FEDERAL COURT OF AUSTRALIA

Ashwin on behalf of the Wutha People v State of Western Australia (No 4) [2019] FCA 308

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| File number: |  |
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| Judge: | **BROMBERG J** |
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| Date of judgment: | 8 March 2019 |
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| Catchwords: | **NATIVE TITLE** – application for determination of native title in relation to areas the subject of separate questions (“Trial Area”) – whether application authorised by all persons in the “native title claim group” under s 61(1) of the *Native Title Act 1993* (Cth) (“NTA”) – whether the application was authorised by a decision-making process that complied with s 251B of the NTA – whether the Court should exercise the discretion in s 84D(4) of the NTA – whether, assuming the claim was authorised, the application should succeed – discussion of legal principles and relevant inquiries under s 223(1) of the NTA – assessment of the traditional laws and customs associated with the Trial Area and specifically the traditional laws and customs which provide for the holdings and sharing of possessory rights and interests in particular land and waters by a group or sub-set of Western Desert persons – whether pursuant to those traditional laws and customs the members of the claimant group are a single group or sub-set of Western Desert Society holding and sharing possessory rights in the Trial Area – whether, insofar as the group possessory rights and interests of the claimant group existed at sovereignty, those traditional laws and customs, and in particular the laws relating to the acquisition, transmission and exercise of rights to land and waters continue to be recognised and observed by the claimant group as a whole – whether those traditional laws and customs (insofar as they continue to be recognised and observed by the claimant group) are to be characterised as providing a connection between the clamant group and the Trial Area – held that application not authorised and not a claim made by persons who, under the traditional laws and customs, constitute a group recognised by those laws as holding group rights to the Trial Area – existence of native title as claimed not established |
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| Legislation: | *Native Title Act 1993* (Cth) ss 13(1), 61, 61(1), 84D, 84D(4), 223, 223(1), 223(1)(a), 225, 251B, 251B(a), 251B(b), 253 |
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| Cases cited: | *AD (deceased) on behalf of the Mirning People v State of Western Australia (No 2)* [2013] FCA 1000  *Akiba* *on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643  *Alyawarr*, *Kaytetye*, *Warumungu*, *Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539  *Anderson v State of Western Australia* [2003] FCA 1423  *Ashwin on behalf of the Wutha People v State of Western Australian* [2010] FCA 206  *Ashwin on behalf of the Wutha People v State of Western Australia (No 2)*[2010] FCA 1472  *Bidjara People v State of Queensland (No 2)* [2013] FCA 1229  *Bodney v Bennell* (2008) 167 FCR 84  *Booth on behalf of the Kungardutyi Punthamara People v State of Queensland* [2017] FCA 638  *Brown v State of South Australia* [2009] FCA 206  *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373  *CG v State of Western Australia* (2016) 240 FCR 466  *Collins on behalf of the Wongkumara People v Harris on behalf of the Palpamudramudra Yandrawandra People* [2016] FCA 527  *Commonwealth v Clifton* [2007] FCAFC 190  *Commonwealth v Yarmirr* (2001) 208 CLR 1  *De Rose v State of South Australia* [2002] FCA 1342  *De Rose v State of South Australia* (2003) 133 FCR 325  *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290  *Harrington-Smith v State of Western Australia (No 9)* (2007) 238 ALR 1  *Hazelbane v Northern Territory of Australia* [2014] FCA 886  *Holborow v State of Western Australia* [2002] FCA 1428  *Jango v Northern Territory of Australia* [2006] FCA 318  *Laing v State of South Australia (No 2)* [2012] FCA 980  *Lawson on behalf of the ‘Pooncarie’ Barkandji (Paakantyi) People v Minister for Land and Water (NSW)* [2002] FCA 1517  *Narrier v State of Western Australia* [2016] FCA 1519  *N.C. (deceased) v State of Western Australia (No 2)* [2013] FCA 70  *Pegler on behalf of the Widi People of the Nebo Estate No 1 v State of Queensland* [2014] FCA 932  *Reid v State of South Australia* [2007] FCA 1479  *Rita Augustine v State of Western Australia* [2013] FCA 338  *Sampi* *on behalf of the Bardi and Jawi People v State of Western Australia*(2010) 266 ALR 537  *Sampi* *v State of Western Australia* [2005] FCA 777  *Strickland v State of Western Australia* [2013] FCA 677  *Velickovic v State of Western Australia* [2012] FCA 782  *Yorta Yorta v Victoria* (2002) 214 CLR 422  *Western Australia v Ward* (2002) 213 CLR 1 |
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| Counsel for the Applicant: | Mr I Viner AO QC with Mr P Tolcon |
|  |  |
| Counsel for the State of Western Australia: | Mr D O’Gorman SC with Mr M Pudovskis |
|  |  |
| Solicitor for the State of Western Australia: | State Solicitor’s Office |
|  |  |
| Counsel for Central Desert Native Title Services Ltd: | Mr M O’Dell |
|  |  |
| Solicitor for Central Desert Native Title Services Ltd: | Central Desert Native Title Services Limited |

REASONS FOR JUDGMENT

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|  | | WAD 6064 of 1998 |
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| BETWEEN: | RAYMOND WILLIAM ASHWIN & ORS ON BEHALF OF THE WUTHA PEOPLE  Applicant | |
| AND: | STATE OF WESTERN AUSTRALIA & ORS  Respondents | |

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BROMBERG J:

1. The applicant in proceeding WAD 6064 of 1998 (the **“Wutha proceedings”**) has applied under s 61 of the *Native Title Act 1993* (Cth) (**“NTA”**) for a determination of native title in relation to an area of some 32,630 square kilometres in the Western Australian ‘Goldfields Region’. The applicant applies on behalf of persons which the application (“**the Wutha application**”) calls “the Wutha people” and makes a claim for native title on behalf of a group of persons which includes the three surviving individuals who constitute the applicant (**“Wutha claim group”**).
2. As I will further explain, the claim made is made by a group of persons who are each said to be descendants of six named apical ancestors. The claim is a group claim in which the applicant asserts that each member of the group holds, in common with other members of the group, native title rights and interests over the entire area of the claim. The group has taken the name “Wutha” for the purposes of this application. The word “wutha” means bush potato. It is not a traditional name which, outside of this proceeding, is or has been associated with the Wutha claim group or their predecessors. The name has been chosen for the purpose of this proceeding as a label for identifying the claimants and their forebears (“**the Wutha group**”).
3. On 9 March 2016 Barker J ordered that certain questions (**“Separate Questions”**) be decided separately from any other questions in the Wutha proceedings as follows:

The following questions are to be set down for hearing in respect of a separate proceeding solely on the issue of connection in respect of all areas claimed, save for the area of the overlap with the Yugunga-Nya native title determination application (WAD 6132/1998):

(a) does native title exist in relation to land and waters in the area?;

(b) if the answer to (a) above is yes:

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

(ii) what are the native title rights and interests held by the native title holders identified in (i) above?

1. These reasons for judgment concern the trial of the Separate Questions as well as a further separate question as to whether the applicant is authorised to bring the Wutha proceeding.

# BACKGROUND

## Claim Area

1. The location and boundaries of the area claimed by the Wutha claim group (**“Wutha claim area”**) are shown in the map attached to these reasons as **Annexure 1.** As I will be extensively referring to various locations or places on that map, a list of places found on Annexure 1 and their location on that map is given in **Annexure 2.**
2. As can be seen from Annexure 1, the claim area comprises 5 discrete areas identified as Areas 1 to 5. As is also apparent from Annexure 1, Area 1 has been designated as the **“Head”**, Area 2 the **“Body”** and Area 5 the **“Tail”**. Those designations reflect the idea that, with some imagination, the Wutha claim area broadly reflects the shape of a dog. I will hereafter refer to Area 1 as the “Head”, Area 2 as the “Body” and Area 5 as the “Tail”.
3. Areas 3 and 4 may be referred to separately however unless expressly stated to the contrary, a reference to the Body is intended to also include a reference to Areas 3 and 4.
4. The area of the Head is the subject of an overlapping claim with the Yugunga-Nya native title determination application (WAD 6132 of 1998). In accordance with the orders of Barker J made on 9 March 2016, the trial of the Separate Questions did not address the existence of native title in relation to the land and waters in the area of the Head. The area the subject of the Separate Questions will be referred to as the **“Trial Area”** and comprises only the Body and the Tail. The Trial Area is hatched in blue on **Annexure 1**.
5. In its original form, the Wutha application made a claim for a single and continuous area of land and waters far greater in size than the present claim area. Various parts of the area formerly claimed overlapped with claims made in other native title proceedings concerning the Goldfields Region of Western Australia. That overlap was the subject of a determination in *Harrington-Smith v State of Western Australia (No.9)* (2007) 238 ALR 1 (*“****Wongatha****”*). A map of the area claimed in *Wongatha* is shown in **Annexure 4**. By orders made in *Wongatha,* the Wutha claim was dismissed in so far as the area claimed was the subject of an overlap with other claims dealt with by that judgment. It is for that reason that what remains of the Wutha claim area are the five disjointed areas shown on **Annexure 1**.
6. Whilst by this judgment, the Court can only determine whether native title exists in the Trial Area, the determination of that question necessarily involves a consideration of places (and circumstances associated with those places) located outside of the Trial Area. In particular many of those places of significance are located to the south of the Tail and to the east of the Body and include Darlot and Weebo and the area down to Leonora, where many of the witnesses called now reside.
7. The Body is an area comprising approximately 16,920 square kilometres. The Body includes the area around the town of Sandstone on its northern boundary, and the area around Lake Barlee at its southern boundary, where the applicant contended that significant ceremonial sites exist including the Panhandle Law Grounds and the Panhandle Corroboree Law Ground. Lawlers and Agnew sit in the north-eastern corner of the Body where further significant sites including the Agnew Men’s Initiation Site, Papa Kanu (Ironstone Knoll) and Papa Quartz Hill were the subject of evidence.
8. The Body is immediately south of the area the subject of the native title determination in *Narrier v State of Western Australia* [2016] FCA 1519 (Mortimer J) (***“Tjiwarl”***). The location and boundaries of the *Tjiwarl* native title claim, and other native title claims in close proximity to the area of the Wutha claim, are shown in the map in **Annexure 3**.
9. The Tail is an area comprising approximately 7,750 square kilometres. Locations of significance to the issues I need to consider include Lake Darlot, Darlot (also known as Woodarra Township), Mulga Queen, Wingara Soak and Runggul Soak, all of which are located at the southern end of the Tail. Wongawol is to the north of the Tail, and Lake Carnegie is to the north-west. Those places are also of significance.

## The course of the trial

1. The trial took place in three phases: an on-country hearing between 13 and 22 March 2017 where lay evidence was taken, a hearing in Perth between 29 May and 1 June 2017 where the lay evidence was completed and where expert anthropologists gave evidence, and final submissions in Perth on 19 to 20 September 2017.
2. The on-country hearing was held over eight days at Leonora and a number of locations throughout the Trial Area. The Court convened at the Leonora Recreation Centre exclusively on the first and fifth to eighth days. The on-country portion of the trial included site views in a number of remote locations in the Trial Area, as well as male and female gender-restricted evidence sessions. The Court was welcomed to country by members of the Wutha claim group, Geoffrey Ashwin and Gay Harris.
3. The site views included the following locations in the southern area of the Tail: Lake Darlot Causeway, Wingara Soak and Runggul Soak. Each of these sites is marked in the map in **Annexure 1** to these reasons.
4. The Lake Darlot Causeway is said to be a traditional crossing point through Lake Darlot. This place is associated with the Kuna Bulla *tjukurrpa* which passes the edge of Lake Darlot at Mount Von Muller. *Tjukurrpa* or *thukur* are Aboriginal words which translate as dreaming stories or dreamtime stories. This area is also associated with the Goombawan *tjukurrpa.* Geoffrey Ashwin, Gay Harris, Lorraine Barnard and June Harrington-Smith (nee Ashwin) (**“June Ashwin”**), Luxie Hogarth and Geraldine Hogarth gave some of their evidence at Lake Darlot Causeway.
5. Located at the southern end of the Tail, Wingara Soak is on dry open ground with a soak of about half an acre featuring some green pasture and water holes. It is suggested to be close to a camp site where ancestors of the Wutha group lived. Evidence was given that the camp site features soft ground, fire places and stones for grinding. It was also suggested that this was a good place for bush food (including *wantirri* (seeds), *kampurarra* (wild tomato), berries and grub) and bush medicine (including sandalwood). Wingara Soak is said to be the birth place of Telpha Ashwin, an ancestor of substantial significance to the Wutha claim. Wingara Soak is associated with the Goomboowan *tjukurrpa* and some of the evidence given at this site was female gender-restricted evidence. June Ashwin, Gay Harris and Geraldine Hogarth gave some of their evidence at Wingara Soak.
6. Runggul Soak is approximately 10 kilometres to the east of Wingara Soak. The site is open ground surrounded by a range of small hills. There is a soak with water holes and some large distinctive granite boulders. The site is suggested to be close to a camp utilised by ancestors of the Wutha claimants including those of the Hogarth family. Luxie Hogarth gave evidence that Runggul Soak was in her mother’s (Daisy Cordella) country and that at various times her grandmother (Mary) and apical ancestor Billy had their main camp here, and together with extended family roamed near here because of the soak. Geraldine Hogarth and Luxie Hogarth gave some of their evidence at Runggul Soak.
7. The Court also conducted site views and heard male gender-restricted evidence at various locations in the Body. In the southern area of the Body, near the north-eastern end of Lake Barlee, the Court heard evidence at the various Panhandle sites. Each of these sites is marked in the map in **Annexure 1** to these reasons. Geoffrey Ashwin, Gary Ashwin and Ron Harrington-Smith gave some of their evidence at the Panhandle sites.
8. In the northern area of the Body, near the area of Agnew and Lawlers, the Court heard evidence at the Agnew Men’s Initiation Site, Papa Kanu (Ironstone Knoll) and Papa Quartz Hill. Each of these sites is marked in the map in **Annexure 1** to these reasons. Geoffrey Ashwin, Gary Ashwin and Ron Harrington-Smith gave some of their evidence at these sites.

## Lay witnesses and apical ancestors

1. Beginning with the three siblings who constitute the applicant and John Ashwin (the **“Ashwin siblings”**), the Wutha claim group includes the following persons who each gave evidence in support of the application: Geoffrey Ashwin, Ralph Ashwin, June Ashwin, John Ashwin, Bradley Ashwin, Calvin Ashwin, Gary Ashwin, Sheldon Harrington-Smith, Joshua Harrington-Smith, Gay Harris, Lorraine Barnard, Luxie Hogarth, and Geraldine Hogarth.
2. Those witnesses are members of one or more of the four ancestral families of the apical ancestors by whom the Wutha claim group is defined. Those ancestral families are: Darugadi, Murni and Matjika (**“Darugadi ancestral family”**), whose decedents include families of the Ashwin siblings through Telpha Ashwin and the non-Aboriginal pastoralist Arthur Ashwin, and the Harris family through Jumbo Harris (Telpha’s brother); Billy (**“Billy ancestral family”**), whose decedents include the Hogarth family; Inyarndi (**“Inyarndi ancestral family”**), whose decedents include the Barnard family; and Julia Sandstone (**“Julia Sandstone ancestral family”**), whose decedents also include the families of the Ashwin siblings because Julia Sandstone’s daughter Sarah Brown married William Ashwin.
3. In this section I further identify each claimant witness, the witness’ connection to one or other of the ancestral families and give a brief outline of the witness’ evidence.

### Geoffrey Ashwin

1. Geoffrey Ashwin is one of the persons who constitute the applicant. He has a connection to both the Darugadi and the Julia Sandstone ancestral families. He is one of the children of Sarah Brown and William Ashwin. William Ashwin’s parents were the non-Aboriginal owner of Dada station Arthur Ashwin and the Aboriginal woman Telpha Ashwin who was part of the Darugadi ancestral family. Sarah Brown was the daughter of Julia Sandstone and an unknown non-Aboriginal.
2. Geoffrey was 76 years old at the time of giving evidence. He is the eldest living descendent of Telpha Ashwin after his older brother, Raymond Ashwin, who is now deceased. He is not an initiated man.
3. Geoffrey has played, at least on the face of the documentations filed with the court, a leading part in the pursuit of the claim. He is the deponent of a number of affidavits filed by the applicant including to support amendments made to the Wutha application.
4. Geoffrey provided a witness statement. A video recording of an interview of Geoffrey was also tendered. He gave oral evidence on site at Lake Darlot Causeway and gender-restricted evidence at the Panhandle sites. He gave evidence and was cross-examined at Leonora.
5. Geoffrey was, not surprisingly, uncomfortable in giving evidence. Although I hold reservations about the reliability of some of the evidence given, I do not doubt his honesty. He gave evidence on matters including his:
6. understanding of *tjukurrpa* and other traditional laws and customs, such as his knowledge of the Kuna Bulla dreaming story, the pathways whereby under traditional laws and customs persons can gain rights and interests in land, traditional decision-making processes and authority to speak for country;
7. family history, including about his grandmother Telpha Ashwin, his mother Sarah Brown, and what he understood about their country; and
8. connection to country through hunting and cooking in the bush with his predecessors.

### Ralph Ashwin

1. Ralph Ashwin is the younger brother of Geoffrey Ashwin. He is also one of the persons who constitute the applicant. He has the same ancestry as Geoffrey and is a descendent of both the Darugadi and the Julia Sandstone ancestral families.
2. Ralph Ashwin gave gender-restricted evidence at the Agnew Men’s Initiation Site. He gave evidence and was cross-examined at Leonora.
3. Ralph came across as a knowledgeable, straightforward and honest witness who was doing his best to assist the Court. He gave evidence on matters including his:
4. understanding of *tjukurrpa* and other traditional laws and customs, including traditional skin systems, the pathways whereby under traditional laws and customs persons can gain rights and interests in land, traditional decision-making processes and authority to speak for country;
5. connection to country; and
6. family history, including how his father William Ashwin had described his country and about his mother Sarah Brown.
7. Ralph had previously given evidence in the *Wongatha* proceeding. He was taken to the summary of his evidence prepared by Lindgren J (at Annexure F of that judgment) and generally confirmed the accuracy of that summary.

### John Ashwin

1. John Ashwin is a sibling of Geoffrey and Ralph Ashwin and his ancestry is the same as theirs. He has a connection by descent to both the Darugadi and the Julia Sandstone ancestral families.
2. John was too ill to attend the hearing at Leonora. He made a witness statement and it was tendered. A video recording of an interview with John was also tendered. He was not cross‑examined.
3. John was 66 years old at the time of making his witness statement and gave evidence that he was not an initiated man. He grew up around Leonora but moved to Cue when he was 17 years old.
4. By his witness statement John gave evidence on matters including his:
5. understanding of *tjukurrpa* and other traditional laws and customs;
6. family history, including his knowledge of Julia Sandstone and her country and his family’s connection to country;and
7. his connection to the claim area, including being taught to hunt and live on country by his elders (including his uncle Jumbo Harris and his parents).

### Bradley Ashwin

1. Bradley Ashwin is the son of John Ashwin. He is the grandson of William Ashwin and Sarah Brown and thereby a descendant of the Darugadi and Julia Sandstone ancestral families. He was 48 years old at the time of giving evidence.
2. Bradley Ashwin made a statement. He gave evidence and was briefly cross-examined at Leonora.
3. Bradley gave evidence on matters including his:
4. understanding of *tjukurrpa* and other traditional laws and customs, including his knowledge of Western Desert language, his knowledge and engagement with various sites in the Head (not in the Trial Area) and his knowledge of the Water Snakedreaming story; and
5. connection to country through camping and hunting with his family.

### Calvin Ashwin

1. Calvin Ashwin is also a son of John Ashwin and has the same ancestry as his brother Bradley. He is a descendant of both the Darugadi and Julia Sandstone ancestral families.
2. Calvin made a statement. He gave evidence and was cross-examined at Leonora.
3. Calvin gave evidence on matters including his:
4. understanding of *tjukurrpa* and other traditional laws and customs, including his knowledge of Western Desert language, his knowledge and engagement with various sites in the Head (not in the Trial Area) and his knowledge of the Water Snake and Ancestral Snakedreaming stories; and
5. connection to country through camping and hunting with his family.

### Gary Ashwin

1. Gary Ashwin is the son of Gary James Ashwin and Cynthia Beasley. He is the grandson of Raymond Ashwin and a great-grandson of William Ashwin and Sarah Brown. He has a descent connection with the Darugadi and Julia Sandstone ancestral families.
2. Gary gave male gender-restricted evidence at the Panhandle site. He made a witness statement. He gave evidence and was cross-examined at Leonora.
3. Gary is a young man who was 31 years of age at the time of giving evidence. He is a *wati* and an initiated man. He lives in Wiluna, and was initiated there largely at his own initiative.
4. Gary gave evidence on matters including his:
5. understanding of *tjukurrpa* and other traditional laws and customs, including going through the law, the traditional pathways whereby persons can gain rights and interests in land, traditional decision-making processes and authority to speak for country; and
6. connection to country, including through his knowledge and experience of camping, hunting and bush medicine.

### June Ashwin

1. June Ashwin is the sister of Geoffrey, Ralph and John Ashwin and has the same relevant ancestry. She is also one of the persons who constitute the applicant. June has a descent connection to both the Darugadi and Julia Sandstone ancestral families. She was 69 years old at the time of giving evidence.
2. June gave evidence at the Lake Darlot causeway and at Wingara Soak. She made a witness statement. She gave evidence and was cross-examined at Leonora.
3. June gave evidence on matters including her:
4. understanding of *tjukurrpa* and other traditional laws and customs, including the traditional pathways whereby persons can gain rights and interests in land, traditional decision-making processes and authority to speak for country;
5. family history, including regarding her parents Sarah Brown and William Ashwin and her paternal grandmother Telpha Ashwin, and her understanding of their country and language; and
6. connection to country through camping and hunting with her family.

### Ron Harrington-Smith

1. Ron Harrington-Smith is the husband of June Ashwin. He is not a descendant of any of the apical ancestors upon which the applicant relies. He was 71 years old at the time of giving evidence.
2. Ron refers to himself as the “spokesman” for the claim group and represented the Wutha claim group in this proceeding prior to legal representation being formally obtained.
3. Ron gave male gender-restricted evidence at the Panhandle sites. He gave a witness statement. He gave evidence and was cross-examined at Leonora.
4. Ron gave evidence that he had been told the history of the “Wutha families” and their traditional association with the country for which they are seeking a native title determination by Sarah Brown, Lenny Ashwin, Raymond Ashwin, and Danny Harris, each of whom are now deceased.
5. Ron had previously given evidence in the *Wongatha* proceeding. He was taken to and generally confirmed the accuracy of the summary of his evidence in that proceeding.
6. I hold some concerns about the reliability of the evidence given by Ron who, at times, gave his evidence in the guise of an advocate rather than a witness. In particular, the evidence he gave about his understanding of Sarah Brown’s claimed association with the Panhandle sites was evasive and non-responsive to the questions asked of him.

### Sheldon Harrington-Smith

1. Sheldon Harrington-Smith is the son of June and Ron Harrington-Smith. Through his mother, June, and his grandparents, William Ashwin and Sarah Brown, he has a descent connection to the Darugadi and Julia Sandstone ancestral families. He was 31 years old at the time of giving evidence.
2. Sheldon made a witness statement. He gave evidence and was cross-examined at Leonora. A video recording of an interview with Sheldon was also tendered.
3. Sheldon lives in Perth where he has lived for 10 years having prior to that lived and grown up in Kalgoorlie where he was born. He is not an initiated man.
4. Sheldon gave evidence of his connection to country and his understanding of *tjukurrpa* and other traditional laws and customs. His evidence was that he had been taught by his parents and elders the importance of hunting and cooking and eating food in the “right” traditional way and the importance of looking after the country you travel over and respecting traditional places and dreaming stories.

### Joshua Harrington-Smith

1. Joshua Harrington-Smith is also the son of June and Ron Harrington-Smith, and has the same ancestry as his brother Sheldon. He has descent connection to both the Darugadi and the Julia Sandstone ancestral families. He was 29 years old at the time of giving evidence.
2. Joshua made a witness statement and was cross-examined at Leonora. A video recording of an interview with Joshua Harrington-smith was also tendered.
3. Joshua lives in the Rockingham areas south of Perth where he has lived for 8 years having prior to that lived and grown up in Kalgoorlie where he was born. He is not an initiated man.
4. Joshua gave evidence of his connection to country and his understanding of *tjukurrpa* and other traditional laws and customs. His evidence was that he had been taught by his parents and elders the importance of hunting and cooking and eating food in the “right” traditional way and the importance of looking after the country you travel over and respecting traditional places and dreaming stories.

### Gay Harris

1. Gay Harris is the daughter of Jumbo Harris and Elyon Bella Harris. She has seven siblings. Her father, Jumbo Harris, was the brother of Telpha Ashwin and the son of Darugadi. Through Jumbo, Gay Harris is a descendent of the Darugadi ancestral family. She was 70 years old at the time of giving evidence.
2. Gay gave evidence at Lake Darlot causeway and Wingara Soak, including female gender-restricted evidence. Gay made a witness statement. She gave evidence and was extensively cross‑examined at Leonora. A video recording of an interview with Gay Harris was tendered. The summary of Gay’s evidence given in *Wongatha* prepared by Lindgren J (at Annexure F of that judgment) was also tendered.
3. Gay was an impressive witness. She was evidently intent on providing the Court with her honest account of events. Gay had an understanding of who her people were and the land that she considered they were entitled to exercise native title rights over. Her evidence demonstrated good knowledge of the families involved in the Wutha application and their connection with other families, with apical ancestors and with the places at which they lived or were otherwise associated with.
4. Gay gave evidence on matters including her:
5. understanding of *tjukurrpa* and other traditional laws and customs, including about *thukur* ordreaming stories and significant places on country associated with them, the traditional pathways whereby persons can gain rights and interests in land, traditional decision-making processes and authority to speak for country; and
6. family history and the apical ancestors, including their connection with other families in the Wutha claim group and their traditional connection with country.

### Lorraine Barnard

1. Lorraine Barnard is the daughter of Trixie Wheelbarrow and Alec Barnard. Her grandfather was Jimmy Wheelbarrow and through him her apical ancestor is her great-great grandmother Inyarndi. She has a descent connection with the Inyarndi ancestral family.
2. Lorraine gave some evidence at Lake Darlot causeway. She provided a witness statement. She gave evidence and was cross-examined at Leonora. A video recording of an interview with Lorraine was also tendered.
3. Lorraine has lived most of her life around Cue which she described as her country. She moved to Leonora about 12 years ago. She was around 69 years old at the time of giving evidence.
4. Lorraine was quite knowledgeable about her genealogy and the history of her own family. She gave evidence including about her:
5. understanding of *tjukurrpa* and traditional laws and customs, including dreaming stories;
6. personal and family history; and
7. connection to country through living on country and learning bush skills and bush medicine.

### Luxie Hogarth

1. Luxie Hogarth is the daughter of Daisy Cordella and the granddaughter of apical ancestor Billy. She has a descent connection to the Billy ancestral family.
2. Luxie gave evidence at Lake Darlot Causeway and at Runggul Soak, including female gender-restricted evidence. She made a witness statement. She gave evidence and was cross-examined in Leonora. A video recording of an interview with Luxie Hogarth was also tendered. Luxie previously gave evidence in the *Wongatha* proceeding. The witness statement that Luxie gave in that proceeding, together with the summary of her evidence prepared by Lindgren J (at Annexure F of that judgment) were tendered.
3. Luxie was 76 years old at the time of giving evidence and is an elder. At various times she found it difficult to communicate and needed the assistance of her daughter Geraldine Hogarth, and because of this, in a practical sense, much of their evidence was given together.
4. Luxie gave evidence on matters including her:
5. understanding of *tjukurrpa* and other traditional laws and customs;
6. personal and family history, including her family’s connection with other families in the Wutha claim group and her family’s traditional connection with country; and
7. her connection to country, including by living on and looking after her country.

### Geraldine Hogarth

1. Geraldine is the daughter of Luxie Hogarth, great-granddaughter of apical ancestor Billy and a descendant of the Billy ancestral family. She was 57 years old at the time of giving evidence.
2. Geraldine gave evidence at Lake Darlot Causeway, Wingara Soak and Runggul Soak, including female gender-restricted evidence. She made a witness statement and was extensively cross‑examined at Leonora. A video recording of an interview with Geraldine Hogarth was also tendered. Geraldine previously gave evidence in the *Wongatha* proceeding. The witness statement that Geraldine gave in that proceeding, together with the summary of her evidence prepared by Lindgren J (at Annexure F of that judgment) were tendered.
3. Geraldine is an impressive woman who is obviously deeply committed to her people. She gave evidence including about her:
4. understanding of *tjukurrpa* and other traditional laws and customs, including various dreaming stories and significant places on country associated with them, and traditional skin groups, burial practices and languages;
5. personal and family history, including her family’s connection with other families in the Wutha claim group and her family’s traditional connection with country; and
6. connection to country, including by looking after her country, camping and hunting.

## Expert Evidence

1. The applicant and the participating respondents - the State of Western Australia (**“the State”**) and the Central Desert Native Title Services Ltd (**“Central Desert”**) - called expert anthropologists who prepared reports, participated in a joint experts’ conference and gave oral evidence. Those experts were:
2. Associate Professor Neale Draper (**“Dr Draper”**), called by the applicant;
3. Dr Ron Brunton (**“Dr Brunton”**), called by the State; and
4. Dr Heather Lynes (**“Dr Lynes”**), called by Central Desert.
5. Dr Draper prepared three reports which were tendered in the proceeding:
6. *Anthropology Connection Report*, revised October 2016, comprising volume 1 (the main body of the report), volume 2 (genealogies) and a restricted section (chapter 15 of volume 1) (**“Dr Draper's first report”**);
7. *Supplementary Expert Anthropology Report for the Applicant*,dated 13 January 2017 (**“Dr Draper's second report”**); and
8. *Second Supplementary Report for the Applicant*, dated 5 May 2017 (**“Dr Draper's third report”**).
9. Dr Draper is a qualified anthropologist and archaeologist, holding a PhD in anthropology from the University of Queensland. He has over 30 years of experience in research, tertiary teaching and professional practice in anthropology and archaeology, mostly related to Australian Aboriginal culture. He is an Associate Professor (Academic Level D) in the School of Humanities (Department of Archaeology), Faculty of Education, Humanities and Law at the Flinders University of South Australia. He has previous experience in the research and preparation of anthropology connection reports for native title cases in Western Australia and South Australia, including as a consultant anthropologist to the Goldfields Land and Sea Council.
10. The issues that Dr Draper addressed in his first report included, amongst other matters, his opinion on whether the Wutha claim area falls inside the area of land that is known by anthropologists as the Western Desert, whether there are acknowledged traditional laws and customs under which rights and interests in the Wutha claim area are possessed, the identity of the people and or groups of people who held rights and interests in the Wutha claim area at sovereignty (as I later explain sovereignty refers to the year 1829), whether the pre-sovereignty community maintained its identity and has continued to acknowledge and observe traditional laws and customs without significant interruption from sovereignty to present, and whether any persons have rights and interests in the Wutha claim area.
11. Dr Draper’s first report addressed those issues in respect of the area of the Head, the Body and the Tail. Dr Draper’s subsequent reports were confined to addressing the Body and the Tail (the Trial Area).
12. Dr Draper’s second report addressed Dr Draper’s response to the expert reports filed by Dr Brunton and Dr Lynes. His third report addressed the evidence given during the trial by the lay witnesses and additional evidence in reply to the expert reports of Dr Brunton and Dr Lynes.
13. Dr Brunton has been involved in the discipline of anthropology for fifty years. Dr Brunton obtained his PhD in anthropology from La Trobe University and has lectured at Macquarie University, La Trobe University and the University of Papua New Guinea. Over the last 25 years, Dr Brunton has focused on a number of issues related to Australian Aboriginal people including native title, cultural heritage, social welfare and reconciliation. Dr Brunton has been retained by the State to provide anthropological reports for a number of native title claims in Western Australia and has also provided anthropological reports for respondent parties to native title claims in South Australian and Queensland.
14. Dr Brunton prepared two reports which were tendered in the proceeding:
15. *First Respondent's Anthropological Report*, dated 4 November 2016, which included a statement of Errata (**“Dr Brunton's first report”**); and
16. *First Respondent's Supplementary Anthropological Report* dated 5 May 2017 (**“Dr Brunton's second report”**). The State filed versions of this report with and without references to gender-restricted evidence.
17. Dr Brunton’s reports address the area of the Trial Area. Dr Brunton’s first report responds to a number of questions posed by the State on the nature and content of the traditional laws and customs in respect of the Trial Area and the nature and extent of the rights and interests to which they gave rise, the identity of the people and or groups of people who held rights and interests in the Trial area at sovereignty, whether the pre-sovereignty community maintained its identity and has continued to acknowledge and observe traditional laws and customs without significant interruption from sovereignty to present and whether any persons have rights and interests in the Wutha claim area. Dr Brunton’s first report also provided detailed comments on Dr Draper’s first report.
18. Dr Brunton’s second report addressed the evidence given during the trial by the lay witnesses and additional evidence in reply to the expert reports of Dr Draper and Dr Lynes.
19. Dr Lynes obtained her PhD in Social Anthropology from the University of Edinburgh. From January 2011 until January 2016, she was employed by Central Desert to undertake anthropological research for native title claims in the desert region of Western Australia. During that time and since, Dr Lynes has been retained to do research and provide anthropological repots for a number of native title claims in Western Australia, including for the Kimberley Land Council.
20. Dr Lynes prepared two reports which were tendered:
21. *Anthropological Report of Dr Heather Lynes*, dated 25 November 2016 (**“Dr Lynes' first report”**); and
22. *Supplementary Anthropological Report of Dr Heather Lynes*, dated 5 May 2017 (**“Dr Lynes' second report”**).
23. Dr Lynes’ first report deals only with the “research area”, being that part of the Tail in respect of which Central Desert performs its functions as a native title representative body under the NTA. Dr Lynes’ second report extends to the whole of the area of the Tail.
24. In her first report, Dr Lynes responds to a number of questions posed by Central Desert on the area of land that is known by anthropologists as the Western Desert, the extent to which the “research area” formed and continues to form part of the Western Desert, the extent to which the research area formed part of the Wutha society at sovereignty and continues to form part of Wutha society, and the extent to which the Wutha claim group hold rights and interests in the research area under Western Desert traditional laws and customs. Dr Lynes’ first report also provided detailed comments on Dr Draper’s first report.
25. Dr Lynes’ second report addressed the evidence given during the trial by the lay witnesses and additional evidence in reply to expert reports of Dr Draper and Dr Brunton.
26. In accordance with Court orders, all three of the experts participated in a conference of experts on 5 and 6 April 2017 in Perth. The experts responded to 19 propositions which had been agreed by the parties prior to the conference. The results of the conference are contained in the Report of Conference of Experts held on 5 and 6 April 2017 in Perth, dated 6 April 2017 (**“Experts’ Report”**).
27. The three experts also participated in a concurrent evidence session on 29 and 30 May 2017, followed by individual evidence and cross-examination on 31 May and 1 June 2017 in Perth.
28. Each of the experts relied on ethno-historical materials prepared by anthropologists who conducted research regarding the Aboriginal people in the general area of the Trial Area in the early to mid-20th Century. Key anthropologists whose work has been referred to and relied upon to some extent by each of the experts include Daisy Bates (**“Bates”**), Norman Tindale (**“Tindale”**), Ronald Berndt (**“Berndt”**), Fred Myers (**“Myers”**), John Stanton (**“Stanton”**) and William Stanner (**“Stanner”**). A brief introduction to these anthropologists is set out below.
29. Bates was an amateur anthropologist who visited the general vicinity of the Trial Area in around the period 1908 to 1911. While she was not a trained anthropologist, she produced a substantial corpus of material regarding Aboriginal people in various regions of Western Australia. Bates is heavily relied upon by Dr Brunton.
30. The works of Bates cited by the experts include:
31. Bates, Daisy, 1911, ‘My camp in the Murchison Bush’, *Western Mail*, June 13: 44;
32. Bates, Daisy, 1985, *The Native Tribes of Western Australia*, edited by Isobel White, Canberra: National Library of Australia; and
33. Bates, Daisy, 1908, ‘Summary of Journeys, Southern’, SROWA Cons 1023 AN 24.
34. Tindale is a key anthropologist whose work has been referred to and relied upon by each of the experts. In 1939, Tindale visited the Goldfields Region of Western Australia. It is of particular relevance to this proceeding that Tindale interviewed and recorded a genealogy for Telpha Ashwin at Mount Margaret in 1939.
35. The works of Tindale referred to and relied upon by the experts include:
36. Tindale Norman, 1939, *Genealogical Data on the Aborigines of Australia Gathered During the Harvard and Adelaide Universities Anthropological Expedition 1938-9*, vol VII, Unpublished ,South Australia Museum;
37. Tindale Norman, 1939, *Harvard and Adelaide Universities Anthropological Expedition Journal*, vol 2, pp 759 to end, 1938-39, Unpublished, South Australia Museum;
38. Tindale, Norman, 1939c, Data Card 2105, Daisy Cordella; and
39. Tindale, Norman, 1939c, Data Card 2131, Maxie Warrigal.
40. In 1957 and 1959, Berndt visited the region of the Trial Area, making stops at Leonora, Laverton, Mount Margaret and Mulga Queen. By his work Berndt sought to analyse and map the western edge of the “Western Desert Cultural Bloc” which I have referred to as the Western Desert. As I explain later, Western Desert is an anthropological construct for the society of Western Desert peoples identified as having shared cultural and linguistic traditions and customs.
41. The works of Berndt relied upon by the experts include:
42. Berndt, R. M, 1959, ‘The Concept of the “Tribe” in the Western Desert of Australia’, *Oceania* 30: 81-107; and
43. Berndt, R. M, 1980, ‘Traditional Aboriginal life in Western Australia: as it was and is’, Pp 3-27 in R. M. Berndt and C. H. Berndt, (eds) *Aborigines of the West: Their Past and Present,* Perth: UWA Press.
44. Myers, Stanton and Stanner are more contemporary archaeologists who are referred to by Dr Brunton and Dr Lynes as authorities on Western Desert societies.
45. Myers is considered an authority on the operation of rights and interests in the Western Desert. The relevant works of Myers referred to in the evidence include:
46. Myers, Fred, 1982, ‘Always ask: resource use and land ownership among Pintupi Aborigines of the Australian Western Desert’, in N. M. Williams and E. S. Hunn (eds), *Resource Managers: North American and Australian Hunter-Gatherers*, Boulder: Westview Press;
47. Myers, Fred, 1986, *Pintupi Country, Pintupi Self*, Berkley: University of California Press; and
48. Myers, Fred, 2016, ‘Burning the truck and holding the country: Pintupi forms of property and identity’, *Hau: Journal of Ethnographic Theory*, 6: 553–575.
49. Amongst other matters, Stanner’s work is of importance because of his analysis of the nature of an “estate group” in the Western Desert. The works of Stanner cited in the evidence include:
50. Stanner, W. E. H. 1965a, ‘Religion, Totemism and Symbolism’, in R. M. Berndt & C. H. Berndt (eds), *Aboriginal Man in Australia: Essays in Honour of Emeritus Professor A.P. Elkin*, Sydney: Angus and Robertson; and
51. Stanner, W. E. H. 1965b, ‘Aboriginal Territorial Organization: Estate, Range, Domain and Regime’, *Oceania* 36: 1-26.
52. Finally, Stanton’s work in relation to the Western Desert is of particular relevance because his research was carried out in the vicinity of the Wutha claim area at Mount Margaret. The works of Stanton cited in the evidence include:
53. Stanton, John, 1983, ‘Old business, new owners: succession and “the Law” on the fringe of the Western Desert’, in Nicholas Peterson & Marcia Langton (eds), *Aborigines, Land and Land Rights*, Canberra, Australian Institute of Aboriginal Studies
54. Stanton, John, 1984, *Conflict, Change and Stability At Mt Margaret: An Aboriginal Community in Transition*, Unpublished PhD Thesis, Department of Anthropology, University of Western Australia; and
55. Stanton, John, 1988, ‘Mt. Margaret: Missionaries and the aftermath’, in T. Swain and D.B. Rose (eds), *Aboriginal Australians and Christian Missions,* Australian Associationfor the Study of Religions

## Use of lay and expert evidence and objections to evidence

1. In determining the ultimate issues in dispute in native title proceedings, the lay evidence of Aboriginal witnesses about their traditional laws and customs and their rights, interests and responsibility with respect to land and waters, is of the highest importance. The importance of this evidence has been affirmed on numerous occasions. I respectfully agree with the observations of the Full Court (North and Mansfield JJ) in ***Sampi*** *on behalf of the Bardi and Jawi People v State of Western Australia*(2010) 266 ALR 537 (at [57]), that “Aboriginal testimony is of the highest importance in a determination of the evidence of native title”.
2. In this observation, the Full Court were approving the remarks made by French J at first instance in *Sampi v State of Western Australia* [2005] FCA 777 (at [48]) where his Honour said:

Their testimony about their traditional laws and customs and their rights and responsibilities with respect to land and waters, deriving from them, is of the highest importance. All else is second order evidence. It is necessary therefore to review the evidence of the Aboriginal witnesses in some detail.

