FEDERAL COURT OF AUSTRALIA

Banjima People v State of Western Australia (No 2) [2013] FCA 868

Citation:	Banjima People v State of Western Australia (No 2) [2013] FCA 868
Parties:	**BANJIMA PEOPLE v STATE OF WESTERN AUSTRALIA AND ORS**
File number:	WAD 6096 of 1998
Judge:	**BARKER J**
Date of judgment:	28 August 2013
Catchwords:	**NATIVE TITLE** – application for determination of native title – whether claimants constitute single group – whether claim area part of traditional country of claimants – whether claimants have maintained connection with claim area – whether claimants descendants of ancestors who had rights and interests in claim area – what native title rights and interests exist – what non-native title rights and interests exist – whether various acts extinguished native title rights and interests – extent of any extinguishment of native title rights and interests **PRACTICE AND PROCEDURE** – application for confidentiality order under s 37AF *Federal Court of Australia Act 1976* (Cth) – whether order necessary to prevent prejudice to proper administration of justice – whether order necessary to protect safety of persons
Legislation:	*Evidence Act 199*5 (Cth) s 136 *Federal Court of Australia Act 1976* (Cth) s 17, Pt VAA, s 37AE, s 37AF, s 37AG, s 37AG(1), s 37AG(1)(a) *Native Title Act 1993* (Cth) s 13(1)(b), s 15(1)(a), s 15(1)(c), s 15(1)(d), s 19, s 23A(2), s 23B(2)(c)(i), s 23B(2)(c)(iii), s 23B(2)(c)(viii), s 23B(7), s 23B(9), s 23C(1), s 23C(2), s 23F, s 24HA, Pt 2 Div 3 Subdiv I, s 24IA(a), s 24IB, s 24IB(a), s 24IB(b), s 24ID(1), s 24ID(1)(a), s 24ID(1)(b), s 24ID(1)(c), s 24ID(3), Pt 2 Div 3 Subdiv M, 24MA, s 24MB, s 24MD(1), s 24MD(3), s 24MD(6A), s 24MD(6B), s 24MD(6B)(b), s 24MD(6B)(c), s 24MD(6B)(d), s 24MD(6B)(f), s 24MD(6B)(g), s 24OA, Pt 2 Div 3 Subdiv P, s 25(4), s 26(1)(c)(i), s 28(1), s 29, s 32, s 39(1)(e), s 44H, s 44H(c), s 44H(d), s 44H(e), s 47, s 47A(1), s 47A(1)(b), s 47A(1)(b)(i), s 47A(1)(b)(ii), s

47A(1)(c), s 47A(2), s 47B, 47B(1)(b), s 47B(1)(b)(ii), s 47B(1)(c), s 47B(2)(b), s 61, s 61A(3), s 190B(6), s 212, s 212(1)(a), s 223, s 223(1), s 223(1)(c), s 225(c), s 225(d), 225(e), s 226(2)(e), s 227, s 228, s 228(2), 228(2)(a)(ii), s 228(2)(b), s 228(3), s 228(3)(a), s 228(3)(b), s 228(3)(b)(i), s 228(9)(c), s 229, s 229(3)(a), s 230, s 231, s 232D, s 233, s 233(1), s 233(1)(c)(i), s 237A, s 238, s 239, s 245, s 245(1), s 246(1), s 246(2), s 248B, s 251D, s 253, Sch 1 cl 36, Sch 5 Pt 3
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Date of last further submissions requested by the Court:	5 July 2013
Place:	Perth
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	2045
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IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **WAD 6096 of 1998**

BETWEEN:	**BANJIMA PEOPLE** **Applicants**
AND:	**STATE OF WESTERN AUSTRALIA AND ORS** **Respondents**

JUDGE: **BARKER J**
DATE OF ORDER: **28 AUGUST 2013**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The claimants are entitled to a determination of native title under the NTA. The Court will now invite the claimants to bring forward a minute of proposed determination in relation to which the Court will hear from the parties in due course

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

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JUDGE:	**BARKER J**
DATE:	**28 AUGUST 2013**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

OVERVIEW

1 Claimants, on behalf of a claim group comprising descendants of named ancestors who identify themselves as members of the Banjima language group (***claimants***), have applied for a determination of native title pursuant to the *Native Title Act 1993* (Cth) (***NTA***) over land and waters in the East Pilbara region of Western Australia (***claim area***), in the Hamersley Range and vicinity of what is today known as Karijini National Park.

2 The State of Western Australia (***State***) does not contest the following:

(1) that Banjima people were located generally within the claim area at the time British sovereignty was asserted over Western Australia in 1829, except as to land north of the Hamersley Range and land between Weeli Wooli Creek and Barimuna (generally referred to as ***Yandicoogina***);

(2) that genealogical links are generally sufficient to connect the present day claimants to those Banjima who held the land at sovereignty, except that the usual rule of patrilineal inheritance has disappeared.

3 In summary the State contends that:

(1) there is no traditional society, in that:

(i) there is no normative and vital system of laws and customs that unites the claimants into one society;

(ii) traditional society did not survive the 20th century disruptions;

(iii) the claimants have not proved continuity of observance/acknowledgment of laws and customs in relation to claimed land;

(2) the current laws/customs relating to land tenure are not traditional;

(3) the low degree of actual occupation of the land, and the absence of exercise of a right to exclude others, precludes any finding of exclusive possession;

(4) land north of the northern escarpment of the Hamersley Range and land east of Barimuna is not traditionally Banjima;

(5) alternatively, the claimants have not proved continuity of observance/acknowledgment of laws and customs in relation to all claimed land.

4 Those respondents known as the BHP Billiton respondents and Rio Tinto Iron Ore (***RTIO***) respondents are principally concerned to address the nature of the rights and interests made out on the evidence and, in particular, whether exclusive possession is made out in that part of the claim area in which they hold interests.

5 Those respondents known as the Pastoral respondents are particularly concerned with the extent of the claim area in the northern part.

6 Primary evidence in the proceeding was given by a number of the claimants including: Alec Tucker, Mrs A Smith (now deceased) Archie Tucker, Brian Tucker, Charles Smith, Mr D Black (now deceased), Mr G Tucker (now deceased), Gladys Tucker, John Todd, Juliette Pearce-Tucker, Maitland Parker, Margaret Rose Parker, Marie-Anne Tucker, Marnmu Smyth, May Byrne, Mr M Smith, Slim Parker, Dawn Hicks, Ronella Hicks, Steven Charles Smith, Timothy Parker; and Mrs J Injie (now deceased).

7 For the reasons that follow, the Court is satisfied that:

- the claimants constitute a single group, which is generally known as the Banjima language group or people;
- the claim area was part of the traditional country of the Banjima at sovereignty;

- the claimants and those from whom they are descended have since sovereignty maintained a relevant connection with their traditional country in accordance with and pursuant to their traditional laws and customs;
- subject to particular findings, including about extinguishment, native title exists in the claim area and is held by the claimants.

8 The claimants are entitled therefore to a determination of native title under the NTA. The Court will now invite the claimants to bring forward a minute of proposed determination in relation to which the Court will hear from the parties in due course.

APPLICATION

9 The native title determination application the subject of this proceeding is the form 1 amended native title claimant application filed in the Court on 1 June 2011 (***application***).

10 The claim area is described in attachment B of the application and depicted in the map at attachment C. Due to the exclusion of parts of the Karijini National Park the claim area does not include all of the land or waters in respect of which the claimants actually assert rights and interests under traditional law and custom.

11 The current proceeding is a combination of four earlier claims: WAD6096/1998, WAD6278/1998, WAD319/2010 and WAD371/2010.

12 Application WAD6096/1998 (***IB claim***) was lodged with the National Native Title Tribunal (***Tribunal***) on 4 June 1996 and is taken to have been filed in the Court on 30 September 1998. The IB claim was amended on a number of occasions and is described by the claimants as the "lead application" under the combination orders made by the Court on 3 June 2011; to which orders further reference will be made later in these reasons.

13 Application WAD6278/1998 (***MIB claim***) was lodged with the Tribunal on 29 September 1998 and is taken to have been filed in the Court on 30 September 1998. Application WAD371/2010 was filed on 29 November 2010 and covered the same area of land and waters as the MIB claim. It differed from the MIB claim principally in the way it described the claim group.

14 Application WAD319/2010 was filed on 29 October 2010 and covered the same claim area as the amended form 1. Application WAD319/2010 sought a determination that native title is held by all Banjima people, consistently with the application in this proceeding.

15 Statements of issues, facts and contentions were filed in the pre-combination IB claim, which had regard to the first report of the anthropologist, Dr Kingsley Palmer, referred to below and filed on behalf of the claimants in that proceeding. That had been written in relation to the former MIB and former IB claim groups and undertaken as a joint exercise commissioned by both groups, as Dr Palmer explains in his first report.

16 The claimants in the MIB claim filed a separate statement of issues, facts and contentions in the MIB claim proceeding.

17 The claimants in this application point out that there is agreement that native title is held by the Banjima people either as communal rights and interests (the preferred IB position) or as group rights and interests (the preferred MIB position). They say that on the issue of communal or group rights and interests each group pleaded, as its alternative case, the case put by the other group.

18 On 20 December 2011, the claimants in the combined application sought leave to amend the statement of issues, facts and contentions filed by the former IB claimants to take account of:

- the combination of the IB and MIB applications;
- the joint report of the anthropological experts for the claimants, Dr Palmer and for the State, Mr Michael Robinson filed 25 November 2011; and
- changes which had been made to the way in which the claim was described in the combined application form 1.

19 The Court noted the changes proposed but considered it unnecessary in the circumstances to formally amend the document, noting that the proposed amendments adequately notified the nature of the claim the claimants intended to advance at trial.

CONNECTION ISSUES

Preliminary Observations

20 It is generally accepted that British sovereignty over what is today the State of Western Australia, but at the outset of colonisation was known as the Swan River Colony, was asserted on or about 1 June 1829. Historians and constitutional scholars it seems still debate whether the Colony was established as of 2 May 1829, 18 June 1829 or 4 March 1831: see *Western Australia v Commonwealth [Native Title Act Case]* (1995) 183 CLR 373 (***Native Title Act Case***) at 429. See also *Daniel v Western Australia* [2003] FCA 666 (***Daniel 2003(1)***) at [156]; *AB (deceased) v Western Australia (No 4)* [2012] FCA 1268 at [52].

21 In this regard, the recently enacted *Western Australia Day (Renaming) Act 2012* (WA) (***WA Day Act***) recites, by way of background to the *WA Day Act*, that:

> A. The 1st of June in 1829 was the day when the first European settlers, under the command of Captain James Stirling RN, Lieutenant Governor, arrived from Britain to settle the Swan River Colony; and
> B. Foundation Day is celebrated on the first Monday of June each year to mark this important event for Western Australians; and
> C. Foundation Day acknowledges our indigenous people as the original inhabitants and traditional custodians of the land and unites all who have made Western Australia their home…

22 Indeed, in this proceeding it is not in dispute that, at sovereignty, Aboriginal people occupied the infant colony and, in particular, that the Banjima Aboriginal people occupied their traditional country in the vicinity of the current claim area, although the extent of that country is in issue.

23 It may readily be inferred from the evidence in this proceeding that upon their arrival in the Swan River Colony the agents of the British Sovereign and the first British settlers had no detailed knowledge of the circumstances and social organisation, laws and customs of the indigenous people. It may also be inferred from that same evidence that the indigenous people were oblivious to the social organisation, laws and customs of the new settlers when they first encountered them.

24 As the evidence, and the reasons for many determinations of native title in this Court since the coming into operation of the NTA attest, the awareness and knowledge of the

British sovereign, its agents, institutions and settlers concerning the indigenous people of Western Australia grew spasmodically through the nineteenth century and into the twentieth century. As exploration and settlement began to disburse beyond the seat of government in Perth and the Swan River and into the more remote reaches of the Colony, including into what is today the Pilbara region of Western Australia, seafarers, explorers, pastoralists and persons interested in the ethnography of Aboriginal people began to report on their social organisation, although, as explained below, in the case of the East Pilbara the reports were never extensive.

