi parents. Therefore, the only way that a person in the position of the Todd respondents and their family can be identified by others as Yindjibarndi is by the acknowledgment and observance of the Yindjibarndi people’s traditional laws and customs.
3. I reject the Todd respondents’ argument that the issue of whether Nibbin or Winningbung (or her son Jack Hicks) was Yindjibarndi should be resolved by determining whether either woman was “likely” to be or have had Yindjibarndi “identity”. That is not the test under s 140 of the *Evidence Act*. The issue can only be resolved by deciding if the Todd respondents have established whether, on the balance of probabilities, it is more probable, or likely, than not that she was Yindjibarndi. As I have explained, I am not satisfied, on the balance of probabilities, that the Todd respondents have an apical Yindjibarndi ancestor.
4. While Nicholson J found that the Hicks family had Yindjibarndi ancestry (*Daniel* [2003] FCA 666 at [509]), his Honour did not find that the Hicks family, currently, were Yindjibarndi. His Honour did not explain his reasoning for his finding as to their ancestry beyond what he said later at [2003] FCA 666 [1452]-[1453], which he qualified by saying (in a finding borne out in the evidence before me):

There was considerable confusion among the third applicants as to the actual structure of the genealogy.

1. That confusion is evident in the different anthropological evidence, from what was before his Honour, that I have had to consider and on which I do not feel a persuasion of mind that it is more likely than not that any of Jack Hicks or Charlotte Lockyer or their respective indigenous mothers was Yindjibarndi. The evidence is too inconclusive and confused by the large number of acknowledged Ngarluma, Mardudhunera, Kariyarra and other (non-Yindjibarndi) descendants within the Hicks family, including their use of Charlotte Lockyer in the list of apical ancestors for the Ngarluma township claim.
2. As the evidence to which I have referred above reveals, descendants of Jack Hicks, the son of Winningbung, and of, his wife, Charlotte Lockyer, the daughter of Nibbin, have no coherent understanding of, *first*, the language or country group of which either Winningbung or Nibbin was a member, and *secondly*, among the generations of various cousins, to which Aboriginal people they or their ancestors belonged. The anthropological evidence, unsurprisingly, reflects that lack of coherence.
3. In my opinion, the Todd respondents bore the onus of proving that they were Yindjibarndi. After all, they applied to be joined under s 84(5) of the *Native Title Act*, because the claim group, as a whole, and the applicant in particular, would not recognise the Todd respondents as Yindjibarndi. I am not satisfied that the Todd respondents have established on the balance of probabilities that they or their living family members are Yindjibarndi.
4. If I am wrong about who bears the onus of proof on this issue, I would have found that the Todd respondents and their living family members are not Yindjibarndi. That is because, I formed the impression that the evidence relating to Winningbung established that she came with Horace Hickes from, and by inference met him at or near, the coast, outside Yindjibarndi country at a time when there is no suggestion in the evidence that she had any Yindjibarndi connection (see [405]-[408] above). I also formed the impression that the evidence relating to Nibbin established that she appeared to be a Mardudhunera, who were also a people associated with the broad area known as “the Maitland” (see [410], [417]-[419] above), or a Ngarluma (see [420]-[421] above) although she may also have been Kariyarra (see 413]-[415] above).
5. Moreover, it is striking that none of the Yindjibarndi elders, or anyone else, in the authorisation meetings for both the proceedings before Nicholson J and me ever suggested that the Todd respondents or their family were part of the claim group. As I have found, the then (and current) position was, in Sylvia Allan’s words “all of the tribe said they’re not Yindjibarndi” (see [475] above).

# (6) THE RELIEF ISSUE

1. The parties did not address any submissions about the way in which the Yindjibarndi’s native title rights and interests, other than those relating to their right to control access, should be described. Since my finding that the Yindjibarndi have that right may affect the way in which the determination required by s 225(b), (c), (d) and (e) needs to be expressed (cf. *Ward* 213 CLR at 82-83 [51]-[52]), I will direct that the parties consult, if need be with the assistance of a native title Registrar, to prepare a draft determination. In the event that no agreement on those matters can be achieved, it will be necessary to have a further hearing.
2. The parties should be able to agree, having regard to my findings on the extinguishment and occupation issues, and their agreements, before final address, on the status of all other land and waters within the determination area (and my finding at [227]), on appropriate wording for a determination under s 225 in respect of those matters.
3. I am not persuaded that I should change the description of the persons holding the group rights comprising the native title, for the purposes of s 225(a), from that used by Nicholson J and approved by the Full Court in *Moses* 160 FCR at 235 [362] and 239 [375], namely that:

“*Yindjibarndi People*” are Aboriginal persons who recognised themselves as, and are recognised by other Yindjibarndi People as, members of the Yindjibarndi language group.

1. In light of my finding that the Todd respondents are not Yindjibarndi, I consider that it may be best to make a declaration to that effect under s 21 of the *Federal Court Act*. However, it may be that such a declaration could be included under s 225(a). I will give the parties the opportunity to consider this issue and, if need be, deal with it at a further hearing.
2. I will also order that the interlocutory applications of the State and FMG to amend their contentions be granted although I have rejected their new contentions as to issue estoppel and abuse of process.
3. The parties should also consider, before I make any final order, whether there are errors of fact or issues that I have not considered. If there are, they should file brief submissions identifying those so that I can address them in order to avoid unnecessarily complicating any appeal.

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| I certify that the preceding five hundred and twenty-one (521) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares. |

Associate:

Dated: 20 July 2017

**SCHEDULE OF PARTIES**

**WAD 6005 of 2015**

**BETWEEN:**

**STANLEY WARRIE, KEVIN GUINESS, ANGUS MACK, MICHAEL WOODLEY, JOYCE HUBERT, PANSY SAMBO, JEAN NORMAN, ESTHER PAT, JUDITH COPPIN, and MAISIE INGIE, ON BEHALF OF THE YINDJIBARNDI PEOPLE**

Applicant

**AND:**

**STATE OF WESTERN AUSTRALIA**

First Respondent

**FORTESCUE METALS GROUP LTD (ACN 002 594 872), THE PILBARA INFRASTRUCTURE PTY LTD (ACN 103 096 340) and FMG PILBARA PTY LTD (ACN 106 943 828)**

Second Respondent

**ROBE RIVER MINING CO PTY LTD, HAMERSLEY IRON PTY LTD, HAMERSLEY EXPLORATION PTY LTD and RIO TINTO EXPLORATION PTY LTD**

Third Respondent

**GEORGINA HOPE RINEHART and HANCOCK PROSPECTING PTY LTD**

Fourth Respondent

**YAMATJI MARLPA ABORIGINAL CORPORATION**

Fifth Respondent

**MARGARET TODD, LINDSAY TODD and PHYLLIS HARRIS**

Sixth Respondent