1. See also ***Alyawarr***, *Kaytetye*, *Warumungu*, *Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at 562 (Mansfield J) and *De Rose v State of South Australia* [2002] FCA 1342 at [351] (O’Loughlin J).
2. Accordingly, as a general proposition, evidence from Aboriginal witnesses will normally provide the most reliable account of traditional laws and customs of the relevant people: ***Jango****v Northern Territory of Australia* [2006] FCA 318at [291] (Sackville J).
3. Expert anthropological evidence is also of some importance. As Mansfield J observed in *Alyawarr* (at [89]); cited with approval in *Bidjara People v State of Queensland (No 2)* [2013] FCA 1229 at [478] (Jagot J):

Not only may anthropological evidence observe and record matters relevant to informing the court as to the social organisation of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences. And there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.

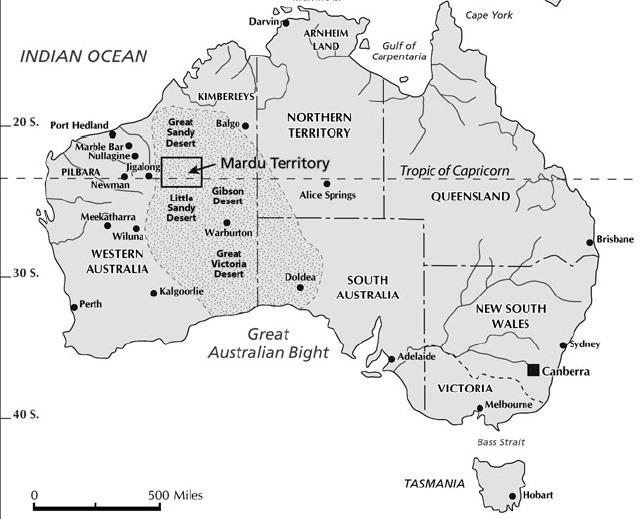
1. Anthropological evidence will not generally establish that the content of the relevant traditional laws and customs acknowledged and observed by contemporary members of a native title claim group is contrary to that which the members of that claim group themselves say it is: *Jango* at [291] (Sackville J).
2. Various evidentiary objections were raised by each of the parties in relation to the lay and/or expert evidence relied upon by other parties. Most of the objections raised were not ultimately pressed. Insofar as objections were pressed I have given consideration to them. Later in these reasons I refer to evidence that was the subject of objections. Unless expressly addressed, inherent in the use of that evidence is my ruling that the objection has not been sustained.

## Other background matters

1. There are a number of non-controversial background matters that it is of assistance to briefly outline in order to better understand the particular issues in dispute in this proceeding. In this section I address those matters.

### Western Desert

1. Each of Drs Lynes, Brunton and Draper gave evidence about the Western Desert. Despite its topographical nomenclature, the Western Desert is not a topographical region with defined boundaries locatable on a map of Australia. The Western Desert is an anthropological construct used by anthropologists to identify an area of some 650,000 square kilometres (*Tjiwarl* at [373] (Mortimer J)) in Western Australia, South Australia and the Northern Territory, in which the culture, language, customs and laws of the people in various land-holding groups within that region bear sufficient commonality and sufficient distinctiveness from their neighbours, to permit their classification as a single cultural block. Hence the alternative name “Western Desert Cultural Bloc” coined by Berndt in 1959.
2. The following map, cited in Dr Brunton’s first report, gives an indication of the approximate boundaries of the Western Desert. The map was prepared by Professor Robert Tonkinson (see Tonkinson, R. 1991, *The Mardu Aborigines: Living the Dream in Australia's Desert*, 2nd ed. Fort Worth, Texas: Holt, Rinehart and Winston; Tonkinson, R. 2011, ‘Landscape, Transformations, and Immutability in an Aboriginal Australian Culture’ in P. Meusburger, M. Heffernan, & E. Wunder (eds), *Cultural Memories: The Geographical Point of View*, Dordrecht, Netherlands: Springer).



1. The origins and development of the Western Desert as an anthropological construct, including Berndt’s analysis, were summarised and discussed by Lindgren J in *Wongatha* at [495]-[498]. His Honour there said (emphasis in original):

[495] The expression ‘Western Desert Bloc’ derives from a seminal article by Professor RM Berndt, the eminent anthropologist and foundation Professor of Anthropology at the University of Western Australia.  The article is ‘The Concept of “the Tribe” in the Western Desert of Australia’, *Oceania*, vol 30, no 2, 1959 (‘Berndt 1959’).

[496] Berndt was not, however, the first anthropologist to discuss the cultural, social and linguistic similarities of the people of the Western Desert.  Professor AP Elkin, Professor of Anthropology at the University of Sydney, had used the term ‘Western Group of South Australian tribes’ in his article ‘The Social Organisation of the South Australian Tribes’, *Oceania*, vol 2, no 1, 1931 (‘Elkin 1931’) p 60 ff.  In that article, he identified two groups of “tribes” found in the vast dry area of the Northern Territory, Queensland, South Australia and Western Australia: an eastern or ‘Lakes’ group, and a western group.  He said that the western group included ‘tribes in the south-western corner of Central Australia and in the south-east of Western Australia’.  He called that group ‘the western group of South Australian tribes’ (*ibid*pp 50, 60–61).  He said that the group was ‘characterised by a remarkable unity of language, mythology and social organisation’ (*ibid*p 60).  As noted above, Professor Berndt was later to designate the same people the [Western Desert Cultural Block].

[497] Professor Elkin stated that ‘dialects of the hordes now working towards Laverton from the desert country on the east and south-east of that town [Laverton] differ little from those heard in the Ooldea district ...’ (*ibid* pp 61-2); and see his book, *The Australian Aborigines: How to Understand Them* (2nd ed, Angus and Robertson, Sydney/London, 1943) (‘Elkin’s book’) p 64 ff.  Elkin does not seem to describe the western group as the ‘Aluridja’ in his 1931 article, but he applied that term to the entire region in his later article, ‘Kinship in South Australia’, *Oceania*, vol 10, no 2, 1939 (‘Elkin 1939’) p 204.

[498] In 1974, Professor Robert Tonkinson also commented on the [Western Desert Cultural Block], describing it in the following terms, in *The Jigalong Mob: Aboriginal Victors of the Desert Crusade* (Cummings Publishing, Menlo Park, 1974) (‘Tonkinson, *The Jigalong Mob*’) p 16:

Correlated with the physiographic and climatic commonalities of the Western Desert are **its uniformities as a cultural bloc** (…).**Its Aboriginal inhabitants speak a common language with dialectical variations and share a similar basic social organization, relationship to the natural environment, religion, mythology, and artistic expression**.  **The relatively homogeneous nature of Western Desert culture** is evident from the available literature, and recent ethnoarchaeological findings suggest that, technologically at least, cultural continuities have existed in this area from several thousand years ago to the present (…).

Any traveller who is familiar with Western Desert culture and who speaks one of its dialects will notice obvious similarities among widely separated groups of Aborigines within the cultural bloc.  I travelled extensively in the area and could make myself understood everywhere using the dialect I had learned.  I encountered many identical kinship terms in use, and although they did not always connote the same classes of relatives in different areas, they formed part of the same type of social organization.  Also many of the rituals and associated ancestral beings were substantially the same in areas hundreds of miles apart.  The regular contact between contiguous Aboriginal groups in the Western Desert that has always been a feature of the area ensures a steady flow of information and objects.  This cultural transmission reinforces the Aborigines’ awareness of their common interests and helps give the Western Desert its markedly homogenous countenance. (my emphasis)

1. There was an apparent controversy between the parties in this proceedings as to the western extent of the Western Desert and whether the Body, in its entirety or otherwise, falls within the Western Desert. A great deal of evidence was given by Drs Brunton and Draper on this issue. However, for reasons which will become apparent, I come to the conclusion that the resolution of this proceeding does not require a definitive assessment of whether the Wutha claim area (and in particular the Body) is or is not part of the Western Desert. For that reason I do not consider it necessary that I engage in an exercise of mapping or defining the boundary (or even the western boundary) of the Western Desert. I note that that exercise would be particularly difficult because the Western Desert is an anthropological construct in relation to which reasonable anthropologists differ as to whether those boundaries are definable and if and where those boundaries may lay.

### Tjukurrpa

1. As will be seen later in these reasons, *tjukurrpa* is relevant to this proceeding as the principal source of rights and interests in land and waters recognised by traditional laws and customs, and a principal manifestation of the connection between land and waters and the persons who rightfully may claim them
2. Translating the meaning and significance of *tjukurrpa* into written non-Aboriginal language has its challenges. *Tjukurrpa* is a belief system which forms the basis of peoples’ spiritual connection to country and to each other, as well as providing the basis for and source of traditional laws and customs. It is a central part of the world view of the Aboriginal persons who have knowledge of and observe traditional laws and customs.
3. *Tjukurrpa* comes from mythical beings that shape and mould the landscape. Those beings are often personified as possessing human, plant, animal or natural object characteristics. However, the nature and function of *tjukurrpa* is not limited to being a spiritual, religious or mythical account of the creation of the landscape and natural world in which Aboriginal people live. The concept of *tjukurrpa* was discussed by Mortimer J in *Tjiwarl*, and described by her Honour as follows at [538]:

[C]ombining many concepts in one word, the Tjukurrpa is past and present, myth and reality, belief and law. It connotes beings who have always existed and still occupy the landscape, and that continued presence is part of the reason that there is a body of rules of behaviour which exists around sites and knowledge related to the Tjukurrpa. Transgressions have a real and immediate effect. The Tjukurrpa is not consigned to history, but rather is a living guide for the lives of Aboriginal people.

1. The evidence demonstrates that *tjukurrpa* is associated with and evidenced by particular features in the landscape. The country through which the *tjukurrpa* travelled is referred to as “dreaming tracks”, and the tracks and locations through which the *tjukurrpa* travelled are often associated with the use and acquisition of the land and waters in question.
2. A number of *tjukurrpa* were outlined in the lay and expert evidence. Those dreaming stories related to significant sites and dreaming tracks in the Wutha claim area, but also continue outside of the Wutha claim area, linking the claim area to land and waters in the broader Wester Desert region.
3. Some of the *tjukurrpa* in evidence was gender-restricted, or partly restricted. Since the applicant’s written submissions and expert reports refer to these *tjukurrpa* by name, and with brief identifying details, I will also do so, but will not traverse in these reasons the details of any evidence given in restricted sessions, or in the written sections of expert reports or the submissions of the parties.
4. There are four relevant *tjukurrpa* of particular importance to this claim which I will briefly outline here, being the Goomboowan dreaming, Kuna Bulla dreaming, Papa Dingo dreaming and Mithilpithii dreaming. The Goomboowan and Papa Dingo dreaming are gender-restricted stories but the broad detail of those stories was addressed in unrestricted evidence and to that extent is included in these reasons. There were references to other *tjukurrpa* in the evidence, but for reasons that will become apparent these are the key *tjukurrpa* with associations to the area in the Body and the Tail.
5. The Goomboowan story is an important source of knowledge about the line of water sources in a wide swathe of country from Wongawol and Lake Carnegie down the west side of the Tail to Lake Darlot and beyond. Evidence was given about the Goomboowan *tjukurrpa* by Gay Harris, Luxie Hogarth and Geraldine Hogarth.
6. Broadly, the Goomboowan *tjukurrpa* is about an ancestral woman who had a very full bladder and when she urinated her *gooboon* (urine) water filled up lakes, rock-holes and streams and spread out across the country in a general southerly direction. Geraldine Hogarth explained that the Goomboowan *tjukurrpa* comes from the north, but that “our people are responsible… the Pini, Dalgandarda Koara people responsible here”.
7. Gay Harris gave evidence that when the ancestral woman urinated:

[H]er Gooboon filled up Lake Matland and overflowed south to from Woganoo and Goonboowan Creek filing soaks and waterholes like Yuldari and Mt Step, then spread out across the flat Melrose country, going underground heading south through the spinifex country where there are no creeks. Then it comes out through a blowhole at Melrose country – darnu, it bursts, when the bladder got too full. It goes into Lake Darlot then Lake Irwin and on to the Lake Raeside, then south east to Coonana where it becomes a little creek. But it continues all the way to the Head of the Blight – the goombooh nutrients feed the whales that come there.

1. Luxie Hogarth told Dr Draper that there is a lengthy song for this story, although it does not seem that she herself sang it for him. Gay Harris said that the story is connected with women’s birthing sites and places where women can conceive.
2. The Kuna Bulla *tjukurrpa* is also referred to as the “Two Snake” dreaming story. It is an open *tjukurrpa* (that is, not knowledge restricted by gender or some other attribute). During the on‑country hearing, the Court viewed some of the principal sites related to this *tjukurrpa*, including at Lake Darlot Causeway. The primary witness who spoke about it in oral evidence was Gay Harris.
3. Gay Harris gave evidence that this *tjukurrpa* is a story about two snakes that travel from somewhere in South Australia, past Darlot along the flat towards Lake Darlot where they rested. The snakes then travel across west into the *Tjiwarl* determination area where they go up the hill and are killed by the dragonfly. Gay Harris gave evidence that when you go to Albion Downs, you can see a big quartz hill and at times you will see a “smoky haze” associated with this *tjukurrpa*.
4. Gay Harris deposed that there are other people who tell this story, not just Wutha (Gay made reference to a “Bandu Wati” from Wiluna telling this story but giving the snakes a different name). Gay Harris gave evidence that it is a sacred dreaming story of the Koara, Dalgandarda and Pini tribes. This is consistent with the evidence in *Tjiwarl*, in which the story of the *Tjila Kutjara* (two carpet snakes being chased by a dragonfly) was a significant *tjukurrpa* (see *Tjiwarl* at [546]-[555] (Mortimer J)).
5. The Papa Dingo dreaming is a dreaming story about a dingo bitch and has topographical associations with the landscape running through the north-eastern corner of the Body down to Leonora and beyond. It is a male gender-restricted story and is associated with significant sites including the Agnew Men’s Initiation Site visited by the Court during the on-country hearing. The key witnesses that gave evidence of this *tjukurrpa* were Ralph Ashwin, Geoffrey Ashwin and Ron Harrington-Smith.
6. Mithilpithii *tjukurrpa* is associated with the area around Weebo near Darlot. It is a story that relates to the giving of life. The Court was not taken to the site. However, the significance of this *tjukurrpa* emerged in evidence given by Geraldine Hogarth and Gay Harris.

# THE PROCEDURAL HISTORY OF THE WUTHA APPLICATION

1. It is necessary that I set out the procedural history of the Wutha application in detail because of its importance to the question of whether the Wutha application was properly authorised in accordance with the requirements of the NTA.
2. The original Wutha application was lodged with the National Native Title Tribunal (**“NNTT”**) on 19 January 1996. The applicant was Raymond Ashwin and the application was simply described as having been made on behalf of “Wutha”. That matter, together with other aspects of the early procedural history of the Wutha claim, is recorded in *Wongatha*. In *Wongatha*, Lindgren J dealt with a claim brought on behalf of “the Wongatha people” over an area of some 160,000 square kilometres located in the Western Australian Goldfields and each of seven applications which overlapped that claim (that claim is shown on the map in **Annexure 4**). One of those overlapping claims was the Wutha claim. To the extent that the Wutha claim overlapped with the Wongatha claim, it was heard and determined by Lindgren J in *Wongatha*.
3. As Lindgren J recorded at [178] in *Wongatha*, the original Wutha application was amended in February and April of 1996. That was followed by a second Wutha application lodged in the NNTT on 13 March 1996 in which the applicant was again Raymond Ashwin. The second Wutha application was subsumed by the first on 22 January 1999. That occurred following the filing of a further amended Form 1 filed in the first application on 19 January 1999. The further amended Form 1 described the native title claim group as follows:

The name of the claim group is Wutha and the Wutha people are those persons who identify themselves as Wutha and are the biological descendants of:

(a) Wunal (also known as Tommy) Ashwin (m) and Telpha Ashwin (f); and

(b) those persons adopted by the biological descendants or with marital relations to those persons.

1. As Lindgren J recorded at [179] and [180], a further amendment was made to the Wutha claim on 4 March 1999 in which the Wutha claim group was defined as consisting of the biological descendants of “Wunal (aka Tommy) (m) Ashwin and Telpha Ashwin (f)” and the adoptees of those biological descendants. By this time the Ashwin siblings were named as applicant. As is further recorded at [181], the claim group description was further amended on 29 April 1999 so as to exclude from the biological descendants of Wunal and Telpha Ashwin, twenty named individuals and their offspring. The Wutha claim group description was in that form at the time of the Wongatha proceeding.
2. The Wutha claim as pursued before Lindgren J in *Wongatha* was made on the basis that the native title rights and interests asserted were held at sovereignty pursuant to the laws and customs of the Western Desert (*Wongatha* at [1743]). Evidence led in the Wongatha proceedings on behalf of the Wutha claim group included evidence of Lenny Ashwin, Ralph Ashwin, Raymond Ashwin, Katherine Adams and Verna Voss. A summary of the evidence given by those persons is found in Annexure F to the *Wongatha* judgment.
3. Lindgren J outlined the reasons why the Wutha claim failed at [2725] as follows:

1. The Wutha applicants were not authorised to make the Wutha application as required by s 61(1) of the NTA.

2. The evidence does not establish that the Wutha Claim group is a group recognised by [Western Desert Culture Block] traditional laws and customs as a group capable of possessing group rights and interests in land or waters.

3. The evidence does not establish that group rights and interests exist in the Wongatha/Wutha overlap under [Western Desert Culture Block] traditional laws and customs.

4. The evidence does not establish that at sovereignty, [Western Desert Culture Block] laws and customs provided for an ancestral group of the Wutha Claim group to possess group rights and interests in the Wongatha/Wutha overlap, or for individuals to be able to form themselves into a group possessing such rights and interests.

5. The Wutha Claim, in so far as it relates to the Wongatha/Wutha overlap, is an aggregation of claims of individual rights and interests, and the Wongatha/Wutha overlap is based on an aggregation of individual ‘my country’ areas the subject of those claimed individual rights and interests, and the NTA does not provide for the making of a determination of native title consisting of group rights and interests in these circumstances.

6. The Wongatha/Wutha overlap is not an area, or part of an area that is ultimately, whether directly or indirectly, defined by reference to Tjukurr (Dreaming) sites or tracks.

7. Approximately the Western one half to two thirds of the Wongatha/Wutha overlap lies outside the area of the [Western Desert Culture Block] ‘society’ on which the Wutha Claim is based.

8. Telpha Ashwin, a post-sovereignty apical ancestor of the Wutha claimants, claimed as her country the former Dada Station, Darlot and Melrose Station, all being just north of the Wongatha Claim area, and it is not established that the ancestors of the Wutha claimants or their descendants, including the Wutha claimants, subsequently acquired rights and interests in the Wongatha/Wutha overlap under pre-sovereignty [Western Desert Culture Block] laws and customs.

9. The evidence does not establish that the claimants constituting the Wutha Claim group have a connection with the Wongatha/Wutha overlap by Western Desert traditional laws and customs as required by s 223(1)(b) of the NTA.

1. Lindgren J dismissed the Wutha claim insofar as it related to the overlap with the Wongatha claim (at[4010]).
2. That part of the Wutha claim not the subject of the *Wongatha* proceedings remained on foot but has been the subject of several interlocutory challenges and various further amendments to which I will now turn.
3. As earlier outlined, the area covered by the Wutha claim includes the Head. An area of the Head overlaps with an area claimed in an application for native title made on behalf of the Yugunga-Nya People in proceeding WAD 6132 of 1998. In 2009, the Yugunga-Nya People brought an application which sought orders under s 84D(1) of the NTA requiring the applicant in the Wutha claim produce evidence of the authorisation of that claim. That application was determined by Siopis J in ***Ashwin*** *on behalf of the Wutha People v State of Western Australian* [2010] FCA 206. His Honour referred to the findings made by Lindgren J in *Wongatha* as to the lack of authorisation and concluded that those findings “were of general application and have the propensity to invalidate the Wutha claim as a whole” (at [36]). Orders were made that the applicant in the Wutha claim file and serve further evidence to satisfy the statutory requirements that the persons comprising the applicant were authorised to bring the Wutha application.
4. On 23 December 2010 in *Ashwin on behalf of the Wutha People v State of Western Australia (No 2)* [2010] FCA 1472, Siopis J dismissed an application brought by the State pursuant to s 84C of the NTA by which orders were sought striking out or dismissing the Wutha claim on the basis that the claim was not authorised and bound to fail. It was contended that, by reason of an issue of estoppel, the applicant in the Wutha claim was bound by the finding made in *Wongatha* that the Wutha claim was not authorised. His Honour determined, with particular regard to s 84D of the NTA and the discretion there given for the Court to hear and determine an application despite a defect in authorisation, that the findings made by Lindgren J in *Wongatha* did not pose “such an insurmountable obstacle to the prospects of success of the Wutha claim … as to warrant the claim being summarily dismissed or struck out” (at [15]).
5. In furtherance of the orders made by Siopis J in *Ashwin*, affidavits were filed and served dealing with the authorisation of the Wutha claim. Following a number of programming orders that issue was listed for hearing and came before Jagot J on 4 July 2013. Her Honour determined that the issue of authorisation ought not to be dealt with separately as a threshold issue but ought instead be dealt with as part of the trial of all issues. Her Honour ordered, *inter alia*, that:

1. The application in proceeding WAD 6064 of 1998 proceed to a hearing on all issues, excluding the issue of extinguishment and such other issues as may be subject to any future order for separate determination in accordance with Pt 30 r 1 of the Federal Court Rules 2011 (not including the issue of authorisation which is to be heard at the same time as all issues arising under s 223 of the Native Title Act 1993 (Cth)).

2. To the extent necessary to enable Order 1 to be achieved, the discretion in s 84D(4)(a) of the Native Title Act 1993 (Cth) to hear the application in proceeding WAD 6064 of 1998 is exercised.

1. On 30 June 2015, an interlocutory application was made by the applicant which sought leave to amend the Wutha application by amending Schedule A of Form 1. The effect of the proposed amendment was to substantially alter the description of the native title claim group. The proposed amendment removed reference to the twenty persons and their offspring which were part of the exclusion earlier referred to and identified additional apical ancestors to those previously included in the claim group description.
2. On 29 July 2015, Barker J ordered that the applicant file further affidavit evidence in support of its interlocutory application. Geoffrey Ashwin filed an affidavit made on 21 August 2015. He deposed to being the eldest surviving male descendent of Telpha Ashwin and Wunal Ashwin and that for that reason, by the traditional law and custom of the Wutha people, decision-making authority in relation to the native title rights and interests of the Wutha people was held by him. Furthermore, he explained the basis for the proposed amendment to the description of the native title claim group. He referred to Dr Draper having been engaged to prepare a connection report and to various meetings attended by him and/or June Ashwin and Dr Draper with representatives of the Harris, Hogarth and Barnard/Wheelbarrow families. He stated that he agreed that each of those families should be included in the Wutha claim group and that Dr Draper had prepared an amended Form 1 to include an amended description of the native title claim group in order to include members of those families. He deposed that in exercising his traditional decision-making authority for the Wutha claim group he authorised the filing on 30 June 2015 of the amended Form 1 prepared by Dr Draper.
3. The proposed amended claim group description read:

The Wutha people, being those persons (including the applicants) who are:

1. The biological descendants of:

(a) Darugadi (aka Thurraguddy), his affine Murni and her mother Matjika, whose descendants include the Ashwin and Harris families.

(b) Julia Sandstone, whose descendants include some of the Ashwin Family.

(c) Billy, Mary-Ann and Mary-May’s sister, whose descendants include the Hogarth and Brennan and Tulloch Families.

(d) Maude Yarlyen and Jimmy Wheelbarra (aka Wheelbarrow), whose descendants include the Barnard Family.

and

2. Those persons adopted by those biological descendants in accordance with Wuthu tradition and custom. (Adoption refers to the situation where a child is ‘grown up’ by a relative or someone without a biological relationship, either because they have been gifted them, or left in their care, as the biological parents are not in a position to care for them. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system).

1. Another affidavit filed in support of the order seeking leave to amend the Wutha application was made by June Ashwin on 29 October 2015. June deposed to an authorisation meeting held in Leonora on 17 October 2015. At that meeting a resolution was carried to amend the Wutha native title application by amending the native title claim group description to the form set out above. June’s affidavit included the notice of the meeting published in the Kalgoorlie Miner newspaper. That notice extended an invitation to attend the 17 October 2015 meeting to “an Aboriginal person whom is a biological descendant, or is adopted by those biological descendants in accordance with Wutha tradition and custom, of one or more of the following ancestors”, and thereafter described those ancestors referred to above (at [149]) in the proposed amended claim group description.
2. June Ashwin deposed to the authorisation occurring pursuant to “Wutha traditional decision‑making”. It appears from an attendance sheet annexed to June’s affidavit that some 21 persons attended the 17 October 2015 meeting.
3. On 30 October 2015, the interlocutory application seeking leave to amend the Wutha application was adjourned to 21 December 2015.
4. At the hearing held before Barker J on 21 December 2015, an affidavit of June Ashwin made on 11 December 2015 was filed. June Ashwin deposed to a meeting held on 5 December 2015 in Leonora in which a resolution authorising the amendment of the Wutha application was carried. The resolution relevantly stated:

Authorisation of Amendments to the Wutha Native Title Claim

Resolution 1: Amended Native Title Application

That the applicant group of the Wutha People in relation to the native title determination application WAD 6064/98 being Geoffrey Alfred Ashwin, June Rose Harrington Smith and Ralph Edward Ashwin are authorised by traditional decision making by Geoffrey Alfred Ashwin to amend the description of the Wutha Peoples native title claim group pursuant to section 64 of the Native Title Act 1994 (Cth) and otherwise amend the Federal Court Form 1 Application for Native Title Determination, commenced by the Wutha People to comply with the Native Title Act 1993 (Cth).

1. The resolution proposed the following claim group description:

The Wutha people being those persons (including the applicants) who identify themselves as Wutha and are:

(1) The biological descendants of:

(a) Darugadi (aka Thurraguddy), his affine Murni and her mother Matjika

(b) Julia Sandstone (“Old Julia”)

(c) Billy

(d) Inyarndi

and

(2) Those persons adopted by those biological descendants in accordance with Wutha tradition and custom. (Adoption refers to the situation where a child is ‘grown up’ by a relative or someone without a biological relationship, either because they have been gifted to them, or left in their care, as the biological parents are not in a position to care for them. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system).

1. The description of the native title claim group in the resolution carried in the meeting of 5 December 2015 differs from that of the meeting of 17 October 2015 in two respects. First, “Inyarndi” replaced the apical ancestors “Maude Yarlyen and Jimmy Wheelbarra” and secondly, where reference had previously been made to the connection between particular apical ancestors and particular families, that reference was removed.
2. June Ashwin also deposed as to the notice given of the 5 December 2015 meeting. A public notice of the meeting had been published in the Kalgoorlie Miner newspaper, a copy of which was attached to June’s affidavit. The invitation to attend given by that notice was in the same form as that earlier discussed in relation to the 17 October 2015 meeting, save that the references made to apical ancestors was updated in accordance with the proposed claim group description. June deposed that she was satisfied “that pursuant to Wutha traditional decision‑making and following the results of the abovementioned authorisation meeting that the Wutha people fully support the amendment to the Wutha native title claim”.
3. The attendance sheet for the 5 December 2015 meeting annexed to June Ashwin’s affidavit disclosed that some fifteen persons had attended.
4. On 21 December 2015, Barker J made orders including an order granting leave to amend the Form 1 of the Wutha application in terms of the native title claim group description the subject of the resolution carried at the 5 December 2015 meeting.
5. On 7 March 2016 an amended Form 1 was filed in accordance with the leave granted by Barker J on 21 December 2015. The claim group description in the amended Form 1 is that described at [154] above.
6. On 30 July 2016 a further application to amend the Form 1 of the Wutha claim was made. No amendment was sought to the claim group description. The amendment sought by that application may be regarded as technical and is of no particular import to the matters I need to consider. Nevertheless, that application was the last occasion on which the Wutha application was amended and is therefore of particular relevance to the question of whether the Wutha application is authorised. That application was supported by affidavits of Geoffrey Ashwin, June Ashwin and Ralph Ashwin each sworn on 30 July 2016.
7. Each of those affidavits refer to an authorisation meeting held on 30 July 2016 at Leonora. June Ashwin deposed as to the resolutions passed by the meeting authorising the making of the amended application. The two resolutions carried at the meeting were in the following terms:

Resolution 1: Authorisation of Amended Native Title Application

That the applicant group of the Wutha People in relation to the native title determination application WAD 6064/98 being Geoffrey Alfred Ashwin, June Rose Ashwin (also known as Harrington Smith) and Ralph Edward Ashwin are authorised by the traditional decision making by Geoffrey Alfred Ashwin to amend the Wutha People native title determination application (Form 1) and presented at this meeting and to make and deal with matters arising in relation to it.

Resolution 2: Amended Native Title Application

That the applicant group of the Wutha People in relation to the native title determination application WAD 6064/98 being Geoffrey Alfred Ashwin, June Rose Ashwin (also known as Harrington Smith) and Ralph Edward Ashwin so authorised by traditional decision making by Geoffrey Alfred Ashwin, do amend and lodge the amended native title determination application (Form 1) as explained and presented at this meeting. Pursuant to the *Native Title Act 1993 (Cth)* and otherwise amend the Federal Court Claimant Application for Native Title Determination (Form 1), commenced by the Wutha People to comply with the *Native Title Act 1993 (Cth)*.

1. June Ashwin also deposed as to the notices of the meeting placed in the Western Australian newspaper on 30 July 2016 and in the Kalgoorlie Miner on 14 and 21 July 2016. Copies of those notices were annexed to the affidavit. Each notice was in the following terms:

You are invited to attend the authorisation meeting if you are an Aboriginal person who is a descendent of one or more of the following apical ancestors name [sic] in the Amended Native Title Determination Application Identifying the native title claim group on whose behalf the application is made as follows:

(1) The biological descendants of:

(a) Darugadi (aka Thurraguddy), his affine Mumi and her mother Matijka;

(b) Julia Sandstone (“old Julia”);

(c) Billy;

(d) Inyarndi

and

(2) Those persons adopted by those biological descendants in accordance with Wutha tradition and custom. (Adoption refers to the situation where a Child is ‘grown up’ by a relative or someone without a biological relationship, either because they have been gifted to them, or left in their care, as the biological parents are not in a position to care for them. This applies regardless of whether or not the child has been formally adopted under the non-Aboriginal legal system), and consider that you hold or may hold native title in relation to the Wutha Peoples native title claim area.

1. The attendance sheet for the meeting indicated that some 18 persons attended the meeting held on 30 July 2016.
2. As is apparent from the terms of resolutions carried at the meeting, reference was there made to the traditional decision-making by Geoffrey Ashwin. Furthermore, the affidavit of Geoffrey Ashwin of 30 July 2016 deposed that the “native title claim group has a traditional decision‑making process for the purposes of section 251B(a) NTA by which the eldest living male descendant of Telpha Ashwin and Wunal can speak and has responsibility for traditional Wutha country and traditional authority for making decisions concerning rights and interests of the kind claimed [in the Wutha application] including decisions relating to this native title determination application”. Geoffrey also deposed that decisions affecting native title rights and interests are made “in consultation with families of Wutha People and for the purposes of this amended native title determination application, decisions are made by me in consultation with my fellow applicants and in consultation with members of the native title group meeting together at an authorisation meeting held for that purpose”. In her affidavit of 30 July 2017, June Ashwin confirmed the “traditional decision-making authority of Geoffrey Alfred Ashwin and the traditional decision-making process of the native title claim group for authorising this amended application for a Native Title determination …”.
3. In his affidavit of 30 July 2016, Ralph Ashwin deposed to have read the affidavits of June Ashwin and Geoffrey Ashwin of 30 July 2016 and confirmed their content as true and correct “with regard to the authorisation given to us by Geoffrey Alfred Ashwin and the authorisation meeting of the native title claim group at Leonora on 30 July 2016 to make this amended Native Title Determination Application”.
4. Each of the affidavits of Geoffrey Ashwin, June Ashwin and Ralph Ashwin contained the following statement:

I (together with the other surviving named applicants who have sworn similar affidavits) am authorised by all of the persons in the native title claim group to make this amended application and to deal with matters arising in relation to it;

The authorisation stated above was given to me pursuant to section 251B(a) of the *Native Title Act 1993* (Cth) (“NTA”).

1. On 2 September 2016, Barker J gave leave to amend the Wutha application in terms of the amended Form 1 that was annexed as GAA-1 to the affidavit of Geoffrey Ashwin of 30 July 2016. The amended Form 1 was filed on 22 August 2016 and is the current Form 1.

# IS THE WUTHA APPLICATION AUTHORISED?

1. There was a suggestion, made at least by the written closing reply submissions of the applicant, that the issue of whether the Wutha application was authorised had been determined by Barker J when making orders on 21 September 2015 and 2 September 2016 granting leave to the applicant to amend the Wutha application. However, in oral closing submissions Senior Counsel for the applicant suggested that Barker J had given some consideration to the question of authorisation for the purpose of dealing with the applications for leave before him, but accepted that whether or not the Wutha application was authorised was a matter for my determination in the trial on the Separate Questions. The trial of the Separate Questions was conducted on that basis. The State contended, without demur from the applicant, that whether the Wutha claim is authorised is necessary to answer in order to answer the Separate Questions.
2. To put beyond question the Court’s capacity to determine as part of the trial already conducted whether the Wutha application is authorised, the following order was made on 28 November 2018 without objection from the parties:

1. On the basis of the evidence tendered and submissions received at the hearing commenced on 13 March 2017, the following question be heard and determined separately from any other questions save for the separate questions the subject of order 1 of the orders of Barker J made on 9 March 2016:

(a) Is the Native Title Determination Application made by the applicant authorised in accordance with the requirements of the *Native Title Act 1993* (Cth)?

1. All parties made submissions on the issue of authorisation. Central Desert adopted the submissions made by the State. The submissions made by the parties on the issue of authorisation proceeded upon a number of assumptions.
2. The State did not expressly rely upon the finding made by Lindgren J in *Wongatha* that the Wutha application was not authorised. No submission was made that the applicant was estopped from contending to the contrary. The State’s challenge to the validity of the application, based on lack of authorisation, was directed at various events which post‑dated the judgment in *Wongatha*. The unstated assumption in that approach was that any earlier defect in the authorisation of the Wutha application was capable of being cured by an authorisation later made.
3. That was the applicant’s position as well. The applicant contended that any lack of authorisation identified in *Wongatha* had been overtaken by the authorisations made at either the 5 December 2015 or the 30 July 2016 authorisation meetings to which I have already referred.
4. Furthermore, despite the evidence filed in relation to the decision-making process under the asserted traditional laws and customs of the Wutha people and the reliance there made on s 251B(a) of the NTA, the applicant contended that the decision-making process utilised at each of those authorisation meetings was a decision-making process agreed to and adopted, by the persons in the native title claim group in accordance with the process contemplated by s 251B(b) of the NTA
5. The applicant’s case was that each post-*Wongatha* amendment made to the Wutha application was validly authorised and that therefore the application as it currently stands is an authorised application. The State’s position was that none of those amendments were validly authorised and that consequently the application is itself unauthorised.
6. In broad terms, there were two challenges made by the State. On the assumption that native title exists, as contended for by the applicant, the State submitted that native title rights and interests in the Trial Area were held by persons not notified of the authorisation meetings and not included in the claim group description. In substance, the State contended that the Wutha application is not authorised because it has not been authorised by all of the persons who are members of the native title claim group, as required by s 61(1) of the NTA. Furthermore, the State contended that the decision-making process utilised at the authorisation meetings failed to conform with the required decision-making process in either of paragraphs (a) or (b) of s 251B of the NTA.
7. I turn to consider the State’s first challenge and I will do so on the assumption, consistent with the applicant’s case and my findings below, that the decision-making process utilised at the 5 December 2015 and 30 July 2016 authorisation meetings was a decision-making process permitted by s 251B(b).

## Has the application been authorised by all parties in the “native title claim group”?

1. I will commence my consideration by setting out those provisions of the NTA relevant to the question of authorisation.
2. Section 13(1) of the NTA provides that an application may be made to the Federal Court of Australia for a determination of native title in relation to an area for which there is no approved determination of native title. Section 61 specifies who may apply for a determination of native title. Relevantly, and in relation to an application mentioned in s 13(1), the Table to s 61(1) states:

**Persons who may make application**

A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group; or

Note 1: The person or persons will be the applicant: see subsection (2) of this section.

Note 2: Section 251B states what it means for a person or persons to be ***authorised*** by all the persons in the native title claim group.

1. Section 251B deals with what it means for a person or persons to be “authorised” by all of the persons in the native title claim group. Section 251B is in the following terms:

**Authorising the making of applications**

For the purposes of this Act, all the persons in a native title claim group or compensation claim group ***authorise*** a person or persons to make a native title determination application or a compensation application, and to deal with matters arising in relation to it, if:

(a) where there is a process of decision-making that, under the traditional laws and customs of the persons in the native title claim group or compensation claim group, must be complied with in relation to authorising things of that kind the persons in the native title claim group or compensation claim group authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

(b) where there is no such process the persons in the native title claim group or compensation claim group authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision-making agreed to and adopted, by the persons in the native title claim group or compensation claim group, in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

1. The term “native title claim group”, found in both the Table in s 61(1) and also in s 251B, is defined in s 253. In relation to a claim for a determination of native title, the definition is somewhat circular and means “the native title claim group mentioned in relation to the application in the Table in sub-section 61(1)”.
2. There are long-standing and well accepted principles concerning authorisation and the proper construction of s 61(1) which I should follow. *First*, the accepted construction of s 61(1) is that “the authorisation contemplated is not of the persons who claim to be the native title holders, but is rather that of the *actual* holders of native title”: ***Akiba*** *on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [913] (Finn J); and see *Wongatha* at [72], [1188]-[1189] and [1216] (Lindgren J); and *Reid v State of South Australia* [2007] FCA 1479 at [28] (Finn J).
3. *Second* and relatedly, a native title determination application does not comply with s 61(1) unless “all” of the native title holders have authorised the application. As Jagot J said in ***Booth*** *on behalf of the Kungardutyi Punthamara People v State of Queensland* [2017] FCA 638 at [34]:

Prevailing orthodoxy is that a mere part or sub-set of the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed cannot authorise the making of a native title claim because they cannot, by definition, comprise all such persons (for example, *Risk v National Native Title Tribunal* [2000] FCA 1589 at [29]-[30] and [60] and at [15]-[22] and the cases cited in those paragraphs).

See further ***Brown*** *v State of South Australia* [2009] FCA 206 at [19]-[20] (Besanko J) and the authorities there cited. The observations of Besanko J in *Brown* have been extensively cited in the authorities including: *Laing v State of South Australia (No 2)* [2012] FCA 980 (Mansfield J), ***Rita Augustine*** *v State of Western Australia* [2013] FCA 338 (Gilmour J), *Collins on behalf of the Wongkumara People v Harris on behalf of the Palpamudramudra Yandrawandra People* [2016] FCA 527 (Jagot J) and ***Velickovic*** *v State of Western Australia* [2012] FCA 782 at [32] (McKerracher J).