25 The Aboriginal people of Australia, as has been commented upon in many determinations of this Court and as the evidence in this proceeding also shows, maintained an oral, not a written tradition and so did not produce their own documented accounts of their first contact with settlers. Knowledge of law and custom at most material times was passed orally and by teaching from one generation of Aboriginal people to the next.

26 What past determinations of the Court also amply demonstrate is that European ethnographic observations made in the early period of contact of one group of Aboriginal inhabitants were not necessarily or automatically true in all respect of all groups. So, what might have been considered true from the observations of a trained anthropologist as a result of fieldwork in the coastal Pilbara region of Western Australia might not necessarily be true of a group of Aboriginal persons living in the Western Desert region to the east of the Pilbara.

27 Thus, in any particular proceeding for determination of native title the claim group may be expected to have their own perspective about who the people are who hold native title for a claimed area, the laws and customs pursuant to which native title is held, and the nature of rights and interests that it entails. The evidence of claimants must accordingly be closely regarded.

28 The evidence of early seafarers, explorers, pastoralists, ethnographers and anthropologists, which falls into an historical category, may also be relevant in any proceeding and have evidentiary value in relation to matters in issue, although depending on the circumstances and context in which it was gathered, and by whom it was gathered, it may need to be treated with care.

29 The evidence of contemporary anthropologists, especially those called to give evidence in a proceeding such as this, will also be relevant and may be of particular assistance to the Court in understanding the nature and significance of the evidence of claimants.

Key Connection Issues

30 At trial the key connection issues raised by the respondents, although often interrelated, were identified by reference to the following topics:

- Banjima society.
- Banjima sub-groups.
- Banjima boundaries.
- Native title claim group membership.
- Maintenance of connection.
- Nature and extent of native title rights.

Banjima Society

31 The State accepts that at sovereignty Banjima people occupied their traditional country in the vicinity of the claim area, although it disputes the extent of the northern and eastern boundary areas now claimed and questions the claimants' claim that, as today, at sovereignty they were comprised of sub-groups.

32 The historical and ethnographic records are relatively sparse when it comes to information about the Aboriginal inhabitants of the East Pilbara and the claim area. It would appear the first Europeans to travel through or near the claim area were the surveyor, FT Gregory, and members of his exploratory expedition in 1861, some 32 years after sovereignty was asserted. Travelling inland along the Fortescue River, to a point close to the north western edge of the claim area and then south west through what came to be known as the Hamersley Range, they encountered Aboriginal people.

33 Following Gregory's expedition, the Colonial government opened up parts of the Pilbara to pastoral settlement. By the 1880s, the claim area was the subject of sustained

pastoral settlement, although the records suggest that parts may well have remained firmly in the possession of the Aboriginal inhabitants until at least the 1890s. The "Banjima" were not however mentioned by name in any of the early records.

34 In this proceeding, two very experienced anthropologists, Dr Palmer, called on behalf of the claimants, and Mr Robinson, called on behalf of the State, had broadly similar views about the process of European settlement in the claim area.

35 For the sake of convenience it is useful here to note the expert reports of the anthropologists received into evidence, and the shorthand expression used for each in these reasons:

- Dr Palmer's expert anthropological report filed 3 September 2010 (Ex 48) – ***Dr Palmer's first report***.
- Amended expert report of Dr Palmer in response to expert report of Mr Robinson filed 25 March 2011 (Ex 49) – ***Dr Palmer's first supplementary report***.
- Amended expert opinion of Dr Palmer in response to Mr Robinson's report filed 29 April 2011 (Ex 50) – ***Dr Palmer's second supplementary report***.
- Supplementary expert report of Dr Palmer filed 12 September 2011 (Ex 51) – ***Dr Palmer's third supplementary report.***
- Expert anthropological report of Mr Robinson filed 14 January 2011 (Ex 52) – ***Mr Robinson's first report***.
- Mr Robinson's supplementary anthropological report filed 11 October 2011 (Ex 53) – ***Mr Robinson's supplementary report***.
- Joint expert report of Dr Palmer and Mr Robinson filed 25 November 2011 (Ex 54) – ***joint report***.

36 I should also mention here that the claimants took exception to late-provided additional materials relied on by Mr Robinson, being field notes of an interview with the late Woodley King and the late Yilbi Warrie, field notes of an interview with Mr D Daniel (deceased), description of a map by Mr K Jerrold (deceased), the Sambo genealogy, field notes from John Laurence, an anthropologist, other undisclosed material relating to people

interviewed for the Yindjibarndi No 1 claim, the record of an interview between Sylvia Allen and Mark Chambers and the field notes from Carolyn Macdonald, an anthropologist.

37 These materials are all referred to in Mr Robinson's supplementary report filed following the taking of on-country evidence. The claimants say a possible explanation for the delayed disclosure of the material on which some of the opinions in the original report was based is that Mr Robinson had only recently sought permission for the disclosure of the material (see [5] of his supplementary report).

38 The claimants accept that some but not all of the additional material was provided by the State and was considered by Dr Palmer in the context of the joint expert report.

39 Nonetheless, the claimants seek a restriction pursuant to s 136 *Evidence Act 1995* (Cth) as to the use that can be made of the evidence so that certain parts of Mr Robinson's supplementary report which contain or refer to a previous representation made by a person are not admissible to prove the existence of a fact that the person intended to assert by the representation; and that the use to be made of such parts is limited to disclosing the basis for opinions expressed by the author of the report.

40 Section 136 provides:

> **136 General discretion to limit use of evidence**
>
> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing.

41 This is a case where the claimants say there is a danger that the use of the evidence might be unfairly prejudicial to them and misleading unless an order limiting its use is made, given the late circumstances in which it was provided and the context in which the materials were created. Thus, they seek an order pursuant to s 136.

42 As Lindgren J in *Harrington-Smith v Western Australia (No 2)* [2003] FCA 893; (2003) 130 FCR 424 at [39] said of this provision, and others, the way in which the discretion is to be exercised "depends on all the circumstances of the particular case". Thus, in *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v Queensland* [2000] FCA 1548, Cooper J declined

to make a s 136 order but made it clear that his refusal to do so would not prevent the respondents from contending that in the circumstances of the case the hearsay statements should be given little or no weight. By contrast, an order was made in *Jango v Northern Territory (No 4)* [2004] FCA 1539; (2004) 214 ALR 608 at [9]-[11].

43 In *The Larrakia People v Northern Territory* [2003] FCA 1175, the Court refused to admit an expert report that had been provided after the conclusion of various tranches of evidence on the basis that its submission would delay the trial and cause unfair prejudice to the other parties. The report was from an expert who had not previously filed a report in the proceeding, was not deemed to be of great probative value and there was a suggestion that due to the death of the expert, for the respondent at least, some of the prejudice caused by the late tender of the report could not be cured.

44 In the circumstances of this case the situation is, as the claimants acknowledge, that Dr Palmer was able to take the additional materials into account and he has been able to respond to them. Indeed, during the concurrent evidence session at trial some of these materials were discussed.

45 In all of the circumstances I think this is one of those cases where the late provision of the materials may be said not to have caused enormous prejudice and this can be seen from the way Dr Palmer was able to accommodate the materials. So too the materials do not appear to be misleading or confusing.

46 I would, therefore, not make an order under s 136 *Evidence Act 1995* (Cth) but would take into account, when considering what weight should be given to them, that the materials were produced late in circumstances where the makers of them have not been, or were not able to be, called in this proceeding.

47 It should also be noted at this point that the anthropologists, consistent with a similar lack of uniformity often evident in anthropological publications, were apparently unable to adopt a common orthography, so that the spelling of indigenous names, places and terms often differs greatly from one source, text and report to another. For the sake of convenience, I have largely adopted the orthography used by Dr Palmer (as to which see the note at p 8 of Dr Palmer's first report), although where the spellings of some words now appear to be in

general usage, such as "Yindjibarndi" or otherwise appears to me to convenient, I have chosen to use that other spelling.

48 I should also mention here that, in the discussion that follows, every effort has been made not to use the full names of recently deceased claimants and other Aboriginal people. However, the names of those who passed away some time ago are often used, as it is understood this is acceptable practice in present circumstances.

49 The Banjima, as noted above, appear absent, at least as an identified group in the early ethnography. Mr Robinson considered that the pattern of early European settlement which favoured the water courses and plains of the lowlands, but avoided the Hamersley Range, "may help to explain why the Banjima remained unmentioned in the literature for the first 50 years of settlement". But there was no doubting the presence of Aboriginal people in the general area. Charles Straker, a travelling inspector responsible for reporting to the Colonial government under the Colonial lands legislation, for example, noted in reports on the Mulga Downs and the Hamersley pastoral stations in 1892, that within and about the Hamersley Range there were a large number of bush natives who refused to work for any master. Straker's report was contained in a history report received into evidence in this proceeding, prepared by Dr Neville Green, a historian deeply familiar with the history of Western Australia. Straker also reported that "this tribe of natives are not stationary in the Range but travel to & fro between that part [presumably Mulga Downs] & the Upper Ashburton".

50 Dr Green also noted Straker's report on the Mulga Downs Station, that:

> There are a large number of bush natives in the Range up this way. Some time ago forty came into the Station with a vowed intention of killing all the white men, they succeeded in spearing one Chinaman & in breaking both his arms & would doubtless have killed him but they were disturbed. Just lately they have sent in a message to the effect that shortly they would come in & kill all the white men & native men & take away the women.

51 Based on this report, the Aboriginal inhabitants in the Hamersley Range may reasonably be said not to have passively accepted colonisation of their territory.

52 Nonetheless, as Dr Green goes on to demonstrate in his history report, the introduced pastoral industry operated by the new settlers was one of the two most significant historical

events that impacted upon Aboriginal people living in the claim area, leading as it did to their engagement on the new pastoral stations; the other being the movement of Aboriginal people out of pastoral employment during the 1950s and 1960s and so away from their traditional countries.

53 The pastoral stations that figure most prominently in relation to this proceeding include those of Mulga Downs and Hamersley just mentioned, and Rocklea, Juna Downs and Mt Bruce.

54 When movement of Aboriginal people away from pastoral stations occurred in the 1950s and 1960s, it was to the coastal town of Onslow that many went, with others moving to other Pilbara towns such as Roebourne and Port Hedland.

55 In those same years, however, the town of Wittenoom in the Hamersley Range thrived due to asbestos mining and attracted many people.

56 The evidence in this proceeding of senior claimants Mrs A Smith (now deceased) and Mr Alec Tucker illustrates and amplifies the observations made in Dr Green's history. They were born on stations in and near the claim area and grew up speaking the Banjima language and being taught about Banjima country and Banjima laws and customs by their parents and elders.

57 Mrs A Smith, for example, was born at Rocklea Station in about 1923. She explained that her birthplace was under a bilari tree. Rocklea Station, while in nearby Gurama, not Banjima, country, was her mother's father's country. Mrs A Smith, however, identified herself as "proper Banjima". Indeed, the evidence shows she was accepted and recognised as one of the oldest Banjima people and elders. Mrs A Smith said that when she was young she learnt that she was Banjima from her mother and from Gurama people who would tell her when they were on Banjima country. They would say to her, "Yurrlou [yurlu] ngurrara" – meaning that this is the country that you belong to.

58 Mrs A Smith explained that her mother's mother's mother (her great grandmother) was known as Gawi, who was Banjima. Her great grandmother taught her grandmother,

Gujinbangu, about Banjima country, and her grandmother taught her mother, Yarluwarra (Maggie), who in turn taught her. They were all Banjima people.

59 Of her mother, Maggie Yarluwarra, Mrs A Smith said she was born at Yarluwarra, near a windmill on Hamersley Station. Her "skin" section was Burungu and she was Banjima. Her country was around Bunurru (or Mt Bruce) and Dukar on the east side of Mt Bruce. Mrs A Smith explained that Hamersley Station was on Gurama country. But Gujinbangu, her grandmother, was Banjima.

60 Mrs A Smith explained that her great grandmother, Gawi, and family used to be at Bidi Bidi Station, which is near the present Karijini National Park rangers' residence.

61 When Mrs A Smith was 17 she married and went with her husband to Juna Downs Station on Banjima country. She used to go cattle mustering with her husband around Juna Downs. They would muster up to Weeli Wolli Creek and Gundawana claypan.