1. It follows that a native title determination application is not authorised unless all of the actual native title holders in the area claimed by the application have authorised its making. The means by which all such persons provide that authorisation is regulated by s 251B of the NTA. The consequence of the application of those principles, as Lindgren J reasoned in *Wongatha* at [1216] and [2733], is that (at least where the applicable decision-making process requires the involvement of all of the persons in the native title claim group), there must be a coincidence between the group for which a determination is sought and the authorising group or, in other words, a coincidence between the actual holders of the particular native title claimed (the native title holders) and the persons who authorised the making of the application (the authorising group).
2. I observe in passing that the prevailing orthodoxy is not without some difficulty. At [913] of *Akiba*, Finn J commented upon the “curiosity” in s 61(1) given that the accepted construction has the consequence that the authorisation issue could, applying the logic referred to by Lindgren J in *Wongatha* at [1190], “only be determined finally after it has been determined whether there are and, if so, who are, the actual holders of the native title claim”.
3. In *Strickland v State of Western Australia* [2013] FCA 677 at [12], Jagot J referred to a “logical conundrum”. In pointing to that perceived difficulty, her Honour was considering the reasoning in *Velickovic* at [36]-[37], where McKerracher J doubted the capacity of an unauthorised application to be re-authorised or ratified in circumstances where the native title claim group is expanded and a larger group seeks to re‑authorise an application initially brought on behalf of a smaller group. The “logical conundrum” to which Jagot J referred exists if both the accepted construction of s 61(1) is applied in conjunction with the reasoning of McKerracher J. As Jagot J said (at [12]), that:

… would preclude, if taken to its logical conclusion, any change to a native title group whatsoever, no matter what stage of the proceedings had been reached and no matter what the reason for the change. This is because, as soon as it is proposed to add in any person to a native title claim group because it is accepted that that person should be a part of the native title claim group, then the application will never be one which was authorised by all persons as required by s 61. This is an unattractive proposition to say the least, because it is not difficult to think of many circumstances in which the interests of justice might well be served by enabling the identification of a native title claim group to be changed including by way of the addition of a person who is recognised, albeit belatedly, to be a proper member of the native title claim group.

1. If there is a “logical conundrum” I need not resolve it here. There is no proper basis for me to depart from the prevailing orthodoxy on the proper construction of s 61(1). Nor do I need to consider the correctness of the reasoning of McKerracher J in *Velickovic* as, in this case, all parties have proceeded on an acceptance that an application may be re-authorised or ratified by a decision of the expanded native title claim group.
2. In relation to the existence of native title, the trial I have conducted was confined to a consideration of the Wutha application but only in so far as it concerns to the Trial Area. As my consideration of the existence of native title has not dealt with the Head, I am not in a position to determine whether or not any native title exists over the whole of the area claimed by the Wutha application and therefore whether there are, and who are, the native title holders for the entire area claimed by that application. It follows that I am not able to conclude, as Lindgren J did in *Wongatha* (at [1190]) in relation to the claim of the Wongatha claim group, that since there are no holders of native title in the area claimed under the application, the application could not have been authorised by such persons.
3. Nevertheless, I am able to consider whether the requisite coincidence between the native title holders and the authorising group exists. In my view, the applicant has not established that it does.
4. To explain that conclusion, it is necessary to address a tension in the applicant’s case the existence of which supports the conclusion that, beyond the authorising group, there may be other persons who hold native title rights in the Trial Area. The tension arises because, on the one hand, the applicant contended that “multiple pathways” (including non-descent based pathways) are, according to Wutha traditional laws and customs, available as the means by which a person could acquire or possess native title rights in the Trial Area. On the other hand, the applicant has limited the native title claim group (as described in the Wutha application) and, consequentially, limited the authorising group to persons who have acquired or possessed native title rights in the Trial Area by means of a single descent-based pathway, which includes adoption.
5. By limiting the authorising group to one only of the multiple pathways which the applicant contended provides the means by which a person can become a native title holder, the applicant’s case leaves open the possibility that the authorising group is smaller than the native title holder group. In that context, and in particular when resort is made to the evidence, in my view, the applicant has not established the requisite coincidence between those two groups. The conclusion that the application was authorised by a sub-set of all of the actual native title holders (on the hypothesis that native title exists) is therefore available.
6. The starting point is an identification of the group of native title holders that the applicant’s claim contemplates the existence of. The description of the categories of persons holding native title asserted by the claim group description in the Wutha application (as described since the filing of the amended application on 7 March 2016) is given at [154] above. The description is confined to persons who identify themselves as Wutha and who are the descendants of the four ancestral families referred to in the description, together with persons adopted by those descendants. It follows that the only means of acquiring or possessing native title rights in the Trial Area, which the claim group description contemplates, is descent from an apical ancestor (including adoption).
7. However, as earlier set out, the applicant’s case is that the Wutha claim group is a sub-set of a Western Desert Society that has a connection to the Trial Area by the traditional laws and customs of Western Desert people. The applicant’s case recognises that under Western Desert traditional laws and customs there are “multiple pathways” whereby persons can gain rights and interests in land or waters or, in other words, acquire and possess native title rights. By paragraph 4(a) of the applicant’s Second Further Amended Statement of Facts, Issues and Contentions (“**SFASFI&C**”) and under the heading “Laws and Customs” the applicant said:

The Claim group have a connection to their claim area by the traditional laws and customs of Western Desert people which recognised the connection of members of the group through one or more of:

(i) birth, association with the land or holding ritual authority; or

(ii) the birth of and association of one or more ancestors to that land; and

(iii) in respect of whom a connection is accepted by the elders of the Claim group according to Western Desert traditional laws and customs

1. Senior Counsel for the applicant confirmed, both at the outset of the hearing and also in the applicant’s written closing submissions, that the paragraph just quoted identifies the “pathways” that the applicant says apply to Trial Area. As is apparent, the various pathways in (i) of the applicant’s description of the “multiple pathways” are not descent based at all. Those at (ii) are descent based but are not limited to descent from named apical ancestors. Sub‑para (iii) then imposes an additional and overarching requirement that is not related to descent, but rather acceptance.
2. From a comparison between the claim group description in the Wutha application (as amended) and the content of para 4(a) of the applicant’s SFASFI&C, it may be concluded that whilst the former contemplates a single descent-based (including adoptees) pathway limited to descent from named apical ancestors, the latter acknowledges that under Wutha traditional laws and customs there exist a number of additional pathways (“**additional pathways**”) by which a person may gain rights and interests in the Trial Area.
3. The applicant contended that the reliance it placed on “multiple pathways” (that is, those referred to above at [192]) was not intended to change the claim group description. That description, so the applicant contended, identifies the persons on whose behalf its application for a determination of native title is made. The applicant said that the claim group description it relies upon, as set out in its application (as amended), is not intended to be a complete description of all of the persons who are the actual native title holders and in respect of whom a determination pursuant to s 225 may be made. The claim made was said to be “not made on behalf of all persons who hold native title … just some of them”. Although what was said may be construed strictly in accordance with its terms, in fairness to the applicant, what I think was intended was not a concession that other native title holders exist, but that other native title holders *may* exist.
4. The applicant’s approach is based on a construction of s 61(1) at odds with what I have described as the prevailing orthodoxy. The applicant submitted that the claim group description in an application for a determination of native title need only identify the persons on whose behalf an application for the determination of native title is made. It is permissible, so the applicant contended, for that “native title claim group” to be a narrower set of persons than those persons who actually hold native title. The purport of the applicant’s submission was that it was not necessary for all native title holders to have authorised the application for a native title determination, because such an application need only be authorised by the native title holders who come together to make the claim.
5. The applicant’s submissions are based on the phrase “the native title claim group” in Table 1 to s 61(1) meaning the persons who have made the particular application for a determination of native title. Accordingly, it is only those persons who need to authorise the particular application. Those persons need not be all of the actual native title holders and they need not even be all of the persons who claim to hold native title rights and interests in the area in question. The suggestion made was that the purpose of public notification, such as a notifications given of the authorisation meetings of 5 December 2015 and 30 July 2016, is to give to persons who are non-claimants and who consider that they are native title holders for the area, the opportunity to make their own applications. It was said that this “is the whole point” of the Full Court’s judgment in *Commonwealth v* ***Clifton***[2007] FCAFC 190 (Branson, Sundberg and Dowsett JJ).
6. The applicant’s contentions find no support in *Clifton* and run counter to the authorities to which I have referred and to the established principle that a sub-set of the actual native title holders cannot validly constitute a native title claim group and cannot make or authorise a native title determination application. To the authorities already mentioned may be added the observations made by Gilmour J in *Rita Augustine* at [215]:

A claim group is not an entity which is created by a determination application: *Turrbal People v State of Queensland* [2008] FCA 316 at [15]; *Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim Group) v Queensland (No 2)* (2010) 270 ALR 564 at [913]. By s 61 of the NTA, the native title claim group is the group of “persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed”. The native title claim group has an existence independent of any determination application, which existence depends upon the traditional laws and customs which give the claim group common or group rights and interests. Subject to s 84D of the NTA, a determination application can only be successful if the group identified in the application is in fact the group which holds native title: *Hazelbane v Northern Territory of Australia* [2008] FCA 291 at [36]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1 at [1206]-[1225]; *Edward Landers v State of South Australia* [2003] FCA 264.

The observations of Gilmour J were adopted by McKerracher J in *AD (deceased) on behalf of the Mirning People v State of Western Australia (No 2)* [2013] FCA 1000 at [73] and Collier J in *Pegler on behalf of the Widi People of the Nebo Estate No 1 v State of Queensland* [2014] FCA 932 at [21]. As Mansfield J said in *Hazelbane v Northern Territory of Australia* [2014] FCA 886 at [123], referring to many of the authorities already referred to above, “[t]here is considerable authority that a claim for native title rights and interests by a sub-set of the putative native title holding group is contrary to s 61 of the NTA and cannot succeed”.

1. It is apparent then that on its own case, the applicant has purported to make a claim on behalf of what it concedes may only be a sub-set of the persons holding native title rights and interests in the area claimed.
2. If the applicant has made the Wutha claim on behalf of such a sub-set, a valid authorisation of the claim will not have been given by either the meeting of 5 December 2015 or the meeting of 30 July 2016. Each of the notices of those meetings failed to extend an invitation or otherwise enable an opportunity to participate, to persons who are native title holders by means of the additional pathways. In those circumstances, it would not be possible to be satisfied that the notices provided the whole of the “native title claim group” (that is, all of the actual native title holders) a reasonable opportunity to attend and participate in the authorisation process: *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 at [30]-[32] (Reeves J); and *Booth* at [29]-[30] (Jagot J). Consequently, it would not be possible to conclude that the resolutions carried at either the 5 December 2015 or 30 July 2016 meetings resulted in an authorisation of the applicant from all of the persons who hold the common or group rights and interests comprising the particular native title claimed.
3. An applicant bears the onus of establishing that its application is authorised. That onus includes the burden of establishing that all native title holders have authorised the application and that no person or persons who hold native title have been excluded. Where there is no suggestion of any native title holders having been excluded, an applicant will ordinarily not need to prove a negative to meet its legal onus. However, where the evidence suggests that native title holders may have been excluded from the authorisation process, an applicant will bear an evidentiary onus to establish that no such exclusion has occurred: *Wongatha* [2967] (Lindgren J).
4. On one view, given that the applicant’s case conceded that native title holders beyond the authorising group may exist, it may be said that a lack of authorisation is plain on the case as propounded by the applicant. There are however a number of reasons why I would hesitate before proceeding on that basis. *First*, I consider a practical approach should be adopted to matters at authorisation. As Stone J said in *Lawson on behalf of the ‘Pooncarie’ Barkandji (Paakantyi) People v Minister for Land and Water (NSW)* [2002] FCA 1517 at [28]:

I do not think, however, that the Act requires decisions of native title claim groups to be scrutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised.

1. *Second*, I consider the concession made by the applicant’s case was intended to be more theoretical than practical, in the sense that the applicant ran an argument that left open the possibility of excluded native title holders rather than conceding that the existence of excluded native title holders is suggested by the facts. *Third*, whether or not the discretion conferred by s 84D(4) ought to be exercised, requires an analysis of whether the existence of excluded native title holders is real or merely theoretical.
2. It is necessary then to turn to the evidence, because beyond the theoretical possibility of excluded native title holders suggested by the way the applicant put its case on authorisation, the evidence also suggested the existence of such persons. That evidence must, for this purpose, be considered on the basis that native title exists in the Trial Area.
3. On the applicant’s case, the additional pathways exist and have contemporary application. That proposition was not controversial. The only controversy between the parties in relation to pathways, which is not relevant for current purposes, was as to whether there were yet further pathways beyond the additional pathways. The contemporary accessibility of the additional pathways is sufficient for current purposes and supports the proposition that one or more non-descent based, and thus excluded, native title holders exist.
4. Each of Dr Brunton and Dr Lynes opined that in relation to the Tail there were persons who may hold native title rights and interests by reason of non-descent based pathways. Dr Brunton deposed that whilst he could not be more specific his understanding was that such persons included the “Beamans, Banks, Narriers, Merediths, etc”. Dr Lynes deposed that:

Members of various families who left places in the desert such as Mungkali, Tjirrkarli and Tjintjirra and settled in the Mulga Queen vicinity in the early part of the 20th century such as the Banks, Bonds, Thomas’ etc. In addition the Meredith-Green family who have members who were known to be born around Runggul soak.

1. In relation to Dr Brunton’s evidence, the applicant contended that I ought give it no weight. I accept (without criticism of Dr Brunton) that his understanding was not sufficiently explained or supported by evidentiary reference and ought not be relied upon.
2. The position for Dr Lynes is different. In her first report, Dr Lynes, identified a number of persons who, in her opinion, “very likely hold native title rights in the Mulga Queen area”. Dr Lynes deposed that in the latter half of 2015, whilst employed as an anthropologist for Central Desert, she and her colleague Sean Calderwood undertook research into the traditional owners of the eastern most portion of the Tail. That research involved a desktop review of the relevant literature as well as multiple field trips. As a result of that research, Dr Lynes concluded “that many families whose country, prior to European settlement, lay in the Spinifex country to the east [of the Tail], around places such as Mungili Claypan, Tjirrikarli and Tjintijirra – gained rights and interests in and around the Mulga Queen area, according to the traditional laws and customs of the Western Desert Cultural Block, due to long term association and receipt of ritual knowledge after migrating out of the desert in the first half of the twentieth century”.
3. Based on the anthropological work of Berndt and Tonkinson, her own field work and that of Sean Calderwood, and the evidence of Kado Muir, Dr Lynes opined that Mulga Queen “was most likely a part of the Western Desert Cultural Block at sovereignty and at all times since and, therefore, the acquisition of rights and interests by long association and the gaining of ritual knowledge is a valid pathway to gaining connection under the traditional law and custom of that country”.
4. Dr Lynes continued:

[142] It is not within the scope of this report (on the basis of my Brief) to detail the connection of each family to the Mulga Queen area, however the people identified by my prior research as having gained rights and interests in the country in and around Mulga Queen according to the laws and customs of the Western Desert Cultural Bloc include the descendants of:

* Paddy Bond;
* Tjujaru/ Anne Green;
* Walayangka and Tjiku Tjiku;
* the siblings Yalana, Rangka Rangka, Putjipa and Yiningka;
* Maraputa/ Jenny Jones and Wogabu/ Wakapu/ Jimmy Walker;
* the siblings Maudie Hill, Willy Hill, Maisie Hill, Snowy Hill, Johnny Hill and Roly Hill;
* the siblings Sandy Banks, Tatitjara Banks and Longfella/ Paddy Banks;
* Waltila and Nanuma;
* Billy Campbell; and
* Imandura and Timpapuru.

A map was created by myself and Sean Calderwood to depict the families and their “sphere of connection”, which is attached to this report as Annexure 2.

[143] While the above research is not conclusive, it is indicative of the fact that there are many people who are not included in the Wutha Claim who claim to hold rights and interests in and around the Mulga Queen area, based on the traditional laws and customs of the Western Desert Cultural Bloc. In my opinion, based on the research referred to above, and subsequent desktop research conducted for this Brief, the people listed above very likely hold native title rights in the Mulga Queen area.

1. The conclusions reached by Dr Lynes were further supported by evidence given by her in her Supplementary Report in which she annexed a further report (the MN-2 Report) which gave a detailed consolidation of the information collected by Dr Lynes and Sean Calderwood.
2. In her examination in chief, Dr Lynes deposed that the basis upon which the families she regarded as likely to have a connection with the southern part of the Tail was “long-term association and the passing on of ritual knowledge in the area, for sites in the area”. In relation to the Mulga Queen families, Dr Lynes listed the current residents of Mulga Queen. Whilst she could not be comprehensive, she identified the current residents as the descendants of Yalana, Rangka Rangka, Putjipa and Yininaka which are the Thomas family, Vanessa Thomas and her family. Dr Lynes further identified the descendants of Sandy Banks and Longfellow Paddy, being members of the Banks family.
3. In cross-examination, Dr Lynes deposed that the Thomas family are descendants of one of four sisters who came from the east and migrated into Mulga Queen. As for the Banks family, Dr Lynes agreed that Banks was a man who came in from the desert to the east in the 1950s with two of his brothers. Dr Lynes acknowledged that their origins, culturally and geographically, are to the north east of the Mulga Queen area. Dr Lynes also stated that research had indicated that the families who had migrated into Mulga Queen had not migrated into a void or empty territory. She opined that there were other people living in the area including the Beaman and Evans families when the immigrant families arrived.
4. There is other evidence given by lay witnesses which is supportive of Dr Lynes’ conclusions. In that respect I have in mind the evidence given by Kado Muir in relation to Maraputa, Jimmy Walker and the Hill, Bond, Beaman, Chapman, Green, Murphy and Banks families; Gay Harris’ evidence in relation to Andy Fisher and his sister Fanny Wack Lloyd; and the evidence of both Gay Harris and Geraldine Hogarth in relation to Nobby Nixon.
5. In his supplementary report, Dr Draper responded to the evidence of Dr Lynes. Dr Draper did not dispute that many migrants from the Spinifex country settled in and around Mulga Queen. Indeed his evidence was that that was “undoubtedly” so. Nor did Dr Draper dispute that those persons have long-term links through Aboriginal *law* with Mulga Queen. He did not dispute Dr Lynes contention that the families in and around Mulga Queen are associated with the area to which Dr Lynes referred and that the area includes area at the southern end of the Tail. Beyond the Mulga Queen families, Dr Draper acknowledged the existence of others whom he regarded as falling outside of the claim group description in the Wutha application but who had a long history of co-residence and social and cultural interaction with the Wutha claimant families. In that respect, Dr Draper mentioned the Narrier family. He also referred to “immigrant Western Desert families from further east and north who have co-resided with Wutha families at places like Darlot for two or three generations (including Kado Muir and the Walker family)”. Others referred to those who “lived among the Darlot community” including “the Hills and Isaacs” and reference was also made by Dr Draper to Peter Hogarth and Don Brockman.
6. In the evidence given by Dr Draper during the conclave of experts, further reference was made by Dr Draper to the existence of persons with an association to the Trial Area but who are not regarded by Dr Draper as within the claim group description. Dr Draper referred to Paddy Walker, the brother of Dolly Muir and Kado Muir’s uncle and said that he was a highly respected *wati* who lived at Darlot for quite some years and worked in the area of Darlot and Barwidgee. Dr Draper said that Paddy Walker was respected and accepted as a community member. Dr Draper referred to Nobby Nixon as a person who had married into the Wutha people and been in the area for a long time. Dr Draper acknowledged that Nobby Nixon had married Gay Harris’ (later in life) mother and that there was “a very close relationship” with the Wutha people. Dr Draper referred to the Narrier family as being one family that was very closely connected to Wutha people over generations including because they travelled together with Wutha people. Speaking of the immigrant families, Dr Draper said that in respect of those that were at Darlot “there was a mix of earlie immigrant families who – married in”. He went on to say that in the case of the Hills, Skipper Sandy and people like Paddy Walker, they had “cultural, historical, ritual knowledge, etcetera”. Emphasising an important qualification (for him) to which I will return, Dr Draper said, referring to immigrants who came into the Trial Area, the “claim group certainly, if it allowed any Western Desert pathway at all, it would be a very large claim group indeed”.
7. In cross-examination, Dr Draper gave evidence about his understanding as to the long-term association of various families that were the subject of the evidence of Luxie and Geraldine Hogarth. That evidence related to the Beaman, Nixon, Evans, Lewis, Bond and Green families sharing *manta* (“place of the home”) with the Hogarth family. Dr Draper said that “the length of association of those families isn’t in doubt”. He said he had been told that the Bonds came in around the 1950s and that other families came in the 1920s to 1930s. Some, such as the Hill family, married into local families. Dr Draper deposed that there was “no doubt about that”.
8. The applicant submitted that Dr Lynes evidence was general and lacking in evidentiary proof; that the level of research conducted by Dr Lynes was “preliminary” and in furtherance of a possible claim (the Mantiljarra-Ngalia claim) that has never been lodged; that Dr Lynes’ report is objectionable on the basis of hearsay and “a lack of basic evidence or basic material to support the generality of the opinions there expressed; and that serious issues of proof arise before any determination of native title could be made in favour of the families that Dr Lynes referred to.
9. I accept that the research conducted by Dr Lynes about the Mulga Queen families may be regarded as incomplete and that the evidence put before the Court by Dr Lynes would not, of itself, be sufficient to substantiate a positive finding that one or more members of the Mulga Queen families has, via the additional pathways, acquired or possess native title rights in the Tail. If it were the case that the evidence of Dr Lynes was being utilised for the purpose of making positive findings that native title is held, the criticism made by the applicant of that evidence may be well‑founded. However, on the question of authorisation, the evidence is relevant for a different purpose. On that issue, the question is not whether the evidence warrants a positive finding that native title is held by the Mulga Queen families, but whether there is sufficiently strong evidence that native title *may* be held, so as to shift the evidentiary burden upon the applicant to establish that no native title holders have been excluded from the authorising group.
10. Furthermore, the evidence of Dr Lynes ought not be considered on its own. It is supported by other evidence to which I have referred, including that of Dr Draper. When all of the evidence is taken into account, the evidence is sufficiently strong to have warranted an evidentiary response from the applicant which denied its force. The evidence sufficiently demonstrated that there is substance in the contention that one or more of the persons in the families referred to may hold native title. I would go further and say that on the evidence, and on the basis of the applicant’s acceptance that the additional pathways are a contemporary means for acquiring and possessing native title rights in the Trial Area, it is likely that native title is held by one or more of the persons in question.
11. I say that because the facts necessary to establish the acquisition of rights by means of the additional pathways – birth, association with the land or holding ritual authority and the birth of or association of one or more ancestors to that land – are not, on the evidence, really in dispute. As I have already recorded, Dr Draper accepted that the Mulga Queen families had long association with the land in and around Mulga Queen. His evidence went further in accepting that long association with the land was also established in relation to families who co-resided with Wutha families at places like Darlot. He accepted that particular individuals had ritual authority. For those reasons not only have the fundamental facts upon which the respondents rely not being negatived by the applicant, the applicant has led evidence from its own expert anthropologist which, in substance, accepted those facts.
12. What Dr Draper denied, but what the applicant’s case accepts, is the existence of the additional pathways. A proper appreciation of Dr Draper’s position is not without its difficulties. Various parts of Dr Draper’s evidence gave the impression that he accepted the existence of the additional pathways. In that respect, I have in mind [770] of Dr Draper’s first report and the fact that he answered “yes” to question 4 of the questions recorded in the Experts’ Report. It became most apparent in evidence given by Dr Draper during the conclave of experts that, despite the impression given by that evidence, Dr Draper was of the view that access to native title rights by means of the additional pathways is conditioned upon acceptance by the Wutha elders and that such acceptance is never given unless the person concerned is a descendent of a local apical ancestor. Whilst in Dr Draper’s opinion, a person with a long-association to the land could be accepted as having a right to reside and participate in social life, in order to acquire or possess native title rights, there could be no acceptance by the elders without the essential condition of descent from a local apical ancestor. In sum, Dr Draper’s real position was that descent from a local apical ancestor is the only pathway to the acquisition and possession of native title rights in the Trial Area. That was the fundamental and only real basis for his disagreement with the evidence of Dr Lynes, as is recorded in Dr Draper’s second report.
13. Dr Draper’s view that there is only a single descent-based pathway was not taken up by the applicant as a basis for denying the holding of native title interests by persons outside of the claim group description or, indeed, for any other purpose. As I have stated, the applicant conducted its case on the basis that the additional pathways existed. The contrary position taken by Dr Draper can be of no assistance to the applicant and the applicant has led no other evidence to negate the available conclusion that the families and persons named by Dr Lynes and Dr Draper as having long association with the land or holding ritual authority, may have acquired and may possess native title rights in the Tail.
14. It follows that the applicant has failed to discharge its onus to demonstrate that no native title holders were excluded from the authorising group. I am therefore not satisfied that the requisite coincidence between the authorising group and the native title holders existed. It follows that the Wutha application was not authorised by the resolutions made at authorisation meetings of either 5 December 2015 or 30 July 2016 and that the application is unauthorised.

## Did the decision-making process adopted invalidate authorisation?

1. Although not made apparent until the filing of the applicant’s written closing submissions made in reply, the applicant ultimately contended that the Wutha application had been authorised by a decision-making process which complied with s 251B(b) of the NTA. That submission took the respondents by surprise. Quite understandably, their submissions assumed, consistently with the evidence filed on behalf of the applicant, that the applicant relied on s 251B(a) of the NTA and would contend that the authorisation of the application had been given by a process of traditional decision-making.
2. The particular traditional decision-making process which the evidence filed on behalf of the applicant stated had been utilised to authorise the application was the decision-making of Geoffrey Ashwin. That evidence asserted that, as the eldest surviving male descendent of Telpha Ashwin and Wunal Ashwin, Geoffrey Ashwin had, by the traditional laws and customs of the Wutha people, decision-making authority in relation to the native title rights and interests of the Wutha people.
3. So much was attested to by Geoffrey Ashwin in his affidavit of 21 August 2015. That evidence was supplemented by June Ashwin’s affidavit of 29 October 2015 which explained that the resolutions made at the 17 October 2015 meeting were made pursuant to “Wutha traditional decision-making”. In relation to the resolutions made at the 5 December 2015 meeting, in her affidavit of 11 December 2015, June Ashwin deposed to the decision-making in that meeting as having been made “pursuant to Wutha traditional decision-making”. The resolutions carried at that meeting expressly referred to the traditional decision‑making of Geoffrey Ashwin. In relation to the meeting of 30 July 2016, in his affidavit of 30 July 2016, Geoffrey Ashwin deposed that the “native title claim group has a traditional decision-making process for the purposes of s 251B(a)” which he asserted was a process for decision-making including in relation to the making of the Wutha application. As is set out above, each of Geoffrey Ashwin, June Ashwin, and Ralph Ashwin (the Ashwin siblings who constitute the applicant) deposed by reference to the resolutions made on 30 July 2016, that they were authorised by the native title claim group to make the amended application by reason of the authorisation given to them “pursuant to s 251B(a)” of the NTA.
4. Other evidence, which it is unnecessary to fully detail here, was more equivocal as to the Wutha decision-making process than that deposed to in the affidavits to which I have just referred. First, there was evidence that established that Geoffrey Ashwin was not a descendant of both Telpha Ashwin and Wunal Ashwin, that ancestry being the asserted source of Geoffrey Ashwin’s authority. Geoffrey Ashwin is a descendant of Telpha Ashwin and the non‑Aboriginal station owner Arthur Cranbrook Ashwin. Wunal was Telpha Ashwin’s Aboriginal husband. Lenny Ashwin, who is now deceased, was a descendent of Telpha Ashwin and Wunal. By an affidavit made on 26 September 2010, Raymond Ashwin who is also now deceased deposed that Lenny Ashwin had been the eldest living male descendent of Telpha Ashwin and Wunal Ashwin, and that he had held the authority to make decisions about the area claimed by the Wutha application. Raymond’s affidavit further stated that on becoming very ill in December 1995, Lenny Ashwin “passed over to him” his traditional authority. That, it appears, occurred despite Raymond Ashwin not being a descendent of Telpha Ashwin and Wunal but, like his younger brother Geoffrey Ashwin, a descendent of Telpha Ashwin and Arthur Cranbrook Ashwin. Geoffrey Ashwin’s evidence is that he gained traditional decision‑making authority from Raymond Ashwin when, on 16 March 2012, two days prior to Raymond’s death, Raymond Ashwin recognised and confirmed him “as the eldest surviving male” after himself “to whom would pass the traditional decision-making authority for the Wutha People”.
5. Secondly, the evidence tended to support the proposition that any traditional decision-making authority held by Geoffrey Ashwin was confined to the Ashwin family. That is, to the descendants of Telpha Ashwin and Arthur Cranbrook Ashwin. That evidence recognised that as the eldest male of his family, Geoffrey Ashwin had decision-making authority in relation to his own family. There was, however, some evidence that Geoffrey Ashwin held wider authority extending to decision-making over all of the Wutha claimants.
6. When confronted with the allegation that the applicant had changed its position in relation to the decision-making process utilised to authorise the Wutha application, Senior Counsel for the applicant denied that that was so. It was submitted that the applicant’s case, in relation to the traditional decision-making authority of Geoffrey Ashwin, had always been confined to the time prior to when “additional people were being brought in”. That was a reference, as I understood it, to the authorisation meeting held on 17 October 2015 referred to above and in relation to which Geoffrey Ashwin deposed that, by reason of the work of Dr Draper, it was determined to extend the native title claim group description so as to include other families and in particular the Harris, Hogarth and Barnard/Wheelbarrow families. I do not accept that submission. It is contradicted by the evidence to which I have referred and in particular the evidence given by Geoffrey Ashwin, June Ashwin and Ralph Ashwin in relation to the decision-making processes utilised for each of the 17 October 2015, 5 December 2015 and 30 July 2016 authorisation meetings.
7. Senior Counsel for the applicant referred to proceedings before Barker J on 29 July 2015 and also on 30 October 2015 relating to the application made by the applicants for leave to amend the Wutha application. It was suggested that, following comments made by Barker J that some further thought may need to be given to whether the traditional decision‑making authority of Geoffrey Ashwin applied in relation to the broader group of families then involved, the applicant reconsidered its position on the question of how authorisation should be given. Whether and to the extent that this occurred is not a matter I need to further consider. It is apparent that even after the hearing before Barker J on 30 October 2015, the affidavits filed by the applicant in support of the asserted authorisations made on 5 December 2015 and 30 July 2016 continued to depose to the use of a traditional decision‑making process involving the decision-making authority of Geoffrey Ashwin made in conformity with s 251B(a) of the NTA.
8. I suspect that what the applicant sought to do after the hearing before Barker J on 30 October 2015, but which was not achieved, was to seek to rely upon an adaptation in which the asserted traditional form of decision-making of Geoffrey Ashwin was to be conditioned by a requirement to consult with the families of the Wutha people including with members of the native title claim group meeting together at authorisation meetings. That consultation requirement is referred to, for the first time, in the affidavit of Geoffrey Ashwin of 30 July 2016.
9. It is plain that the inconsistent way in which the traditional decision-making processes of the Wutha people have been variously asserted and dealt with by the applicant demonstrates a significant degree of artificiality. That has a consequence for other issues to which I will later return.
10. On the question of whether the Wutha application was authorised on either 5 December 2015 or 30 July 2016, all parties, including the applicant, now accept that authorisation did not occur by reason of any traditional authority held by Geoffrey Ashwin, whether in consultation with others or not. That was the position which at all times the State and Central Desert contended for and, on my view of the evidence, the applicant would not have established the contrary position if that submission had been pressed.
11. Unfortunately for the applicant, its changed position as to the decision-making process utilised at the authorisation meetings did not resolve the controversy as to whether, by reason of the decision-making process utilised, valid authorisation was given by those meetings. That is because the respondents contended that: *first*, resort to the decision-making processes available under s 251B(b) of the NTA is only available where a traditional decision-making process of the kind contemplated by s 251B(a) does not exist, and *second*, that I ought not be satisfied that a traditional decision-making process did not exist.
12. On the hypothesis that the Wutha claimants are a society of Western Desert people observing Western Desert traditional laws and customs, the respondents contended that the evidence supported the existence of a form of decision-making contemplated by s 251(B)(a), of the NTA namely – a process where decision-making is made by senior people or elders recognised as having knowledge of and interests in the respective domains of activity involved, with decisions concerning particular families being made by the acknowledged heads of those families.
13. The respondents principally relied on the responses given by the experts in the Experts’ Report to the following question:

What is the nature of the decision-making process which applied or likely applied in respect of the Trial Area at effective sovereignty, or, if there were or were likely to have been different decision-making processes in respect of different parts of the Trial Area, the nature of those different decision-making processes?

**Assoc. Prof Draper**: Tjukurrpa would have provided the general framework for decision-making. It is likely that decisions were made by senior people of the Trial Area recognised as having knowledge of and interests in the respective domains of activity involved. Decisions concerning families would have been made by the acknowledged heads of those families.

**Dr Brunton**: In the tail, at effective sovereignty, decision-making processes were most likely dictated by the Tjukurrpa. It is likely that decisions were made by senior people recognised as having knowledge of and interests in the respective domains of activity involved. I think it is unlikely, at least in the [Western Desert], that these people could be structurally predicted in terms of genealogical status. The situation in the body area is likely to have been similar although it is possible that there was a greater emphasis on genealogical status of decision-makers.

**Dr Lynes**: In the tail, at effective sovereignty, decision-making processes were most likely dictated by the Tjukurrpa. It is likely that decisions were made by senior people recognised as having knowledge of and interests in the respective domains of activity involved. I think it is unlikely, at least in the WD, that these people could be structurally predicted in terms of genealogical status.

1. As may be apparent, each of Dr Draper, Dr Brunton and Dr Lynes accepted that the traditional decision-making process at sovereignty was that decisions were made by senior people of the Trial Area recognised as having knowledge of and interest in the respective domains of activity involved.
2. The applicant did not cavil with that proposition and in its closing submission, the applicant noted that consensus and said this:

There is every reason, therefore, to accept that the contemporary Western Desert decision-making processes of the claim group involving *“senior people”* or *“elders”* is in accord with traditional decision-making processes applied in respect of the Trial Area at effective sovereignty

1. However, responding to the submissions of the respondents, the applicant contended that a claim group may decide to adopt a decision-making process where there is not a traditional decision-making process for “this meeting”. What I understand the applicant to have here contended is that where there is no process of decision-making that, in the words of s 251B(a) of the NTA, “must be complied with in relation to authorising things of that kind”, the group can decide to adopt a particular decision-making process. I accept that contention. It is consistent with the text of s 251B(a) of the NTA.
2. The applicant next contended that the fact that a particular decision-making process was adopted in the authorisation meetings should be regarded as evidence of the non-existence of a mandatory traditional decision-making process in relation to authorising the things that were dealt with in the authorisation meetings. Additionally, in its oral closing submissions, the applicant contended that I should infer that the Wutha claimants did not have a traditional form of decision-making process “because they had not come together as a group prior to [the authorisation meetings]”. I infer that what the applicant sought to say was not that the persons constituting the native title claim had never before come together, but that they had not before come together for the particular purposes of the authorisation meetings. Lastly, the applicant contended that the evidence did not indicate a singular Western Desert traditional decision‑making process to which every group of Western Desert people must conform.
3. The two paragraphs of s 251B of the NTA are arranged hierarchically. The paragraphs are mutually exclusive; paragraph (b) only applies if paragraph (a) does not: *Wongatha* at [1230] (Lindgren J).
4. On the authorities, a formal resolution is not required for a group to establish that it is not bound by any traditional process, evidence to that effect may be provided by the context or conduct of the meeting: ***N.C. (deceased)*** *v State of Western Australia (No 2)* [2013] FCA 70 at [79]‑[80] (McKerracher J). The inference that a mandatory traditional decision-making process does not exist may be drawn from the fact that the members of the native title claim group were prepared to adopt a non-traditional decision-making process: *Holborow v State of Western Australia* [2002] FCA 1428 at [50] (French J); *N.C. (deceased)* at [79] (McKerracher J).
5. None of the resolutions carried at the authorisation meetings discussed above expressly disavow the existence of a traditional decision‑making process. Further, they each refer to the traditional decision‑making of or by Geoffrey Ashwin. On their face, neither of those matters support the inference contended for by the applicant contended for that no traditional decision‑making process existed.
6. However, the purpose of the references made to Geoffrey Ashwin in the resolutions carried is ambiguous. On one view, it may be regarded as an expression of the decision-making process actually utilised for the decision the subject of each of the resolutions. Alternatively, the reference to the traditional decision‑making of Geoffrey Ashwin may be a reference to the process of decision-making that the resolutions require the members of the applicant to abide by in implementing the decision the subject of the resolution.
7. The former view is not supported by the evidence that each resolution was moved, seconded and carried unanimously. That evidence serves to indicate that the decision-making process utilised was a process for determining the will of the meeting rather than that of Geoffrey Ashwin. The very convening of a meeting and the ascertainment in that meeting of the will of the meeting is inconsistent with the idea that the decisions there made were made by Geoffrey Ashwin. It follows, in my view, that the second construction should be preferred. The references made in the resolutions to the decision-making of Geoffrey Ashwin may be regarded as neutral on the question of whether the inference for which the applicant contends ought to be drawn.
8. Whilst I accept the evidence of the experts that the traditional decision-making process in Western Desert societies is a process where decisions are made by senior people with recognised knowledge, that evidence is of a general nature. That evidence did not specifically address what may, at least on one view, be regarded as the non-traditional subject of the authorisation of particular individuals to make and pursue an application under the NTA: *Anderson v state of Western Australia* [2003] FCA 1423 at [46] (French J). Nor did that evidence address the extent to which the traditional decision-making process to which it referred is a mandatory process in relation to that topic.
9. I consider that there is force in the proposition that, the adoption by the persons at the authorisation meetings of a process of decision-making which sought to determine the will of those gathered, suggests that no mandatory traditional decision-making process was regarded by those persons as applicable for dealing with decisions of the kind there dealt with. That is particularly so given that the resolutions were carried unanimously and absent any evidence of dissent or protest as to the decision-making process adopted.
10. Against that inference is the direct evidence of Geoffrey Ashwin, June Ashwin and Ralph Ashwin who, by the affidavits to which I have earlier referred, deposed to the existence of the traditional form of decision-making of Geoffrey Ashwin, its use at the authorisation meetings, and its characterisation as a form of traditional decision-making. However, I consider that evidence to be wholly unreliable. When tested in cross-examination, neither Geoffrey Ashwin, June Ashwin or Ralph Ashwin revealed any real understanding of what they had deposed to, including as to why steps were taken at different points in time to amend the definition of the native title claim group and the basis or character of the decision-making authority relied on.
11. The evidence of the Ashwin siblings is also contradicted by other evidence, including their own oral evidence, which (as I have already recorded) suggested that in so far as there is a traditional decision-making process in which Geoffrey Ashwin has authority, it is a process confined to decision-making within the Ashwin family.
12. Having rejected the evidence of the Ashwin siblings in respect of a mandatory traditional decision-making process being adopted, I consider that from the adoption by the persons at each of the authorisation meetings of a process of decision-making agreed by them, an inference is available that an alternative process of decision-making, and in particular a process contemplated by s 251B(a) of the NTA, did not exist.
13. It follows, in my view, that the persons gathered at the authorising meetings were entitled to adopt and did adopt a decision-making process of the kind permitted by s 251B(b) of the NTA. The decision-making process adopted at the authorising meetings is not a basis for concluding that the Wutha application is not authorised.
14. Nevertheless, I have reached the conclusion that, for the reasons earlier considered, the Wutha application is unauthorised.

## Should the s 84D(4) discretion be exercised?

1. It is necessary then to turn to s 84D(4) of the NTA and the submission made by the applicant that the Court should exercise the discretion there given and determine the Wutha application despite any defect in its authorisation.
2. Section 84D of the NTA relevantly provides:

…

(3) Subsection (4) applies if:

(a) an application does not comply with section 61 (which deals with the basic requirements for applications) because it was made by a person or persons who were not authorised by the native title claim group to do so; or

(b) a person who is or was, or one of the persons who are or were, the applicant in relation to the application has dealt with, or deals with, a matter arising in relation to the application in circumstances where the person was not authorised to do so.

Note: Section 251B states what it means for a person or persons to be authorised to make native title determination applications or compensation applications or to deal with matters arising in relation to them.

(4) The Federal Court may, after balancing the need for due prosecution of the application and the interests of justice:

(a) hear and determine the application, despite the defect in authorisation; or

(b) make such other orders as the court considers appropriate.

1. Section 84D(4) permits the Court to “hear and determine” an application for the determination of native title “despite the defect in authorisation”. The Wutha application has now been fully heard so far as it relates to the Trial Area and, by this judgment, that aspect of the application will be determined. What the applicant seeks therefore, is that the want of authorisation of its application be excused in my determination of that part of its application with which I am dealing. I accept that s 84D(4) of the NTA empowers the Court to provide that relief, but for the following reasons I would decline to grant the relief sought.
2. In the exercise of the discretion given by s 84D(4), of the NTA there are two considerations specified that must be taken into account. As the broad scope of those considerations suggests, what is intended is that the discretion be exercised by reference to the particular circumstances of the case. It is not necessary to detail the way in which the discretion has been exercised in other cases*.*
3. The first consideration that must be taken into account is the need for the due prosecution of the application. In so far as that consideration entails the encouragement of speedy, inexpensive and efficient resolution of applications, it is a consideration that weighs in favour of the applicant. The application already has a very long and difficult history. If native title exists, legal recognition for the native title holders is well and truly overdue and ought not be further delayed. In the face of a formal defect in authorisation, that would be a powerful factor in favour of the exercise of the discretion given by s 84D(4) of the NTA.
4. However, the defect here is substantive and not merely formal. If the defect was to be excused and again, on the assumption that native title exists and for reasons already canvassed, it is likely that the interests of persons who may be native title holders will be prejudiced and severely so. Those persons may, in accordance with the scheme of the NTA discussed by the Court in *Clifton*, be denied recognition as native title holders: *Clifton* at[44]-[161] (Branson, Sundberg and Dowsett JJ).At the least, those persons may have been denied their entitlement to participate in this application - to choose the applicant, to shape the application and to support it with their own evidence. In the circumstances of this case, particularly given what I later say about the evidentiary shortcomings of this application, I consider the potential for prejudice to be significant.
5. I reject the applicant’s contention that no weight should be given to prejudice of that kind on the basis that those persons who have been excluded can make their own application. The submission misunderstands that if the persons excluded should properly have been included as part of the native title claim group, they do not have the capacity to bring their own application because such an application would, itself, be an application brought by a sub-group of the “native title claim group” referred to by s 61 of the NTA. Nor can the applicant legitimately complain about the late stage at which the issue which has given rise to the defect has been raised. As the procedural history shows, want of authorisation has been raised on several prior occasions. When raised before Jagot J, the applicant itself contended that the issue of authorisation should be left to trial. Further, and in any event, there is no evidence before me that the persons who are potentially prejudiced knew about this application, were put in a position of being able to understand the ramifications of it for them, and nevertheless sat on their hands.
6. The interests of justice do not favour the exercise of the Court’s discretion under s 84D(4) of the NTA and taking all of the necessary considerations into account, I decline to exercise that discretion.

# ASSUMING IT TO BE AUTHORISED, SHOULD THE WUTHA APPLICATION SUCCEED?

1. In the case that I am wrong in reaching the conclusion that the Wutha application is not authorised or wrong in refusing to exercise the discretion provided by s 84D(4) of the NTA, I will set out my reasons for concluding that the Wutha application does not succeed in any event.

## The legal principles and the relevant lines of inquiry

1. On the basis of the applicable legal principles, it is appropriate that I identify, in broad terms and at this juncture, the matters that the Wutha claimants must establish in order to succeed.
2. The starting point for a consideration of a claim of native title is the NTA. That is because the claim is made for a determination of rights that are defined under that statute: *Western Australia v* ***Ward*** (2002) 213 CLR 1 at [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *De Rose v State of South Australia* (2003) 133 FCR 325 (*“****De Rose (No 1)”***) at [155] (Wilcox, Sackville and Merkel JJ).
3. That directive requires me to turn to the definitions of the expressions “native title” and “native title rights and interests” which are given by s 223(1) of the NTA. That provision is in the following terms:

**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.

1. In *De Rose* *(No 1)*, Wilcox, Sackville and Merkel JJ construed s 223(1) of the NTA by reference to observations made in various authorities including by the High Court in *Ward*, ***Yorta Yorta*** *v Victoria* (2002) 214 CLR 422 and also *Commonwealth v Yarmirr* (2001) 208 CLR 1. Having set out the terms of s 223(1), their Honours identified the characteristics that native title rights and interests must have as follows (at [159]):

The rights and interests must have the three characteristics specified in paras (a), (b) and (c) of s 223(1) of the NTA:

(a) they must be rights and interests which are “possessed under the traditional laws acknowledged, and the traditional customs observed” by the Aboriginal peoples;

(b) the Aboriginal peoples, by those laws and customs, must have “a connection with the land or waters”; and

(c) the rights and interests must be “recognised by the common law of Australia”.

1. As the Full Court said at [161] in relation to sub-para (a) of s 223(1), that sub-para requires the identification of:

* laws and customs said to be traditional laws and customs; and
* the rights and interests in relation to land or waters which are possessed under those laws and customs.

1. Importantly, and following upon the observations made in *Yorta Yorta* at [38] (Gleeson CJ, Gummow and Hayne JJ), the subject matter of the inquiry required by sub-para (a) of s 223(1) is the rights and interests which find their origins in the traditional laws and customs (in the sense of rules having a normative content) that existed before sovereignty, that is, before the time when the British Crown asserted sovereignty over the lands and waters in question.
2. As the Full Court in *De Rose (No 1)* said at [165], it follows from *Yorta Yorta* (at [46]-[47]) (Gleeson CJ, Gummow and Hayne JJ) that the word “traditional” in the concept of “traditional laws and customs” carries with it the following two elements:

* an understanding of the age of the traditions, in particular a requirement that the origins of the law or custom lie in pre-sovereignty norms; and
* the requirement, flowing from the reference to rights or interests being *possessed* under traditional laws, that the normative system under which the rights and interests are possessed “has had a continuous existence and vitality since sovereignty”.

1. The reference there made to the expression “continuous existence and vitality” must, as Mortimer J observed at [822] of *Tjiwarl*, be understood in the context that the focus of the definition in s 223 and indeed the focus of the NTA, “is on the body of traditional laws and customs observed in relation to the acquisition, possession and exercise of rights and interests in land and waters”. Accordingly, as her Honour continued (at [823]-[825]):

[823] In assessing continuity (if that shorthand expression might be used) the central question is whether the traditional laws and customs of a claim group which relate to the acquisition, transmission and exercise of rights and interests in land and waters are recognised and observed by claim group members as a living normative system in substantially the same form they had at sovereignty (allowing for permissible adaptation, as I discuss below).

[824] So, for example, in terms of weighing and assessing evidence about continuity, the fact that – as in this case – some traditional laws and customs, such as those concerning the skin system, may be seen to have broken down and become somewhat confused is of less weight in the determination of the continuity required under s 223. See, to this effect, observations of the Full Court in *De Rose (No 2)* [2005] FCAFC 110; 145 FCR 290 at [63].

[825] It is also appropriate to recall, as the State submits, that continued recognition and observance is assessed at the level of the group as a whole, rather than each and every individual member of it; and what constitutes sufficient acknowledgement and recognition will be a question of fact and degree in each case: see De Rose (No 2) at [58].

1. As to sub-para (b) of s 223(1), the Full Court in *De Rose (No 1)* said this at [167]:

The paragraph requires:

* an identification of the content of traditional laws and customs; and
* the “characterisation of the effect of those laws and customs as constituting a ‘connection’ of the peoples with the land or waters in question” (*Ward (HC)* at [64]).

1. In relation to the purposes served by sub-para (c) of s 223(1), the Full Court in *De Rose (No 1)* said at [172]:

* recognition may be refused to rights and interests which are “antithetical to fundamental tenets of the common law” (*Yorta Yorta (HC)* at [77]; *Ward* (HC) at [21]); and
* the requirement of recognition by the common law emphasises that the native title rights or interests must have existed at sovereignty, that is, at the time of “intersection” of the two legal systems (*Yorta Yorta (HC)* at [77]).

1. It is necessary to observe, as did the Full Court in *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290 (“***De Rose (No 2)***”), that the chapeaux to s 223(1) of the NTA refers to native title or native title rights and interests as meaning “the communal, group or individual rights and interests of Aboriginal peoples Torres Strait Islanders …”. As the Full Court said at [38]-[39] (Wilcox, Sackville and Merkel JJ) (emphasis added):

[38] … The classification is a statutory construct, deriving from the language used in *Mabo (No 2)*. If it is necessary for the purposes of proceedings under the NTA to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests. By contrast, group and individual native title rights and interests derive from a body of traditional laws and customs observed by a community, but are not necessarily claimed on behalf of the whole community. Indeed, they may not be claimed on behalf of any recognisable community at all, but on behalf of individuals who themselves have never constituted a cohesive, functioning community.

[39] The distinction between group and individual rights and interests (to the extent it matters) is perhaps more difficult to identify. *An example of group rights and interests may be those held by a subset of a wider community, the traditional laws and customs of which determine who has interests in particular sites or areas. The members of the subset may or may not themselves be an identifiable community, but their rights and interests are determined by the traditional laws and customs observed by the wider community. The members of the subset might be expected, under the traditional laws and customs, to share common characteristics in relation to certain land or waters, such as rights and responsibilities as the custodians of particular sites*. Ordinarily, it might be expected that the “group” holding native title rights and interests would have a fluctuating membership, the composition of which would be determined by the relevant body of traditional laws acknowledged and customs observed.

1. The character and extent of native title rights and interests, whether communal, group or individual depends upon the content of the traditional laws and customs in question: *Bodney v Bennell* (2008) 167 FCR 84at [148] (Finn, Sundberg and Mansfield JJ); *De Rose (No 2)* at [31] (Wilcox, Sackville and Merkel JJ); *Akiba* at [164] (Finn J).
2. Taking into account the way in which the applicant has put its case (a matter I will further address later in these reasons), namely, that the Wutha group is a sub-set of the Western Desert Society and that the members of that group, hold and share group rights and interests in lands and waters in the Trial Area in accordance with Western Desert traditional laws and customs, the lines of inquiry required in this case by reason of s 223(1) of the NTA, are as follows:
3. What are the traditional laws and customs (that is, the normative rules) of Western Desert Society and, specifically the laws and customs which provided for the holding and sharing of possessory rights and interests in particular land and waters by a group or sub-set of Western Desert persons? (“**Question 1**”)
4. Pursuant to those traditional laws and customs, are the members of the Wutha group a single sub-set of the Western Desert Society holding and sharing possessory rights in the Trial Area? (“**Question 2**”)
5. In so far as the group possessory rights and interests of the Wutha group to the land and waters of the Trial Area existed at sovereignty, since that time, have the traditional laws and customs, and in particular the laws relating to the acquisition, transmission and exercise of rights to land and waters from which those possessory rights and interests originated, continued to be recognised and observed by the Wutha group as a whole? (“**Question 3**”)
6. Can those traditional laws and customs (in so far as they have been continued to be recognised and observed by the Wutha group) be characterised as providing a connection between the Wutha group and the Trial Area? (“**Question 4**”)
7. Although the lines of inquiry I have posed refer to the position at sovereignty, it is not in issue that an inference may be drawn that the circumstances which existed at or around the time of first contact between indigenous and non-indigenous people, are likely to be reflective of the circumstances that existed at and shortly prior to sovereignty: *Sampi* at [64] (North and Mansfield JJ). That time is often referred to in native title proceedings as “effective sovereignty”. It is agreed that, in this case, sovereignty occurred in 1827, and effective sovereignty occurred in the decade of the 1890s.
8. It is not in contest that the applicant bears the legal onus of proof on all of these issues and that the standard of proof is the balance of probabilities: *Tjiwarl* at [403] (Mortimer J).

## The contentions of the parties

1. It is sufficient for present purposes that I give an outline of the contentions of the parties. I will provide more detail of the competing contentions as I deal with the issues which are fundamentally in dispute.
2. By reference to the chapeau to s 223(1) of the NTA, it is necessary first to address the capacity (that is, whether “communal, group or individual”) that the applicant claims traditional rights and interests are held by the Wutha claim group and their ancestors. The applicant did not contend that the rights and interests held are or were “individual rights”. The applicant’s case is that the relevant rights and interests are “group … rights and interests”. Although a reference is made in overview (at para 1(a) of the applicant’s SFASFI&C) to the Wutha claim group being “a community or group under s 223(1)”, applying the distinction between a “community” and a “group” to which the Full Court in *De Rose (No 2)* referred at [38] to the way the applicant put its case, the applicant’s case must be regarded as advocating that the relevant rights and interests contended for are “group” rights and interests held by the Wutha claimants as a group.
3. Consistently with that characterisation, the applicant further contended that:

* the Wutha claim group members and their ancestors are Western Desert people, a group of Aboriginal people part of, or a sub-set of, the broader Western Desert Society (para A1(b)(iii) of the applicant’s SFASFI&C);
* the claim group members and their predecessors “are a society, group and a sub-set of Western Desert Society associated with the claim area connected to it by and observing traditional law and customs of Western Desert people relating to the claim area” (para 2(d) of the applicant’s SFASFI&C, and to the same effect at para C2(g)(v));
* that the applicant’s contention and evidence “is to be understood” in the way expressed in the applicant’s SFASFI&C (by reference to the paragraphs referred to above) and by reference to the applicant’s opening address, namely, “that the applicant’s ancestors and their descendants were ‘a group, part of or a sub-set’ of Western Desert Society”;
* “[t]he applicant’s claim is a claim for group rights”; and
* that the applicant’s case is “that the claim group holds group native title rights as a sub-set of Western Desert Society”.

1. The applicant’s case is that the Trial Area, as part of a wider surrounding area (an area comprised by the Trial Area and the areas of the Wutha claim previously dealt with in *Wongatha*), was the “traditional Western Desert country” of the ancestral families of each of the apical ancestors listed in the claim group description. Described in terms of the particular ancestral families, the applicant contended that each of the Darugadi, Billy, Inyarndi and Julia Sandstone ancestral families should be understood (collectively) as “traditional local groups within the wider Western Desert Society living on and occupying the Trial Area at effective sovereignty, the genealogies of those ancestral families connected by interfamily relationships so that, together, they constitute a traditional land-holding group as a part of or [a] sub-set of Western Desert Society”. The proposition put by the applicant was that the four ancestral families were genealogically connected to each other and connected to the Trial Area “as their ‘territory’ or ‘range’ within which they lived and travelled for sustenance and ceremony by shared observance of Western Desert law and custom”. Without elaboration or specific reference being given to any particular evidence or research, that was said to be entirely explicable in terms of traditional Aboriginal social organisation, as identified by Professor Elkin and other anthropologists.
2. It is important to appreciate that the applicant’s case, as set out in its SFASFI&C and elaborated upon through Dr Draper’s evidence and the applicant’s submissions, was that the native title interests and rights of the Wutha claim group over the whole of the Trial Area were shared by the members of the claim group, in the sense that possessory rights in all parts of the Trial Area were held by all members of the group. In that respect, the applicant’s SFASFI&C said this at para A4(b):

In common with most aboriginal custom [sic], the traditional laws and customs of the Claim group incorporate possessory rights in relation to their traversed and used lands and waters; that possessory connection is shared by all members and passed on down the generational line;

1. There was, however, an acknowledgement that access to and use of lands and places “is different depending upon age, authority and who is entitled to speak for country”. That statement, as I understand it in the context of the applicant’s assertion of its claim, was intended to convey that the possessory rights shared by all members of the Wutha group across the whole of the Trial area may be engaged or distributed differently.
2. Those contentions were initially adopted by Dr Draper in his first report as exemplifying the way in which the traditional laws and customs of the Wutha claim group determine connection to the claim area. However, in his second report Dr Draper sought to clarify his position in relation to the phrase “traversed and used lands and waters”. He stated that in order to reflect his opinion, the phrase should be understood as not intending to include areas in which any member of the Wutha group “had set foot at some time in the past” but refers to areas “habitually travelled and used”.
3. Dr Draper’s first report included a map entitled “Wutha Country–Family and Individual Examples of Inhabited Country” (“**Map 5-7**”). A copy of Map 5-7 is annexed as **Annexure 5**. The map plotted what Dr Draper elsewhere described as “patterns of association with country” or the “runs” of the Wutha families, or the areas said by Dr Draper to have been the “habitually travelled and used areas to which [the Wutha group] claimed possessory rights”.
4. The “runs” identified by Dr Draper in Map 5-7 surround and traverse the Trial Area as well as the Head. Dr Draper sought to emphasise that the “runs”, as depicted by him, did not include places and areas to which people travelled merely as visitors or had individual or family rights due to inter-marriage or other factors. The “runs” depicted by Dr Draper were asserted to be the areas that the Wutha group “holds rights and responsibilities of ownership”, “believe that they held traditional rights to dwell and use resources, and for which they believe they hold rights in relation to ‘speaking for country’, or ownership rights”, or “for which the people concerned could be seen legitimately as holding rights in common as a group”. Dr Draper described the Wutha group as asserting “core rights”, rather than “contingent rights”, to the Wutha claim area. As Dr Brunton explained by reference to the anthropological literature, “core rights” are right to the possession, occupation, use and enjoyment of the land and waters to the exclusion of all others. This incorporates rights to: resolve amongst themselves disputes about land tenure; maintain the integrity of, and control the circulation of, cultural knowledge and paraphernalia relating to the land; conduct ceremonies on the land; grant or refuse permission to others to do any of the above; inherit and bestow the above rights and interests; and, maintain and protect economic and religious sites on the land. “Contingent rights” are more limited and consist: the right to hunt and fish on the land or in the waters; the right to take natural resources from the land and waters, including mineral resources; the right to dispose of such resources by trade or exchange; and the right to move about on the land or waters, or live and erect dwellings on the land (subject to age and gender restrictions that would apply to certain sites or areas).
5. Dr Draper opined that the “pattern of evidence and the pattern of runs” demonstrated a society or group that included each of the Wutha ancestral families. Dr Draper asserted that the Wutha claimants held core rights “in common as a group” to all of the area depicted in Map 5-7, which includes the Head and the Trial Area. Each member of that group shared a possessory connection to the whole of the group’s area, so that in Dr Draper’s opinion, any descendent of the apical ancestors relied upon by the applicant has “a possessory connection to the entirety of the Wutha Claim”.
6. The common ownership of the Wutha claim area by the Wutha ancestral families was regarded by Dr Draper as one of the matters “which cement this society together”. Dr Draper also relied on “the family connections recorded in the genealogies and associated skin and other social rules, and finally the shared cultural traditions, beliefs and practices and associated sacred sites which link those people to that country”.
7. In closing oral submissions, counsel for the applicant emphasised that the applicant’s claim was that the Wutha claimants, as a single group, constituted by interrelated families, have shared, as their predecessors had shared, rights and interests over the whole of the Trial Area, being connected to that area by a shared acknowledgement of Western Desert traditional laws and customs.
8. Turning then to the contentions of the State, the State accepted that at sovereignty Western Desert laws and customs applied in respect of the Tail. The State further accepted that the evidence is consistent with the majority of the Wutha claimants being Western Desert people whose ancestors held rights and interests in the Tail, and potentially, the north-eastern corner of the Body in the area adjacent to and including Agnew and Lawlers. That acceptance is consistent with the opinion of Dr Bruntonand, so far as it concerns the Tail, the opinion of Dr Lynes. Dr Brunton also opined that it was possible that Areas 3 and 4 were within the Western Desert.
9. The extent of the concession, so far as it relates to the north-eastern corner of the Body was not given in precise terms, although clarity may be found in the way in which the State has identified what may have been intended as the converse of the concession – the area in the Body in relation to which the State seeks a negative determination. That area has been precisely identified as that part of Pinnacles Station (Pastoral Lease No 49812) within the Body and that area within the Body to the east of Pinnacles Station as marked on a map which appears as an attachment to the State’s Amended Response to the applicant’s SFASFI&C. The area there identified covers the north-eastern corner of the Body and includes Areas 3 and 4.
10. The State also acknowledged that the evidence given by the experts established that, at the time of effective sovereignty, each of Darugadi (his affine Murni and her mother Matjika), Billy, Inyarndi and their ancestors, held rights in the Tail.
11. The State submitted that that concession may be regarded as a starting point for evaluating subsequent acknowledgement and observance of traditional laws and customs by the descendants of these apical ancestors. In the State’s Amended Response to the applicant’s SFASFI&C, the State acknowledged that the Tail was occupied by a society or group referred to as “Pini” and that the Pini acknowledged and observed Western Desert laws and customs. It was further admitted that the Tail was part of the traditional country of Darugadi, Billy and Inyarndi, and that Darugadi (his affine Murni and her mother Matjika), Billy and Inyarndi were Western Desert people.
12. As I understand the State’s position (putting together admissions made in the pleadings and the submissions made by the State), it accepted that at effective sovereignty, a society or group whom Tindale identified as “Pini” and which included each of the Darugadi, Billy and Inyarndi ancestor families occupied the Tail and held rights to land and waters in respect thereof in accordance with Western Desert traditional laws and customs.
13. However, the State made no similar concession in relation to Julia Sandstone, her ancestors or her descendants. The State’s position is that, neither at effective sovereignty nor at any other time, did Julia Sandstone hold rights to land or waters in the Tail. The State further disputed that Julia Sandstone was a Western Desert person. It disputed that under Western Desert laws and customs Julia Sandstone held any rights to land or waters in the Tail or in the Body, although the State acknowledged that Julia Sandstone may have held rights in the Body “as a non-Western Desert (for example, Badimia) person”.
14. I will return to consider the position in relation to Julia Sandstone and her daughter Sarah Brown in more detail shortly.
15. To restate my understanding of the State’s position, the State accepted that, pre-effective sovereignty, a group or sub-set of Western Desert people existed and was broadly constituted by the Darugadi, Billy and Inyarndi ancestral families and other persons accepted by that group under Western Desert traditional laws and customs (but not Julia Sandstone). The State accepted that the group, so constituted, occupied the Tail and held rights and interests in that area in accordance with Western Desert traditional laws and customs acknowledged and observed by them.
16. The State took a very different position in relation to the Body, in respect of which the applicant’s case is fundamentally reliant upon the apical ancestor Julia Sandstone.
17. The State contended that the applicant had failed to establish that pre-effective sovereignty, Julia Sandstone and/or her descendants were joined, as part of the same (land-holding) group or sub-set, with the ancestral families of Darugadi, Billy and Inyarndi. That was so including because the evidence did not establish that Julia Sandstone or her daughter Sarah Brown were Western Desert people or that their traditional country was within the Body, or that Western Desert laws and customs applied to the Body (other than possibly the north-eastern corner in the area adjacent to and including Agnew and Lawlers). For essentially those reasons, the State submitted that the applicant’s contention that, pre-effective sovereignty, the Wutha group held rights and interests in the Body has not been established.
18. Central Desert’s interests and its submissions were confined to the Tail. In relation to the Tail the position taken by Central Desert was broadly consistent with that of the State.

## Traditional laws concerning rights to land and waters (Question 1)

1. The normative rules of Western Desert Society providing for the holding of rights and interests in land and waters, are not substantially in contest. Nor is it in contest that so far as Western Desert laws and customs applied in the Trial Area at effective sovereignty they were comparable to Western Desert laws applicable generally. Each of Drs Brunton and Draper agreed that the evidence did not reveal any significant difference.
2. All of the experts agreed that “*[t]jukurrpa* is the basis of people’s connection to country”. I accept that *tjukurrpa* is a belief system which explains the shape and character of the landscape and underpins the connection which Aboriginal peoples have to the landscape and to each other in their sharing of it. Through dreaming tracks, sacred sites, forbidden places and other site specific manifestations, *tjukurppa* serves to define the territory over which particular people have possessory rights. As Dr Lynes stated: “[n]ot only does the *tjukurrpa* dictate *who* might have rights and interests in land (ie the principles upon which rights and interests might be claimed), the *tjukurrpa* also dictates *how* decisions must be made about those lands within which rights and interests are held”.
3. As Dr Brunton stated: “it seems that everywhere Aboriginal people’s understandings about the connections to their country were underpinned by the ‘religious’ or ‘spiritual’ notions that their ‘title deeds’ to land – the songs, stories, ceremonies, designs and physical paraphernalia associated with specific states or tracks of country – had been created by ancestral beings …”.
4. There are two aspects of Western Desert normative rules as applicable to the Trial Area which were the subject of some conflict in the evidence but, ultimately, were not in significant contest as between the parties.
5. *First*, there was some conflict in the evidence as to the decision-making process provided for by Western Desert traditional law. However, as I have stated above at [237]-[239] all of the parties ultimately accepted, and I would conclude, that the traditional decision-making process, including as applicable to recognition of a person’s claim to an interest in land and waters, is that decisions are made by senior people recognised as having knowledge of and interest in the area concerned. As Dr Lynes explained by reference to the work of Myers and Cane, decision‑making amongst Western Desert Aboriginal peoples involves a process of consensus; “a process whereby a decision is agreed amongst a given group of interested members, with those holding the most sacred knowledge of the country in question being accorded the most say”. In the words of Kado Muir, a witness called by Central Desert, there will be senior people who are recognised as having a higher level of authority and they will generally make a decision that other people agree with.
6. *Second*, as indicated already at [222], Dr Draper’s position was that only a single descent‑based pathway existed under the normative rules for the acquisition and possession of native title rights in the Trial Area. However, as also already stated, the applicant did not adopt that position; its position and that of each of the parties, was that under Western Desert traditional law there are multiple pathways for the acquisition and possession of native title rights and interests.
7. The applicant’s position as to the extent of those multiple pathways is set out at [192] above. Both Drs Brunton and Lynes opined that “potentially there were more pathways to connection”, although neither identified any particular additional pathway as having specific application to the Trial Area. The other potential pathways were set out in Dr Brunton’s first report. By reference to the work of Myers, Dr Brunton listed each of the potential pathways as follows:

1. conception at the place A;

2. conception at a place B made by and/or identified with the same Dreaming a A;

3. conception at a place B whose Dreaming is associated mythologically with The Dreaming at A (the story lines cross);

4. initiation at A (for a male);

5. birth at A;

6. father conceived at A or conditions 2–5 true for father;

7. mother conceived at A or conditions 2, 3, or 5 true for mother;

8. ‘grandparents’ (*tjamu*, *kaparli*, including all kin types so classified) conceived at A or conditions 2–5 true;

9. residence around A; and

10. death of close relative at or near A (1986: 129-30).

1. Dr Brunton went on to state that the above list represented an extreme case which is not necessarily found to the same extent in all parts of the Western Desert. Dr Lynes’ evidence was to the same effect. She opined that not all of the pathways listed by Myers are recognised or equally emphasised across the whole of the Western Desert.
2. I accept that in so far as Western Desert traditional laws and customs applied in the Trial Area, those laws provided for the acquisition of rights and interests to land and waters through descent but also through other pathways. Consistently with the applicant’s formulation at para 4(a) of the applicant SFASFI&C, those pathways included association with the land or the holding of ritual authority or the birth on or association of one or more ancestors to that land. There may have been other applicable and additional pathways but the evidence does not enable me to say the extent to which that was so.
3. Importantly, the applicant’s proposition set out at para 4(a) of the SFASFI&C, that a person’s connection to an area provided by one or more of the pathways must be accepted by the elders of that area, is consistent with the evidence given by Dr Lynes and Dr Brunton. I accept the evidence of Dr Lynes that, ultimately, a claim to an interest in a particular area, must be recognised by “countrymen”. Referring to the work of Myers, whom Dr Lynes described as “an authority on the operation of rights and interests in the Western Desert Cultural Block”, Dr Lynes said that within the Western Desert, land-holding groups “are not a given”; individuals do not just gain rights and interests via descent from previous land-holders, rather “[i]dentification is an ongoing process, subject to claim and counter claim, dependent on validation and acceptance or invalidation and non-acceptance”. In the words of Myers, “ownership is not a given but an accomplishment” and “[i]t must be actualised and accepted by others”. Dr Brunton made essentially the same point in reliance upon the work of Myers.
4. As much of the evidence revealed, collective acceptance of a person’s interest in a particular area and membership of the land-holding group for that area will be granted through an accumulation of criteria that augment a person’s ability and authority to speak for that area and the sacred sites within it. The accepted pathways provide the criteria.
5. There was other evidence before me as to the traditional laws and customs of Western Desert people. That evidence dealt with skin systems and a range of customary practices. I set out much of that evidence in **Annexure 7** in the context of considering whether continued observance of traditional law and customs has been established. It is not necessary for me to dwell further on those matters now because unlike the traditional laws just discussed, those matters are not centrally concerned with the acquisition, possession or exercise of rights and interests in land and waters.
6. It is, however, helpful to say something now about what the evidence says about patterns of behaviour and other circumstances which may be demonstrative of the existence of a group of people holding and sharing possessory rights to land and waters in accordance with Western Desert traditional laws and customs.
7. On my understanding of the evidence of each of the experts, they each accepted and I would accept, that evidence that a group of people had a common spiritual association to an area by reference to the *tjukurrpa* for that area should be regarded as demonstrative of the shared possessory rights of members of the group to the particular land and waters in question.
8. As later discussed, evidence of a shared common identity by a group of people may be instructive in identifying a land-owning or land-sharing group. However, the evidence tells me that great care needs to be exercised in this respect including because the same tribal label may be associated with many groups and that tribal or language labels can be misleading.
9. As I will discuss in more detail, Dr Draper opined that inter-familial relations and patterns of association with land that display considerable overlap in relation to the use of and association with that land by the same people, is demonstrative of a single land-owning group sharing the land in question in accordance with traditional laws and customs.
10. I do not consider that it was a dispute, and in any event I would accept, that inter-familial relations across a group of people may be an indicator of a single land-owning group. That an overlap in relation to the use of land by a group of people is demonstrative of shared possessory rights to it under Western Desert traditional law and custom, was a contested proposition.
11. As I have mentioned but will later further explain, Dr Draper clarified his position to suggest, in essence, that only the habitual use of particular land and waters by particular persons should be regarded as demonstrative of the shared possessory rights and interests in that area of that group of persons.
12. On the basis of the evidence, I would accept that occupation of a particular area, as evidenced by habitual roaming in or use of that area by a particular group of persons, whilst not conclusive, should be regarded as supportive of a conclusion that the group has possessory rights and interests in the area in question. I would also regard as supportive of such a conclusion, evidence that Aboriginal persons outside of the group regarded the group as having possessory rights in the area, including evidence of those other persons seeking permission to enter or to use the area in question.

## Whether as a single group or sub-set the Wutha group hold possessory rights in the Trial Area (Question 2)

1. An understanding of the relevant pre-sovereignty circumstances should commence with the information given to Tindale by Telpha Ashwin in an interview conducted by Tindale in May 1939. Telpha is a central character in the identification of the Wutha group. The best available information suggests that Telpha was born in about 1887 at Wingara Soak located in the southern part of the Tail.Tindale interviewed Telpha when she was about 50 years of age. She was recorded by Tindale as a member of the “Pini tribe” (pronounced as “Binni” by some of the witnesses). With my own adaptation to Tindale’s record (for ease of reference), Telpha described her tribal boundary as follows:

from Lorna Glen to Lake Carnegie taking in Wongawol (but not further north to Charles Wells Creek), along the line of lakes (southern boundary of Lake Carnegie) to Lake Wells and then west to Bonython Creek, then south west-ward to Mount Maiden (near Mulga Queen) and to Darlot then west to Yandal and north through Mount Gray Station, Mindi Hill and back to Lorna Glen.

1. The boundaries described by Telpha are broader than but encapsulate the entirety of the Tail. It is helpful to give a description which locates the Tail within those broader boundaries in the knowledge that, on a rough average, the distance between the southern and northern boundary of the Tail is about 120 kilometres and the distance between the eastern and western boundaries of the Tail is about 70 kilometres. The boundaries described by Telpha extend well beyond the Tail’s northern and north eastern boundaries by some 40 to 80 kilometres. The north-eastern boundary of the territory described by Telpha tapers back towards the mid-eastern boundary of the Tail and then largely follows that boundary to Darlot, located beyond the southern tip of the Tail and south of Lake Darlot. To the north of Darlot, the area described by Telpha extends westward some 40 kilometres beyond the western boundary of the Tail, but from Mount Gray it tapers off as the boundary heads north past the north-western corner of the Tail and back to Lorna Glen.
2. None of the Body falls within the area described by Telpha. The closest point between that area and the Body is Darlot which is some 60 kilometres from the edge of north-eastern corner of the Body.
3. Telpha is the daughter of two of the apicals upon whom the applicant relies. Her father was Darugadi. There is some uncertainty as to who her mother was.Tindale identified her mother as Murni and her grandmother as Matjika. He recorded that Telpha was raised by her grandmother. However, Gay Harris deposed to her understanding that Matjika is the same person as Murni. She said that she was very sure that the two names were names for the one person, and that the person was her grandmother. It is not essential to resolve that conflict in the evidence. I will assume, however, that Gay Harris is correct and that Murni and Matjika are two names for the woman who was Durugadi’s affine and the mother of Telpha and her brother Jumbo Harris. I will refer to her as Murni/Matjika in my reasons going forward. It is accepted by each of the expert anthropologists and all of the parties that the members of the Darugadi ancestral family are Western Desert people.
4. It is clear that Darugadi and his affine Murni/Matjika were alive at the time of effective sovereignty given that Telpha was born in about 1887 and her brother Jumbo Harris is recorded as having been born in 1889.
5. The apical Billy had two partners, Mary-Ann and Mary-Ann’s sister. Billy and Mary‑Ann had two daughters including Daisy Cordella (later Daisy Hogarth), and Billy had two further daughters, presumably with Mary-Ann’s sister. The sisters were referred to by Gay Harris as the “four sisters” – Julia Hill, Amy Rex, Daisy [Cordella] and Trilby Weeties. Daisy Cordella is the mother of Luxie Hogarth and the grandmother of Geraldine Hogarth each of whom gave evidence. As Dr Brunton opined, Daisy Cordella was a probable informant for Tindale in 1939. Tindale created a data card for Daisy Cordella as well as for Mary-Ann. Those records show that Mary-Ann was born in the period “1880-90” at Darlot and that Daisy Cordella was born in 1909 at Darlot. The “tribe” assigned by Tindale to Mary-Ann was “Pini” and for Daisy “Tjalkadjara Pini”. Billy was labelled by Tindale as “Tjalkadjara or Pini”. Each of the experts and all of the parties accept that the members of the Billy ancestral family were Western Desert people.
6. Billy’s date of birth is not clear, but it may be assumed that, just as for his partner Mary-Ann, he was alive at effective sovereignty. His place of birth is also not entirely clear. A record to which Dr Draper referred (an anthropologist’s report tendered in *Wongatha)* suggests that he was born in Darlot, but both the applicant and the State’s submissions suggest that Billy came from Wongawol/Lake Carnegie. Geraldine Hogarth was adamant that Billy was born in Darlot.
7. Inyarndi is the great grandmother of Lorraine Barnard who was a witness in this proceeding. Lorraine gave evidence that Inyarndi came from Lake Carnegie. She was clearly alive at effective sovereignty given that her son Jimmy Wheelbarrow was born in 1888. According to his death certificate, Jimmy Wheelbarrow was born in the “Wongawol District”. Each of the experts accepted that Inyarndi was “Pini” and a Western Desert person.
8. On that evidence, it is likely that each of the apicals Darugadi, Murni/Matjika, Billy and Inyarndi, as well as Billy’s partner Mary-Ann and Darugadi’s daughter Telpha and son Jumbo Harris, as well as Inyarndi’s son Jimmy Wheelbarrow, were all alive at effective sovereignty.
9. There is a sufficient body of evidence, as well as a level of acceptance amongst the experts and the parties that called them to enable the conclusion that, at effective sovereignty, each of the Darugadi, Billy and Inyarndi ancestral families were Western Desert people and part of the same group or sub-set of Western Desert Society, and that the territory in which they held rights to land and waters, in accordance with Western Desert traditional laws and customs, was that described by Telpha to Tindale.
10. Drs Brunton and Lynes accepted that it is likely that each of the apicals Darugadi, Murni/Matjika, Billy and Inyarndi were “Pini” or in the case of Billy, “Pini and/or Tjalkadjara”. It may be assumed that the close relatives of those apicals were also members of the same group.
11. The connection of these persons to each other and to the territory described by Telpha to Tindale is supported by evidence of their places of birth and death, their common placement and travels at various times in and through that territory. There is evidence that the tracks travelled by these persons followed dreaming tracks which formed part of the *tjukurrpa* which they likely acknowledged, shared and observed.
12. Each of the persons I have identified as having been alive at effective sovereignty was likely born in the territory described by Telpha to Tindale. It may be that Darugadi was born some 20 kilometres north of Wongawol and it seems likely that Jumbo Harris was also born at about the same place – Thurrguddy Creek. However, to conclude that Thurrguddy Creek is outside the territory described by Telpha to Tindale is to impose unwarranted precision upon the general description of boundaries which Telpha gave to Tindale.
13. Before describing the evidence about the places where these persons were located or the roaming of country with which they were likely involved, it is necessary to record contextual considerations of some importance.
14. At the extreme north of the territory described by Telpha to Tindale is Wongawol and Lake Carnegie. At the south is Lake Darlot and slightly further south the township of Darlot. Between those two areas, a chain of waterholes, rock-holes or soaks exists and forms part of the Goomboowan dreaming.
15. The Goomboowan dreaming is an important part of the *tjukurrpa* applicable to the area described by Telpha to Tindale. As earlier described, it is a women’s story in relation to which unrestricted as well as female gender-restricted evidence was received mainly from Gay Harris, Geraldine Hogarth and Luxie Hogarth. The evidence established that there is a lengthy song with many verses for the Goomboowan dreaming and that it is a story about water (amongst other subjects). I accept Dr Draper’s evidence that the Goomboowan dreaming:

… provides an important source of knowledge about the chain of water sources which provide the traditional travelling route and associated use of surrounding country between Wongawol and Lake Carnegie in the north, down the west side of the [Tail] of the Wutha Claim to Lake Darlot and south east to Wingara and Runggul Soaks, Milurie and Mulga Queen, or southwest towards Darlot (now known as Woodarra) and Weebo. This stretch of country with water made this transhumance possible on a regular basis, whereas the normally waterless sandhill country to the east across the [Tail] area north of the Grant Duff Range was only useable on those relatively rare occasions when recent rains provided temporary water sources and blooms of plant growth”.