62 Mrs A Smith said she used to look after the women in the camp. She shot kangaroo for the women when the men were not there. She learnt how to carry emus properly back to camp. Her son, Camus, was born on Juna Downs.

63 Later, she and her husband went to work on Wyloo Station to do some fencing, then Red Hill Station and then back to Wyloo Station and Kooline Station, all to the west of Banjima country.

64 Eventually, from about 1961 to 1965 she said she and her husband went to work on Mulga Downs Station, on Banjima country. They used to travel back to Juna Downs during holiday time to visit family.

65 Mrs A Smith said that when she and her husband went back to Mulga Downs they sent their children to the Roebourne Hostel where they went to school, but the children would come back to Banjima country in their school holidays.

66 She said when she and her husband finished at Mulga Downs in 1965 they too moved to Roebourne and took the children out of the hostel in order to teach them more about Aboriginal culture.

67 Mrs A Smith said that she followed her mother in becoming Banjima and people can choose to follow their mother or their father.

68 Mrs A Smith said she still spoke the Banjima language she learned as a child and said she has taught it to her children and to her grandchildren. She can also understand the language of the nearby Palkyu and Nyiyabarli people too.

69 She said that when she grew up she was taught about the country and the places and the places to go and not to go and about spirits, yindas and warlu.

70 Mrs A Smith gave extensive evidence about law and customary practices.

71 Mr Alec Tucker was born in 1943 on Mulga Downs Stations. His parents were living and working there at the time. His father was Wardigbung-nha (Raymond Tucker) (deceased), who he says was a Banjima man.

72 Mr Tucker grew up and worked on Mulga Downs Station until he was about 20 years of age. The Tucker family and Wargibungu (Ginger Parker) and his family were on Mulga Downs at that time. He said there were also some Nyiyabarli, Palkyu and Yindjibarndi families staying at Mulga Downs then as well, and they all lived together in the native camp not too far from the Mulga Downs homestead.

73 He said that he and his family had holidays from station work at Hooley Paddock and Horace's Mill or Nguarrunu, about two miles north of Hooley Paddock on Mulga Downs. He said it was mostly Banjima people at the holiday camp unless it was ceremony time and then people from other language groups would arrive, including the Ngarla and Yindjibarndi people.

74 When he was about 20 and had finished his Aboriginal law and culture school on Mulga Downs, Alec Tucker said he went to work on stations along the Ashburton River, and at Coolawanyah and Hooley Stations. He said he continued to work at Mulga Downs on and off in the 1960s and 1970s, his last year being 1972.

75 After 1972 Mr Tucker stayed in the town of Wittenoom for a while. He became a police aide and was then stationed at Nullagine for three years. After that he spent time

working in Roebourne but now spends most of his time in Tom Price and at Wirilimura Block, which is in the claim area.

76 Mr Tucker said that his father, mother and the old people told him he was Banjima and he knew this from when he was young. His Banjima family taught him about Banjima law and culture. He was told his yurlu was Mulga Downs and right through Banjima country.

77 Like Mrs A Smith, Alec Tucker said that a person can follow their father or mother with respect to country.

78 Alec Tucker also gave extensive evidence about Banjima country and laws and customs.

79 The evidence of Mrs A Smith and Alec Tucker is redolent of the evidence of the older claimants, which strongly points to the historic existence of a Banjima language group or people. The life histories of Mrs A Smith and Alec Tucker also provide a solid evidentiary base to the observations made in Dr Green's history report concerning the engagement of Aboriginal people, and especially Banjima people, on lands in or near their traditional country, from a time soon after the establishment of the pastoral industry, and how they moved to other towns outside the claim area as late as the 1960s and early 1970s, but later returned to visit or live in or near the claim area.

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

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

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

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

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

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

82 Both Dr Palmer and Mr Robinson approached the question of whether Aboriginal people occupied the claim area and the related questions of who those Aboriginal people were at sovereignty, whether they were organised as a single group, or in sub-groups, and the extent of their traditional country in much the same way. They sought first to conduct a relevant literature review and then regard the evidence available to them in contemporary times, including materials admitted into evidence in this proceeding. They each accepted the proposition that if a particular Aboriginal people could be shown to have been in occupation of the claim area at around the time of first contact between settlers and Aboriginal people in the area, then it may be inferred that those same Aboriginal people were in occupation of the claim area at the time British sovereignty was asserted over it in 1829. "Contact" then becomes the "effective sovereignty date", as all parties accept.

83 As to who those Aboriginal people in occupation of the claim area were at the time of contact and whether they comprised a single society, these were questions the answers to which the anthropologists readily agreed. In their joint report following conferral between them prior to the hearing of this proceeding and after they had each filed expert reports in the proceeding, the anthropologists agreed with the proposition that, at the time of sovereignty, there was a single Banjima society and today there continues to be a single Banjima society.

84 In their respective literature reviews, Dr Palmer and Mr Robinson noted, among other things, the following:

- Early settler writings mention Yindjibarndi and Palyku people, neighbours of the Banjima, in literature at the end of the nineteenth century and in the early twentieth

century, but no reference is made to the Banjima (Mr Robinson's first report at section 2.2.1).

- Clement, a mining entrepreneur, who travelled widely in the Pilbara at the very end of the nineteenth century, including it seems near Mulga Downs, describes the Yindjibarndi and the Palyku, but not the Banjima. He also refers to the Ngarluma (his "Gnalluma"). Clement's map locates the Palyku (his "Balgu") south of the Fortescue River and in the Eastern Hamersley Range and states that from there they go "[f]ar into the desert". Dr Palmer does not place any significance on the failure of Clement to mention the Banjima. Mr Robinson considers it is a "relevant" fact, one explanation being that they may not have been in the Fortescue Valley at the relevant time. Mr Robinson refers to the later information given to Tindale (discussed below) lending some support for the view that the Palyku were then in possession of parts of the Fortescue Valley. He also notes, however, that Radcliffe-Brown, the pioneering anthropologist, in the early part of the twentieth century considered Clement's work to be "careless and inaccurate", although in what respects, Robinson says, it is not clear. (Dr Palmer's first report at [58]-[59]; Mr Robinson's first report at section 2.2.2.)

- Bates and Radcliffe-Brown were in the Pilbara area in 1910-1911. They were part of the Cambridge University expedition of 1910 that travelled from Perth to the north-west of Western Australia to undertake scientific research. Bates made a map with annotations of areas to the south of the Ashburton River. Dr Palmer says the Banjima are more or less absent from Bates' written record, although she did provide a brief mention of the Banjima in her manuscript of the "Native Tribes of Western Australia" remarking that "exact locality cannot be stated". She placed them in what she called the "central areas". Mr Robinson notes a drawing made by Bates apparently as a result of a discussion with an informant, Karindungu (who at material times appears to have been a medical patient at Dorre Island when Bates met her and who apparently identified herself as Palyku). The "Panjima" (Banjima) are shown to be south west of Kubia which Bates identifies as Hillside – possibly Hillside Station north of the Banjima claim area, which, Robinson notes, would be consistent with the position in or near the Hamersley Range. In that drawing, above the Banjima and to the west are the "Injibandi" (Yindjibarndi) and the "Ngaluma" (Ngarluma). (Dr Palmer's first report at [60]-[65]; Mr Robinson's report at section 2.2.3).

- Radcliffe-Brown published the results of his fieldwork in north Western Australia in his 1912 paper, "Three Tribes of Western Australia". It makes passing reference to the Banjima. As Mr Robinson notes, Radcliffe-Brown said of the Banjima only that they were "[o]n the south of the Fortescue River" and that Palyku "[o]ccupies part of the Fortescue River". (Dr Palmer's first report at [66]-[68]; Mr Robinson's first report at section 2.2.4.)
- Daniel Davidson in 1938 produced a map that accompanied a catalogue of linguistic and cultural groups by way of a "Preliminary Register of Australian Tribes and Hordes". He located the Banjima "S.E. of Hammersley [sic] Ra. C. Fortescue R". He appears to have relied on Radcliffe-Brown for his information. (Dr Palmer's first report at [69]-[70].)

85 To that point of the literature review, as the anthropologists noted, the Banjima are to be found in the literature although not until the early twentieth century are they mentioned by name, along with the Palyku. However, the extent of their traditional country is not made clear.

86 Mr Robinson (Mr Robinson's first report at [108]) concluded, on the basis of the literature review to that point, that in relation to the claim area it was possible to say that:

- Palyku people were identified as occupying parts of the Fortescue Valley and the headwaters of the Fortescue River.
- The Banjima were not identified in the literature until 1910 suggesting they may have been unknown, as a group, to settlers in the area.
- Information given to Bates supports a Palyku presence at Mulga Downs.
- Information given to Bates associates at least one Banjima person with the Mt Lockyer (Watugara) area.
- Information obtained by Radcliffe-Brown situates a Palyku local group at Milimbirinya, on the eastern edge of the Banjima claim area.
- According to Radcliffe-Brown, the Palyku were north of the Fortescue River and the Banjima were south of the Fortescue River.
- There is evidence of inter-marriage between Palyku and Banjima.

- The Yindjibarndi were identified on the middle reaches of the Fortescue River and the Fortescue Valley. The full extent of their traditional country along the upper reaches of the Fortescue River is unreported.
- The Nyiyabarli were not reported in the early published or unpublished literature.

87 In his first supplementary report, Dr Palmer commented on Mr Robinson's analysis of the early ethnography to explain why he would not draw, in all cases, the same potential significance suggested by Mr Robinson. However, ultimately, Dr Palmer (at [43]) considered that Mr Robinson's conclusions from the data (at [108] of Mr Robinson's first report) were not contentious. Dr Palmer considered that the nine conclusions drawn by Mr Robinson could be reduced to six by amalgamating common subjects and rearranging them topically, as follows:

- At the time the research discussed was carried out (circa 1911) Palyku were present at Mulga Downs and occupied parts of the Fortescue Valley and its headwaters, including Milimbirinya. Dr Palmer agreed with this conclusion.
- According to Radcliffe-Brown the Banjima were south of Fortescue River, the Palyku to the north. Dr Palmer agreed with this in part, but noted that Radcliffe-Brown also has the Banjima at Mulga Downs. He said this would also have Banjima speaking people occupying country within the Fortescue River Valley and not confined to the Hamersley Range to the south. He said bearing in mind the width of the valley at Mulga Downs, for example (approximately 20 km at Mulga Downs and 25-30 km in the vicinity of Mt Marsh) this yields a very general "boundary". Such a boundary is, by this account, north of the Hamersley Range scarp, but short of the northern boundary of the MIB applications as he stated in his earlier report (Dr Palmer's first report at [450]).
- Yindjibarndi were in the middle parts of the Fortescue River, but their extent was not recorded. Dr Palmer agreed with this conclusion.
- The Banjima may have been unknown to writers prior to about 1910, while the Nyiyabarli do not appear in any early accounts. Dr Palmer agreed with this conclusion.
- A Banjima person was associated with Mt Lockyer. Dr Palmer suggested Mr Robinson may have made an error here and meant to write that Bates associated a

Palyku person with Mt Lockyer. He agreed to the extent that Watugura is provided as an annotation preceding "Mulga Downs". He said whether it qualifies the name Karindungu he cannot be sure. The name Watugura is also used in connection with other names. The difficulty then is to know what Bates meant by this term and what place it signified. He thought it possible that she coined it as a term for Mulga Downs.

- Palyku and Banjima language speakers intermarried. Dr Palmer agreed with this conclusion.

88 The work of Norman Tindale is also of relevance and was closely considered by the anthropologists, falling as it does between the early ethnographic period, including in the early part of the twentieth century, and the native title era (1993 forward), and may be described as follows. Tindale's work in the Pilbara fell into three phases. In 1940 he published a tribal map of Australia which included the Pilbara. However, it appears that, for that work, he did not personally carry out any field work in the Pilbara. In 1953, however, he visited the Pilbara where he personally collected information about tribal distribution. In 1966 he attempted a follow up visit but apparently did not complete it.

89 Tindale's 1953 work was a collaboration with Joseph Birdsell, first as associate and then as leader of a joint UCLA-Adelaide Universities expedition to the Pilbara. Others assisted in the field, including a research student named PJ Eplang and another assistant named BS Coaldrake. Tindale's research was a collaborative effort with Birdsell and the others.

90 Although the 1966 Pilbara trip was aborted, apparently by a cyclone, Tindale nevertheless collected some data, including from the linguist Carl von Brandenstein who was based at the University of Western Australia. Brandenstein provided him with a copy of his map of Pilbara languages, which Tindale included in his 1966 journal. The assumption is made that when Tindale published his "Aboriginal Tribes of Australia" in 1974 he used the various source materials mentioned to reach the views there expressed. It may be added that in the field work conducted by Tindale in 1966 he was accompanied by J Greenway who produced his own journalistic account of the trip in 1972.

91 Dr Palmer contends that Tindale's 1953 materials are of particular relevance to the study areas, since he visited Wittenoom, Mt Florance pastoral station and Yandeyarra pastoral station and also visited Pilgangoora, then a mining centre, where he took over 100 genealogies, as well as Port Hedland and Roebourne, where he collected genealogies. He also made notes on "tribal" areas and collected other ethnographic material.

92 Dr Palmer (Dr Palmer's first report at [74]-[76]) considered that Tindale's "compass" was quite limited with a focus on what he called "tribal boundaries". In effect, Dr Palmer contrasted the compass adopted by Tindale with the doctoral research that he, Dr Palmer, conducted in the Pilbara in the mid to late 1970s that culminated in the publication of his PhD thesis in 1981.

93 Mr Robinson also accepted (Mr Robinson's first report at [118] and following) that when assessing Tindale's work it should be remembered that it was not all based on first-hand knowledge but included research collaborations with others and information from the literature and that the "tribal" descriptions in his publication usually referred to a range of source material. For example, Mr Robinson noted that Tindale's entry for the Banjima (his "Pandjima") cites Radcliffe-Brown and John Connelly (although not Bates), his own field journals from 1953 and 1966, a 1954 paper by Ernest Worms, a manuscript of the anthropologist, Ruth Fink, a 1964 publication by Ronald Berndt and two pieces of information from Brandenstein. Thus, for Mr Robinson – and one may interpolate, Dr Palmer – it is preferable to use Tindale's published material as a "starting point" before considering his field journals. While Dr Palmer considered the 1953 Tindale materials are of particular relevance to the claim area, it is to the 1974 publication that Mr Robinson first directed his attention.

94 Tindale recognised the Banjima (his "Pandjima") in his 1974 "Australian Tribes of Australia", as being located on the:

> [u]pper plateau of the Hamersley Range south of the Fortescue River; east to Weediwolli Creek near Marillana; south to near Rocklea, on the upper branches of Turee Creek east of the Kunderong Range. In later years under pressure from the Kurama, they moved eastward to Yandicoogina and the Opthalmia Range forcing the Niabali eastward. They also shifted south to Turee and Prairie Downs driving out the Mandara tribe, now virtually extinct. [Punduwana], a native place not yet located, was their main refuge water in very dry times; other refuges were in Dales Gorge and at [Mandjima] (Minjina Creek on maps). They practised both circumcision and subincision in the male initiation ceremonies.

95 So far as the Nyiyabarli are concerned, as Mr Robinson noted, they are here referred to in the literature for the first time (as the "Niabali"). Tindale positioned them in 1974 on the "middle waters of the Fortescue River; north west to Roy Hill; on Weedi Wolli Creek north of the Opthalmia Range".

96 Tindale here also referred to the Palyku (his "Bailgu") as well as to the Yindjibarndi.

97 Tindale's 1953 journals show that he travelled to the mining centre at Pilgangoora where large numbers of Aboriginal people were working after the 1944 pastoral workers' strike. He was told by a Nyamal man that his people used the expression "Mandanjongo" to refer to the Yindjibarndi and the Banjima people, and that the word meant "top side people". Tindale here also recorded in his field journal that evidence was accumulating to show that Palkyu and Nyiyabarli were two separate tribes, the Palkyu on the upper Fortescue River where they meet the Banjima, who come in for water at the Fortescue River. The Nyiyabarli lived to the east of the upper Fortescue as far to the east as "Jiggalong [sic]" in the Irawara Range, being the range from which "Jiggalong Creek" originates.

98 Tindale also recorded in his journals that the Banjima and the Palkyu harboured an historic enmity that predated contact with Europeans.

99 Tindale received a sketch map from one Paddy Jones of his "tribal area", an apparent reference to his Banjima country, that made reference to the pastoral stations Duck Creek, Rocklea, Juna Downs and Mulga Downs, and which also referred to Wittenoom and Coolawanyah.

100 The anthropologists agree, and I accept, that the question of the existence or identity of a group cannot be easily separated from the question of the boundaries of a group. One can begin a discussion about a "people" by assuming their existence, and then asking and answering questions about where they reside, where is their country, where is their nation? Alternatively, one can identify an area of land and waters and ask, who belongs to that area, whose country is it, to what nation does it belong? The answer to the latter questions may well be that there is more than one people who are associated with an area in question. The approach taken by the anthropologists to this point, however, was simply to ask whether the

literature disclosed that there was a separate people known as the Banjima in or in the vicinity of the claim area, leaving aside the precise country with which they may have been associated until later. As can be seen from the above discussion, however, it is difficult to separate these two issues.

101 What is clear from all of the Tindale literature is that the Banjima, at least by the time of Tindale, were well-recognised in the literature as a separate group with their own, to use the expression in Tindale, "tribal boundaries" in the vicinity of the claim area.

102 To this point the data and evidence provided by the anthropologists is strongly in support of the view that there was, at the time of contact, an Aboriginal group identified as the "Banjima" which belonged to country in the vicinity of the Hamersley Range (and the claim area). Put another way, this data and evidence shows the "Banjima" are not an invention as a group of people; and that they would appear to have a lineage. The State and other respondents do not challenge this general proposition; indeed they accept it.

103 When one considers the ethnographic data in the context of the evidence of elders such as Mrs A Smith and Alec Tucker, there is no doubt that there has long been a group of Aboriginal people associated with the country in the general vicinity of the claim area who were known as Banjima, with their own language and country, and their own laws and customs.

104 On the basis of all this evidence I find the Banjima were a distinct group of Aboriginal people at the time of contact, and so at sovereignty, comprising a single community or society; but as to the detail of their internal or intramural arrangements, whether they were comprised of sub-groups and as to the precise country they occupied further inquiry is necessary.

Banjima Sub-Groups

105 Like Mrs A Smith and Alec Tucker, the other Aboriginal witnesses who identified as Banjima had no doubt about their Banjima identity. Most considered they were primarily members of a "Top End" or Milyranba Banjima sub-group or a "Bottom End" or Mungurdu Banjima sub-group. Some considered they were members of both sub-groups. All considered, however, they were members of a single Banjima community.

106 Mrs A Smith drew a distinction between Top End Banjima and Bottom End Banjima. She said that Top End Banjima are called Birrdirla, which means range or hills; and are also known as Milyaranba. She said she was Top End Banjima and her elders taught her that. She said that Bottom End Banjima or Fortescue Banjima from the Mulga Downs area were called Mardungurra and Marndugardi. She said "mardungurra" means the flat country that goes west to Marillana Station. She said the two groups have the same language, but there are different words. She described where the country of the Milyaranba Banjima ran.

107 Alec Tucker said he mostly speaks for Mulga Downs but has rights to Juna Downs too because of the connection to Juna Downs of Bob Tucker Wirilimura, his father's father's father (great grandfather). He considered that because Wirilimura was connected to Top End Banjima and Bottom End Banjima then people with that family connection had interests in both Pantikurra Banjima (Bottom End) and Milyaranba Banjima (Top End) areas.

108 He also said that Banjima people started out together in Juna Downs and then some went to Mulga Downs and became Pantikurra Banjima and the ones in Juna Downs became Milyaranba Banjima but people like him have rights across all Banjima country. I should interpolate to say I understood Mr Tucker, in this regard, to be speaking particularly about his own family connections.

109 He explained that the Milyaranba Banjima are on the Top End around Juna Downs and Packsaddle and that, while he has a right to freely visit that area, before he goes there he likes to make sure he is respectful, so he always tells one of the older members of the Smith or Black families that he is going there, just to let them know. He said it shows respect for them and their ancestors.

110 Brian Tucker also said he knew he was Banjima from when he was young from what his father told him and taught him about Banjima law and culture. On visits to his father's family on Mulga Downs Station, his father would tell him that this was his country, his yurlu. He said he was told that he had rights in both the country of his mother and his father. In his case his father's country was Banjima and his mother's was Nyiyabarli. He explained that his sister Marnmu Smyth's children take their Banjima country through their mother and that is a proper way to do it. Brian Tucker and his siblings, he explained, were also descended from Wirilimura, his great grandfather, who was born on Juna Downs Station, as were that

old man's two sons. He explained that one of those two was his maarli (grandfather), Jacob Tucker (deceased), who moved from Juna Downs to Mulga Downs and started his own family there.

111 Brian Tucker said that when he was growing up the old people mentioned the Wirilimura and Pirturti mobs, although his father and the late Herbert Parker said that there were Innawonga Banjima people, known as the "Rocklea people", and the Fortescue Banjima that people called the "Mulga Downs people". The particular expression "Milyaranba Banjima" was an expression he had only heard more recently.

112 Similarly, Mr G Tucker said he belonged to Wirilimura country and to the Banjima group and he always had understood from what he was told that he was Banjima. Alec Tucker's father and the late Percy Tucker taught him about Banjima law and culture. He was also told that the area around Mulga Downs and other areas in Banjima country were his yurlu. Like Brian Tucker, he too was descended from Wirilimura, his great grandfather.

113 Maitland Parker explained that he was Banjima through his late father, Herbert Parker (who was Banjima through his mother, Whitehead) and his father, George (Marndu) (that old man being buried on Mulga Downs). He knew that the Parker, Long and Tucker families were all Banjima and that they had always been together and practised Banjima law together.

114 Slim Parker said he became Banjima by following his father and his father following his father and so on. The women inherit through their father as well.

115 Slim Parker said that he had been taught there were two Banjimas, one in the Fortescue/Mulga Downs area, and the other being the Juna Downs mob, a lot of whom worked on Rocklea Station and Juna Downs Station. They were often called Bottom End Banjima (the Fortescue group) and Top End Banjima (the Juna Downs group).

116 Slim Parker said that the Juna Downs area was outside the area he claimed the right to "make decisions about" and that the other Banjima group could not make decisions about his Top End country.

117 He also considered the correct term for the Fortescue Banjima was “Marditja”, which is the river, the whole of the Fortescue floodplain. He considered the Parkers, Tuckers and Long families belonged to that group.

118 Slim Parker considered the proper name for the Juna Downs group was “Mardailguru”.

119 He said in law time the Bottom End Banjima paint Fortescue River designs on their backs and when conducting law in the Wardirba they often did so with the Gurama, Innawonga and Ngarla people, all associated with “Top End country”. He said there were ceremonial grounds and law camps along the Ashburton River, Turee Creek and Rocklea and Hamersley Stations. He said Juna Downs people conducted ceremonies and Wardirba mainly around those places.

120 When asked whether Top End law was identical to Fortescue Banjima law, Slim Parker said that in regards to the Walajingka law then, yes, and in regards to the Wardirba law then he would say, no, it is not the same, but similar. He said things sung within the Wardirba, for example, about the animals, the bush medicine and so forth in terms of where everything is, are for two different areas.

121 He also said that before, in the old times, people knew where people were living and they knew were their main camp was. They knew where the resources were. They knew what things they were dependent on. But if they needed assistance because of drought or other problems they could cross over. They also visited each other for ceremony. You could marry between groups and then a man had to bring his wife back to visit her people, so they would come together. He said there would also have been recognition and respect for the main owners of a place – their ngurra or country.

122 One of Mrs A Smith’s sons, Charles Smith, said that a person is Banjima through their biological connections, like their mother or father. The Banjima are different from other groups and have their own language, areas, law, dances, songs and dreamtime stories. He said that, in the Dreamtime, the Mangunjba or Dreamtime spirit travelled through Banjima country, leaving it for the Banjima people.