1. Gay Harris recalled that the “old people” in Wiluna recognised her and her sister as “the owners of Darugadi country in Wongawol” meaning that their family come from there. The “old people” referred to Darugadi as the “Goomboowan boss”.
2. Other *tjukurrpa* of contextual relevance connected to the Darlot area is the Kuna Bulla dreaming at Lake Darlot and the story of Mithilpithii connected to various sites at Weebo.
3. The connection with, responsibility for and observance of the Goomboowan dreaming, the Kuna Bulla and the Mithilpithii *tjukurrpa*, and the use and application of the knowledge provided by it by the Darugadi, Billy and Inyarndi ancestral families at or about the time of effective sovereignty, is suggested by the places they frequented and the travels they appear to have made.
4. Telpha’s birth at Wingara Soak in about 1887 places the Darugadi ancestral family at Wingara Soak (some 20 kilometres north of Lake Darlot) at that time. Jumbo Harris’ birth about two years later places the family at the other end of the territory described by Telpha to Tindale, in the north at Thurraguddy Creek near Lake Carnegie. The uncertainty in the evidence as to whether Darugadi was born at Thurraguddy Creek or at Wingara Soak itself points to Darugadi’s likely association to both of those places and his travels along the major water sources between Lake Carnegie to the north and Darlot to the south. Darugadi’s travel to and association with Thurraguddy Creek is further supported by the evidence that he was buried there.
5. Furthermore, the suggestion of regular travels between the major northern and southern water sources in the area described by Telpha to Tindale is found in the evidence about Darugadi’s affine Murni/Matjika. She was born at Kalyaltcha, on the southern side of Lake Carnegie, but with Telpha’s birth at Wingara Soak in 1887, Murni/Matjika is located at or about the southern end of the territory described by Telpha to Tindale. That the Darugadi ancestral family travelled from south to north with some regularity is also demonstrated by evidence that shortly after having been born in Wingara Soak in the south, Telpha, as a little girl, met her first non-Aboriginal person in the north at Kalyaltcha. The evidence also places Telpha “a little later” back down south at Elistoun Creek (near Lake Darlot) meeting another non-Aboriginal, the explorer John Forrest.
6. The birthplaces of Billy’s four daughters suggests that the Billy ancestral family regularly moved between Wongawol/Lake Carnegie and the Darlot area. In 1909 when his daughter Daisy Cordella was born at Darlot, the Billy ancestral family were likely to have been there. Amy Rex was born in the Mount Step area (not far north of Lake Darlot), Trilby Weeties was born at Windidda (just south of Lake Carnegie) and Julia Hill was born at Wongawol. As I shall explain, in the 1920s the Billy ancestral family was at Wongawol and then travelled south to the Darlot area.
7. Inyarndi was likely born at Lake Carnegie. In 1898 she was in or about Lake Carnegie in the “Wongawol District” giving birth to her son Jimmy Wheelbarrow. According to testimony given by Inyarndi’s great-granddaughter Lorraine Barnard to Dr Draper, “Inyarndi’s traditional country ran south from Lake Carnegie along the rockhole traveling route to Darlot”. Before settling in Cue, Inyarndi fled from Wongawol south to Darlot in or around the 1920s as a result of the events to which I now turn.
8. In the early part of the 20th century, a pastoralist called Tommy Melon and “old Jack Appleby” were involved in the shooting or shootings of Aboriginal people located at Wongawol. The best evidence suggests that the shootings likely took place in the 1920s. That was the evidence of Gay Harris and also of Luxie Hogarth.
9. Telpha’s mother (Murni/Matjika) was shot dead by Tommy Melon and is buried at Wongawol. Billy and his family were there at Wongawol at the time of the shootings as were Inyarndi and her family. The evidence suggests that the shootings were significant to the history of the Darugadi, Billy and Inyarndi ancestral families.
10. Beyond those ancestral families, other persons associated with those ancestral families also left Wongawol as a result of the shootings. Gay Harris deposed that Rosie Meredith’s family, Skipper Sandy’s wife Molly and Patty Jindardi’s wife Alice, as well as Daisy Cordella and her sisters (whom she referred to as her father’s [Jumbo Harris’] “sister – cousins”) came to the Darlot area. According to Gay Harris, others, including her uncles and aunties fled to Wiluna and also to Mulga Queen. She mentioned Old Mr Fisher, an ancestor of the Redman family, as coming from Wongawol to the Mulga Queen area. Others went to Jingalong and “different ways”.
11. Several references made by Gay Harris support the proposition that when these persons fled from Wongawol to the Darlot area they were travelling through their own country. Gay Harris said that they “were chosen” (perhaps she meant “had chosen”) to go to the “Darlot/Weebo area” because “they had a *thukur* in that country, in Mithilpithii. I was told that the women “were chosen” for that Weebo country because “their *thukur* was there waiting for them when they fled”. She continued that “[o]ur *thukur* was at Mithilpithii, which is a special women’s place. There is a matching one at Weebo”.
12. That evidence of *thukur* at Mithilpithii and Weebo is consistent with evidence given by Geraldine Hogarth to which I will return.
13. Gay Harris also said in her oral evidence that “[t]hey all had their *thukur* and everything down here [referring to the Darlot area] so they came down”. Additionally, Gay Harris deposed as to her understanding that it took a long time for the “Pini people” who left Wongawol to travel by foot to the Darlot area and that the land they travelled through was not, at that time, occupied by other people. Gay did say however that maybe there were some “Tjalkadjarra” and some “Koara” people in the Tail when “the mob from Wongawol came down”. She specifically mentioned the Greens as being in the area around Darlot at the time before the people came down from Wongawol, and also Skipper and Jindardi being in the Mulga Queen area at that time. In the context of the other evidence she gave, it seems that Gay Harris understood all those persons to be closely associated with the people that came down from Wongawol and of the same group or tribe. Her understanding was that the labels “Pini”, “Koara” and “Tjalkadjarra” (sometimes referred to by her as “Thalkanthunu”) all essentially referred to the same tribe.
14. In her witness statement, Luxie Hogarth stated that her mother, Daisy Cordella, had told her that when she was 18 she had left Wongawol country with her sisters and cousins because of the Tommy Melon shootings. Her mother had told her that they travelled to Mulga Queen, then came down to Darlot and stopped there and at various pastoral stations. One interpretation of the evidence in the statement of Luxie Hogarth as well as the evidence on the same topic given in the statement provided by her daughter Geraldine Hogarth, as well as the evidence given by them both in *Wongatha*, is that they were saying that the Billy ancestral family was originally from the Wongawol area and fled south permanently to the Darlot area as a result of the Tommy Melon shootings. Luxie and Geraldine elaborated on this in their oral evidence. Luxie said that her mother (and presumable her mother’s family) was travelling to Wongawol when they heard about “that white man there was collecting all the people”. She suggested that on receiving that information her mother changed direction and travelled away from Wongawol and down to Darlot. That was also Geraldine Hogarth’s understanding. She said that the Billy ancestral family was not from Wongawol in the sense that their home territory was confined to Wongawol. Her understanding was that, with other members of the tribe, they traversed up and down between the Wongawol and the Darlot areas for ceremony and for their “law and culture”.I accept that evidence. It seems to me to be consistent with other evidence, and in particular the evidence that, at a time prior to the Tommy Melon shootings, the members of the Billy ancestral family had at various times been located in and around the Darlot area.
15. In *Wongatha* (at [2539]-[2541]), Luxie Hogarth gave evidence that her mother came that way to Lake Darlot and was “camping there because it is one [of the] dreaming stories, dreamtime story”. Lindgren J accepted that Luxie’s mother had told her that there was a story associated with Darlot. Further, Lindgren J accepted that the dreaming story associated with the Darlot area was part of the reason why those fleeing Wongawol as a result of the Tommy Melon shootings came to the Darlot area. Evidence before me, but originally given in *Wongatha* by Luxie Hogarth, included that her mother and her aunties had said to her that they thought that “the people chose to come to Darlot because the same *thukur* stories came down there from Wongawol”.
16. In *Wongatha*, Geraldine deposed that “[t]here are sacred women’s stories that are connected to places in both areas”. In the proceeding before me, Geraldine Hogarth also deposed to her understanding that the *thukur* in the Darlot area was a reason for the travels to the Darlot area of the people with which her ancestors were associated. She said that her understanding was based on the *thukur* in the Darlot area that her grandmothers had told her about. She specifically mentioned dreaming stories “about Weebo, about Lake Darlot, about Mithilpithii, that Thuruda and other sites that are round there [belonging] to men and women”. She indicated that she had given evidence in *Wongatha* about Mithilpithii.
17. A summary of that evidence is set out in Annexure F to the *Wongatha* judgment and was adopted by Geraldine Hogarth and tendered in this proceeding. That summary of evidence records that evidence was given at Miilka and Mithilpithii and at a number of other locations on Weebo Pastoral Station. Those locations were said to be a part of a site complex known as “Mithilpithii”. The story of Mithilpithii is said to relate to the giving of life.The summary records Geraldine Hogarth’s evidence that her grandmother had told her the stories [about Mithilipithii].In *Wongatha* (at [2542]), Lindgren J referred to the evidence of Geraldine Hogarth and Luxie Hogarth given at Mithilpithii and said that “[t]heir evidence related to the features of the landscape and was of activities which used to take place there”. His Honour held that knowledge of what used to happen has been passed down from grandmothers, to mothers and daughters.
18. The reference made by Geraldine Hogarth in her evidence before me to the dreaming stories about Lake Darlot which had (in part) motivated the travel down from Wongawol, is a likely reference to the Kuna Bulla dreaming story which was the subject of female gender-restricted evidence given by Geraldine Hogarth, as well as her mother Luxie and also Gay Harris, at Lake Darlot.
19. As earlier stated, Inyarndi’s great-granddaughter, Lorraine Barnard, gave evidence that Inyarndi came from Lake Carnegie where her son Jimmy Wheelbarrow was born. I have also earlier referred to the evidence of Inyarndi’s traditional country running south from Lake Carnegie along the rockhole travelling route to Darlot. Evidence given by Lorraine Barnard also suggested that the Tommy Melon shootings were the impetus for Inyarndi and her brothers and sisters having to leave that area. Lorraine told Dr Draper that Inyarndi moved south permanently when Tommy Melon was shooting Aboriginal men and taking their women at Wongawol Station.
20. Each of Geraldine Hogarth, Luxie Hogarth and Gay Harris referred to the people sharing the territory described by them as “Pini”, “Koara” and “Tjalkadjarra”. The understanding of Geraldine Hogarth and Gay Harris seems to be that whilst one of those labels may have more application to some of those people than others (for instance Billy was referred to by Geraldine Hogarth as “Tjalkadjarra” and Gay Harris referred to Patty Jindardi and Skipper as both “Koara” and “Tjalkadjarra”), those labels were each applicable to the same group of people. They both also suggested that those people were known as the “Darlot mob”.
21. I should also record that each of Luxie Hogarth, Geraldine Hogarth and Gay Harris had a broader view of the southern extent of the territory which was the traditional country of their ancestral group and now their own *manta* (home area) than that described by Telpha to Tindale. For instance, Geraldine Hogarth stated that when she referred to the Darlot area being the area that her ancestors came down to after the Tommy Melon shootings, she was referring to an area extending well to the south of Darlot (going towards the Leonora area) and also to the areas west and south west of Darlot taking in the Banjawarn and Erlistoun pastoral stations.
22. For present purposes it is not necessary for me to determine whether rights were held by the Darugadi, Billy and Inyarndi ancestral families beyond the Tail to the extent suggested by the evidence of those witnesses. It is relevant, however, for me to record that the Weebo area, with which the Mithilpithii *tjukurrpa* is associated, is sufficiently close to Darlot to be regarded as within the territory described by Telpha to Tindale.
23. The evidence to which I have referred supports the conclusion that, at or about effective sovereignty, the Darugadi, Billy and Inyarndi ancestral families (with others) were members of the same group or sub-set of people who shared a connection with, a knowledge of and responsibility for the *tjukurrpa* in the territory described by Telpha to Tindale. The evidence supports the conclusion that for those reasons, as well as their use and occupation of that territory, that group held rights and interests to the land and waters of that territory in accordance with Western Desert traditional laws and customs. Those conclusions are supported by the evidence given by the expert anthropologist to which I now turn.
24. As I have said, Dr Brunton’s view was that each of Darugadi, Murni/Matjika, Billy and Inyarndi shared a common tribal identity. Dr Brunton opined that these persons were members of the same pre-effective sovereignty society. That society was “Pini”, although he thought other labels may also have been associated with the people in the area in question. Dr Brunton regarded a shared common identity as an important element in identifying the persons who share a common society or group,although he cautioned that there is a real difficulty in the use of the tribal labels to define a society within the Western Desert.
25. He opined that a Western Desert group or society may, in terms of its interests in land, possess many estates and that the “Pini” society is likely to have consisted of a number of estates located in the territory that Telpha described to Tindale. He was circumspect about the extent to which all estates used by a group or particular society are estates in which all members of the group had rights and interests, particularly in relation to estates on the edges of the area in question. He accepted that, at effective sovereignty, Darugadi (and Murni/Matjika), Billy and Inyarndi and their ancestors, whether alone or in combination (including with others, but excluding Julia Sandstone), held rights and interests in the area described by Telpha to Tindale. He considered that each of those apicals held rights in some portions of that area.
26. Dr Lynes agreed. She added that in the Western Desert there are unlikely to be hard and fast boundaries as between different groups or societies because on the edges of territory there may be a bit of overlap where people who identify under different labels may each consider particular areas to be their country.
27. Dr Draper agreed that pre-effective sovereignty, the Tail was a collection of estates belonging to or associated with a group most commonly labelled as Pini. He opined that a feature of that group (actually and conceptually), was that the possessory connection to the land is shared between members of the group across a conglomeration of estates in which some members might have a closer association with a particular estate or estates than others. He said that the basis for that shared possession was a common spiritual association by reference to *tjukurrpa* or normative laws and customs. Dr Draper opined that each of Darugadi (and Murni/Matjika), Billy and Inyarndi and their ancestors, whether alone or in some combination (including with others), held rights in the area described by Telpha to Tindale. He differed from Drs Brunton and Lynes by including Julia Sandstone as a holder of rights in that area. He also differed by extending the area in which such rights were held to areas beyond the territory described by Telpha to Tindale to an area including the Body and the Head.
28. Each of Drs Brunton and Lynes opined that whilst it is possible, it is not probable that the rights held by the Darugadi, Billy and Inyarndi ancestral families extended beyond the territory described by Telpha to Tindale, and in particular into the area around Lawlers in the north-eastern corner of the Body.
29. I am satisfied that, consistently with the concessions made by the State, pre-effective sovereignty, each of the Darugadi, Billy and Inyarndi ancestral families variously occupied the Tail and that the members of those families held possessory rights to land and waters in the Tail in accordance with Western Desert traditional laws and customs.
30. The satisfaction just expressed, only advances the applicant’s claim in so far as it relates to the Tail. To make good its claim to the Body, the applicant largely relied on the asserted connection with the Body of the apical Julia Sandstone and her daughter, Sarah Brown. Given the applicant’s case that a single group, sub-set or society (the Wutha group) comprising all four ancestral families share rights and interests in an area which includes both the Tail and the Body, and in so far as the applicant contended that those rights and interests were possessed by those families at sovereignty, it is necessary to further consider whether, pre-effective sovereignty, the group holding rights in the area described by Telpha to Tindale included Julia Sandstone (or her ancestors), and whether the area in which that group held rights and interests in land and waters extended into an area which included the Body.
31. There is however, one aspect of the case put by the applicant which suggested that the Wutha group acquired right and interests in the Body post-effective sovereignty. The closing written submissions of the applicant put a great deal of emphasis on the marriage of Sarah Brown to William Ashwin in 1930. This was said to have brought about “a convergence” of the Julia Sandstone ancestral family with the Darugadi, Billy and Inyarndi ancestral families as a single society or land-holding group sharing rights and interests in both the Tail and the Body. Implicit in that proposition is that upon that marriage, rights and interests in the Body were acquired by the Darugadi, Billy and Inyarndi ancestral families and their descendants and that interests in the Tail were acquired by the Julia Sandstone ancestral family and its descendants, so that consistently with the applicant’s case as to the sharing of rights and interests, each member of those families shared a possessory interest in land and waters across both the Tail and the Body.
32. In closing oral submissions, Senior Counsel for the applicant somewhat resiled from the heavy reliance which he had earlier put on the marriage of Sarah Brown to William Ashwin. Whilst the marriage continued to be relied upon, it was said that the marriage was a relevant matter in the context of the broader contention that the ancestral families were connected “by a shared acknowledgment of Western Desert traditional law and custom”.That submission, as I understand it, sought to revert to Dr Draper’s reasoning as to the nature of the Wutha group as a single land-holding group and the means by which it acquired rights and interests in the Body. I will return to that shortly.
33. I should first address the reliance placed on the marriage of Sarah Brown to William Ashwin and the suggestion that on that marriage there was a convergence of the four ancestral families and their shared rights and interests in land and waters. That reliance would be entirely unfounded unless it was demonstrated that the asserted convergence occurred pursuant to the traditional laws and customs of the people in question. Nothing of the sort has been demonstrated. Assuming in favour of the applicant that the rights and interests held in the Body by the Julia Sandstone ancestral family in 1930 were held under Western Desert traditional lawsand customs, there is no evidence from which I could possibly conclude that Western Desert traditional laws and customs provided for the convergence of rights and interests in land and waters across multiple family groups upon a single instance of inter-marriage between two of the multiple families involved. None of the experts (including Dr Draper) gave evidence in support of the existence of laws and customs to that effect and Senior Counsel for the applicant could not otherwise support the proposition contended for by reference to any evidence of Western Desert lawsand customs. The proposition must be rejected.
34. I turn then to consider Dr Draper’s reasoning in support of his view that members of a single land-owning group (the Wutha group) shared possessory rights and interests in lands and waters in the Tail and the Body. Although he did not expressly and clearly distinguish between them (as I consider he should have), I understand Dr Draper to have relied on both pre-effective and post-effective sovereignty circumstances, mainly concerned with what he called “patterns of association with country”, to support his conclusion. I have taken into account both the pre‑effective and post-effective circumstances upon which Dr Draper appears to have relied, but I do so on the understanding that, in relying upon Dr Draper’s approach, the applicant does not contend that rights and interests were acquired post-effective sovereignty by way of succession but does contend that post-effective sovereignty circumstances are confirmatory of the pre-effective sovereignty holding or acquisition of the rights and interests asserted.
35. Julia Sandstone is sometimes referred to by the name “Old Julia”. Her time of birth and place of birth are somewhat contested. Dr Draper depicted her as being from the “Paynesville area near Sandstone”. That seems to be based on information provided by her grandson (and Sarah Brown’s son) John Ashwin. However, in 1939 Tindale met one of the children of Julia Sandstone, her son Max Warrigal. Based on information obtained from Max Warrigal, Tindale recorded Julia Sandstone as having been born at Menzies in the period “1890-1900”. He also recorded that Julia Sandstone’s husband (and Max Warrigal’s father) was “Maxie of Leonora”. Whether or not she was born at or near Sandstone, Julia Sandstone’s connection to Sandstone is not in apparent contest. Three of her five children were born there – Charlie Sandstone in 1906, Sarah Brown in 1912 and Max Warrigal in about 1916.
36. I accept that Julia Sandstone was alive at or about effective sovereignty. I incline to the view that the information as to her birth place is likely to be more reliable coming from her son than from her grandson and consider, on that basis, that it is more likely that Julia Sandstone was born in Menzies. It is not clear when Julia Sandstone died. She is buried at Mount Magnet.
37. There is not a lot more known about Julia Sandstone, other than for information which comes from Sarah Brown directly or indirectly through her children. Most of that information concerns the places that Sarah Brown travelled to with her mother as a young girl in or about 1920.
38. It is the childhood travels of Sarah Brown with her mother Julia Sandstone which are plotted by location on Map 5-6 of Dr Draper’s first report (**Annexure 6**) and then depicted on Dr Draper’s critical Map 5-7 as “Sarah Brown’s Travels” (**Annexure 5**). Those travels are said by Dr Draper to be a likely reflection of Julia Sandstone’s regular travel routes established prior to 1900 and therefore the “traditional country of Julia Sandstone”.
39. At [163]-[166] of his first report, Dr Draper said this:

[163] It is probable that Sarah Brown's childhood travels with her mother are similar to routes her mother Julia would have travelled before Sarah was born. Places that Sarah told her children she travelled to regularly have been plotted onto Map 5-6 to represent the traditional country of Julia Sandstone. As Sarah was born in 1912, it is reasonable to assess her mother's regular travel routes as being established prior to 1900.

[164] The locations chosen to represent Sarah Brown's travels, and extrapolated to represent her mother’s traditional country, consist of Sandstone, Windsor, Payne’s Find, Youanmi Downs, Cashmere Downs, Perrinvale, Mount Ida, Menzies, Niagara, Kookynie, Tower Hill near Leonora (mapped as Leonora), Sturt Meadows, Chain of Waterholes at East Terraces (mapped as East Terraces), Laverton, Salt Soak near Mulga Queen (mapped as Mulga Queen), Weebo and Lawlers.

[165] This is not an exhaustive list of places Sarah visited. It does, however, included [sic] the places that are regularly nominated as locations Sarah travelled to or stayed. These reports ultimately derive from Sarah's own discussion of places she visited and includes places she identified as sites for ceremonial business. Windsor, approximately 70 km south east of Limestone Bore, is included on Map 5-6 because it is a corroboree ground which Sarah is said to have visited on her rounds (Draper 2014: 59).

[166] This evidence suggests that the central portion of the Wutha native title claim area, the “Body” and two small, isolated portions of the claim area [Areas 3 and 4], lie within Julia Sandstone's traditional country. Charlie Sandstone's and Sarah Brown’s births lie on the border of Julia's traditional country in 1906 and 1912 respectively.

1. Having concluded by that reasoning that the reported post-effective sovereignty travels of Sarah Brown and Julia Sandstone reflected the traditional pre-effective sovereignty country of Julia Sandstone, the next step in Dr Draper’s reasoning was to conclude that Julia Sandstone’s traditional country was the traditional country of the Wutha group. The fundamental premise for that conclusion is the asserted overlapping patterns of association with the country of Julia Sandstone and the country of the other Wutha apical ancestors and their inter-familial relations at or about effective sovereignty. That overlapping and those familial relations are suggested to be indicative of each of those ancestral families belonging to the same group, sub-set or society sharing rights and interests over the same lands and waters. In Dr Draper’s third report, he said this about the Julia Sandstone, Darugadi, Billy and Inyarndi ancestral families (at [13]):

In my opinion, these families are from the same society (a subset of Western Desert Society), not from neighbouring societies (ie, Western Desert and non-Western Desert), for the simple but compelling reason that they share country throughout the Wutha claim area, and that descendants of all of the apical family lines identified for the Wutha claim have through several generations demonstrated traditional rights and interests throughout the claim area.

1. Later, Dr Draper said (at [15]):

The documented, ongoing relationships of the these families with one another and with the entirety of the [Trial Area] are consistent with the conclusion that the Wutha claim families constituted a subset of Western Desert society …

1. Other than for one matter in relation to an asserted genealogical relationship between Julia Sandstone and Inyarndi to which I will return, it is not necessary for me to consider Dr Draper’s views about the post-effective sovereignty interactions between Julia Sandstone’s descendants and those of Inyarndi. The evidence upon which Dr Draper relies for those views is directed at inter-familial relations and patterns of association with country, which Dr Draper asserts connects persons associated with the Head and the Body. The focus of the present analysis, accepting for the moment that inter-familial relations and overlapping patterns of association with country are demonstrative of a single society or land-owning group, is whether the evidence upon which the applicant relies demonstrates that, pre-effective sovereignty, there were inter-familial relations and overlapping patterns of association with country sufficient to show that, in accordance with Western Desert traditional laws and customs, the members of the same land-owning group (the Wutha group) shared rights and interests in both the Tail and the Body.
2. There is no evidence of any pre-effective sovereignty genealogical connection between the Darugadi and Julia Sandstone ancestral families or the Julia Sandstone and Billy ancestral families.
3. A genealogical relationship between Julia Sandstone and Inyarndi was asserted in Dr Draper’s third report. Dr Draper provided his third report after witness evidence was received and, in particular, after Lorraine Barnard had given her evidence. In that report, Dr Draper opined that Julia Sandstone could be included within the Inyarndi apical descent line. The basis for this late claim by Dr Draper is flawed. The claim is based on information obtained from Lorraine Barnard, Inyarndi’s great-granddaughter. Dr Draper’s report states that Lorraine Barnard revealed to him that “she was told that Ngoonjul was closely related to Julia Sandstone (“Old Julia”), and was either her father or her uncle”. On that basis, Dr Draper opined that Julia could be included within the Inyarndi apical descent line. It seems that Dr Draper had assumed that as Inyarndi was a wife of Ngoonjul, Inyarndi was Julia Sandstone’s mother. However, that conclusion is contrary to the evidence given by Lorraine Barnard.
4. In her evidence, Lorraine Barnard confirmed that her great-grandfather was Ngoonjul. She identified her connection to June Ashwin as arising from sharing Ngoonjul as a great‑grandfather. She said that Ngoonjul was Julia Sandstone’s father, but explained that there was no genealogical relationship between Inyarndi and Julia Sandstone. Inyarndi was one of several wives that Ngoonjul had. According to Lorraine Barnard, Julia Sandstone was the daughter of Ngoonjul and a wife of Ngoonjul (but not Inyarndi) that Lorraine was unable to name.
5. On the basis of what he says he was told by Lorraine Barnard, Dr Draper’s third report also contains the following observation which is the subject of objection by the State (emphasis added):

[Inyarndi’s] husband Noon:jul (Ngoonjul) was from Sandstone, and his traditional country also included Darlot, which is how they came together. Lorraine is certain that *they were from the same people*, and not from different tribes, from the stories told to her.

1. Lorraine Barnard did give evidence that Ngoonjul was “a Sandstone man”. She said he lived all of his life there and that he had “connection to Wiluna, Meekatharra, Cue, Sandstone”. She did not say that Ngoonjul’s country included the Darlot area, nor did she suggest that Inyarndi and Ngoonjul were “from the same people”. I accept that Dr Draper’s account expands upon the evidence actually given by Lorraine Barnard and that the State was denied the opportunity to cross-examine Lorraine on that assertion given the lateness of the applicant’s reliance upon it. On that basis, I would uphold the State’s evidentiary objection. I would add that, in any event, the observation made by Lorraine Barnard as reported by Dr Draper is an observation made at a high level of generality and not deserving of significant weight on the issue with which I am concerned. That is so including because, as Dr Brunton observed, the fact that two persons identify as being from the same people or tribe does not of itself sustain a conclusion that they are of the same land-owning or land-sharing group.
2. At [174]-[175] of his first report and with particular reference to Map 5-7 (**Annexure 5**), Dr Draper said this:

174. The Hogarth family country overlaps much of the area described by Telpha as ‘Pini’ county. There is also considerable overlap with the traditional country of Sarah Brown and Julia Sandstone (see Map 5-7). Map 5-7 shows 10 examples which have been recorded for the area of country inhabited by a family or individual, to illustrate the extents and interactions of these ‘runs’ as they are sometimes called, in relation to the claim area. These are not intended as examples of ‘my country’ (Harrington-Smith and Ors 2007) cobbled together to assemble an artificial group ‘country’. Rather they comprise a recorded sample of how a native title claim area within a traditional ‘country’ defined by the claimant group actually is populated and utilised by its inhabitants. Temporally, the pattern shown on the map is a composite, as the examples which could be found span a period of more than a century. Some of the examples represent a specific person's lifetime, while others refer to a cumulative record for more than one generation of a particular family.

175. Julia and Sarah's identified traditional country encompasses most of the eastern portion of the Wutha native title claim area, both the small separate areas and a considerable portion of the central claim area. The country and places described by Luxie and Geraldine add another layer, or component to Wutha traditional country. Daisy Cordella's possible birthdate is 1909 in Darlot, so her parents were probably contemporaries of Telpha Ashwin, Jumbo Harris and Julia Sandstone. They probably were living and travelling in their traditional areas around or before 1900.

1. Before addressing Map 5-7 and Dr Draper’s assertion of there having been “considerable overlap” in interactions with country, the last two sentences of [175] contain an assertion that Julia Sandstone was probably a contemporary of Billy, Mary-Anne, Telpha Ashwin and Jumbo Harris in Darlot at or about 1909. The foundation for that assertion is not given. There is no evidence that Julia Sandstone ever met or was located at the same place at or about the same time as the other individuals named by Dr Draper. On the evidence upon which Dr Draper himself relies, at or about 1909, Julia Sandstone was bearing children in Sandstone. Sandstone is some 220 kilometres from Darlot and Darlot is not one of the locations identified by Dr Draper (at [164] of his first report set out above) as a specific location to which Julia Sandstone travelled. Whilst it is possible Julia Sandstone travelled to Darlot at or about 1909, Dr Draper’s suggestion that she was probably a contemporary of Telpha Ashwin and Jumbo Harris is too speculative to be given any weight.
2. There is no positive evidence before me of any pre-effective sovereignty genealogical or other familial relations or interactions between the Julia Sandstone ancestral family and the Darugadi, Billy or Inyarndi ancestral families or any of the other persons or families with which the latter families were associated. There is no or insufficient evidence from which any such relations may be inferred. In that respect, I also note that, despite the evidence that Sarah Brown passed onto her children many stories about her travels with her mother and despite the fact that Sarah Brown married into the Darugadi family, the stories told by Sarah Brown do not include accounts of any interactions between Julia Sandstone or her ancestors with the Darugadi ancestral family or any other of the relevant families which I am satisfied were associated with the area described by Telpha to Tindale.
3. Turning then to Dr Draper’s reliance on the information depicted in Map 5-7 (**Annexure 5**), the first observation that needs to be made is that, as Dr Draper himself recognised (at [174] of his first report set out above), the patterns shown in Map 5-7 “spanned a period more than a century”. There are only two patterns in Map 5-7 which, as I understand Dr Draper’s evidence, are intended to depict the pre-effective sovereignty “runs” of particular individuals. Those patterns are “Telpha Ashwin’s Travels” which, despite the label, does not depict Telpha’s travels but depicts the “boundary locations” of Telpha’s country (presumably as described to Tindale) and “Sarah Brown’s Travels”, being the places that Sarah travelled to with Julia Sandstone (at or about 1920) which, as earlier indicated, Dr Draper relies upon as likely to reflect Julia Sandstone’s traditional country prior to 1900.
4. The pattern for Sarah Brown depicted in Map 5-7 is based on the locations (plotted in Dr Draper’s Map 5-6) identified by Dr Draper at [163]-[164] of his first report (set out above), being the locations that Sarah Brown told her children that she travelled to.
5. In terms of overlap with the area described by Telpha to Tindale (as interpreted by Dr Draper and depicted on Map 5-7), there is only one location of all of the locations used by Dr Draper to plot Julia Sandstone’s pattern of travel, which may be said to be a location within the territory described by Telpha to Tindale. That location is “Salt Soak near Mulga Queen”. Not only is the suggested overlap confined to merely one location, that location is at the boundary of the area described by Telpha to Tindale.
6. The line drawn by Dr Draper on Map 5-7 for “Sarah Brown’s Travels” that intersects at Mulga Queen is, as I understand Dr Draper’s evidence, intended to reflect the route that Sarah Brown (and therefore Julia Sandstone) walked from “Mulga Queen and then onto Lawlers” as recounted to Dr Draper by June Ashwin. The actual route that may have been taken between these two locations is open to speculation. It is possible that in walking that route, Julia Sandstone extensively entered into the territory described by Telpha to Tindale, but there is nothing to suggest that she did. Presuming that something like the most direct available route was taken, Julia Sandstone would have walked at or about the southern boundary of the territory described by Telpha to Tindale.
7. For the purpose of identifying the members of a single group or sub-set of people and the area in which that group shared rights and interests to land and waters, I would give little weight to overlapping interactions with country at a boundary. As Dr Lynes stated in the evidence given by her during the experts’ conclave, within the Western Desert and at the boundary between two land-owning groups there will inevitably be “a bit of overlap in which there are sites that both consider to be part of their country”.
8. Assuming in favour of the applicant that Julia Sandstone’s travelling routes reflect Julia Sandstone’s traditional country, the evidence relied upon by the applicant demonstrates little more than that the traditional country of Julia Sandstone bordered the traditional country of the Darugadi, Billy and Inyarndi ancestral families as depicted by Dr Draper on Map 5-7 by reference to the area described by Telpha to Tindale. Contrary to Dr Draper’s conclusion, that evidence does not demonstrate considerable overlap in interaction with the same country by those families.
9. In any event, I do not accept that Julia Sandstone’s traditional country would have been anywhere near as extensive as Dr Draper concluded that it was.
10. The area which Dr Draper attributes to have been Julia Sandstone’s country is vast by any measure. The distance between Laverton and Paynes Find (being the most westerly and easterly points of the area asserted to have been Julia Sandstone’s country) is some 460 kilometres. Between the most northerly point (Mulga Queen) and the most southerly point (Menzies) is some 250 kilometres. That one group of Aboriginal people “habitually travelled and used” an area of that size to the extent that, as Dr Draper would have it, they acquired core rights to land and waters over the entirety of the area is not a conclusion which ought be accepted without compelling substantiation. Dr Draper has not referred me to any anthropological study or any other credible research which would support his (seemingly unquestioned) acceptance that such a vast holding of possessory rights in land by one group was likely.
11. Dr Brunton considered that, in formulating his opinion of what constituted the traditional country of the Wutha group, Dr Draper may have taken into account all of the areas that their forebears had travelled over and used. Dr Brunton considered that for an anthropologist to take such an approach would be “quite extraordinary” and “almost certainly factually wrong”.Dr Brunton relevantly said this:

I know of no part of Aboriginal Australia where the traditional laws and customs allow for ‘possessory rights’ over land that a group has simply ‘traversed and used’, independently of holding core rights to the land, or having been given some kind of long-standing license or permission by those who do hold core rights …

1. Dr Brunton considered that if Dr Draper’s approach only took into account lands which the Wutha group forebears traversed and used but over which they already had possessory rights, the question would arise as to how a single group could have obtained possessory rights “to such an enormous stretch of country”.
2. Dr Draper sought to address these criticisms, which I consider to be fundamental, in his second report. Dr Draper’s response is unpersuasive. Dr Draper denied that he had included any area in which any member of the Wutha group had simply set foot upon at some time in the past. He asserted that his approach was to only take into account “habitually travelled and used areas to which [the Wutha group] claimed possessory rights or ‘already had possessory rights’”. However, little or no attempt was made by Dr Draper to justify that assertion. Nor do I regard that assertion to be supported by the evidence.
3. For current purposes, it is only necessary to assess Dr Draper’s justification in relation to his assessment of the vast area he says was Julia Sandstone’s traditional country. That justification is given in Dr Draper’s first report at Part 5.3.2. The information there referred to does not sustain a conclusion that it is likely that the group of which Julia Sandstone was a member “habitually travelled and used” the entirety or even the vast majority of the area claimed by Dr Draper. Although Dr Draper asserted that the locations he has identified that border the area he has concluded was the traditional country of Julia Sandstone, were places that Sarah Brown told her children she travelled to “regularly”. Dr Draper’s report or the witness evidence called by the applicant, provides little or no evidence in relation to most of the locations which Dr Draper relied upon.
4. The information that Dr Draper relied upon at Part 5.3.2 of his first report includes that Julia Sandstone gave birth to children at Sandstone; that Sarah Brown was working at Agnewand at Gwalia (near Leonora)(and that presumably Julia Sandstone was with her); and that, as recounted by Sarah’s daughter Vera Voss (now deceased), Sarah Brown knew of and had visited the “Chain of Waterholes” (not far from Leonora).
5. In Part 5.3.2 Dr Draper then refers to evidence given by Raymond Ashwin in *Wongatha* as to his mother’s travels. The extract relied upon is taken from the summary of Raymond’s evidence in *Wongatha* prepared by Lindgren J. No mention is made in that evidence of most of the locations that Dr Draper relies upon for his conclusion as to the extent of Julia Sandstone’s traditional country. Furthermore, the evidence relied upon by Dr Draper is highly selective. When Raymond Ashwin’s evidence as to Sarah Brown’s traditional country is read in its entirety, it is apparent that Raymond Ashwin regarded his mother’s country as not defined by, and more limited than, the country she travelled to for ceremony. Raymond Ashwin referred to travels for ceremony to Salt Soak near Mulga Queen as well as to law grounds at Perrinvale (in the south-eastern corner of the Body, near the Panhandle Men’s Initiation Site). However, Raymond Ashwin’s evidence of what his mother told him was her traditional country did not encompass those locations. He said that his mother’s country was “Sandstone down to Leonora then Menzies”. He referred to that as one area and as being “their tribal run”. Further, as Dr Draper noted in his first report, Ralph Ashwin’s evidence in *Wongatha* also described his mother’s country as being “from Sandstone, to Leonora, down to Menzies and back to Sandstone”.
6. In coming to his conclusion about the extent of Sarah Brown’s and therefore Julia Sandstone’s traditional country, Dr Draper pays little or no attention to Sarah Brown’s own account of her traditional country as communicated to her sons or as directly communicated by her to the Seaman Land Inquiry. In 1984, Sarah Brown made a submission to the Seaman Land Inquiry. In that submission, she stated that “my tribe roamed in the area of Kookynie, Leonora and in the immediate areas” and that “the area my people roamed, [was] Kookynie, Leonora, Lawlers [sic] … at the time I was a child, there were a small number of old people left of our tribe which lived around Leonora, Gwalia and Kookynie”. Sarah Brown did not mention any area in the Trial Area other than Lawlers.
7. In support of his conclusion that the locations he relied upon were “regularly” travelled to by Sarah Brown, Dr Draper also refers to information he received from June Ashwin. He states at [162] of his first report, that June Ashwin recounted the locations visited by Sarah Brown as follows:

That’s where she walked from – Sandstone, Menzies, Cashmere, Kookanee [Kookynie], Laverton to Mulga Queen then onto Lawlers then back to Sandstone.