123 He accepted that there are internal differences between the Banjima. He said the Milyaranba or Top End Banjima and the Pantikurra Banjima or Bottom End or Fortescue Banjima had some differences.

124 Marnmu Smyth said that she was Banjima and that all groups got their own country given to them by Mangunjba (or god) and had their own yurlu, wangka (language) and law. She said that she had recorded an old man at the Wangka Maya Pilbara language centre dealing with the Banjima language for the Bottom End and the Top End. But they were "one tribe" and it was only the dialect that was different.

125 Marie-Anne Tucker said that she was Banjima and she only heard about Top End and Bottom End Banjima since the mining started. Nobody talked about Top or Bottom End Banjima in the early days. She said her yurlu was Mulga Downs and Wirilimura block. She also said that just because a person is born on Banjima country does not make them a Banjima person.

126 That last proposition was also agreed to by Mr D Black, who said that to be a Banjima a person must be born into it. They must get it through their "bloodline". You can be born anywhere but what is important is whether you follow your mum or your dad and where you get your country from. In his case, he did not follow his father, who is Gurama; he followed his Banjima mother.

127 Mr D Black stated that if someone claims to be Banjima they have to show you how they are Banjima. They have to tell you who their mother, father and grandparents are, that sort of thing. Mr D Black said that when he was growing up, he knew he was Banjima and who Banjima families were. He did not then hear about the Top or Bottom End Banjima. Banjima people he considered were all the same, although they have different dialects and speak a little differently.

128 He considered that native title had caused people to differentiate between the Top End and Bottom End groups and that before then it did not matter which part of Banjima country you came from. In the old times people used to help each other and there were no real differences between the Banjima. He said he used to go on heritage surveys with

Bottom End Banjima people and Top End Banjima people and there was never talk about different Banjima then.

129 Steven Smith similarly said that to be Banjima you have to be born Banjima and that nobody "votes you" to be Banjima. And you can follow either your mother or your father. He has chosen to follow his father, who had rights in Top End Banjima country.

130 Steven Smith said he preferred to call people in the Top End, Milyaranba, while people in the floodplain area, the Bottom End, he calls Muugurdu (meaning flood). He considered those names have been in the Banjima country for a long time.

131 He also considered in the old days Banjima people used to move around all over Banjima country, depending on where food and water was. He had been told this by an old uncle.

132 He said that at Banjima law and culture time he represents both Top End and Bottom End Banjima, although in native title he is just involved on the "IB" side. He says he has rights in the Bottom End from his mother and rights in the Top End from his father.

133 May Byrne said that all Banjima people are the same people with the same language, even if they pronounce words slightly differently. They share many of the same ancestors because it was common and important for them to marry people from "neighbouring groups". By neighbouring groups she meant the Pantikurra and Milyaranba groups who had been marrying each other so they can "keep it in the Banjima". She said this still happens.

134 Similar evidence about how one becomes a Banjima was given by Juliette Pearce-Tucker, Archie Tucker, Gladys Tucker, John Todd, Mervyn Smith and Dawn Hicks.

135 The preponderant evidence of all these witnesses was that Banjima people today see themselves as either Top End or Bottom End although some assert direct interests in both areas. Native title proceedings seem to have sharpened divisions. Mr D Black's testimony certainly suggests so, as does much of the evidence.

136 The evidence of those senior Banjima witnesses was, however, also consistent with a view that sub-groups have existed for a long time. Some witnesses though said that they had only heard the names of sub-groups recently. For example, Mervyn Smith said there was no Top or Bottom End. However, his brother Steven stated that the names of the sub-groups had been in the country a long time. The context for their statements is, I accept, that their father (Sid Smith, a descendant of apical ancestor Gawi) is identified in the evidence as Milyaranba and their mother Gladys Tucker is the daughter of Percy Tucker (deceased) (a descendant of apical ancestor, Wirilimura) who was identified as Bottom End. As a result, these current group members can be seen to hold rights in both areas, to all of Banjima country, through their father and that old ancestor, and through their mother and that old ancestor. Groupings are less important or obvious to them. Another example of this phenomenon is the evidence of Dawn Hicks whose paternal grandmother was Whitehead and whose maternal grandfather was Cookie, who was said to be Top End Banjima. Thus, as she said, "My yurlu is Banjima, right through, top and bottom end".

137 The evidence also discloses that there are those families who strongly claim their connection to Bob Tucker Wirilimura and those families who claim through other ancestors. There seems little doubt that Wirilimura was born on Juna Downs Station and that his son, Jacob, at one point moved to Mulga Downs Station, as he also did. He was recognised throughout as a most senior Banjima Law man with traditional rights in all Banjima country.

138 The evidence of these witnesses and other claimants provides strong support for the view that there is but a single Banjima society, as much as there may today be groupings within that society as to who the recognised people are to speak for and thereby, as Slim Parker put it, "to make decisions about" the use of Top End country, on the one hand, and Bottom End country, on the other. There is a question whether, having regard to the evidence of the claimants, the currently discernible groupings into Top End Banjima and Bottom End Banjima are historical, in the sense that they reflect traditional groupings.

139 There is much in this evidence which suggests that, for traditional spiritual, geographical or topographical reasons, there were always people who were primarily connected with the Top End Milyaranba area and others who were always associated with the Pantikurra or floodplain area, although the groupings may not have been inflexible and

people may well have utilised all available resources wherever they were to be found on Banjima land, especially in hard times, and that they met for ceremonies. The evidence of Mrs A Smith certainly implies that Banjima people were associated with and had responsibility for particular places or areas, while at the same time joining up for ceremonies at holiday times. Steven Smith's evidence suggests that Banjima people used the land, in an economic sense, expansively and were not limited in so doing to particular tracts of land. Slim Parker's evidence also emphasises a traditional right of Banjima to speak for particular areas of country, in the sense of having a pre-eminent right to make decisions about its use, when required, but that people also moved about the country, especially when times were tough.

140 In this context, it is appropriate to consider the opinions of the anthropologists, Dr Palmer and Mr Robinson on the issue of groupings. In their joint report and in the evidence they gave during the concurrent evidence session at trial, Dr Palmer and Mr Robinson agreed with the proposition that: at the time of sovereignty, there was a "single Banjima society" and today there continues to be a "single Banjima society", although there was a question in relation to what *territory* the single Banjima society related.

141 In their joint report, they also addressed the proposition that: those who identify as Banjima are comprised of sub-groups, these sub-groups being a feature of pre-sovereignty Banjima society. By way of outcome, they agreed as follows:

> We agree on the presence of sub-groups today, but not on whether they were likely to have been a feature of local organisation pre-sovereignty. Our reason for disagreement in the latter case develops from our differing interpretations of the earlier ethnography.

142 Mr Robinson considered (Mr Robinson's first report at [376]) that the early anthropological literature did not contain any support for the existence of sub-groups of the type reported for other societies, although linguistic research contains support for possible dialect differences within the Banjima. He considered the idea of Banjima sub-groups emerged in the more recent literature, especially in heritage survey reports and in the Karijini National Park draft management plans.

143 Mr Robinson was of the view that it was difficult to reach a firm conclusion on this issue on the literature alone, because it is slight in volume and lacks the kind of depth

associated with research into the societies discussed by him. He stated, however, that if there had been sub-groups that simply were not reported on by the earlier researchers, it might be expected that they would now emerge with some clarity in the contemporary views of the claimants and that there would be agreement within the group about their character and longevity. From the evidence he had seen, there were uncertainties and differing views within the Banjima themselves about sub-groups, whether they existed in the past and, if they existed now, who their members were and what set them apart from each other.

144 Mr Robinson's discussion on this issue in his first report appeared within Ch 6 dealing with the topic, "One or Two Societies". While the expression "societies" was used, Mr Robinson noted (at [344]) that he had been specifically asked about the "community, group (or groups) or individuals" who held rights and interests at sovereignty and whether they were held as members of a society or as sub-groups of a society. He also noted that he had been asked whether, if there is evidence for the existence of two sub-groups, they comprise a "society" in the Yorta Yorta sense – this being a reference to the High Court of Australia decision in *Yorta Yorta v Victoria* [2002] HCA 58; (2002) 214 CLR 422 (***Yorta Yorta HC***).

145 Mr Robinson accepted that there are frequent references to sub-groups in the literature on Australian Aboriginal societies. He set out much of the published literature to this end from southern, northern and central Australia. He noted that regional groupings of descent groups had also been noted. In particular, he referred to the position in the Kimberley region of Western Australia. In relation to the central Pilbara, Mr Robinson noted that the Gurama people, neighbours of the Banjima, are said to be made up of three sub-groups who, as he understood it, had each pursued independent native title claims. However, he could not reach any firm conclusion based on existing literature as to whether or not at sovereignty there were sub-groups within a broader Banjima society.

146 Mr Robinson noted, however, the range of labels used in more contemporary times to identify the two sub-groups mentioned in the evidence today: the northern group or "Fortescue Banjima" or "Bottom End" Banjima, as well as some of the other names by which they sometimes are referred to or refer to themselves; and the southern group or "Top End" Banjima or "Milyaranba" Banjima, and some other names by which they are also referred to or refer to themselves.

147 As an aside, Mr Robinson noted that the English glosses "Top" and "Bottom" and "Fortescue Banjima" are not topographically accurate and said he agreed with Dr Palmer's observation that country claimed by the "Bottom End" Banjima includes both lowlands and highlands and is not apt if it is meant to reflect physical elevations. "Fortescue" Banjima was also a misnomer in his view in terms of the country being claimed in the MIB claim, as it extends from parts of the Hamersley plateau to the Fortescue Valley and beyond to parts of the Chichester Ranges.

148 Mr Robinson had regard to the claim that two dialects were spoken in the claim area at sovereignty, each associated with a particular area. However, he could not find any evidence in the literature and agreed that there was nothing to support the assertion that the "Bottom End" Banjima constitute a "language group".

149 Mr Robinson also considered the question of social organisation, laws and customs and local organisation in order to ascertain whether, for example, cultural and marriage practices suggested the existence of two separate groups. Additionally, he considered the topic of "religion" in relation to the Wardirba mytho-ritual sequence to determine whether from that data one might infer two separate groups.

150 Mr Robinson concluded (Mr Robinson's first report at [410]-[412]) to the following effect:

- A review of the literature shows it is not unusual for there to be sub-groups in Aboriginal societies and that these are often collections of contiguous descent groups who may speak separate dialects, but where they do exist they do not necessarily claim ownership of land in their own right.
- He has not detected differences in social organisation or local organisation that point to the existence of two sub-groups and all Banjima people seem to follow the same kinship and section system, as well as laws relating to the ownership and use of land. If there are differences in ritual relating to the Wardirba, and claimants appear to hold the view that there are, then he believes they are likely to exist within the same mytho-ritual structure, that is, sub-groups do not possess entirely different religious traditions but practise aspects of the same religious tradition in different ways.

- He was not convinced on the basis of the materials he has reviewed that there were or are any sub-groups of the Banjima that comprise separate societies in an anthropological sense.

151 In his first report, Dr Palmer dealt with the question of "society" in Ch 4, headed "Banjima Society and the Landowning Group". Dr Palmer noted (at [175]) that, in anthropology, the terms "society" and "community" were often used generally to mean a set of people rather loosely identified or recruited by reference to common criteria. He noted that the word "society" is often used without the user feeling the need to define it (see footnote 29 at p 49) but also that the term "community" has been used more often in discussions about Aboriginal local organisation in a specialist sense, although it has not been generally accepted in the literature. Accordingly, Dr Palmer said (at [175]) he uses the terms "society" or "community" to refer to those who, together, recognise the mutual observance of laws and customs and show adherence to a common normative system. Thus, members of a society should be shown to have some internal correlation of laws and customs such that its members can be understood, in the common sense of the word, to be members of a single "society". He noted, by reference to the Shorter Oxford English Dictionary, that the ordinary meaning of society is "a body of people forming a community or living under the same government".

152 Having regard to the anthropological discussions undertaken by Mr Robinson in his first report and his supplementary report and also the evidence given by him in the concurrent evidence session, and his reference to the anthropological meaning of "society", I do not understand Mr Robinson to be offering an anthropological meaning for the word "society" which is materially different from that proffered by Dr Palmer for the terms "society" and "community".

153 Like Mr Robinson, in his discussion of the different groups recognised for the purposes of society or community in the anthropological literature Dr Palmer was at pains to debunk the use of particular expressions as synonyms for "society" or "community". The first term that Dr Palmer dealt with in this regard (at [177] and following of his first report) was, "tribe". As observed above, the production of a "tribal map" occurs in the literature at various points, including in the work of Tindale. Davidson produced a "tribal map" as well in 1938, although Palmer said that Davidson described the largest political unit in Aboriginal

local organisation as the "horde". Dr Palmer accepted that the word "tribe" was useful, provided that it was understood that it represented a group whose members recognised similarities of dialect and culture as well as geographical contiguity. He noted, however, by reference to Davidson, that these social, linguistic and cultural groups had "no semblance of centralised political authority nor any sense of political confederation".

154 Dr Palmer thus expressed the view, consistent with Davidson's analysis, that names which have often been associated with tribal nomenclature in Aboriginal Australia furnish a means of identity by reference to such things as the common language (or languages) of its members and the contiguity of the territory of its members. He said that where language association (whether currently spoken or not) is a significant determinant of identity, the term "language group" provides a more accurate description of such a group than the term "tribe". Thus, he uses the expression "language group" in much of his report (as indeed does Mr Robinson, as I would apprehend it, for similar reasons).

155 Dr Palmer went on to point out that Davidson's use of the term "horde" was later replaced by the phrase "local descent group", perhaps coined by Berndt in 1959, as the "landowning group". More recently, the "landowning group", Dr Palmer said, has been called the "country group", and referred to Dr Ian Keen in 2004 and Dr Peter Sutton in 2003 for use of this expression, in recognition of the fact that the group was not invariably recruited by reference to descent and filiation.

156 Dr Palmer also stated that anthropologists had differentiated "hordes" from the "landowning group", a distinction that earlier writers, such as Radcliffe-Brown, did not make. Dr Palmer said the language group is not a landowning group, but typically was made up of component country groups whose members had rights to one or more areas of country or "estates". I should interpolate here to say that I understand Dr Palmer was here reporting on how anthropologists, over time, have come to understand the complexities of Aboriginal connections to land in classical or first contact terms.

157 Following Dr Keen and Dr Sutton, Dr Palmer favoured the use of the phrase "country group" (rather than "estate group") for the "landowning group", and the phrase "residence group" (not "horde") for the "land using group". He said that a country group is to be understood as the set of people who together exercised rights in an area of country. They

may have been recruited to membership of the group by means of a number of different pathways, including but not limited to descent. As a country group is not a descent group, it may, however, include members of a descent group.

158 Dr Palmer also noted that since multilingualism and language group exogamy (that is to say, marrying out of the group) were commonplace in Aboriginal Australia, a person might claim an identity by reference to more than one language, as Dr Keen in 2004 demonstrated. Members of one language group would then share laws, customs, practices and beliefs with others who primarily identified by reference to another language. Thus a "language group", Dr Palmer said, does not necessarily correspond to a "society" in the sense that he would define that expression. Those who share laws and customs may do so with members of other language groups, as well as their own. This does not limit their ability to differentiate themselves, however, by reference to their land and language. The recognition of commonalities by reference to shared laws and customs, Dr Palmer said, may have engendered commensality and facilitated interactions in ritual activity, where common beliefs and practices were shared. It may also have promoted the exchange of goods and wives.

159 It should be said, in relation to this analysis provided by Dr Palmer, that, while I generally accept the analysis offered, caution should be exercised in relation to the adoption of such anthropological expressions as the "landowning group" and the "residence group" when determining claims under the NTA, because of the possible inference that only the members of a "landowning group" have rights or interest in relation to land or waters under traditional laws and customs and that other persons or members of other groupings within the same language group have none.

160 Indeed, Dr Palmer went on to suggest that typically the "country group" may be shown to have the "fundamental" or primary right to "speak for" areas of country and to protect particular sites within it, whereas the "residence group" may have "economic rights" over one or more country areas. By his evidence in this regard, I understood Dr Palmer to be suggesting that the "fundamental" right to "speak for" country and protect sites tends to reflect a higher order, religious or sacred imperative, whereas the right to use land economically tends to reflect a more mundane or secular imperative. It might be observed, nonetheless, that both sets of rights, recognised traditionally, are no less rights relating to lands and waters for the purposes of the NTA.

161 Dr Palmer, accepting (as Mr Robinson had) that there plainly was at all material times a single Banjima community or society, then considered the ethnographic data for evidence of sub-groups within the broader group. He noted that Clement, writing early on about the western Pilbara, observed the importance of dalu (or increase sites) in the region, and how each dalu was owned by a senior man, and would pass to his son on his death.

162 Dr Palmer also noted that Radcliffe-Brown, writing principally of the Kariera in the early twentieth century, made reference to each "tribe" being divided into "hordes" each with its "own defined territory". Dr Palmer says (Dr Palmer's first report at [199]) that "on the reasonable assumption" that Radcliffe-Brown's account of local organisation would also have been applicable to the Banjima, it is possible to draw a picture of how Radcliffe-Brown would have understood Banjima local organisation; that is, as local groups composed of members who traced descent from common ancestry in the male line which exercised rights over defined territory and exercised rights to totemic sites of spiritual significance in their country and together by a shared language made up the "tribe". Dr Palmer says it was this arrangement that Davidson essentially recognised in 1938 as being generally applicable across Australia.

163 Dr Palmer thus concluded (first report at [220]-[223]), in relation to the likely nature of Banjima society at or about the time of sovereignty, to the following effect:

- First, there was evidently a language group of people who shared a common identity called Banjima.
- Second, the data indicate that there were both regional and dialect differences within the Banjima society. Thus, there appears to have been at least two sub-groups marked by differences of dialect, one called Pantikura or, perhaps, Dukur, the other, Mijaranypa or Milyaranba. Brandenstein recognised a regional name "Marduiidja" for those occupying the riverine areas.
- Third, the groups who identified as Banjima also identified by reference to an area of country which included parts of the Hamersley scarp and plateau and adjacent Fortescue River valley environments. The exact geographic extent of those who so identify depended upon the composition of the country groups and the "estates" in which they claimed rights.

164 Dr Palmer, however, accepted that what he outlines is something of a reconstruction of Banjima local organisation as it may have been at the time of sovereignty and in doing so he has had to rely on general anthropological literature (Dr Palmer's first report at [224]).

165 Dr Palmer, in his first supplementary report, stated he is less certain than Mr Robinson as to the non-existence of constituent groups of Banjima in pre-sovereignty times. In his view, the evidence of the claimants, the later literature and the common occurrence of such groups elsewhere, as Mr Robinson himself illustrated in his first report, supports the conclusion that there may have been constituent groups of the Banjima. Like Mr Robinson, he agreed that the constituent groups currently comprise a single society for the purpose of the native title application.

166 In his supplementary report, Mr Robinson agreed there is support in the evidence for the existence of sub-groups and says it is possible that differences have arisen from pre-sovereignty cultural differences, but it is also likely that any pre-existing differences have been heightened by post-sovereignty changes. He noted there is not unanimity amongst the witnesses about the integrity of the sub-groups with some stating that they are only a recent occurrence. He considered, however, there is broad agreement about the people who now constitute the sub-groups and the areas over which they have rights

167 Thus, the anthropologists, in their joint report, came to agree the outcome that sub-groups are present today, but not on whether they were likely to have been a feature of local organisation pre-sovereignty. The reason for their disagreement develops from their differing interpretations of the earlier ethnography.

168 In the concurrent evidence session at trial, Mr Robinson confirmed that his view was formed on the basis that there is not any "strong evidence" for the existence of sub-groups in the literature. He acknowledged that anthropologically there are many examples of sub-groups in traditional Aboriginal societies, but in this case, apart from a reference by the linguist Dr Geoffrey O'Grady and some analysis by Dr Alan Dench, there is nothing in the literature itself that leads him to conclude that there were likely to have been sub-groups at sovereignty. Mr Robinson concluded by saying:

> … and I'd put it no higher than that.

169 Dr Palmer in the concurrent evidence session maintained his disagreement with Mr Robinson on this point. He considered the evidence in the literature, although "spotty", was present. He referred to the different names for Bottom End and Top End Banjima identity he had set out in Table 6.1 and 6.2 of his first report, including Fortescue Banjima and Milyaranba Banjima. He emphasised that Dr O'Grady, Brandenstein and Dr Dench had noted different groups. And he had also noted different groups when he was working with the Banjima in the 1970s.

170 Dr Palmer said that, although there was some confusion with the names, coupled with the idea that the presence of sub-groups is very common in larger language groups of people across Aboriginal Australia, why would there not have been similar sub-groups amongst the Banjima? This was particularly so, given the fact that, on his understanding of the different topography, "the relational form of the two groups is very clear".

171 Dr Palmer emphasised that the topography, the geography and the physical geography had not changed since sovereignty. That remained the same. He considered, that given the imperfect nature of the materials, one could not be certain about these matters. However, it seemed to him that there was a reasonable case to be made out for there having been, at sovereignty and prior to sovereignty, people who spoke a similar language, Banjima, but recognised themselves as being a little bit different to another group of Banjima. Thus, his view was that there were probably two sub-groups of Banjima then, and that is the current position.

172 In the result, I am persuaded by all the evidence that, at sovereignty, on the balance of probabilities, there were sub-groups of Banjima that reflected the country group/residence group organisation outlined by Dr Palmer and discussed above. I take Mr Robinson's points that there is no "strong evidence" in the ethnographic literature to suggest the existence of sub-groups of Banjima at sovereignty. I would perhaps prefer to use the expression, "no clear evidence" in this regard. But then, as is noted in the discussion above concerning the existence of the Banjima as a single society, nor is there "strong" or "clear" evidence about the existence of the Banjima as a separate, identifiable language or "tribal" group in much of that same early literature.

173 This is not a case where in earlier times any trained anthropologist, such as a Radcliffe-Brown, ventured into the central Pilbara, or the Hamersley Range, to conduct field work. Nonetheless, Radcliffe-Brown was in the general region in that he conducted fieldwork, principally in relation to the Kariera, north of Roebourne. When one also takes into account the pioneering work of Radcliffe-Brown and Davidson's work in the 1930s culminating in his publications in 1938, as well as the other anthropological research adverted to by both Mr Robinson and Dr Palmer in their reports, the organisation of Aboriginal societies in local groupings (however they might be classified by anthropologists today) suggests, on the balance of probabilities, there was some form of local grouping among the Banjima that reflected the country group/residence group organisation suggested by Dr Palmer. Clement's mention of dalu sites and how they were passed from father to son points in this direction. The work of the linguist, Dr O'Grady, the observations of Brandenstein and also those of Dr Dench referred to by Dr Palmer, suggesting dialects among the Banjima, add weight to the conclusion I draw, on the balance of probabilities, that Dr Palmer's expression of opinion on this issue should be preferred to that of Mr Robinson. I also note, as I did above, that in the course of the concurrent evidence session when this topic was discussed, Mr Robinson said of the basis of his opinion:

> … and I'd put it no higher than that.

174 When one goes to the ethnographic and anthropological evidence, the fact also is that since the 1970s, at least, anthropologists and other ethnographers working with the Banjima have been very alert to their local groupings – the Top End Banjima and the Bottom End Banjima. I do not consider, based on all the evidence, that the groupings are simply to be explained by post-sovereignty activities – as Mr Robinson suggests might be an answer to the conundrum. The strength of the evidence of members of the claim group as to the fact that they constitute separate groups within the claim area, combined with the general understanding as to how local groupings within Aboriginal groups in the general Pilbara region seem to have operated at around and before the time of sovereignty, all lead me to conclude, on the balance of probabilities, that there were local groupings at the time of contact of Banjima people with British settlers and so at the time of sovereignty.

175 As both anthropologists agree, plainly they exist today by reference to the anglicised expressions "Top End Banjima" and "Bottom End Banjima", or Milyaranba Banjima and Fortescue Pantikurra Banjima.

Traditional Banjima Boundaries

176 ***Introduction***: The parties and the anthropologists, Dr Palmer and Mr Robinson, treat the claim area as having southern, western, northern and eastern boundaries.