1. These are locations said by Dr Draper to be “visited” by Sarah Brown. Again, the locations identified are more limited than those relied upon by Dr Draper to construct Julia Sandstone’s traditional country. None of the locations identified by June Ashwin are west of Sandstone.
2. In her evidence before me, June Ashwin described her mother’s “run” as “Sandstone, Cashmere Downs, Perrinvale where Panhandle is, Menzies – big corroboree ground there – across to Kookynie – another big place there, they followed the corroborees, Mulga Queen, Weebo, Lawlers then back to Sandstone”.June Ashwin deposed that all of the locations that she stated her mother travelled to were said by her mother to be “the area she roamed”.
3. In so far as June Ashwin’s evidence as to the area her mother “roamed” is to be construed as her mother’s traditional country, that evidence would be inconsistent with her mother’s own account of her traditional country and also the account of that country given by June’s elder brothers Raymond Ashwin and Ralph Ashwin. The inconsistency may be explained by June Ashwin’s acceptance that the area her mother said she roamed was not expressly referred to by her mother as her country. June Ashwin agreed that in 1984 her mother had said that her tribe lived around Leonora, Gwalia and Koakynie. It is apparent also that June Ashwin’s understanding of where her mother roamed includes places where her mother attended for corroborees. In that respect, June Ashwin mentioned Mulga Queen, Weebo and Lawlers. I would not accept, without more, that attendance at a location for ceremony is of itself a basis for concluding that the location is part of the traditional country of the attendee. As the expert evidence recounts, Western Desert people often travelled beyond areas in which they held possessory rights and interests in land and waters in order to attend ceremonies and for other purposes.
4. I accept that it is likely that, post-effective sovereignty, Sarah Brown travelled to Mulga Queen and south-west to Lawlers for ceremony. It is quite possible that pre-effective sovereignty Julia Sandstone may also have travelled that route for the same purpose.
5. It is unsurprising that Julia Sandstone travelled widely post-effective sovereignty. The evidence of those travels is mainly evidence of Julia Sandstone’s travels with her daughter Sarah Brown in or about the 1920s to avoid “the welfare”. Sarah Brown’s father was a non‑Aboriginal man named Charlie Brown. She was lighter-skinned and for that reason she was liable to be removed from her family by the police. According to Dr Draper and on the basis of what he was told by June Ashwin, Julia Sandstone spent much of her life avoiding “the welfare” so that she could keep her daughter Sarah Brown. June Ashwin told Dr Draper that, with the exception of Sarah, all of Julia Sandstone’s children were taken away by “the welfare”. As Dr Draper stated, Sarah Brown’s children recount stories of Sarah’s efforts to avoid the “the welfare”. Many of those efforts are likely to account for the travels of Julia Sandstone and her daughter Sarah at or about 1920 when Sarah was a child. That brings into question the conclusion arrived at by Dr Draper in his first report that it is probable that Sarah Brown’s childhood travels with her mother are similar to routes her mother travelled prior to 1900. It does not follow that travels undertaken to avoid “the welfare” equate with traditional travelling routes. It might be presumed that traditional travelling routes are undertaken for traditional purposes. The purpose of avoiding “the welfare” is not traditional and makes the presumption that routes taken for that purpose were traditional routes on traditional country much more contestable. It must be recognised that Julia Sandstone’s desire to hide Sarah from “the welfare” may well have regularly taken her outside of her traditional country.
6. I will return to the question of where Julia Sandstone’s traditional country was and whether or not a finding as to that matter is available to be made. For present purposes, I am satisfied that the evidence does not establish that any part of the territory described by Telpha to Tindale was part of Julia Sandstone’s traditional country pre-effective sovereignty. As I have found, the evidence does not establish either familial relationships or overlapping patterns of association with land or, in other words, the sharing of land or shared affiliation in relation to land between the Julia Sandstone ancestral family and the Darugadi, Billy and Inyarndi ancestral families. In particular there is no evidence of the sharing of, association with, knowledge of or responsibility for the *tjukurrpa* connected to the territory described by Telpha to Tindale by Julia Sandstone, her family or her ancestors.
7. There is no evidence of any association by Julia Sandstone with either the Goomboowan, the Kuna Bulla or the Mithilpithii *tjukurrpa*. There is no evidence that Sarah Brown had any knowledge of that *tjukurrpa*. June Ashwin had no apparent knowledge of that *tjukurrpa* (as discussed in **Annexure 7**). Apart from her evidence that she was aware of the existence of the Goomboowan dreaming, she gave no evidence at all about either that *tjukurrpa* or Kuna Bulla or Mithilpithii. Given that Sarah Brown was “high up in culture”, and particularly given that much of the *tjukurrpa* concerned is women’s business, it might be supposed that if Julia Sandstone was associated with that *tjukurrpa* she would have passed it on to her daughter Sarah Brown and that in turn, Sarah would have passed it on to her daughter, June Ashwin.
8. The lack of commonality between Julia Sandstone and the other apicals in terms of their claimed country is further made apparent from the understanding displayed by the Ashwin siblings about the different sources of what they asserted to be their entitlement to country.
9. As is apparent from Dr Draper’s first report, Raymond Ashwin and Ralph Ashwin, both children of William Ashwin and Sarah Brown, asserted their interests to the Tail by reference to their father’s country (their father being a descendent of Darugadi) and asserted their interests in the Body by reference to their mother’s country (their mother being a descendent of Julia Sandstone). The assertion by those persons of different and disparate sources of entitlement as between the Tail and the Body supports the conclusion that a single land-owning group did not possess interests in both the Tail and the Body, and that the interests in land and waters of the Darugadi ancestral family were different and distinct from the Julia Sandstone ancestral family.
10. The evidence of Raymond Ashwin and Ralph Ashwin as to their country is used by Dr Draper in Map 5-7 to suggest a commonality of possessory rights to country as between the Tail and the Body and the area between them. That representation is misleading given the different sources of entitlement for each of those areas which each of Raymond and Ralph Ashwin referred to.
11. The evidence of Geoffrey Ashwin was that the Wutha claim was made up of two claims, his mother’s claim and his father’s claim. His understanding was that his mother and father “had different country” which was “united” upon their marriage.
12. Furthermore, despite Dr Draper’s suggestion to the contrary, there was no uniformity of view within the Wutha claimants (or at least those of them who gave evidence) as to whether they held any rights in the Body. The Ashwin siblings and other descendants of Sarah Brown made that claim, but no one else did. When Gay Harris was asked “who are the right people for [the Body]” she said “[n]ot me … [n]o I don’t go that far”. Neither the evidence of Gay Harris or Luxie and Geraldine Hogarth displayed any awareness by them of an association in relation to land and waters or any association at all between their ancestral families and that of Julia Sandstone. That division or split in the Wutha claimants, between the Ashwin siblings and their families (who claimed the Body and the Tail) and the Harris and Hogarth families on the other hand (who laid claim only to the Tail) must have been apparent to Dr Draper. Yet its significance to the issue of whether more than one land-owning group or society existed in the Trial Area pre-effective sovereignty seems to have been inexplicably ignored.
13. Both Drs Brunton and Lynes were critical of Dr Draper’s reasoning in many respects including his conclusion, that a single land-owning group held rights and interests over the entirety of the Trial Area.
14. Dr Brunton was strongly of the view that “there were at least two different societies whose members held rights and interests in the [Trial Area] at sovereignty”. Dr Brunton opined that it likely that the various groups within the Body “would have been identified with a number of different tribes”, and not the “Pini tribe” with which the Tail would have been identified. True it is that Dr Brunton was largely of that opinion because of his view, which I do not consider has been established on the evidence, that non-Western Desert people (including the Ngauwonga and the Badimia) constituted various estate groups within the Body. Nevertheless, Dr Brunton was prepared to countenance the fact that Julia Sandstone may have held rights in the eastern parts of the Body as well as in Areas 3 and 4 as part of a Western Desert tribe. He was clearly of the view that Julia Sandstone and the estate group to which she belonged was distinct and different to the estate groups that, at pre-effective sovereignty, held interests in the Tail or the wider area described by Telpha to Tindale.
15. In a passage which I consider correctly identified one of the central flaws in Dr Draper’s reasoning, Dr Lynes said this:

It is my opinion that Draper has failed to fully consider the possibility of local distinction or variation and articulation amongst the various groupings of people comprising the Western Desert Cultural Bloc, as well as failed to recognise the possibility that the whole of the Wutha claim area is and was not covered by one society, but rather is and was covered by two or more societies.

1. A great deal of evidence was received as to whether or not the Body was Western Desert country and whether or not Julia Sandstone was a Western Desert person. Much of that evidence, relied upon by the State, was directed to demonstrating that the Wutha group was not a single group or sub-set of the Western Desert Society. I accept that contention but have done so without the need to determine whether the Body was Western Desert country and despite my view that it is likely that Julia Sandstone was a Western Desert person.
2. On the basis of the available evidence, I am not satisfied that pre-effective sovereignty Julia Sandstone or her ancestors were part of the same landholding group or sub-set of Western Desert Society as that of Darugadi, Billy and Inyarndi or, that the area in which that group had shared rights and interests extended to Julia Sandstone’s traditional country. Specifically, I am not satisfied that pre-effective sovereignty, the group or sub-set to which the Darugadi, Billy and Inyarndi ancestral families belonged included Julia Sandstone or that that group held rights and interests in the Body. I turn then to explain why I consider that that conclusion is fatal to the Wutha application.

## Not a claim for group rights

1. My finding that Julia Sandstone was not a member of the same land-holding group or sub-set of Western Desert Society as the Darugadi, Billy and Inyarndi ancestral families undermines a fundamental premise upon which the Wutha claim has been made; namely, that the Wutha group is a single sub-set of Western Desert Society. As the Full Court said in *De Rose (No 2)* at [39] (Wilcox, Sackville and Merkel JJ), the members of a sub-set need not be an identifiable community but “might be expected, under the traditional laws and customs, to share common characteristics in relation to certain land or waters, such as rights and responsibilities as the custodians for particular sites”.
2. It has not been established that Julia Sandstone shared common characteristics in relation to the same land and waters with the other apicals upon which the applicant relies. Nor is it established in relation to the Wutha group as currently constituted that the descendants of Julia Sandstone share common characteristics in relation to the same land and waters with the descendants of Darugadi, Billy and Inyarndi. It may be the case that those claimants who are descendants of Julia Sandstone and of Darugadi (the Ashwin siblings and their offspring) share common characteristics in relation to the whole of the Trial Area, but all other claimants do not. For instance, Gay Harris shares no common characteristics in relation to the Body with the descendants of Julia Sandstone (assuming the latter have rights and interests in the Body).
3. Contrary to the applicant’s contention that the group claim here made is like that made in *Tjiwarl*, it is not. As is made clear by Mortimer J in *Tjiwarl* at [70], it was accepted that the group claim made in that case was a claim:

… on behalf of a group that exists in accordance with traditional law and custom, being all the persons who together have rights and responsibilities in relation to the *tjukurrpa* of the Claimed Area in accordance with the mechanisms referred to in Applicants SIFC …

1. The case put by the applicant must fail. A determination that by reason of their descent, the descendants of Julia Sandstone hold native title in relation to the Tail cannot be made. Assuming in favour of the applicant that Julia Sandstone held rights and interests in the Body, a determination that, by reason of their descent, the descendants of the Darugadi, Billy and Inyarndi ancestral families hold native title in the Body cannot be made.
2. The Wutha claim is not a claim for group rights as is envisaged by s 223(1) of the NTA because it is not a claim made by persons who, under their traditional laws and customs, constitute a group recognised by those laws as holding group rights to particular land and waters. The claim made fails on that basis as well.

## Do the descendants of Julia Sandstone hold rights in the Body?

1. I have considered and will now briefly set out my reasons for concluding that even if the Court could by this application make a determination that the descendants of Julia Sandstone, as distinct from the Wutha group as a whole, hold native title rights to the Body, no such determination should be made.
2. The starting point for any determination as to whether native title rights are held in the Body by descendants of Julia Sandstone, is a finding that the Julia Sandstone ancestral family held rights in the Body at sovereignty. Without that finding a determination of native title in relation to the Body must fail.
3. As I have already found, most of the locations relied upon by Dr Draper to identify Julia Sandstone’s traditional country are not supported by the evidence, as locations in which it is likely Julia Sandstone had possessory rights to land or waters pre-effective sovereignty. As I have also found, it is more likely that Julia Sandstone was born in Menzies. That is the only pre-effective sovereignty location for Julia Sandstone which the evidence directly supports. It is clear for all the reasons already discussed that post-effective sovereignty Julia Sandstone travelled widely but it is by no means clear that her travels were confined to her own traditional country.
4. On the evidence before me, it is not possible to determine with any confidence the extent to which Julia Sandstone’s known travels or known occupation of land was within her own traditional country or outside of it. The evidence is deficient and does not enable me to make a finding as to the location and extent of the rights and interests in land and waters held by Julia Sandstone pre-effective sovereignty. That is so even if I was to assume that the entirety of the Body (including Areas 3 and 4) is Western Desert country. As I have said, on the evidence, I do not accept Dr Draper’s view that Julia Sandstone’s country extended across the vast area for which he contended. I accept however that there are two areas within that territory which the evidence suggests Julia Sandstone did have a substantial association.
5. *First*, I accept that Julia Sandstone had a substantial association with Menzies and the area to the north around Kookynie and Leonora. That conclusion is supported by Julia Sandstone’s place of birth, her known residency around Leonora and by the country claimed by her daughter Sarah Brown. In particular, I have in mind Sarah Brown’s statement to the Seaman Land Inquiry that “my tribe roamed in the area of Kookynie, Leonora and in the immediate areas”. However, none of that area is in the Body.
6. *Second*, I accept that Julia Sandstone had a substantial association with Sandstone. Three of her children were born there between 1906 and 1916 and it is likely that she spent substantial time there raising her children. Lorraine Barnard’s understanding that Ngoonjul was from Sandstone and that he was Julia Sandstone’s father requires further investigation, but may explain why Julia Sandstone came to Sandstone and her significant presence in that area. Sandstone is on the northern border of the Body.
7. I am inclined to accept that one or other of the two areas I have identified may have been Julia Sandstone’s traditional country. However, I cannot accept, on the evidence, that the area between those two areas was Julia Sandstone’s traditional country. The two areas I have identified are a long way apart. The distance between Menzies and Sandstone is some 250 kilometres. It is likely that Julia Sandstone travelled between the two areas and it is more likely that she did so coming through Agnew/Lawlers. However, the evidence is insufficient to persuade me that in travelling between the two areas she travelled through her own traditional country. Nor does the evidence of Sarah Brown’s knowledge of the Panhandle sites persuade me that this area was within her mother’s traditional country. As I have said already, visits to ceremonial grounds located beyond a person’s traditional country were common.
8. I am inclined to think that there is stronger evidence in favour of Julia Sandstone’s traditional country being located in the Menzies, Kookynie and Leonora area than in the Sandstone area. In that respect I take particular account of the fact that Sarah Brown did not refer to Sandstone when describing her traditional country. Nevertheless, a finding as to the location and extent of Julia Sandstone’s traditional country would involve speculation. Specifically, the applicant has failed to persuade me that, pre-effective sovereignty, Julia Sandstone had any rights or interests in any land or waters within the Body.

## Continuity (Question 3)

1. The conclusions I have reached so far make it unnecessary to consider this question. In the case that those conclusions are wrong, I should record my reasons for concluding that continuity is not established.
2. The focus for the inquiry raised as to continuity is whether those traditional laws and customs concerned with the acquisition, possession and exercise of rights and interests in land and waters have, since sovereignty, continued to be recognised and observed.
3. In that respect, I have already referred to the observations made by Mortimer J in *Tjiwarl* at [823]. Those observations are consistent with the following observations made by the Full Court in *De Rose (No 2)* at [63]-[64] (Wilcox, Sackville and Merkel JJ):

[63] What sort of link, then, must be established between the rights and interests in relation to land or waters said to be possessed by a native title claimant community or group and its acknowledgement and observance of traditional laws and customs?  In our view, it cannot be stated more precisely than that the community or group must show that it has acknowledged and observed those traditional laws and customs that recognise them as possessing rights and interest in relation to the claimed land or waters.  Contrary to the Fullers’ submissions, s 223(1)(a) does not necessarily require claimants to establish that they have continuously discharged their responsibilities, under traditional laws and customs, to safeguard land or waters.  Of course, the traditional laws and customs may provide that the holders of native title lose their rights and interests if they fail to discharge particular responsibilities.  But s 223(1)(a) does not impose an independent requirement to that effect.

[64]           Obviously enough, evidence that a native title claimant community or group has faithfully performed its obligations under traditional laws and customs would provide powerful support for its claim to possess native title rights and interests (assuming that the other requirements of s 223(1) are met).  But evidence that members of the community or group have not faithfully met their responsibilities, for example as *Nguraritja* for particular sites, will not necessarily be fatal to their claim.  It must always be a matter of fact and degree as to whether the community or group has acknowledged and observed the traditional laws and customs on which it relies to establish possession of native title rights and interests.

1. The State contended that the focus of the relevant inquiry should be on the most important laws and customs and submitted that, for present purposes, primary consideration should be given to:
2. acknowledgment and observance of *tjukurrpa*; and
3. participation in Western Desert ceremonial life.
4. Central Desert disagreed as to the emphasis put by the State on (b). It contended that participation in Western Desert ceremonial life is not required to be demonstrated. I would agree. Unless it were the case that the relevant traditional laws and customs provide that the acquiring, holding or exercise of native title rights and interests in land and waters is dependent upon, or affected by, participation in Western Desert ceremonial life (and it has not here been suggested that they do), for the reasons given in *De Rose (No 2)* to which I have just referred, s 223(1)(a) of the NTA does not impose an independent requirement to that effect. Of course, evidence of participation in ceremonial life may well be helpful in demonstrating the continued observance of traditional laws and customs in a general sense, and that may bolster the conclusion that specific laws providing for possessory rights in land and waters have also continued to be observed.
5. I do, however, accept that the extent of acknowledgement and observance of *tjukurrpa* is an important consideration in determining whether there has been a continuity of observance of traditional laws and customs concerning the acquisition, possession and exercise of rights and interests in land and waters from sovereignty to the present time. As I have found, *tjukurrpa* is the basis of Western Desert people’s connection to country; *tjukurrpa* serves to define the territory over which particular people have possessory rights and it dictates how rights are acquired and how decisions in relation to land and waters are made.
6. Of less significance to the present question is the evidence relating to various traditional laws and customs not directly concerned with the acquisition, possession or exercise of rights and interests in land and waters. For example, exclusive evidence was received in relation to skin systems, burial practices, hunting, collection and preparation of food and caring for country. The assessment of those matters may have an indirect bearing on the relevant question in the same way as the evidence of participation in ceremonial life may do so for the reasons explained above.
7. As earlier stated by reference to *De Rose (No 2)*, the present question is not whether all members of the Wutha group have continued to recognise and observe the relevant traditional laws and customs, but whether the Wutha group as a whole has done so.
8. I am clearly of the view that the applicant has failed to discharge its onus of establishing that there has been continuity in the recognition and observance of the relevant traditional laws and customs.
9. The first problem the applicant’s case confronts on this issue is that no attempt has been made by the applicant to establish the extent to which those persons who gave evidence may be regarded as representative of the whole Wutha group. Assuming for current purposes that the Wutha group is confined to the descendants of the four ancestral families of Darugadi, Billy, Inyarndi and Julia Sandstone, the genealogies prepared by Dr Draper suggest that the Wutha group extends to over 280 living persons. That estimate is given in the State’s submission. The accuracy of it was not contested by the applicant. In any event, it seems clear that the Wutha group extends to hundreds of living persons. Only 12 witnesses from the Wutha group were called to give evidence and no evidence was tendered or submission made by the applicant as to why those witnesses should be regarded as representative of the whole.
10. It may have been possible to draw some inferences about the representative nature of the evidence called, by reason of the status (for instance as an elder) of some of the witnesses or by reason of the family from which a particular witness came. However, the available inferences are insufficient to allow me to formulate any reliable view as to the likely position of the Wutha group as a whole. That is particularly so because, as I shall detail shortly, the evidence as to the continued recognition and observance of traditional laws and customs by the witnesses called was mixed. The evidence of some failed to demonstrate continued recognition and observance whilst the evidence of others did so.
11. **Annexure 7** to these reasons contains a summary of what I consider to be the most pertinent evidence by the lay witness who gave evidence on their continued recognition and observance of traditional laws and customs. That summary is not a comprehensive summary of the evidence given by those witnesses, and has particular reference to the evidence on knowledge of *tjukurrpa* and relevant dreaming stories, and knowledge and understanding of traditional law relating to the acquisition of property and traditional decision-making. These are the matters which I consider throw the greatest light on the relevant question.
12. The witnesses I consider to have demonstrated continued recognition and observance of traditional laws and customs were Gay Harris, Luxie Hogarth and Geraldine Hogarth. I was also under the impression that these witnesses knew more than what was elicited from them in their evidence regarding these matters. I note in particular, in relation to Luxie, that while there were some gaps in her evidence, I consider those gaps were more likely to be the product of advanced age than an absence of knowledge and understanding. On balance, although I consider the extent of his knowledge was less than the witnesses listed above, I consider that Ralph Ashwin also demonstrated a sufficient recognition and observance of traditional laws and customs.
13. I consider other persons such as Lenny Ashwin (deceased), Gary Ashwin, Raymond Ashwin (deceased), Danny Harris (deceased) and Lorraine Barnard were likely to have knowledge and understanding of traditional laws and customs, but that their evidence failed to demonstrate the requisite connection to the Trial Area. That is, their evidence failed to demonstrate knowledge of the *tjukurrpa* as it applies and is observed in the Trial Area. Again, the deficiency may well be more the product of a case not well presented rather than an actual absence of knowledge or observance.
14. Based on the evidence, I consider that Geoffrey Ashwin, June Ashwin, John Ashwin, Calvin Ashwin, Bradley Ashwin, Sheldon Harrington-Smith, Joshua Harrington-Smith and Katherine Adams (deceased) have not demonstrated a sufficient knowledge of or continued recognition and connection to, the *tjukurrpa* of the Trial Area. I accept that these witnesses had knowledge of and engaged in particular cultural activities such as camping, hunting and gathering. However, these witnesses did not demonstrate sufficient familiarity with important dreaming stories. Their evidence about acknowledgement and observance of the *tjukurrpa* outlined in **Annexure 7** failed to demonstrate the kind of substantial acknowledgement and observance of traditional laws and customs required to satisfy s 223(1)(a) of the NTA.
15. The evidence of these witnesses, and particularly Geoffrey Ashwin, June Ashwin and John Ashwin on the pathways by which traditional rights and interests in land may be acquired, and traditional decision-making processes served to reinforce my view that they have, at best, a rudimentary knowledge and understanding of *tjukurrpa*. Their knowledge seems to be at odds with what I have found to be the available traditional pathways under Western Desert law and the traditional decision-making processes. I appreciate, however, that the evidence they gave on these subjects may reflect a misunderstanding created by the proceeding itself, in the sense that there was confusion in their evidence about what was required by traditional laws and customs and what they believed was required for native title applications made under the NTA.
16. My conclusion that only a few members of the Wutha group demonstrated knowledge and observance of *tjukurrpa* is consistent with the opinions expressed by Dr Brunton and Dr Lynes.
17. I harbour a suspicion that much more could have been done, but was not done, to persuade me that the Wutha group as a whole continue to recognise and observe traditional laws and customs. My impression that this claim is dominated by the Ashwin siblings to the exclusion of others, probably explains why the vast majority of witnesses called were from the families of the Ahwin siblings. As I have said, their evidence on this topic was largely unhelpful. Why other members of the Wutha group were not called or not called in greater number was not explained. To give the most obvious example, Gay Harris’ son Anthony Harris is a *wati* and therefore someone whose evidence, it may be assumed, was likely to be helpful to the applicant. Anthony was neither called nor mentioned in Dr Draper’s report. I can only act on the evidence put before the Court, and on that evidence, I have a clear view that the applicant has failed to discharge its onus of establishing continuity.
18. Finally on this topic, I should say that I appreciate that the extent of a person’s spiritual knowledge and observance is likely to be highly personal and a matter of great sensitivity. It is unfortunate that it is necessary that such an assessment need be made. Having made it I have done so intending no disrespect or offence to those who asserted a higher level of spirituality and knowledge than that which the evidence they gave suggested.

## Whether traditional laws and customs provide a connection with the Trial Area (Question 4)

1. In the circumstances, this inquiry is unnecessary to pursue. I am, however, able to say that if the applicant had succeeded on Questions 2 and 3, I would have characterised the traditional laws and customs in question as providing a connection between the Wutha group and the land and waters claimed.

# CONCLUSION

1. For the reasons given, the answer to the separate question as to whether the Wutha application is authorised in accordance with the requirements of the NTA is “No”.
2. The answer to the question as to whether it has been established that native title exist in relation to land and waters in the Trial Area is also “No”. It is not necessary to answer those questions dealing with who are the persons or group of persons holding native title rights or what are the native title rights and interests held by such persons (Question (b) of the Separate Questions).
3. The State made an application for a negative determination. That is, a determination that no native title exists in the Body other than for the small areas described above at [291]. The State has sought an opportunity to consider these reasons and the findings I have here made before further addressing that application. That is a sensible course. As the Full Court (North, Mansfield, Jagot and Mortimer JJ) said in *CG v State of Western Australia* (2016) 240 FCR 466 at [66]:

Whether it is appropriate to proceed to consider the making of a negative determination will depend in part upon the reasons why a claimant application has failed.

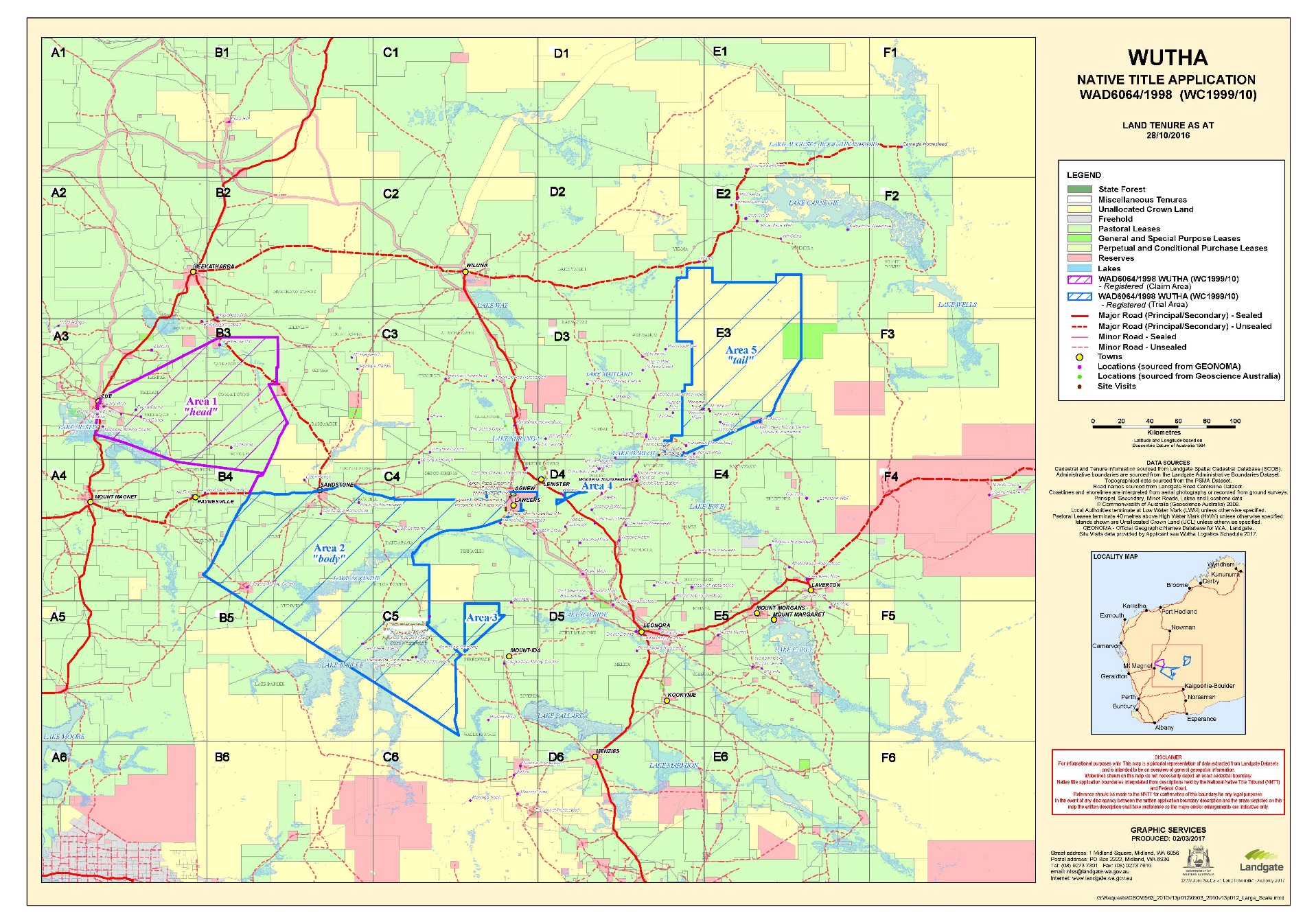
1. Should the State indicate that it seeks to pursue its application for a negative determination, I will deal with the need to receive further submissions. In that respect I should indicate that I would want to be addressed on whether the Court has the power to entertain such an application made by a respondent to a claimant application in circumstances where the Court has held the claimant application to be unauthorised.
2. An opportunity should be given to the parties to consider these reasons before the Court makes orders that reflect my findings. I will list the proceeding for the purpose of receiving submissions from the parties as to the orders that the Court should now make. Should the parties agree as to the form of orders which should be made, minutes of proposed consent orders should be filed. In that eventuality, the need for any further hearing will be reconsidered.

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| I certify that the preceding four hundred and fifty-six (456) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg. |

Associate:

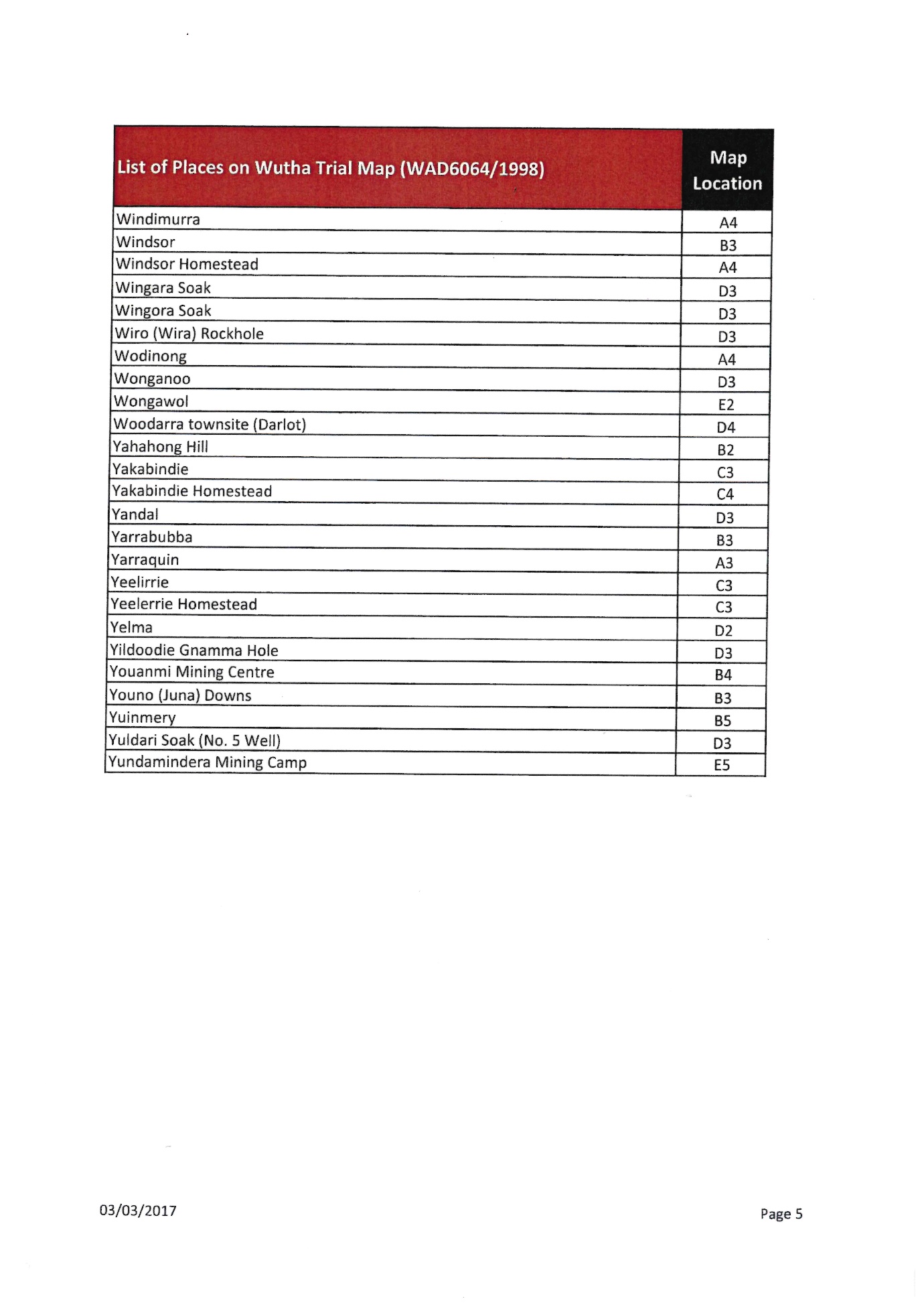
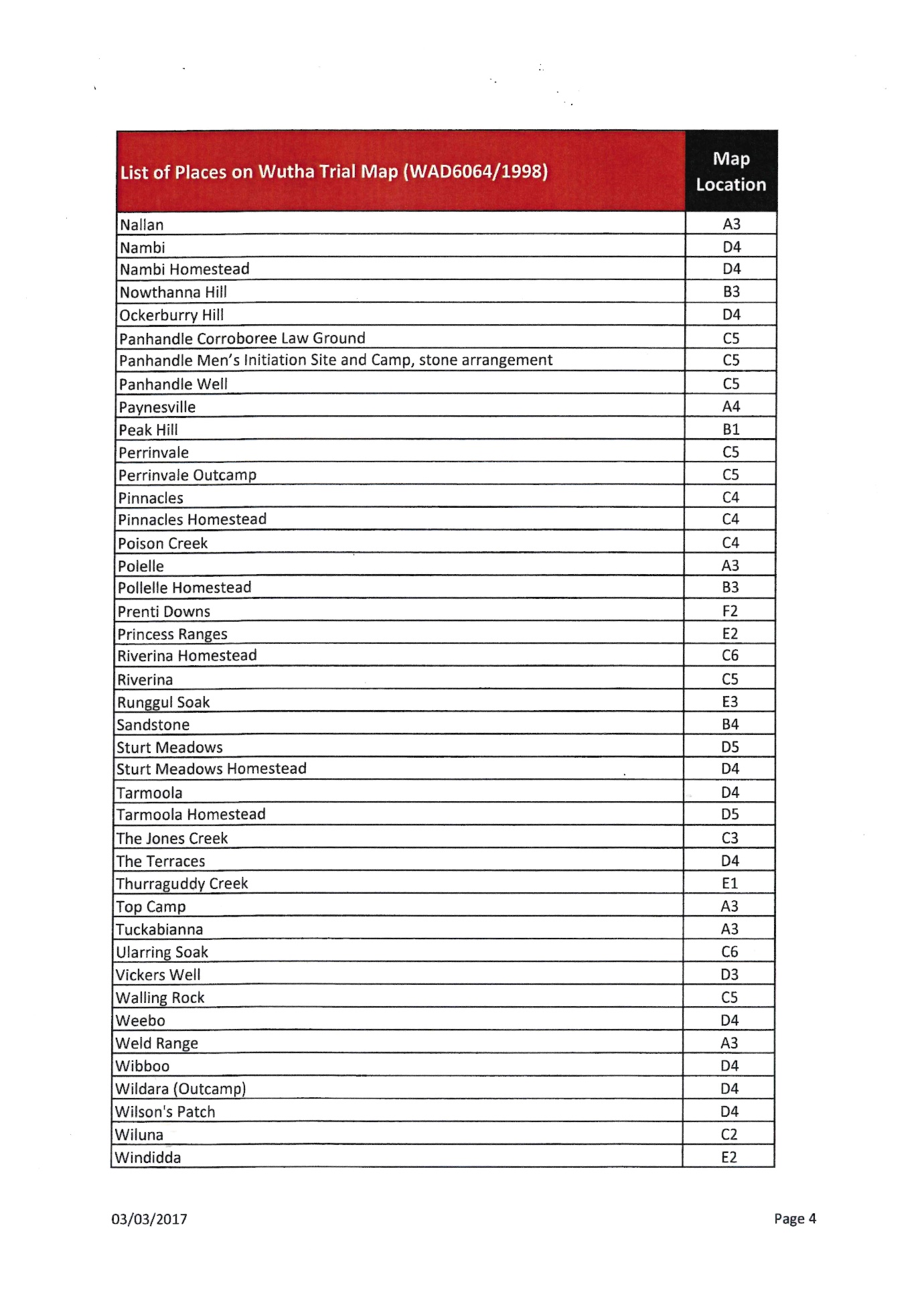
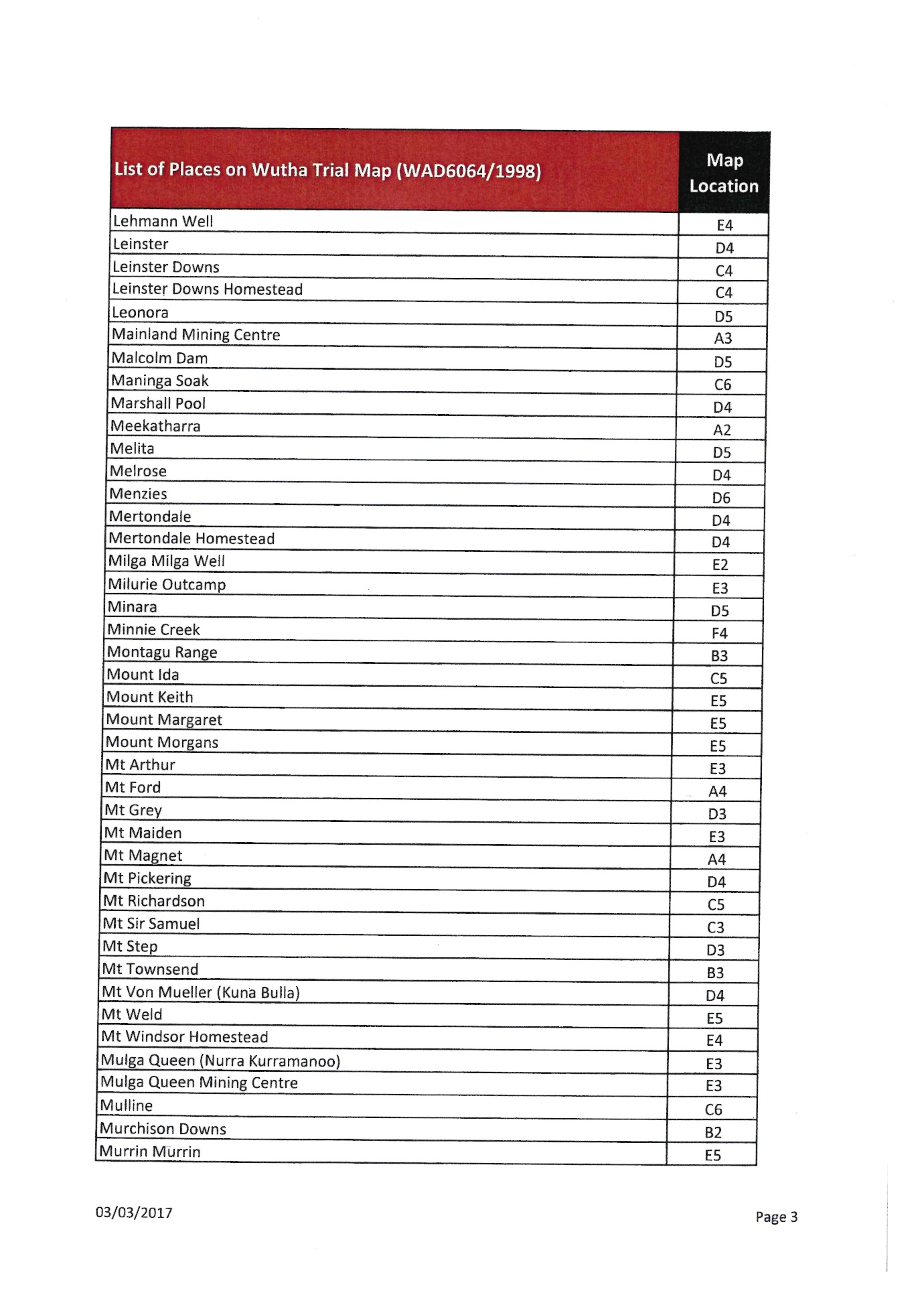
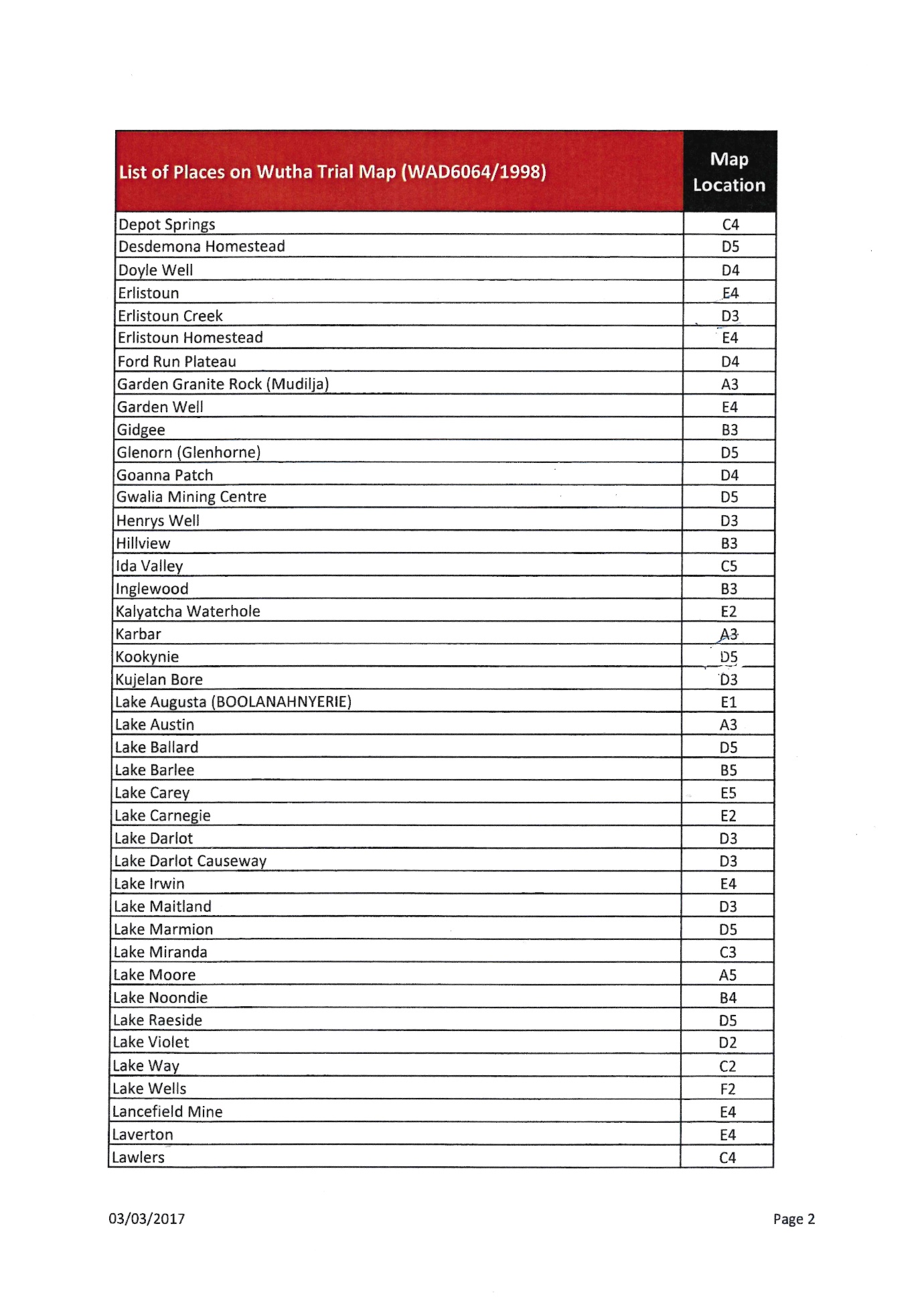
Dated: 8 March 2019