177 The southern boundary with the Innawonga/Ngarla is not in contention between the parties. (The "Ngarla" I should note is a shorthand reference to the nearby group whose full name is Ngarlawangga.) Similarly, the western boundary with the Gurama (which I understand is a reference to the group known as the "Eastern Guruma") is not in contention. It is the northern boundary (Fortescue Valley) and the eastern boundary (Weeli Wolli and Yandicoogina) that are put in contention, particularly by the State.

178 The Banjima witnesses gave clear evidence about their boundaries as claimed. I will return to it after first considering what the historical and ethnographic data appears to reveal in each case.

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

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

from those descendants and no anthropological field inquiries have been carried out on the topic for the Banjima claim.

180 It will be appreciated that if these points of agreement are accepted by the Court then Banjima people may historically be said to have held native title rights and interests in the Fortescue River Valley in the vicinity of Mulga Downs, although some of that country may have been "shared" with members of different language groups (or other "tribes" to use that loose expression). In this regard, as explained by the anthropologists, sharing of country is not uncommon in border or transition areas.

181 As to the third point of agreement between the anthropologists, that there is ground for concluding that Toby Dingoman (deceased) may have had traditional rights over some parts of Mulga Downs associated with the area known as Nyiya, the point ultimately made is that, whatever the evidence is to support that view, no evidence has been presented in this proceeding to suggest that there are any persons who now claim native title rights or interests in that area through Toby Dingoman. The point is related to the "shared" country point of agreement. Toby Dingoman, who on the evidence is not identified as a Banjima man but would appear to have links to the Yindjibarndi, may have had interests that co-existed with those held and enjoyed by persons who were or are identified as Banjima people.

182 In approaching the question of boundaries the anthropologists agree that distinct boundary lines do not always present themselves in any discussion between different Aboriginal groups over who holds rights and interests in relation to apparently adjoining or proximate areas of country. In some circumstances, particularly where the country of one group begins to run out and the country of another starts, there may well be a basis for concluding that both groups have rights and interests and, in that sense, "share" the area of country. In this regard, it is trite to observe that prior to contact with the British settlers, Aboriginal groups did not use maps to demark the extent of their country and the commencement of the country of another group.

183 Dr Palmer has expressed the view that boundary lines on a map are, however, a familiar concept at least to those with whom he has worked from and including the 1970s. He thinks it likely the existence of maps may have influenced the way in which claimants understand the extent of their country today. Dr Palmer indicated, however, that he did not

use any such maps in the course of his fieldwork, preferring instead to allow claimants to discuss their country based on their own understanding of the "language identity of particular areas". He found that the idea of a distinct boundary line, as might be drawn on a map, did not always accord with claimant's views as to how country could be identified by reference to a "language group" association.

184 Dr Palmer (Dr Palmer's first report at [360]) stated that claimants commonly cited mountain ranges as references that marked the transition from one language group identity to another. Similarly, he said, the intermediate area of the Fortescue Marsh was cited as an eastern "boundary" for Mungardu Banjima country. He observed that mountain ranges and marshes probably provided little economic opportunity for hunters and gatherers and, based on this assumption, he thought it reasonable to conclude that such relatively large areas were unlikely to be in "economic" contention. In those circumstances, dominant topographic features covering relatively large areas of country, he considered, can best be understood as "transitional zones" where specific proprietorship was not required to be defined since it was subject to limited use. Dr Palmer considered this intrinsically indeterminate nature of the boundary was supported by comments made by some of those with whom he worked.

185 Before the Banjima claims were combined, Dr Palmer accompanied members of the MIB claim group on several field visits. The data collected assisted him in forming views but did not represent to him a lineal account of a "boundary". Dr Palmer described the data collected in respect of the north-west of the claim area, where he commenced at Hamersley Gorge. He showed the approximate extent of the country that he called the "Fortescue River Banjima" country (see figure 7.1, p 110, first report).

186 He ascertained from his informants that from Yirdimanara (site 80) there were a series of pools in the upper reaches of the West Yule River in the northern Chichester Range and that from Yirdimanara to those pools it was Banjima country all the way to White Springs. He was told that it is then Yindjibarndi to the north-west "on top". One informant, Johnny Parker (deceased), told him that the Yindjibarndi were at Hooley Creek. He was told the tableland and hill country they had crossed from Mulga Downs Station was all Banjima country. Another informant, Brian Tucker, drew a map to show the northern boundary of Banjima country.

187 From the data he acquired, Dr Palmer said it would appear that the MIB claimants held the view that their northern boundary follows the northern slopes of the Chichester Range before turning south on the Chichester Range, south-east of Hooley Station, to run across to Hamersley Gorge.

188 Dr Palmer stated that, consistent with accounts provided by Milyaranba Banjima informants, the Mungardu or Fortescue River Banjima (the MIB group) cited older members of their family or group as the sources of their information on the extent of Banjima country. For example, Slim Parker told him that knowledge had been "handed down from the forefathers" a process he was continuing by teaching young people today. Eric Carey told him that he gained his information about the northern extent of Banjima country from the late Wobby Parker. Eric Carey told Dr Palmer that it was "the old people who put these boundaries", although they were made a long time ago in the Dreaming.

189 Similarly Dr Palmer said Maitland Parker told him that he had been told about Barthangarana (site 19) by Horace Parker (deceased). Other senior claimants told Dr Palmer, he said, that they were taught about their country by the "old people" and they mentioned Herbert, Ginger and Wobby Parker, and Pat and Henry Long, all now long deceased. Brian Tucker similarly told him he was taught these things about the country by the "old people".

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

191 It is useful to take a moment to consider what the Wardirba is. Dr Palmer (Dr Palmer's first report at [386]) stated there are different Wardirba. Each is understood to embody a signature reflective of both language and a country. The songs encapsulate both the spirituality of the countryside and may be related to specific places. The spiritual

ordination of the place is then commemorated through the performance of the song. By dint of this association, he said, a place that may be identified in the Mungardu Banjima Wardirba is considered to lie within Mungardu Banjima country. Command of the songs in ritual practice is also a signal to others of the singer's rights within that country, particularly in relation to the spiritual management of that country.

192 Dr Palmer (at [387]) stated that the identification of places as being within Mungardu Banjima country is sometimes legitimated by reference to spiritual ordination. In his view, according to this belief, the songs of the Wardirba provide the dogma that furnish incontrovertible justification for the attribution of a language-group identity to a place. However, Dr Palmer made the point that not all places he has discussed are identified with Wardirba songs, but those that are substantially bolster accounts of the extent of Banjima country. This is because, in his view, spiritual associations are believed to transcend the mundane, having their origins in realms and times beyond the mortal and the temporal.

193 He also stated (at [388]) that the Milyaranba Banjima also acknowledge their own type of Wardirba. His information in this regard as to the relationship between boundaries, place and this mytho-ritual cycle is more limited since the older Milyaranba claimants are all female and would not be privy to the knowledge held by the men. However, Dr Palmer said he did gain some limited information from Steven Smith that would lead him to conclude that there is understood to be a relationship between Milyaranba and the Wardirba and country which is utilised by this group when relating places to their language group identity.

194 In his assessment, Dr Palmer considered that the accounts of the extent of Mungardu Banjima country were both "comprehensive and consistent". He noted that there appeared to be some variations in view as to the northern extent of Banjima country, particularly in the vicinity of White Springs Station. However, on balance he was of the view that the northern slopes of the Chichester Range would appear to be accepted by members of the group as a boundary. He considered the boundary, as in the case of the boundary identified with the Fortescue River Marsh, confirmed the importance of seeing boundaries as transitional zones rather than hard lines on a map.

195 Mr Robinson (Mr Robinson's first report at [139]), in suggesting a far more contracted northern boundary for the Banjima, significantly relied upon the data apparently

provided by one Peter Maiebong (a Banjima man) to Tindale in the 1950s, who is recorded as saying of Banjima territory:

> The gorge leading to Hamersley Station from the lower end of Coolawanyah divides the Pandjima from the Kurama, their western neighbours. The northern boundary is the top edge of the northern scarp face of the Hamersley Range; they did not go down into the gorges except near their sources except when they were driven by shortage of water in droughts. There were refuge pools on the south branch of the Fortescue River, at Dale Gorge and at 'Mandjina' (or Mungina Creek of maps). To the north east their boundary extended along the Hamersley scarp to the range across the Fortescue River (South Branch) from the 'Kardaidari' (Goodiadarrie of maps) Hills. Mandjina (Munjina of maps) Pool was a Pandjima water. They went east to the headwaters of Jandikudji'na (Yandicoogina of maps) Creek, their neighbours were the Bailgu. On the south they visited Juno (Juna) Downs Station, Perry's Camp. Their S.W. boundary fell just E. of Mt Samson. 'Mili' mili (Milli Milli Spring) was a Pandjima water 'very permanent'.
>
> At Juno Downs and along the Turee Creek, their southern boundary, they met the 'Inawangga', also said as 'Inawongga'. East of them he knew of the 'Ngarla' or 'Ngarlawonngga' (Ngarlawangga); he only knew of them as names since most of his life he had spent on the Indjibarndi site, having worked in Indjibarndi country since he was a young fellow. The Kurama people were on the northern of Turee Creek, west of Juno Downs and the Inawongga ran west to meet with the Tjururo on Ashburton Downs

This quotation is slightly altered from the original in that the symbol used in the original in the name of the Innawonga and the Ngarla and related expressions has been reproduced here as "ng".

196 Mr Robinson considered this to be a significant statement about the location of the Banjima, coming from a Banjima man and collected near Banjima country. He considered it tells us that the northern Banjima boundary was the edge of the Hamersley Range and that, in one of the passages to which Dr Palmer in his first report did not refer, Banjima people did not go down the gorges except in drought. If accurate, Mr Robinson reasons, this would suggest that traditional Banjima territory did not extend into the Fortescue Valley beyond the Hamersley escarpment.

197 Also of significance for Mr Robinson was Peter Maiebong's further statement, which he said also was not referred to in Dr Palmer's first report, that the neighbours of the Banjima at Yandicoogina were the Palyku (that is, not the Nyiyabarli).

198 Mr Robinson explained that the remainder of the description by Tindale relates to Banjima land in the southern part of the claim area.

199 Mr Robinson observed (at [143]) that immediately after obtaining this information from Peter Maiebong, Tindale records Peter Maiebong's description of Yindjibarndi country, which, as far as the eastern portion has relevance to this proceeding is concerned, was as follows:

> The eastern boundary Injibandi lies between the Wangkalka and Marana Pools on the Fortescue River, about 10 miles west of 'Kudaidari (Goodaidarrie Hills). Marana is just west of the position of Mundanulladje Pool (of maps) and 'Wangkalka is the Waldthboothamunna Pool of maps. A younger man said that he thought [Waliwarani] Pool was the boundary of the old Kawa:ra Station. I could not find these places on my map and the more detailed search with Old Peter yielded the here accepted version. My informant's comment was that the map names were ones given by Bailgu people. The real name of Mundanulladje is 'Malandji:na. Idimanara (Eera Baranna of maps) Pool on Hooley Station is in Injibarndi country; north east of here is a rough range and nobody goes there; beyond is Njamal tribe territory with which they here have a limited common boundary. White Springs H.S. is Njamal territory…

200 Mr Robinson considered that Tindale's "Marana Pool" is the same place as Maddina Pool (the "r" and the "dd" producing similar sounds), approximately 20 km north-north-west of the current Auski roadhouse. "Waldthanboothamunna" is located on the Fortescue River approximately 20 km north-east of Auski roadhouse. Considering both descriptions together, Mr Robinson reasoned that the Fortescue Valley, including Mulga Downs up to a point north of the present Auski roadhouse, was traditional Yindjibarndi country. He considered, therefore, traditional Banjima country was on the Hamersley Plateau although some movement down into the Fortescue Valley might have occurred in search of resources, particularly for water.