# ANNEXURE 1

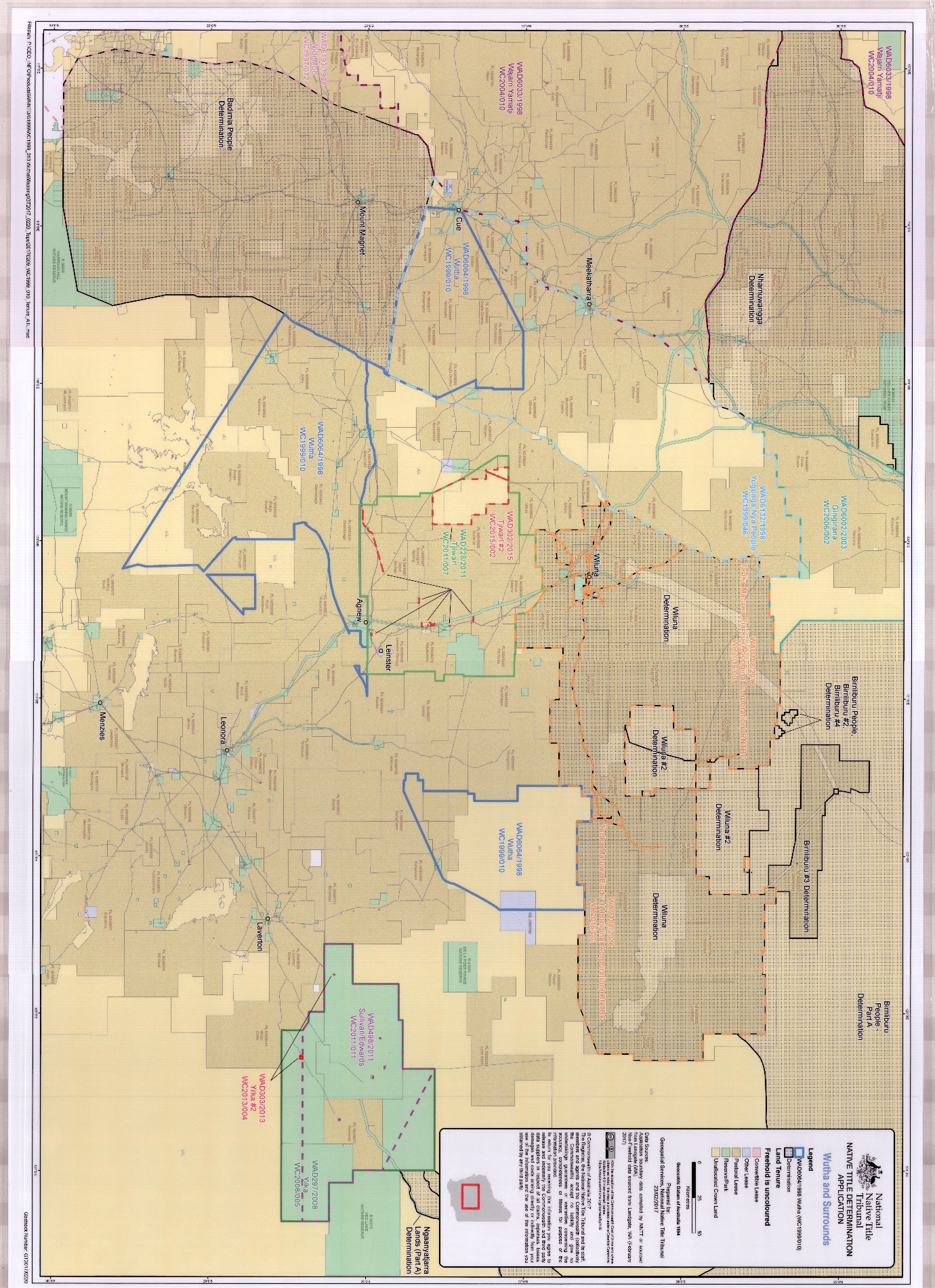
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# ANNEXURE 2

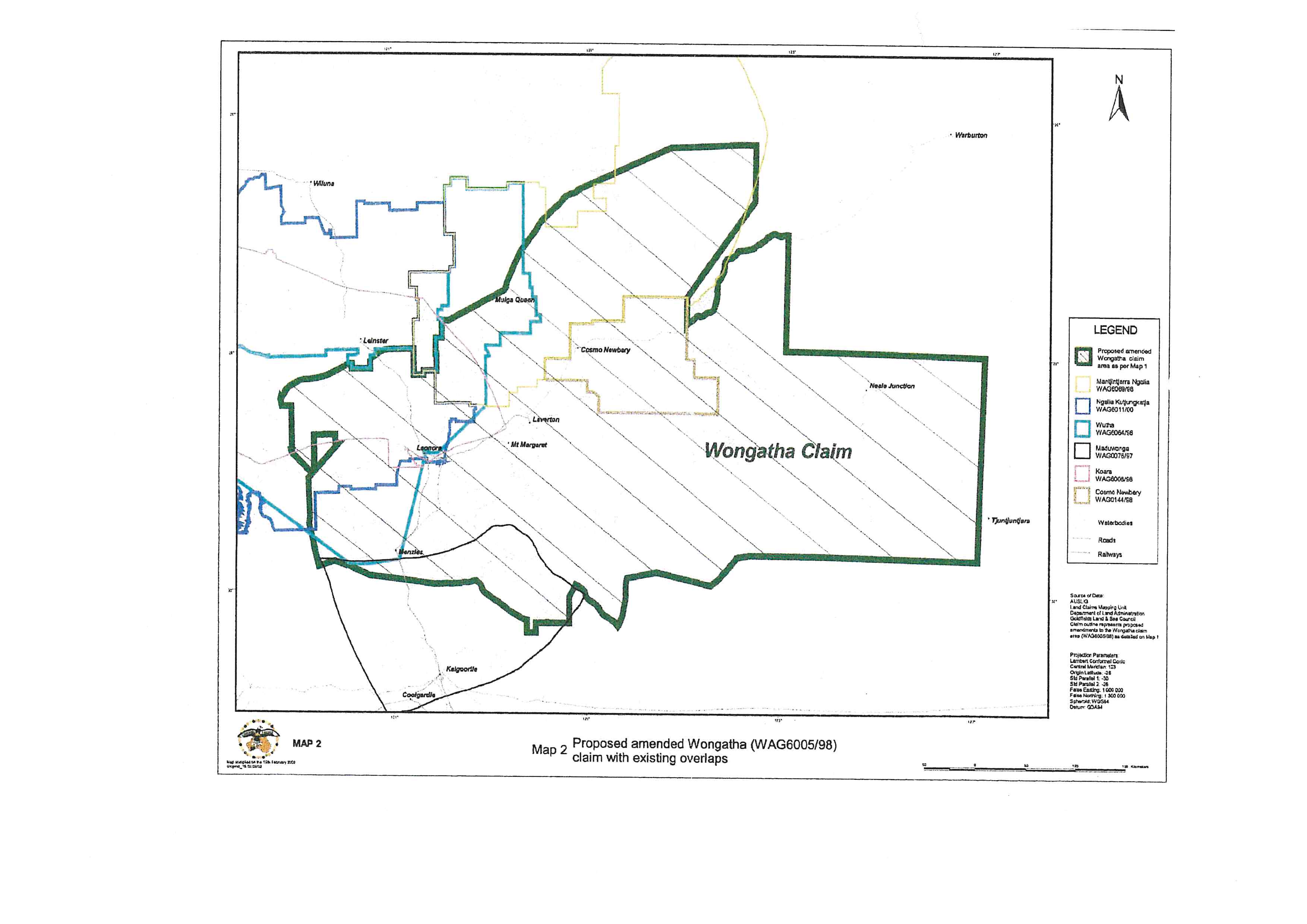
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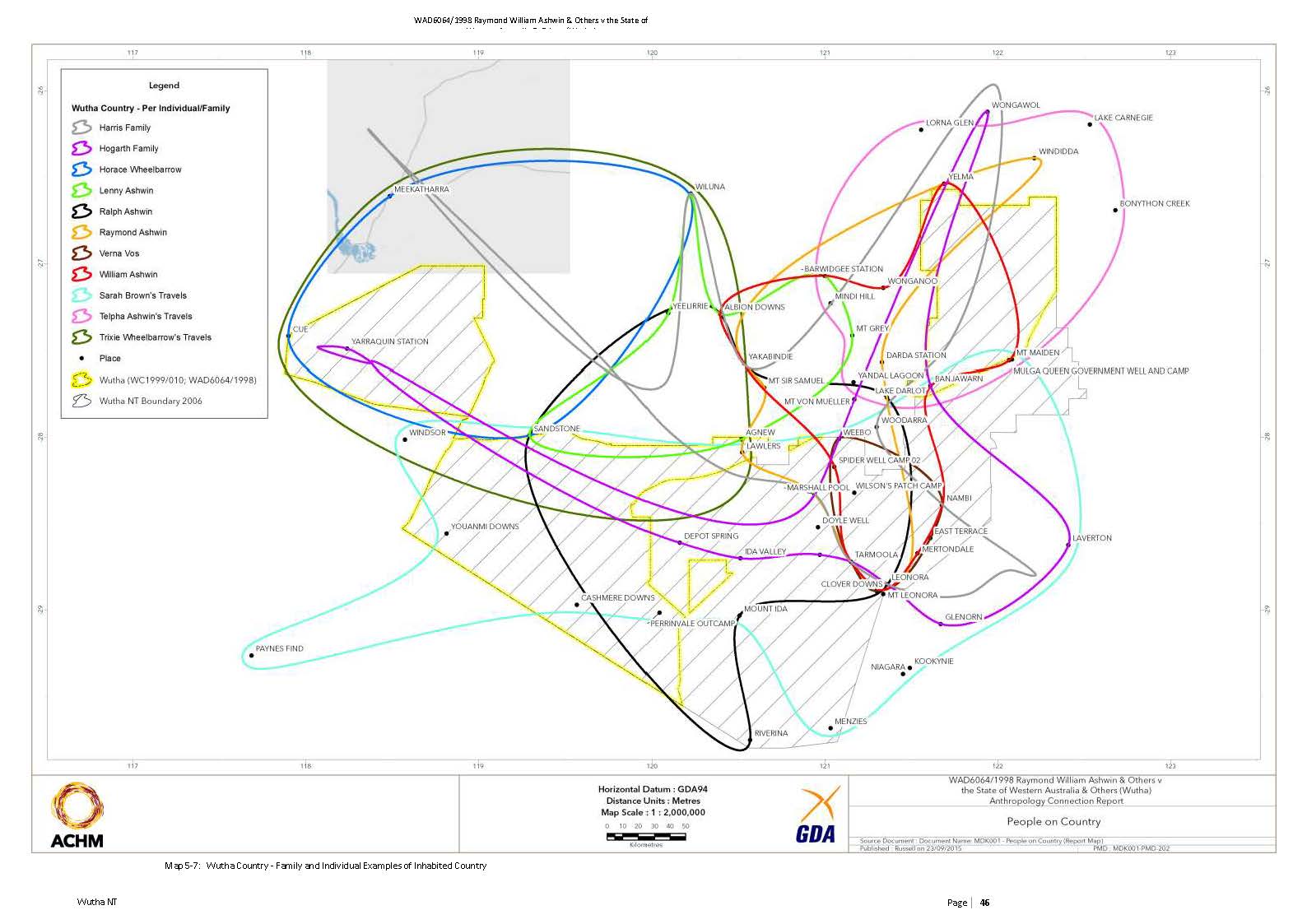
# ANNEXURE 3

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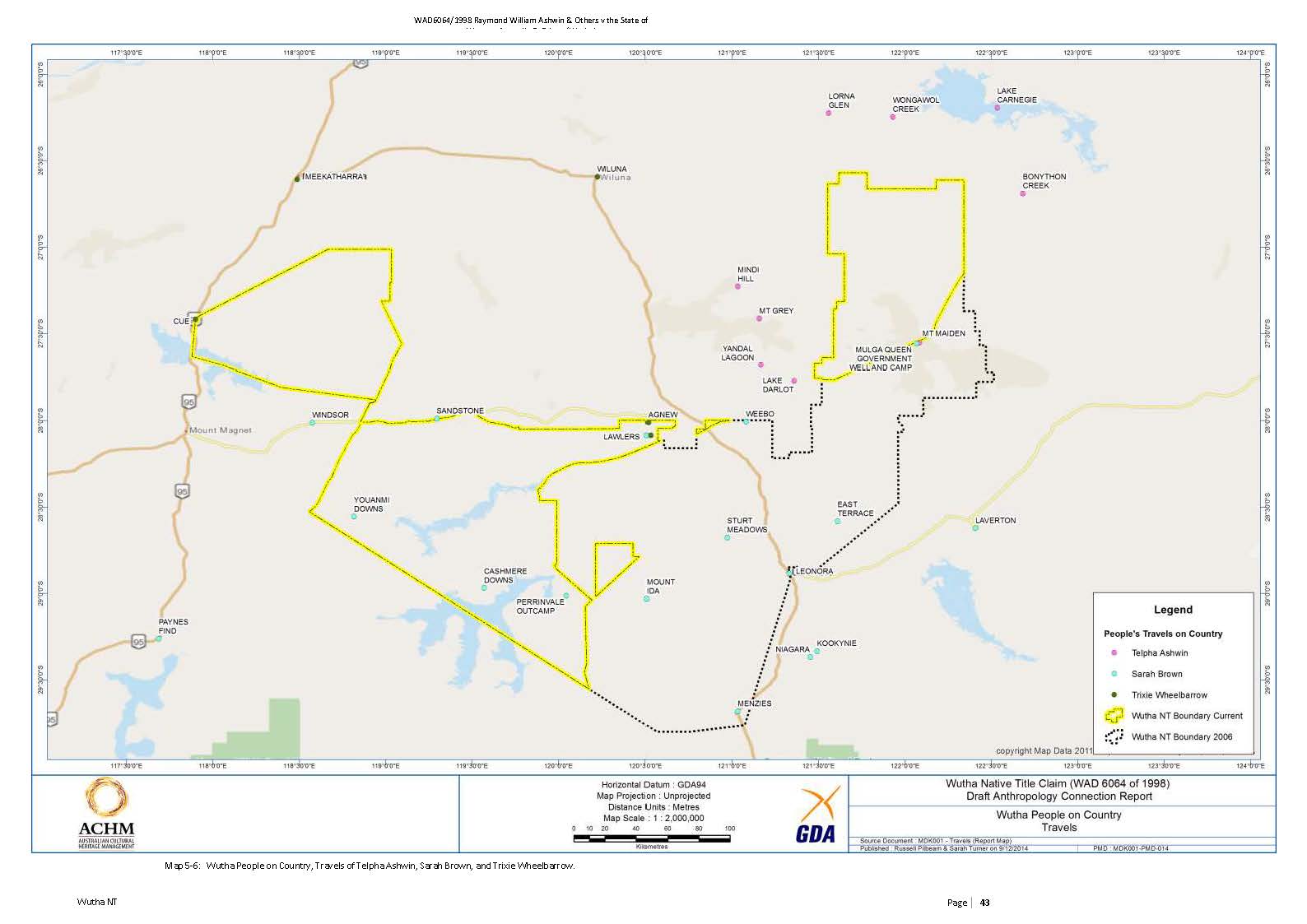
# ANNEXURE 4

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# ANNEXURE 5

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# ANNEXURE 6

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# ANNEXURE 7

**CONTINUITY EVIDENCE**

**INTRODUCTION AND APPROACH TO EVIDENCE**

1. This annexure has been prepared for the purpose of summarising the evidence of various lay witnesses on their continued recognition and observance of the traditional laws and customs connected to the Trial Area. The annexure is not a comprehensive record of the evidence given by those witnesses and has a particular focus on the evidence of their knowledge and observation of *tjukurrpa*. The importance of *tjukurrpa* as the repository of traditional laws relating to the acquisition of rights and interest in land has been discussed already. Where the witness gave an account of his or her understanding of how traditional laws relating to the acquisition and exercise of rights to land and waters operate, that understanding has been recorded. I have also had regard to and summarised evidence given by the various lay witnesses in relation to their knowledge and observance of other traditional laws and customs. For reasons also already discussed I have accorded less weight to those matters.
2. Most of the witnesses whose evidence was relied on by the applicant, directly gave evidence by way of witness statements and oral evidence. In relation to some of those witnesses, a summary of their evidence prepared by Lindgren J in *Wongatha*, as found in Annexure F to that judgment, was also tendered. In each instance where that summary of evidence was tendered in respect of a witness who gave evidence in the proceeding, the witness confirmed the accuracy of that summary (although in some instances there were specific corrections). For some witnesses a witness statement made by that witness in *Wongatha* was also tendered.
3. The applicant also sought to rely on the evidence of certain witnesses who did not give oral evidence in the proceeding, either because the witness was too ill to attend the trial, or because that witness had passed away by the time of the trial. In those instances I permitted the applicant to tender witness statements filed at an earlier time in the proceeding, or the summary of evidence given in *Wongatha* as prepared by Lindgren J.
4. I allowed the applicant to tender this material because it appears to me that, because the applicant is required to show that the Wutha group has continued to acknowledge and observe relevant laws and customs since sovereignty, it is relevant to have an understanding of the knowledge and observation of *tjukurrpa* and other traditional laws and customs of persons who are now deceased.
5. In respect of those witnesses whose evidence was limited to the summary of evidence in *Wongatha* prepared by Lindgren J, the State submitted that I should adopt any findings made by Lindgren J in that proceeding. I disagree. I need to make my own findings based on the best evidence before me. However, as will become apparent, I did not ultimately consider that evidence to be of much assistance to the applicant in establishing a continuing connection to the Trial Area.

**GAY HARRIS**

**Knowledge and observance of *tjukurrpa***

1. Gay deposed that the *thukur* or dreaming stories “tell us about places to find water, and what happens when it floods after a big rain”. She described learning and understanding dreaming stories as a consequence of being told stories by her family and through travelling with her family throughout her life. She tells the dreaming stories to her family to continue their oral traditions about their relationship with the land.
2. Together with Geraldine Hogarth, Gay Harris was a primary witness in relation to the Goomboowan dreaming. Gay described the Goomboowan dreaming story in the terms discussed in my reasons at [128]-[129]. In addition to the evidence described above she gave female gender-restricted evidence in relation to this dreaming story. As it was restricted evidence it ought not be outlined here, but additional detail was given. I have a concern that a less than full version of the story may have been given because of a reluctance to talk about the restricted subject matter in a setting in which males and non-Aboriginal persons were present. Nevertheless, my assessment is that Gay has a knowledge and understanding of the fundamental and significant aspects of the story and probably the deeper spiritual elements.
3. There is some ambiguity in the evidence before me as to the extent that Gay applies the Goomboowan dreaming in terms of where she travels, camps and roams or where she looks after the country. Gay describes her *manta* as in Wildara where she was born, Agnew where her sister was born, Lawlers, Weebo and Marshall Pool.She deposed to hunting and camping mainly in Darlot, Lawlers, Agnew, Marshall Pool, Goanna Patch, Wildara and Leinster. Gay also gave evidence that there is a lot of bush food at Wingara Soak in a good season. Many of these places are associated with the area connected to the Goomboowan dreaming story, but Gay’s presence there was not directly linked to that dreaming.
4. Gay was also a primary witnesses in relation to the Kuna Bulla dreaming story. Gay described the Kuna Bulla dreaming story in the terms discussed in my reasons at [132]-[133]. The evidence she gave was of a general nature indicating the path that the two snakes travelled from the south past Darlot and west into the *Tjiwarl* determination area. The general nature of the evidence given by Gay makes it difficult for me to assess her familiarity with this dreaming story and its importance to her. Further, as noted above, it may be that a less than full version of the story was given because of the setting in which Gay gave her evidence. Gay did not give direct evidence in relation to the extent to which her activities are associated with this *tjukurrpa*. However, her evidence was that she has spent time hunting and gathering in the Darlot and Weebo areas, as well as around Leinster, Agnew and Lawlers which broadly align with the Kuna Bulla dreaming track.
5. As discussed at [346]-[348] of my reasons, Gay deposed that her family had a *thukur* in Mithilpithii (a special women’s place) and that the existence of that *thukur* was why her father’s family were “the chosen people to go from Wongawol to the Darlot/Weebo area”. Gay was not taken to this matter in her oral evidence and her evidence did not directly address the content of the Mithilpithii dreaming or the extent to which she continues to have an active association with that *tjukurrpa*. Nevertheless, I was under the impression that Gay knew more than what was elicited in her evidence about this *tjukurrpa*. Gay’s evidence also indicated that she had spent time hunting and gathering in areas around Darlot and Weebo associated with the Mithilpithii dreaming.
6. Gay did not give evidence about *tjukurrpa* related to the Body. When asked in cross-examination who were “the right people” for the Body, and having been shown a map of that area, she answered “[n]ot me”, and “I don’t go that far”.
7. Gay gave evidence of her understanding of traditional laws and customs relating to the basis for a person’s entitlement to exercise rights over land which, broadly speaking, are consistent with my findings about applicable traditional laws and customs. She deposed that, under “Pini law”, if you are always in the country and you use, occupy and hunt in that country, then you have rights in that country. Further, if you were born in the country, or your brothers and sisters are born in the country, you have rights to that country so long as you use and occupy that area.
8. In relation to her understanding of gaining entitlement through birth, Gay deposed that, if Aboriginal people are visiting and a lady gives birth to a child, that child does not have rights in the country in which it is born. However, she stated that this is a matter of choice and “the land is crying out for owners of the country”.
9. In cross-examination Gay said that she can’t tell another Aboriginal who says it is their country to “go back”. She said that if they can “mingle with us, follow our law and culture, maybe we can accept them like that”.She also described a distinction between being a custodian of land where you live, and having ownership of that country. Gay identified the Hill brothers, who married her aunties, as an example of this. She said that the Hill brothers have been accepted into her family because they married her aunties, but they look after the land as custodians not owners. They personally identify their country as “back there, back there in Mungili”.
10. Gay was aware of traditional laws and customs relating to looking after and maintaining water sources and rockholes on country. However, she said that Aboriginal people now do not look after the rockholes like their ancestors did because the cattle have “made a mess of the water”. She said that it is important to clean up the sites where she camps and cooks, “because you are not supposed to leave a hole in the *parna*. Got to cover it up”.
11. Gay deposed to the importance of passing on knowledge of *tjukurrpa* and traditional laws and customs. She tries to go to areas of her country regularly with her children and grandchildren to take care of it and make sure it is healthy, especially any water sources. She also tries to tell dreaming stories to her family to continue their oral traditions about the relationship of her people to the land.

**Knowledge and observance of other traditional laws and customs**

1. The main areas that Gay has spent time in the bush are Lawlers, Agnew, Marshall Pool, Goanna Patch, Wildara and Leinster. She has also been to Booylgoo Springs, Depot Springs and the Pinnacles.
2. When Gay goes hunting now she hunts in Darlot, as well as Nambi, Goanna Patch, Agnews and the area around Lawlers. She said she would be frightened to go on other peoples’ country.
3. Gay hunts for kangaroo, goanna, emu and gathers wild berries, *quandong*, silky pear, *bardis*, honey ants, seeds (for grinding into flour), and bush medicine. She explained that *kurrumin* seeds are ground to make damper, and that these seeds only grow in certain places like Vickers Well, Yakabindie and Kigalong. *Wutha* (wild potato) are found at Depot Springs, Windidda, Wongawol and Carnegie.
4. Gay gave evidence that in a good season there is good bush food available at Wingara Soak including *wantiri* grass seed, *kampurrara* (wild tomato), *bardis*, prickly tree, koara tree and grub. There are also berries, *quandong*, sandalwood and bush medicines in this area.
5. She said that her grandchildren know about bush tucker, and that they learnt this from their mother and herself when they took them out bush.
6. Gay gave evidence about traditional methods of finding water, including by observing the “birds, animal pads and kangaroo diggings”. While Gay’s witness statement said that she still uses the same method to find water, in cross-examination she indicated that when she goes hunting nowadays she takes water from the tap with her because cattle have damaged and contaminated the water holes.
7. Gay deposed that traditionally it was men who cooked emu and kangaroo but now women also have to cook because the men in the family are working. She believes that her people cook goanna differently to other people by leaving it in the ashes longer and cutting it up so that the feet are not sticking out. She said that “desert people” probably cook goanna and emu in the same way, and that this involves breaking the legs and tying the feet together “so they don’t get up out of the fire”.
8. When Gay was a young girl corroborees were held in the Darlot area with Aboriginal people from “all over”. She was allowed to watch the corroborees if women were taking part, and remember’s the women’s dances. She recalls participating in the dancing at the last big corroboree on the Leonora Reserve in the 1960s.The music they danced to involved sitting down and slapping your thighs with your hands (*papalthin*) while at the same time the men tapped sticks and they all sang. If it was an open corroboree, anyone could watch, but there were closed parts when women and children had to lie under blankets.
9. Gay said that the people who came to the corroborees would camp there for the duration of the meeting then return to their own country. The *wangkayis* would bring things to trade with one another. The Mount Magnet mob used to bring red ochre (for painting the body) from Wilgi Mia to the west of Cue and trade it for bags of *kurrumin* seed from Banjawarn country, for grinding. In addition there was trading of blankets, clothes and meat *(kuka).*
10. Gay gave evidence in relation to going through the *law* at Leonora, saying that:

Wati law finished here in the late 1960s. It is finished but culture is not finished. Nowadays people go through law with other people to say they are able to claim authority. Wutha people now go on age and lineage [to determine seniority and authority] not from people making claims about being a wati.

1. Gay’s evidence demonstrated a knowledge of skin systems and the traditional laws and customs associated with them. She gave evidence that she is *purungu,* her father was *tharuru,* and her mother was *panaka*. Her evidence was that children take their skin system from their grandmother, and that accordingly her grandchildren are *panaka*.Her evidence indirectly demonstrated knowledge of the traditional laws and customs associated with marriage between different skin systems, variously describing the marriages of members of her family as “the right way” by reference to these laws and customs.
2. Gay said that when Aboriginal people first met at corroborees they would stand in a big circle and someone would say that all the *purungu* should go on one side, *tharuru* on another side, *yiparrka* somewhere else, and *milangka* somewhere else. Gay explained that this is what you call *papaluku.* She said that by being drafted into their own skin groups, they knew whom they could and could not marry.
3. Gay gave some evidence in relation to Aboriginal language groups, deposing that her mother spoke the “Wongatha language” which is spoken by people who come from the Laverton area, and that her father spoke the “Tjupan language”. Gay explained that she had learnt those languages and gave examples of some different words and their use in those languages.
4. Gay also gave some evidence in relation to traditional burial practices. She still attends funerals in Wiluna and Laverton where they follow a traditional way of putting people to rest called *yirrkapi*. She said that “the law” is not to marry for a year after the husband or wife died, and that after a year the surviving spouse was free to remarry.

**GERALDINE HOGARTH**

**Knowledge and observance of *tjukurrpa***

1. Geraldine spoke about the importance and geographical extent of the *tjukurrpa*, stating that:

This *tjukurrpa* dreaming one end to the other, north to east, west to - north to south, east to west. We are a band of people, groups that have our *tjukurrpa* it’s right through this land Australia, what we call Australia. I like to call it *tjukurrpa* because all Aboriginal people, we are chapters in a big book, so chapter 1 can be this - we'll say our group. That story continues on. The second chapter is another group so – but the story still run through. So as my understanding what I've been taught through my old people, we are chapters in this book and we look after - then when that story it continues, that group - the lakes separate our tribal grounds. If that make any sense.

1. Geraldine was a primary witness in relation to the Goomboowan dreaming story, and described this story in the terms discussed in my reasons at [127]-[130]. She explained how this dreaming extends beyond her people’s country and is shared with other Aboriginal people, but said that her people have responsibility for the story in their country: “it can come from north come in but we are responsible, our people are responsible for I'll say the Pini, Dalgandarda [Tjalkadjara], Koara people responsible here”.
2. Geraldine also gave female gender-restricted evidence in relation to this dreaming. Because it was restricted evidence it ought not be outlined here, but additional detail was given. It may be that a less than full version of the story may have been given because of the setting in which the evidence was given and her reluctance to talk about the restricted subject matter. Nevertheless, my assessment is that Geraldine has a knowledge and understanding of the fundamental and significant aspects of the story and probably the deeper spiritual elements.
3. Geraldine did not give direct evidence in relation to the extent to which her interaction with country is associated with the Goomboowan dreaming. However, she described her country (*parna* or *manta*) as Weebo, Sturt Meadows, Tarmoola and Darlot as well as Banjawarn, Runggul Soak, Wingara Soak, Kudjelan, Yuldari Soak, Mount Vernan, Milyari and Kunabulla. She said that she lived in these areas as a child growing up and that these areas are my “feeling, my *kuurti* [spirit] for that place is there”. She said that the areas around Tarmoola, Sturt Meadows, Weebo, Ida Valley and Wilson’s Patch are particularly special to her because she grew up there a child and they are significant sites to her family. She stated that there are places in their country that are restricted to women, and that the women go there and look after these places.
4. As discussed at [346]-[352] of my reasons, Geraldine gave evidence in *Wongatha* about the Mithilpithii dreaming that was tendered in this proceeding. Geraldine also gave oral evidence of there being a significant women’s site associated with the Mithilpithii dreaming at Weebo. While Geraldine’s evidence before me did not address the detail of the Mithilpithii story, its significance, or the extent to which she is active in respect of that *tjukurrpa*, I was also under the impression that she knew more than what was elicited from her in her evidence, including about the deeper spiritual elements of this dreaming. This is consistent with Lindgren J’s commentary on the evidence given by Geraldine and Luxie Hogarth at sites associated with Mithilpithii in *Wongatha* where his Honour said that they described the content of the Mithilpithii story, the features of the landscape at Mithilpithii, what activities used to take place there, and how that information had been passed down from mother to daughter over many generations. Furthermore, Geraldine’s evidence that her *parna* or *manta* is at Weebo is consistent with the area associated with the Mithilpithii dreaming.
5. Geraldine’s understanding is that the acquisition of rights in land requires an ancestral connection to the country, but also a connection to country through living, roaming, hunting and camping, or looking after that country and its *tjukurrpa*.
6. She said that that the rights “her people” have in their country are to go onto that country, camp on it, hunt and take bush tucker, look after and protect the country, teach young people about it, and say who can have access to it.
7. Geraldine deposed that it is important to ask the people who speak for country before going there to camp and hunt. If friends of hers visit they ask her where they can go and hunt and she will tell there where to go. She said that “[i] f they went to the wrong place the *gawdi* would tell them that they are not supposed to be there. The *gawdi* are spirits which come from the land. The *gawdi* on our *parna* will look after us, and warn strangers away”.
8. Geraldine explained that “her people” protect their country in a number of ways, such as: looking out for possible harm to country (particularly from new mining activity); taking part in site clearance surveys for mining activity; cleaning the rockholes and soaks, conserving wildlife by taking only animals they need; camping in proper places, not in wind-grass or spinifex or by rockholes or soaks; and leaving camping and cooking places clean and covered up (because it is wrong to leave a hole, like a wound, in the *parna*).
9. Geraldine looks after rockholes and soaks in her country by looking after the water lilies in the rockholes and making sure they are clean. Her family covers the rockholes with branches to protect them, but leave a little bit of room so that the animals can drink the water. She said that there are two rockholes on the "Darlot road" that she cleans out. However, it is not clear whether those rockholes are within in the Trial Area.

**Knowledge and observance of other traditional laws and customs**

1. Geraldine gave evidence that her family goes out hunting and camping whenever the weather is fine. They go to Darlot, Nambi, Sturt Meadows and other areas north-west of Leonora. Her family will take what bush foods they need, and only kill enough animals to satisfy their needs.
2. Geraldine was taught by her grandmother that when you hunt an animal you should talk to it and say “sorry” (*nharru kukutu*). She said that this is because in their culture they believe that “those animals were human beings like them”.
3. Geraldine deposed that “bush tucker” is very important and that she had been taught about the different kinds of bush food, where to find it and how to prepare it. Geraldine said that she gets *thalu* (wild onions which grow around lakes and creeks), *bardis, namanga* (honey ant)*, tarrunis,* and *linki*. From the *tjinpa* (grasses) she gets seeds to make *numa* (damper). Geraldine also eats *tjaakampa* and *pulyu* (wild berries), *bululu* (wild carrot or radish), *kalkurla* (silky pear), *pipitharli* (wild yam), *tarrun* (green apple), *ngutturl* and *yowlirrie* (tree sap), *libon* (mushroom) and *wutha* (wild potato). The *kuka* (meat) her family eats includes *karlaya* (emu), *kanala* (hill kangaroo), *papimaru* (goanna), and *tjilkamarra* (echidna).
4. Geraldine deposed that Aboriginal *law* still passes through Leonora. There aren’t full ceremonies for women with singing and dancing anymore, but she said that, nevertheless, the women in her family sing and dance together because it is important to them in order to teach these traditions to their children.
5. When men’s business passes through Leonora, Geraldine deposed that the men who are related to her (by blood or by skin group) come to see her to tell her what roads they are going on and to tell her not to go on those roads. Geraldine communicates this to other people so that they don’t go there during the men’s business; this would be *ngurlu* (taboo).
6. By her witness statement Geraldine deposed to her skin group and the importance of skin groups in Aboriginal *law* for marriages, funerals and other social aspects of life. Her statement included a diagram of how skin groups are assigned for marriages and children, identifying the four skin groups as: *purungu*, *karrimarra*, *panaka* and *tharruru*. Her evidence was that these *laws* and customs are very important to her.
7. She gave detailed evidence about skin systems and their relevance. She explained that skin groups determine “the groups of women you can talk to about women’s things, like hunting or cooking or teaching young girls about growing into women”.
8. Geraldine’s evidence indicated that skin systems were relevant to her own life, including because her grandmothers and family had made arrangements for her marriage so that it was a “right-way” marriage by reference to skin systems.
9. Geraldine gave detailed evidence about burial practices in her witness statement. Skin groups are relevant and she said that if a *panaka* person dies, then all of the funeral arrangements will be made by people who are *tharruru*, or *panaka* from the generation up or down (that is, someone who would have called the deceased “brother” or “sister”).
10. Burial ceremonies are done in a certain way to honour the life of the deceased from the beginning, to the middle, and to the end. Geraldine was taught these ceremonies by her grandmothers and has taught her *panaka* and *tharurru* cousins these traditions. Geraldine said that these laws and customs are very important to her.

**LUXIE HOGARTH**

**Knowledge and observance of *tjukurrpa***

1. I have referred at [349] to [352] of my reasons to the evidence that Luxie Hogarth gave about dreaming stories in *Wongatha*. While Luxie did not greatly elaborate on her knowledge of the dreaming stories associated with the Body or the Tail, her daughter Geraldine was the primary witness in relation to a number of those stories and deposed to being taught those stories by her mother and grandmother. Because of her old age, much of Luxie’s evidence was given jointly with her daughter Geraldine. I gained the impression, and think it would be fair to assume, that Luxie is at least as knowledgeable as Geraldine, or at least was as knowledgeable as Geraldine when she was younger. To the extent that there were gaps in Luxie’s evidence, I consider those gaps were most likely to be the product of advanced age rather than an absence of knowledge or understanding.
2. Luxie spent most of her life living in the area around Leonora. She was brought up around Tarmoola, Ida Valley, Weebo and Sturt Meadows Stations. In her oral evidence she also referred to living around Darlot and Runggul as a little girl. She went to school at Mount Margaret Mission and stayed there for one year when she was eight. She and her family camped regularly at Marshall Pool. She met her husband at Sturt Meadows where she lived in the 1950s. They lived on Sturt Meadows, Glenorn and Tarmoola Stations from the early 1960s to the late 1970s. After this she moved to Leonora and they spent a few years moving between Darlot, Goanna Patch and Wilson’s Patch. She came back to Leonora in the early 1980s because her father was sick, and in 1983 she did a trip across the southern part of the Tail.
3. Luxie’s evidence demonstrates that she has spent her life living, camping and hunting in areas broadly associated with the *tjukurrpa* of the Tail and the north-eastern corner of the Body.
4. In *Wongatha* Luxie deposed that her mother said that her *ngurra* is Leonora because they camped around that area, but her home and *manta* was around Tarmoola, Weebo and Darlot. Luxie gave evidence that her *manta* is Leonora, Darlot, Weebo, Banjawarn, Runggul, Wingara, Kudjelan, Mulga (next to Milyari where the ration depot was), Yuldari, Mt Vernon, Wudarra, Kunabulla (Mount Von Meuller). She said that: “[w]e know our *manta* because that’s our *manta* and we can camp and hunt and we know that our *manta*”. Her evidence was that her family are the traditional custodians of Wilson’s Patch, and that Runggul Soak is very important to her family.
5. Luxie deposed that when she goes onto other people’s country she asks first because “we feel shame when we go into another place”, but if we are given permission “I feel right”. She said that when Aboriginal people who don’t speak for their country want to come on to it to camp or hunt, under “the law” they should come and ask first.
6. When she goes camping on her *manta* she gets the “younger people” to clean out the rockholes and soaks. She explained that this is done so that when the next rain comes the water will fill up the rockhole so that there is water next time they go to that place.
7. I would otherwise infer that Luxie’s understanding of *tjukurrpa* is consistent with that of her daughter Geraldine.

**Knowledge and observance of other traditional laws and customs**

1. When she was living in Leonora with her husband, Luxie spent most of each week out in the bush camping, prospecting and visiting her aunties at Wilson’s Patch. She gave evidence that they slept in a *wiltja* (traditional shelter made from sticks), and ate kangaroo, big goanna and goat. They collected *thaakampa* (wild berries), *pulyu* berries and *kalkurla* (silky pear) at Wilson’s Patch. They continued camping at Wilson’s Patch until 1989 when they were forced off that land. After this she camped around Tarmoola and Weebo Stations, Darlot, Goanna Patch, Sturt Meadows (around Wabiradda and Doyle’s Well) and Marshall Pool. In oral evidence she also spoke of camping in the area around Lawlers.
2. By her witness statement Luxie deposed that she still goes “out bush” to the places she used to go such as Marshall Pool, Doyle’s Well and Weebo. She goes there because she has known those area for a long time and was introduced to them by her mother and her aunties and their husbands when they used to go camping. Her family taught her how to get food and how to hunt.
3. Luxie deposed that bush tucker is very important and that she had been taught about different kinds of bush foods, where to find them and how to prepare them. On her *manta* she hunts, camps and collects seeds for grinding. Those seeds are *tjinpa* and *kurrumin*, and her mother also used to collect these. She explained that you can get *tjinpa* seeds at spring time and *kurrumin* seeds after the big rain comes and new shoots come up. You make damper (*nurma*) from these seeds.
4. She explained that her family still use grindstones for grinding up medicine plants such as sandalwood seeds into paste used for healing sores, and to grind up plants to boil up medicine.
5. Luxie explained that *kalkurla* is the silky pear and *pipitharli* is a wild yam which grows only in good seasons in swampy country. She eats *piptharli* when it has been raining. She eats *tarrun* (whichis like a green apple) and *pulyu* (wild berry). She also eats *ngurturl* which is the sweet sticky sap from the *karrla* tree or *kurrdon* tree, and *yowlirrie* which is a different sap with red lumps along a branch.
6. She deposed that *wutha* are wild potatoes that grow around Depot Spring. Her mother used to plant them at Wilsons Patch.
7. Luxie said that her family cook kangaroo in the ground in one fire and cook the damper separately. To cook kangaroo in the traditional way she said that:

You take the guts out with a *yintji*. You then wrap it around with a cord from the guts, so it can cook properly. You throw the *marlu* in the fire and burn the fur. You then get bushes and rub the burnt fur off, cut the legs and tail off, then put it in the hole in the ground, a *tharrar*, to cook it.

1. She says that she continues to introduce the younger generations to country in the same way.Her daughters and grandchildren go with her camping, and she teaches them skills such as digging honey ants and *bardis*.
2. Luxie deposed that she is *karrimarra* and her mother was *tharruru*. Her daughter follows her mother and is *tharruru*. Her father’s skin group was *panaka*. Her and her siblings grew up knowing this and she deposed that it is still very important to know “how you fit in”. I would otherwise infer that Luxie’s knowledge of skin systems is consistent with that of Geraldine as discussed above.

**LORRAINE BARNARD**

**Knowledge and observance of *tjukurrpa***

1. Lorraine described her country as Cue, which is located in the Head. She grew up in the area around Cue, including the area near Meekatharra. She used to travel with her family as a child, including to places like Yarraquin and Inglewood.
2. Lorraine gave evidence that she was involved in women’s business from when she was about 10 years old. The women sang songs and showed her the women’s dances. This occurred in the area around Cue and Meekatharra. The women would go to a special women’s place at Garden Well near Cue where the women would sing, tell stories and dance. She still remembers the songs and parts of the dance. Lorraine said that she will teach this to her grandchildren if they want to learn.
3. Lorraine deposed to the importance of Wingara Soak based on stories told and handed down from her mother and grandfather and uncle. She said that this was the site where Wanmulla warriors would cross Lake Darlot during raiding parties. It was during these raiding parties that three women (whom she referred to as “grandmothers”) from Lancefield were taken by the Wanmulla people.
4. Lorraine’s evidence did not demonstrate that she has a grant deal of knowledge of the *tjukurrpa* associated with the Trial Area. Nor did she give evidence about her understanding of traditional laws relating to acquisition of rights and interests in land. While my impression is that Lorraine is likely to have a greater knowledge of *tjukurrpa* than was elicited from her when she gave evidence, the evidence she gave did not assist the applicant with establishing a continuing connection to the *tjukurrpa* of the Trial Area.

**Knowledge and observance of other traditional laws and customs**

1. Lorraine gave evidence that she learnt bush skills from her “old people”. She was taught that grass seeds can be collected and cooked in the ashes, or ground to make damper, and that you can weave bags with the long *wantiri* grass. She learnt how to find her way home using a “special star” and “tall trees”, as well as how to track and find emu eggs.
2. By her witness statement she deposed to different plants that are used for medicine, including *guruma* which has prickly white flowers and can be used for treating skin, hair and colds. She said that sandalwood and *quandong* nuts can be used to fix skin sores and ringworm, and that the petals of the “everlasting flower” can be crushed into an ointment for skin complaints.
3. Lorraine had some knowledge of traditional burial practices. She gave evidence that in the “old days” when someone’s husband or wife died, after 12 months the custom was that they would “drag a spear around” to let people know that he or she was free to re-marry. However, she said that his tradition is not practiced anymore, and probably stopped in around the 1950s when she was at school.

**GEOFFREY ASHWIN**

**Knowledge and observance of *tjukurrpa***

1. Geoffrey is not an initiated man and, broadly speaking, his knowledge of *tjukurrpa* and the relevant dreaming stories was rudimentary. He gave evidence about the Kuna Bulla dreaming story, but his knowledge of the story was only partial or fragmentary. He could not remember why the story was important, albeit during his evidence at Wingara Soak he explained that this dreaming story is “all around through him”. He had learnt the story from Lenny Ashwin, Raymond Ashwin and the “old people”.
2. Geoffrey knew that there was an important dreaming story at Weebo, and that the story relates to how the snake made the water channel. He said that Weebo is his “stamp in the ground”, but he has forgotten a lot of the stories associated with this area.
3. Geoffrey appeared to be aware that Panhandle was a significant site, but the first time he had travelled to the site was in around 2014 during a site visit associated with this proceeding. He did not give evidence in relation to the ceremonial and ritual importance of the various sites at Panhandle.
4. Geoffrey’s view was that the pathway to acquiring rights to land was descent-based. However, at times his evidence appeared to be confused, and it was not clear whether he was talking about pathways to acquiring rights under traditional laws and customs or what he understood to be the requirements for a claimant to be a group member for the purpose of a native title proceeding. Overall my impression was that Geoffrey had, at best, a partial and rudimentary understanding of traditional laws and customs in relation to acquiring rights to land.
5. Geoffrey’s understanding of traditional decision-making processes and authority to speak for country was also rudimentary. In evidence before me he appeared to have little real understanding of the content of much of what he had deposed to in various affidavits filed in the proceeding and the traditional decision-making process adopted for the purposes of authorisation. His evidence demonstrated that he either did not have knowledge of traditional decision-making processes, and or that he was confused between the requirements of traditional decision-making processes and what he perceived to be the requirement for a native title application.

**Knowledge and observance of other traditional laws and customs**

1. Geoffrey gave evidence that he lived in Leonora from when he was a child until he was 27 or 28 years old, before living in Darlot, Kalgoorlie, Geraldton and Perth.He never used to stay away from Leonora for too long and would come back to go hunting for his family. Geoffrey goes out hunting kangaroo and says it is important to “keep these things alive” and cook the “right way”. He has taught his sons how to hunt, live off the land and cook kangaroo.
2. Geoffrey’s family used to go hunting at Tarmoola, Nambi, Mertondale, Weebo, Wilgarra and other stations. His father, mother and the “old people”, including his uncle Jumbo Harris, taught him how to hunt rabbits, kangaroo, goanna and emu. He was taught how to cook emus and kangaroo in the “right way”.
3. When they were out hunting his mother would gather food including different seeds, wild apples and *bardis*. He and his mother used to dig for grubs. His mother would also make damper on the grinding stones and bring it for them to eat. For medicine they collected sandalwood nuts, which they used to grind on grinding stones and put on cuts and sores.
4. When he was 16 years old, Geoffrey worked at Weebo Station and spent time with the “old people” there. He took the old ladies out to get seed and find grinding stones in the scrub, and the old men out to collect wood from trees that they had marked for making boomerangs and spears. He used to catch kangaroo and rabbits to share the meat with the “old people”. He said that he had to work and “never had free time much to get in with the old people” but that he “would have liked to have heard and been told a lot more”. In the course of cross-examination Geoffrey said that when he goes hunting now it is from Kalgoorlie and he has not been hunting in the Trial Area for some time because “all the roos around here are all scattered now because of the – the station owners got rid of all the windmills and things for sheep and… it’s hard to get a kangaroo place they reckon”.
5. Geoffrey deposed that when he was around 11 years old there was a ceremonial ground at the back of Leonora. He used to help clear the ground and watch parts of the ceremonies. However the boys had to hide under sheets because they were not allowed to see some parts of the ceremony. He has not participated in ceremonies or rituals in the area since the “old people” had corroborees when he was a boy living in Leonora. He had not learnt traditional languages.
6. Geoffrey had knowledge of the existence of different skin groups and that he was *karrimarra*. However, he could not remember the other skin groups and did not appear to have broader knowledge of the laws and traditions associated with skin systems.

**RALPH ASHWIN**

**Knowledge and observance of *tjukurrpa***

1. Ralph is not an initiated man but has spent time with initiated men like Lenny Ashwin, Keith Narrier and Jumbo Harris. He seemed to have a better understanding of traditional laws and customs than did those of his siblings who gave evidence. Nevertheless, he either did not have a deep understanding or he was not given the opportunity to display that knowledge through his evidence. My impression is that it is more likely to be the latter.
2. No substantive witness statement was filed by the applicant for Ralph Ashwin for reasons that are not clear, nor was he cross-examined in detail during the trial. The summary of his evidence prepared by Lindgren J in *Wongatha* was tendered, and Ralph generally confirmed the truth of this summary.
3. Ralph gave himself up to go through the law in the early 1980s in Wiluna but the *watis* turned him away because he was “too old”. He was told that they could not put him through the law, “but if you go back to Leonora, that country is yours”. He gave evidence that his father (William Ashwin) had told him that their family was not allowed to go through the law because his grandmother Telpha Ashwin had told the “law people” that the Ashwins in the Leonora area were “not allowed to go through the law”.
4. Ralph was one of the primary witnesses in relation to the Papa Dingo dreaming. He described this dreaming story in the terms outlined about at [134] of my reasons. He explained that the Papa Dingo dreaming is a dreaming story shared with many Aboriginal people. He gave additional evidence about the detail of this dreaming story during the male gender-restricted evidence, but because that evidence was restricted it ought not to be outlined here. During the on-country hearing Ralph was able to describe the significance of different locations that the court visited in the context of the Papa Dingo dreaming.
5. Ralph deposed to learning the Papa Dingo dreaming story from initiated men such as Keith Narrier, Lenny Ashwin and his uncle Jumbo Harris. He said that he does not travel to the significant men’s business sites associated with the Papa Dingo dreaming without being accompanied by an initiated man.
6. It was not apparent from the evidence before me that Ralph specifically uses this *tjukurrpa* in terms of where he travels, camps and roams or where he looks after the country. However, Ralph described his country as the area from Darlot, to Sandstone, down to Mount Ida (areas in the Body), Riverina, up to Albion Downs and Yakabindie, and back to Leonora.He further deposed to hunting and camping around the Leonora district, Darlot, Lawlers, Agnew, Marshall Pool, Goanna Patch, Wildara and Leinster. He referred to Weebo being one of “their” sacred sites, and said that the “law fellas” said “if I go back to Leonora, I’m in charge of all that area like Weebo Stone and everything”. These areas are broadly consistent with and include parts of the Papa Dingo reaming track as it travels through the country close to the Trial Area. He did not say whether his activities on country are associated with this *tjukurrpa*.
7. Ralph deposed that he used to hunt and check sacred areas in the area from Darlot, to Sandstone, down to Mount Ida, Riverina, up to Albion Downs and Yakabindie, and back to Leonora. He described this as his country, saying that he was born there and it was the country of his parents and ancestors. Most of the sacred areas which he checks are on the northern side of Leonora, including Albion Downs and Weebo. He was told about the sacred places in this country by Jumbo Harris and other “ancestors”.
8. Ralph gave evidence that every Aboriginal person has a say in their country and that they should not go to other people’s country and “practice culture” if they do not know what their culture is. He did not otherwise give evidence of his understanding of traditional laws in relation to acquiring or exercising rights to land.

**Knowledge and observance of other traditional laws and customs**

1. When it is emu egg season Ralph goes out camping a lot. He was taught by the “old people” to recognise when it is emu egg season by “looking at the Milky Way”. Another seasonal food that Ralph collects is the *wutha* (bush potato), which is found around the Sandstone area.
2. In *Wongatha*, Ralph said that he goes out hunting every second week. The main areas where he hunts are around Leonora, at Ida Valley, around the back of Sturt Meadows, and at Clover Downs. He still goes out and checks sacred sites to see if things are being destroyed by mining companies and “to see whether our culture is still there and I can hand it down to my children and other people”.
3. Ralph deposed that when he was about 11 years old he would go out hunting with his uncle Jumbo Harris. They would take their kangaroo dogs with them and whatever they killed along the way (kangaroo and emus), they would cook in the ashes of their fire. When they were camping the “old men” would do the cooking and the “old ladies” (who he called his “aunties”) would get goannas, *bardis*, rabbits, honey ants and other bush food. There was a separate fire for “ladies’ business” where damper and other things were made.
4. Jumbo Harris and Micky Warner taught Ralph to cook kangaroo in the traditional way. He was taught to cut out the intestine from a kangaroo and stitch it back up using the intestines as cotton, dig a hole in the ground to a certain depth and width, stack fire in it, break the kangaroo’s legs and throw the kangaroo onto the hot coals so that the hair would burn off. He explained that after cooking in the ground, they had to fill the hole up to the right level to keep the animal’s spirit (*gawdi*) inside.
5. The “old men” told Ralph that he had to continue to cook in the traditional way and teach other people in order to continue their culture. He was told that if he cooked in a different way, he would be punished (“probably hit with a *tjuna* stick or a boomerang”). Ralph deposed that he has always followed those instructions and has taught his children and grandchildren the way that his ancestors cooked.
6. Ralph takes younger people with him and teaches them things out in the bush, including how to track and cook kangaroo in the ashes. He wants the children to learn those things “so that they don’t lose their culture”.He said in *Wongatha* that: "I believe that country is my country and I still go out today and practice my culture and I teach it to the younger generations."
7. Ralph said that when he was a little boy around the age of 11 there were corroborees at the Leonora Reserve. The young boys had to cover their heads with blankets and were not allowed to watch the sacred dances. He said that they were allowed to watch other dancing, most of which was done by men, while women would sit down and sing.
8. Ralph gave evidence that he has learnt about skin groups through his involvement with the Aboriginal Language Centre in Kalgoorlie after the time he gave evidence in *Wongatha*. I do not consider that knowledge obtained in this context assists the applicant in establishing a relevant connection.
9. Ralph deposed that he could understand some of the Tjupan Aboriginal language, but could not speak it very well.

**JOHN ASHWIN**

**Knowledge and observance of *tjukurrpa***

1. John Ashwin only gave affidavit evidence. He was too ill to attend the hearing at Leonora and was not cross-examined on his evidence. Most of his evidence related to the Head. His evidence touching upon either the Body or the Tail provided little or no assistance to the applicant.
2. John moved from Leonora to Cue at the age of 17 and lived in that area for most of his life. He deposed to knowing the country and *law* in that area. He is not an initiated man, but said that the *watis* in Wiluna referred to him as the “Cue Boss”.
3. In his witness statement John described important places in the area of the Head including Cue, Lake Austin, Garden Rock, the Pinnacles, Yarraquin and Tuckibianna. He deposed to teaching his sons about that country, who have in turn taught his grandchildren. However, his evidence did not address his knowledge and connection to the Trial Area.
4. John’s evidence did not demonstrate that he has knowledge of the dreaming stories associated with the Trial Area, nor that he has observed or used that *tjukurrpa*. He did not give evidence in relation to his understanding of traditional laws in relation to acquiring rights to land.

**Knowledge and observance of other traditional laws and customs**

1. John’s witness statement described growing up around Leonora and learning to hunt with his family, including his Uncle Jumbo Harris and his parents. The “old people” taught him and his siblings about country, including what to eat and how to hunt. He said that the “old people” would not take them anywhere near “special business places” and they were “not allowed to look that way”. He didn’t know what would happen if you did look, but said that “I think it makes your arm no good. That’s why my arm is no good now”.
2. John said that when he was a child there were corroborees at Leonora and Goanna Patch. He described how, when they did certain dances during these ceremonies the children were supposed to stay under a blanket and not look, but he was caught looking and that is why his eyesight is not good. He deposed that they do not do corroborees at Leonora anymore.

**BRADLEY AND CALVIN ASHWIN**

1. The evidence of John Ashwin’s sons Bradley and Calvin Ashwin, was also of little or no assistance to the applicant in establishing a continuity of connection to the Trial Area.
2. Their knowledge of and engagement with country appeared to be limited to various sites in the Head, including going camping and hunting in several sites in the Head as children with their family and grandfather “Pop Brockman”. Calvin also gave some evidence of learning to cook kangaroo in the traditional way from his father John Ashwin.
3. Their knowledge and understanding of *tjukurrpa* and other traditional laws and customs, as demonstrated in the evidence they gave, was negligible. They did not give evidence in relation to the relevant dreaming stories or their observance and use of that *tjukurrpa*. Nor did they give evidence in relation to important cultural sites and their traditional significance. Neither witness had any relevant knowledge of skin systems.
4. Bradley Ashwin gave evidence to the effect that he has never personally done anything to protect his country, though he remembered "as a kid" that "we'd always clean out" rockholes. Calvin Ashwin said that he cleaned out rockholes, but he did not say that that occurred in the Trial Area.
5. By their witness statements, which were in almost identical form, they deposed that they speak and understand Western Desert languages, including the “Tjupan” language. They also deposed to speaking and understanding the “Badimai” language spoken by people south of the Wutha claim area, and the language spoken by “Wajarri” people to the West.

**Gary Ashwin**

**Knowledge and observance of *tjukurrpa***

1. Gary is an initiated man and a *wati* who went through the *law* at Wiluna, Blackstone and Fitzroy. He gave evidence that his “area” was Wiluna and that his “country” was his grandfather Raymond Ashwin’s country, which was Wiluna, Leonora, Carnegie and Mount Margaret.
2. Gary gave evidence that initiation is a process of learning about *tjukurrpa*, including important places and dreaming stories and songs. In this context he gave evidence about the general importance of law grounds, law ceremonies, initiation places and initiation ceremonies. As that evidence was given in male gender-restricted evidence, I will not elaborate on the detail of that evidence here.
3. While he was knowledgeable about traditional laws and culture generally, my overall impression was that, although a *wati*, Gary’s association with the Trial Area as a *law* man was limited. Beyond the time he had spent in the general area in his childhood, it was not apparent on the evidence that Gary has spent any time in the Trial Area for ritual or traditional purposes. That is, his evidence did not indicate that his visitation to the Trial Area was connected to his role as a *wati* or with traditional purposes.
4. Gary’s knowledge of the history of his own family and their people appeared to be more limited than other witnesses in the proceeding. For example, while he had knowledge of Telpha Ashwin and Jumbo Harris, he gave evidence that he had not heard of any of the apical ancestors.
5. Gary spoke generally about the importance of dreaming stories and their relevance to his world view, but with limited exception he did not give evidence about dreaming stories relevant to the Trial Area. He mentioned something of the Goomboowan dreaming. Further he did not have particular knowledge of important sites in the Trial Area connected to those dreaming stories. For example, Gary had not been to the Panhandle corroboree site before the day on which he gave evidence at the site, and the evidence he gave in relation to that site was based on his knowledge of other rituals and ceremonies, not his knowledge of the specific *tjukurrpa* at this location.
6. Gary deposed that he was raised by his grandparents, and his grandfather Raymond Ashwin taught him about country and about hunting and living off the bush. He learnt about the bush around Cosmo Newberry, Leonora, Bronseqing, and the other side of Murrin Murrin. They often camped near rockholes that his grandfather knew about.His grandfather taught him that it was important to keep the rockholes clean because they were ancestral places and it was their responsibility to care for their traditional country. For this reason, when they were driving they would stop and check them out and clean them out. Gary has taken his children to show them these places and taught them the same things.

**Knowledge and observance of other traditional laws and customs**

1. The “old people” taught Gary about bush food and medicine plant. For example, he said that the traditional remedy for toothache is the sap from a red gum.
2. Gary deposed that he has travelled, camped and hunted through the country near Wongawol and Lake Carnegie. He has also been through the country south of there, the “Sand Hill” country and the rockholes down to Wonganoo Station. He gave evidence that his grandfather Raymond Ashwin taught him that those rockholes follow a story line south to Wonganoo and Barwidgee.
3. Gary also knows the Sandstone/ Menzies area because some of the Ashwin family came from there and were raised there. He did not go there with his grandfather or uncles and aunties when he was growing up, but has travelled around Sandstone and Cue area as an adult to see the country and the places that his family talked about.
4. Gary has general knowledge of corroboree sites but did not give evidence about specific corroboree sites in the Body or Tail. He gave evidence that he is aware of common markers in the Western Desert to symbolise that an area is a corroboree or ceremony ground. He has not participated in a corroboree in the area of the Body or Tail.
5. I gained the impression that Gary has knowledge of different skin groups and the laws related to skin systems. I also gained the impression that Gary has some knowledge of traditional Western Desert languages.

**JUNE ASHWIN**

**Knowledge and observance of *tjukurrpa***

1. June gave evidence that she was aware of the Kuna Bulla and other dreaming stories including the Papa Dingo dreaming and the Emu dreaming,but her knowledge of the stories was rudimentary at best. In relation to the Kuna Bulla dreaming, June’s knowledge was based on what Gay Harris and her “brother” had told her.
2. Despite its significance as *tjukurrpa* connected to the area of the Tail, June did not have knowledge of the content of the Goomboowan dreaming. She was aware that the area around Lake Darlot and Wingara Soak was significant because “our dreaming… that’s come from this way”. She said that the area was significant because her grandmother Telpha was born at Wingara Soak and roamed this area and because the area was “the tjukurrpa dreaming and that’s important to us as well”.
3. June deposed to her understanding that “there are dreaming tracks on our country” and that “rocks and hills… are connected by spirits”. However, she did not know where the dreaming tracks are. While she had knowledge that “some stories you can’t tell as they are sacred for our people only”, she was not able to recall any of those stories or the name of any of those sacred stories.
4. June’s evidence did not demonstrate that she has significant knowledge of *tjukurrpa*,or actively associates with it. She does not appear to have spent time camping or hunting and gathering at significant sites associated with the relevant dreaming stories, or have knowledge of those sites independently of what she has been told in connection with this proceeding. Her evidence suggested that the first time that she visited Wingara Soak and Runggul Soak was with Ron Harrington-Smith and Gay Harris in 2014 or 2015 on a visit that related to this proceeding. While June was aware that these sites were important women’s sites, she did not have personal knowledge of why that is so.
5. Although there were inconsistencies in her responses in cross-examination, June’s evidence in relation to the acquisition of rights to country was to the effect that rights could only be obtained through descent from ancestors or “old people” who had rights to country in that area. Her evidence was that you could not obtain rights to country by roaming or walking in country that was not your country. She was not aware of any other way (beyond descent) of obtaining rights in country.My impression was that she lacked an understanding of laws in relation to acquiring rights and interests to land.
6. June’s understanding of traditional decision-making processes and authority to speak for country was rudimentary. In evidence before me she appeared to have little real understanding of the content of much of what she had deposed to in various affidavits filed in the proceeding and the traditional decision-making processes adopted in authorising the proceeding. Her evidence demonstrated that she either did not have knowledge of traditional decision-making processes, and/or that she was confused between the requirements of traditional decision-making processes and the perceived requirements of the decision-making process for a native title application.
7. By her statement, June deposed that she learnt about traditional customs and beliefs from her parents, including how to look after country. She said her family still look after the land like her forefathers did by clearing soaks, springs and other waterways and removing rubbish. She has taught her grandchildren to do this. However, while I might accept that June considers it of importance to care for and maintain country under traditional laws and customs, her evidence in cross-examination casts doubt on the extent to which she has or continues to spend time caring for and maintaining the country in the Trial Area.
8. June said that:

When we go out on surveys we don't practice law but we respect it still. Though there is no more law and corroborees you need to keep it together all the time. Look after it. Pass It on. Make sure no one destroys it. This is still real, and we teach our kids to do the same. You don't have to be a wati to do this. We can look after it still.

1. While I would accept that June considers this to be important, there was insufficient evidence before to demonstrate that June continues to “look after” law and culture in this way.

**Knowledge and observance of other traditional laws and customs**

1. June gave evidence of camping, hunting and collecting bush foods in the area in and around Leonora when she was a child living in Leonora. However, the only place that June mentioned going camping with her parents that was close to or within the Trial Area was "the boundary line between Leinster and Weebo stations". The last time that June could recall going camping with her parents was in around 1957 or 1958.
2. By her witness statement June claims to continue to take camping trips with her children and grandchildren every opportunity she can. However, June’s evidence in cross-examination cast doubt on the extent to which she has ever done or continues to camp, hunt and gather in the Trial Area.
3. June has lived in Kalgoorlie for most of her adult life and the only times that June could recall travelling to significant sites in the Tail and the Body were in relation to site visits with Dr Draper for the purpose of the proceeding and a couple of camping trips with her children when they were at school. She said that she had been to the Panhandle area four or five times in her life, but at least two of those occasions were on heritage surveys for mining companies with Dr Draper in 2014 or 2015.
4. June recalled seeing two or three corroborees at Leonora Reserve as a child but had no recollection of the detail of the ceremonies. She was allowed to watch some of the dances but was told to get under the blankets because there were some things they were not allowed to watch as children.
5. June gave evidence that her grandmother (Telpha) closed the law in the late 1960s and that there were no more corroborees after that time. Gay Harris had told her this and she did not know why this had happened except that “there’s no law around here” and “it was all finished”.
6. June was aware of skin systems but does not know the details of the traditional laws and customs associated with them. She had been told that her mother and father were married the “wrong way”, but could not explain why that was so.

**RON HARRINGTON-SMITH**

1. Ron is not a member of the Wutha claim group. He gave evidence that he has been married to June Ashwin for 50 years and has a long association with the Ashwin family, including having spent time with Sarah Brown, Lenny Ashwin, Raymond Ashwin and Danny Harris (each now deceased). As Ron is not a member of the Wutha claim group, his personal connection to the Trial Area is not relevant to the matters I need to decide. However, to the extent that Ron gave evidence of what he was told by individuals in the older generations of the Wutha group who are now deceased, I consider that evidence to be of some relevance to continuity. In particular that evidence may give some insight into the connection that these deceased persons, who are an older generation of the Wutha group, had to the *tjukurrpa* of the Trial Area.
2. Ron gave evidence that Sarah Brown had told him about the Panhandle Law Grounds and Panhandle Corroboree Site in around 1984. She had told him that Panhandle was a significant area and very important to the Ashwin family, and that she used to camp in this area for ceremonies when she was 16 or 17 years old. She also told him that she had lived, camped and roamed in this area and that she had a “vital interest” in this area.
3. Ron also gave evidence that he had been told about the Panhandle Law Grounds, Panhandle Corroboree Site and Agnew Men’s Initiation Site by Lenny Ashwin, Danny Harris and Keith Narrier, and that he had visited these sites with Danny Harris. Ron was told that the Agnew Men’s Initiation Site and Papa Quartz Hill are associated with the Papa Dingo dreaming story. He gave some, but limited evidence about the storyline of the Papa Dingo dreaming and the physical features in the landscape associated with it. Because Ron’s evidence about this was given in male gender-restricted evidence, I will not set out the detail of his evidence. However, I did not consider that evidence to be of sufficient specificity to advance the applicant’s case.
4. My impression from Ron’s evidence (and other lay and expert evidence given in the proceeding) was that Lenny Ashwin, Danny Harris and Keith Narrier likely knew more about those sites and the associated *tjukurrpa* than what was communicated in Ron’s evidence. This may be because Ron was not an initiated man and only limited detail of the traditional laws and customs associated with these areas was communicated to him. Ron gave evidence, for example, that because he was not an initiated man he had not been shown certain sacred objects at these sites, although he was aware that they existed.
5. It also appeared to me from his evidence that many of the discussions that Ron Harrington-Smith had with Sarah Ashwin, Lenny Ashwin, Danny Harris and Keith Narrier occurred in the context of heritage surveys relating to mining activing or in the course of progressing this proceeding. As earlier expressed I also hold reservations about the reliability of Ron’s evidence of his conversations with Sarah Brown in relation to the Panhandle sites.

**SHELDON AND JOSHUA HARRINGTON-SMITH**

1. In their witness statements, which were in almost identical form, June Ashwin’s and Ron Harrington-Smith’s sons Sheldon and Joshua Harrington-Smith deposed to the importance of respecting traditional places and dreaming stories, as well as the importance of looking after the country on which you travel. However, overall their evidence failed to demonstrate even a rudimentary knowledge of *tjukurrpa* and other traditional laws and customs. They did not give detailed evidence of any of the relevant dreaming stories or their observation and use of those *tjukurrpa*. Nor did they give evidence in relation to important cultural sites in the Trial Area and their traditional significance.
2. While these witnesses have been on occasional camping or hunting trips with their family, this appears to have been limited to the Sandstone and Leonora areas. Sheldon also gave evidence of camping between Cashemere Downs and Perinvale, but did not say when or in what circumstances. Neither witness deposed to camping or hunting in the area of the Tail. Both witnesses deposed to the importance of hunting and cooking in a proper cultural way, and gave evidence of learning the proper way to trap *bangarra* (goanna) and cook kangaroo from their elders.
3. Both witnesses gave evidence that it is important to respect traditional places, including rockholes and soaks. Sheldon named the rockhole near “45 Station” as one he had cleaned up, but he also said that “[t]hat was years ago. I don’t know what’s happened now”. It was not clear that this rockhole was in the Trial Area. Joshua gave general evidence of the importance of cleaning rockholes, but did not say that he has ever cleaned up a rockhole, nor did he give other evidence about how he respected traditional places.
4. Their evidence was of little assistance to the applicant in establishing the continuity of observance of traditional laws and customs associated with the Body, and of no assistance in relation to the Tail.

**KATHERINE ADAMS**

1. Katherine Adams is one of the children of Sarah Brown and William Ashwin. She has a descent connection to both the Darugadi and the Julia Sandstone ancestral families.
2. Katherine has now passed away. She did not provide a witness statement in this proceeding or give evidence in the trial. The applicant tendered the summary of her evidence in *Wongatha* prepared by Lindgren J. She gave evidence in *Wongatha* in Leonora on 26 March 2002.

**Knowledge and observance of *tjukurrpa***

1. Katherine’s evidence did not demonstrate that she had a knowledge of the dreaming stories associated with the areas in or around the Trial Area. Nor did her evidence indicate that she had significant knowledge or understanding of other traditional laws and customs associated with the Trial Area.
2. Katherine’s evidence indicated that she understood that her rights to country derived from a descent pathway. She described her country as Dada where her father was born. She said that this is her country because “my parents or my father and that on their run, come from Dada”.

**Knowledge and observance of other traditional laws and customs**

1. Katherine described growing up around Leonora and being taught to camp, collect bush tucker and cook by her parents and other people including her uncle Jumbo Harris. This occurred at places such as Sturt Meadows, Tarmoola and Sawpit along the road to Nambi. Her evidence suggests a detailed knowledge of the different types of bush tucker available around the area of Leonora.
2. At the time of giving evidence in *Wongatha* Katherine said that she still goes out bush.However, her evidence did not indicate that this was in the Trial Area.
3. Katherine gave evidence that as a teenager she would sit and spend a lot of time with the “old people”. She said that she taught her children and grandchildren about bush foods and “goes out in the bush with them at every chance she gets”. She said that she watches to see that her children and grandchildren cook kangaroo in the traditional way, and they will get in trouble form the “old people” unless they cook it correctly.
4. Katherine gave some evidence on traditional burial practices, including that traditional practices were followed at her father’s funeral in 1979, her mother’s funeral in 1992 and Lenny Ashwin’s mother’s funeral in 1995.

**LENNY ASHWIN**

1. Lenny Ashwin has a descent connection to the Darugadi ancestral family. He is one of the children of Jim Hennessy and Doris Foley. Doris Foley was the daughter of Telpha Ashwin and her Aboriginal husband Wunal.
2. Lenny has now passed away. He did not give evidence at the trial. The applicant tendered the summary of Lenny’s evidence prepared by Lindgren J in *Wongatha* as well as a statement made by Lenny in that proceeding. Lenny gave evidence in *Wongatha* at Leonora on 27 March and 15 July 2002.

**Knowledge and observation or use of *tjukurrpa***

1. Lenny was a *wati* who went through the *law* at Wiluna when he was about 17 years old. He was involved in “law business” in Wiluna as a young man, but stopped going out on “law business” when he moved to Leonora in the 1970s. He said that even though they have “given up” on “the law” in Leonora, the “law business” still goes on and “it will never stop”.
2. Lenny gave some evidence in relation to the Papa Dingo dreaming, in particular as it related to the Malcolm Dam area close to Leonora (outside the Trial Area). He said that Gwalia Hill is the mother dog who is sitting waiting for her two little puppies that are missing. Tank Hill, to the north of Leonora, is the little puppies coming down from Wiluna. He said that he was told this story by the “old people”. Lenny did not give evidence in relation to the Papa Dingo dreaming as it relates to the Body, nor more generally as to the extent to which his interaction with country is associated with this *tjukurrpa*.
3. Lenny described his country as being to the north of the area of the Body, encompassing Barwidgee, Mount Grey across to Albion Downs Station, Yeelirrie, down to Sandstone, right up to Agnew and back to Wiluna. My understanding is that, at least in so far as he described his country as including Agnew, this country has an association with the Papa Dingo dreaming.
4. Lenny’s evidence did not directly address his understanding of traditional laws in relation to acquiring rights and interests in land. He said that his country is where he grew up around where he used to “play”. He also described his father’s country as the area from Mulga Queen to Cox’s Find, to Laverton and back to Wiluna. The difference between the description of his father’s country and his own country may indicate that he did not view descent as the only pathway for the acquisition of rights and interests in land.
5. Lenny deposed that he would go out bush with Ralph Ashwin and tell him about “the law”. He would, for example, tell Ralph not to go in certain directions because “you have to go through the law before you go to some places”.However, his evidence did not indicate whether the prohibited places that he had knowledge of were in the Trial Area.

**Knowledge and observance of other traditional laws and customs**

1. Lenny’s evidence demonstrated that he had knowledge of skin systems and placed importance on this. He also gave some evidence about Aboriginal language and that he knows the Mantjintjarra language.

**RAYMOND ASHWIN**

1. Raymond Ashwin is one of the children of Sarah Brown and William Ashwin. He has a descent connection to both the Darugadi and the Julia Sandstone ancestral families.
2. Raymond was one of the named applicants in the proceeding together with his siblings, but passed away before the trial. In addition to statements made by Raymond in support of the Wutha application, the applicant tendered the summary of Raymond’s evidence prepared by Lindgren J in *Wongatha* as well as a statement made by Raymond in that proceeding. Raymond gave evidence in *Wongatha* at Kalgoorlie on 11 November 2002.

**Knowledge and observance of *tjukurrpa***

1. Raymond’s evidence did not demonstrate that he had knowledge of the dreaming stories associated with the Trial Area other than the Papa Dingo dreaming, which was referred to but on which no detailed evidence was given. He deposed that he, his father and his three brothers (Ralph Ashwin, Geoffrey Ashwin and John Ashwin) had not been through “the law”because they were brought up in a “white” environment.
2. Raymond gave evidence that the pathway for acquiring rights and interests in land was descent and marriage. However, it is not clear if this evidence related to his understanding of traditional laws or whether it related to his understanding of the requirements for participation in a native title claim. He said that he has always claimed Darlot country as his country through his father, and that the country he claims is exactly the same as his father’s country “stone for stone”. He described his country as running from Leonora up to Wiluna, over to Yelma in the east and Windidda back to Darlot. He said that the boundary would be about 100 kilometres south of Wiluna. Raymond deposed that all of his brothers and sisters have the “exact same country” as he does.
3. Raymond also gave evidence that he claims the area from Sandstone down to Leonora and Menzies from his mother because this was an area she roamed and participated in tribal meetings.
4. When he was a child Raymond was told by his parents and the “old people” where he could and could not go, including that he should not go close to tribal or sacred places. He said that he still respects this law and has taught his children not to go to these places. While his evidence referred to a prohibited ceremonial ground near Leonora, he did not identify specific prohibited places in the Trial Area.
5. Raymond also deposed that he would not go out to Wiluna or Warburton without permission from the Aboriginal people in the area because they are very strict and you must have a permit or “recent permission” to go there. He said that other than when he lived in Kalgoorlie, he has not gone camping and hunting outside of the area that he considers to be his country.

**Knowledge and observance of other traditional laws and customs**

1. Raymond gave evidence about camping and hunting with his wife and children at Goanna Patch and Weebo, both when they lived in that area and on long weekends after they had moved to Kalgoorlie. His evidence indicated that he had knowledge of different types of traditional bush tucker.
2. Raymond’s evidence indicated that he had knowledge of the importance of rockholes and keeping them clean. He referred to visiting particular rockholes at Wilson’s Patch and the “Chain of Waterholes” to the north-east of Leonora (although he said that he thought this was “a bit out of his country”), but did not give specific evidence of his visiting or caring and maintaining rockholes in the Trial Area.
3. Raymond could understand some of the “Darlot” Aboriginal language, but could not speak it. He was aware of skin systems, but said that he had not been taught about these.

**DANNY HARRIS**

1. Danny Harris is a sibling of Gay Harris and his ancestry is the same as hers. He has a connection by descent to the Darugadi ancestral family.
2. Danny has now passed away. He did not provide a witness statement or give evidence at the trial. The applicant tendered the summary of his evidence in *Wongatha* prepared by Lindgren J. Danny gave evidence in *Wongatha* at Laverton on 14 March 2002, Kalgoorlie on 14, 15 and 18 November 2002 and Murphy’s Hill/ Cox’s Find on 19 November 2002.

**Knowledge and observance of *tjukurrpa***

1. Danny gave evidence that he went through “the law” as a young man at Wiluna, and two or three more times after that at unspecified places. He said that all of his brothers also went through “the law”. Danny deposed that he has not done much “law business” since he was married, but that his son and nephew “carry it on now”.
2. Danny’s evidence did not otherwise address his knowledge of *tjukurrpa* associated with the Trial Area.
3. Danny’s evidence did not directly address his understanding of traditional laws in relation to acquiring rights and interests in land, however it appears that his understanding is that those rights and interests are acquired by descent, birth and association with country. He deposed that his country is the same as his grandfather’s, which is the area from Minnie Creek, to Marntjal and Lake Throssell, down to Burtville and back to Laverton, Laverton Downs, and Cox’s Find towards Mulga Queen. He said that he thought his country goes west to Leonora because he was born there and that he has been to Weebo, Leinster, Agnew, Mount Samuel and Darlot which are within in his father’s country. He said that his children will have Cosmo as their country because that area is his country.
4. Danny’s evidence appeared to be inconsistent in relation to whether Darlot was part of his country. This may be a consequence of a degree of confusion between his understanding of traditional laws and the requirements native title law. At one point in his evidence he said that he can claim his grandfather’s country around Darlot even though he has never lived there.Later he said that he cannot claim Darlot as his country because he has lived in Laverton nearly all of his life and does not want to claim Darlot.
5. Danny gave evidence that he did not know if, under traditional law, other Aboriginal people should ask him whether they can go onto his country to hunt and get bush tucker.
6. Danny’s evidence demonstrated that he places importance on caring for and maintaining rockholes. He said that he has shown his children all of the rockholes and soaks in their country because he wants them to look after those places. However, it was not clear on the evidence whether any of the rockholes Danny was referring to were located in the Trial Area.

**Knowledge and observance of other traditional laws and customs**

1. Danny appeared to have knowledge and understanding of skin systems and placed importance on that, although he said that nowadays only some young people follow skin rules when choosing who to marry.
2. Danny described going camping in the bush nearly every weekend, and gave evidence of his knowledge of hunting and “bush tucker”. He also gave evidence about Aboriginal language, including that he knows the “Wongatha, Ngaayatjarra and Koara languages”.

**FREDDY BANKS, ROSE BANKS AND PHYLLIS THOMAS**

1. Each of these individuals is deceased and the applicant tendered the summary of the evidence prepared by Lindgren J in *Wongatha* in respect of each witness. They did not give evidence in support of the Wutha claim in *Wongatha* (rather, in relation to the Mantjintjarra Ngalia claim)*.* Furthermore, no submission was made that they are descendants of any of the four ancestral families that the Wutha group rely upon, and therefore, on the applicant’s claim, that they are part of the Wutha group. In any event their evidence was limited to their migration into the Mulga Queen area from Spinifex country (to the east of the Tail) as children, and that they had passed though some areas in the proximity of Mulga Queen.
2. Based on the summaries of their evidence tendered in this proceeding, it does not appear that Freddy, Rose or Phyllis gave evidence about their understanding or observance of *tjukurrpa* or other traditional laws and customs associated with the Trial Area. On that basis I do not consider that their evidence assists the applicant in establishing a continuing connection to the Trial Area.