201 Mr Robinson considered that Tindale accepted Peter Maiebong's information as reliable as it matches the placement of the Yindjibarndi and the Banjima on his 1974 map; whereas if he also had accepted information provided to him by an unidentified "younger man", the eastern boundary of the Yindjibarndi would have been 20 or 30 km further east near Cowra. At the time Tindale spoke to Peter Maiebong, Robinson estimates Maiebong would have been about 55-60 years of age and, according to his genealogy taken by Tindale, would have been a descendant of an unnamed Banjima couple (who, on further analysis of Dr Palmer's genealogies filed in the Court, would appear to be Nyathaba and Gudara, both of "Hamersley Range"). Peter Maiebong would also have been the grandson of the estimable Bob Tucker Wirilimura. All in all, Mr Robinson considered Peter Maiebong may be considered a knowledgeable informant to whose account weight should be attached.

202 Mr Robinson also had regard to information provided by a Gurama man, Tumbler, who was living on the Roebourne reserve in 1953 and told Tindale that Yindjibarndi lands include "Mulga Downs to E of Wittenoom", and that the Palyku did not come very far west of the salt bush plains, which Mr Robinson considers matches what Peter Maiebong had told Tindale. Rather, Tumbler indicated that the Banjima had a boundary along the range through Coolawanyah, Mt Florance, Wittenoom to Mulga Downs

203 Mr Robinson noted, however, that Brandenstein, working in the mid-60s in the linguistic field, produced a map of the language situation in the Pilbara which was noticeably different from Tindale's 1970 format. He locates the Banjima over a considerably larger area than Tindale and provides a location extending north of the Hamersley Range. Mr Robinson noted that Brandenstein positions the Yindjibarndi north of the Banjima while the Palyku are displaced as neighbours and placed east of Roy Hill. The Nyiyabarli are placed by Brandenstein on the upper reaches of the Fortescue as eastern neighbours of the Banjima.

204 Mr Robinson stated that Brandenstein does not reveal how he arrived at this language distribution. However, he suggested that Brandenstein's text suggests a degree of "territorial dynamism". Mr Robinson referred to Brandenstein's note that a considerable number of Palyku were "enticed away from their home grounds around Nullagine to replenish the dwindling coastal tribes" as labour in the pearling industry. He also commented generally on movement away from homelands to towns and other centres.

205 Mr Robinson also noted what he considers to be an "intriguing entry" in Brandenstein's paper of the word "Marduiidja", which Brandenstein says is a place name referring to "the lowlands of the upper Fortescue River". Mr Robinson noted that the word is nearly identical to the title of the MIB claim, except that the MIB appear to be using it to describe a group, while Brandenstein says it is a name for a place or locale. Brandenstein, he says, positions Marduiidja upriver from claimed Banjima land and north-east of Mt Newman. In a footnote, he says, Brandenstein explains that the term is a "non-tribal designation of the Upper Fortescue flats between Roy Hill and Jigalong", often used with reference to the origin of rites and songs – a "ritual and landscape term".

206 Mr Robinson also said Brandenstein identified two dialects of Banjima, although he does not refer to either of them by the name Marduiidja. Mr Robinson said that

Brandenstein's location of groups seems to have been influenced by Tindale's earlier (1940) map, to which it bears some similarity, and opined that it may be that Tindale's original positioning of the Banjima overlying the Fortescue River influenced Brandenstein to position them there as well. Brandenstein, he said, does not say how he arrived at this location. Mr Robinson noted that Brandenstein's paper was written a few years before Tindale's book was published and, by that time, Tindale had come to a quite different view about where the Banjima were situated.

207 Mr Robinson also referred to the work of the linguist, Dr Dench, who in a map in his thesis places the Banjima on the Hamersley plateau, and situates them south of the Fortescue River extending to the Hamersley escarpment, but not beyond to the Fortescue Valley. He shows the Nyiyabarli as their eastern neighbours, the Palyku as their north-eastern neighbours and the Yindjibarndi as their north-western neighbours

208 Mr Robinson noted that, in an earlier paper, prior to his thesis, Dr Dench reported that the traditional lands of the Banjima lay "in the tablelands of the Hamersley Range and includes the gorges along the Hamersley scarp".

209 Mr Robinson also noted heritage surveys conducted since the 1970s in relation to large-scale mining developments, in particular, in relation to Aboriginal heritage, including under the *Aboriginal Heritage Act 1972* (WA), as well as surveys conducted since the passage of the NTA. He noted that Dr Palmer had been responsible for a number of these surveys.

210 Dr Palmer dealt with the Tindale data both from 1953 and 1974 in his first report as well as in his first supplementary report. In his first supplementary report Dr Palmer reproduced Tindale's map of Banjima country collected from Paddy Jones in May 1953 and from Sambo Jawambang in 1953, as well as another map collected from Roy Mackay in May 1953. Dr Palmer doubts the suggestion made by Mr Robinson in his first report that the "Paddy Jones" map was drawn by Paddy, with Tindale adding the names of places and features, on the basis that there is no basis to so conclude. Dr Palmer notes the map shows the northern boundary of the "Pandjima Tribe" lay well to the north of the Fortescue River upon which both Coolawanyah and Mulga Downs Stations are located. Millstream, Mt Florance, Hooley, Yandeyarra, Abydos and Woodstock Stations are all shown to the

immediate north of the boundary. Dr Palmer said this raises the question of how Tindale was able to record in his 1974 work that the boundary followed the northern scarp of the Hamersley Range. That finding was clearly at odds with the field data he collected from Paddy Jones.

211 Dr Palmer suggested that one possible explanation, which could be developed from the map, is that Tindale originally had the Hamersley Range to the north of Coolawanyah and Mulga Downs. This has been crossed out by repeated hash strokes on the map. Perhaps, and Dr Palmer accepted this is speculation, Tindale read the map in his notes and recorded the boundary incorrectly when preparing his publication, later to realise his mistake and correct the map but not the text of his 1974 publication.

212 As to the "Sambo Jawambang" map, Dr Palmer noted that Tindale shows Yindjibarndi country to include the Fortescue River valley through Coolawanyah to just north of Wittenoom and the Hamersley Range, south of which he marks "Pandjima Tribe". In Dr Palmer's view the map appears to have as its focus country well to the north of the claim area and shows only an approximation to geographic accuracies. Thus, Yandeyarra is shown just north-west of Coolawanyah, which is incorrect.

213 Dr Palmer also noted that Tindale wrote in the same set of notes that "Niabali waters all run to Fortescue River from Jiggalong [sic] west to headwaters of Fortescue. West is Pandjima country". Dr Palmer says this contradicts his map based on information gained from Sambo – unless Tindale was uncertain of the geography.

214 Dr Palmer also noted that Tindale recorded that according to one informant "Niabali Tribe = Balygu" and that "Pailgu = Niabali country. Balygu & Niabali same talk. Balygu = Parlgu live on NE side. The boundary was at Soda Creek 10m S of Bonnie Downs. Niabali were large lot. Balygu were small lot". Dr Palmer said that on the map he then produced Tindale has the annotation "Balygu (formerly Niabali use different but…". Dr Palmer said his copy does not allow him to read the rest of the note. However, he considered the apparent equation of Nyiyarbarli and Palyku may account for the absence of the latter in the earlier literature.

215 As to the map collected by Tindale from Roy Mackay shortly prior to his work with Paddy Jones, Dr Palmer noted that the map shows the Banjima extending north as far as Yandeearra and the Yindjibarndi extending east only as far as Mt Florance. Tindale wrote the following comment under the map:

> Banjima coming from Hamersley Range drove Balygu out of Mulga Downs before white times.

Thus, Dr Palmer noted, according to this account, the Palkyu were at some indeterminate time prior to white settlement in possession of Mulga Downs (not the Yindjibarndi) and then, but before white settlement, the Banjima displaced them.

216 In this context, Dr Palmer came to Peter Maiebong's account as collected by Tindale. Dr Palmer noted that he discussed this account in his first report but also recognised Mr Robinson's comments that some quotations were truncated in his earlier account of the data. However, Dr Palmer was at pains to point out that he did explain in his first report that what Peter Maiebong had told Tindale apparently was consistent with the way Tindale drew his boundary in his 1974 map, which was different from his earlier 1940 view that the Banjima were on the eastern portion of Hamersley Range about Mulga Downs.

217 Dr Palmer acknowledged that Peter Maiebong's account of the eastern boundary of the Yindjibarndi in the Fortescue River puts the boundary of the Yindjibarndi a short distance east of the present position of the new Great Northern Highway, and this is reflected on Tindale's 1974 map.

218 As a result, Dr Palmer said Tindale then had a number of accounts of "boundaries" relating to the Banjima "tribal territory", some of which were contradictory. Dr Palmer said why Tindale chose to accept Peter Maiebong's view over that provided by Roy Mackay or Paddy Jones in his 1974 map is not explained. Why should he have accepted that later account, Dr Palmer asked, when others had earlier said that the country west of the Nyiyabarli was Banjima? Dr Palmer said that, while Mr Robinson is of the opinion that Peter Maiebong's views should be accorded weight, Tindale would have provided a fairer representation of his field data had he admitted the contrary views of his informants, but he chose not to do so.

219 Dr Palmer suggested that one possible explanation as to why Tindale privileged one informant over another is that Peter Maiebong was telling Tindale about the northern boundary of the "Top End Banjima", but, whatever the reason, the contradictions inherent in Tindale's data render his 1974 map suspect. Dr Palmer suggested a second explanation may lie in the fact that Tindale attempted to reconstruct boundaries as he speculated they might have been prior to European settlement, which may have led him to choose the views of one informant over another (something discussed in Dr Palmer's first report at [189]).

220 Dr Palmer, nonetheless, considered that Mr Robinson has regarded the arguments of his first report carefully and fairly. Dr Palmer considered that, overall, Mr Robinson is of the view that, while he agrees that Tindale should be treated with caution, this does not mean setting him aside altogether. Dr Palmer agreed with that position and said that is the very reason why he discussed his findings in his first report and amplified his account in the first supplementary report. He considered the difference between Mr Robinson and himself is perhaps that Mr Robinson gives Mr Tindale more weight than he considered appropriate and is thus more inclined to accept that perhaps the Palyku (but apparently not the Yindjibarndi, despite the Tindale materials discussed above) were in the Fortescue Valley.

221 Dr Palmer said that, in completing his review of Tindale and the additional research and comments provided by Mr Robinson, he made four points:

- The Tindale material contains contradictions as outlined above, which Mr Robinson downplays. Dr Palmer would like to understand better how Tindale decided upon which version he should finally adopt and publish. In publishing only one part of his field data he did not represent the ethnographic reality as he found it on the ground involving Banjima, Palyku and Yindjibarndi.
- Tindale was attempting in his 1974 work to reconstruct pre-sovereignty boundaries. Yet he noted that the Banjima moved into Mulga Downs (north of the Hamersley scarp) before the time of white settlement. If this was so, then it is possible that this was country possessed by members of the Banjima language group prior to sovereignty.
- The account of "tribal" boundaries is plagued by uncertainty about how people may have identified in terms of a language group identity in the past. This is a matter discussed at length in his first report (at [177]-[178] and [437]-[445]), and one he has

discussed again in his first supplementary report. In Dr Palmer's view, the focus on "tribes" as land owning groups involves acceptance of a false premise and is consequently misleading. It is one of the reasons why Tindale needs to be treated with caution.

- While Dr Palmer said he did take into account Tindale's views, he also took notice of what the claimants and those with whom he worked told him. Dr Palmer said that, as Mr Robinson pointed out, knowledge is passed down through an oral tradition and while he fully explored Tindale's views, he also considered the claimants views were more likely to be accurate than Tindale's.

222 Both the anthropologists also had regard to evidence that was given in the earlier determination of this Court in what the anthropologists call the "Daniel claim" (a reference to the proceeding that culminated in *Daniel 2003(1)*).

223 Mr Robinson (Mr Robinson's first report at section 4.1.2) referred to evidence from the Daniel claim and suggested that the evidence given bears on the question of Yindjibarndi occupation of the Fortescue River. Mr Robinson said (at [200]) that the judgment in the Daniel claim (at [97]) noted that:

> Not all the traditional Yindjibarndi country to the south of Hooley Station is the subject of this claim. As a result, the claim area is well within the southern traditional boundaries asserted by the Yindjibarndi people.

He also noted that the Court in the Daniel claim (at [129]) went on to find:

> That the northern escarpment of the Hamersley Range marks the southern boundary of Yindjibarndi country is generally consistent with the evidence of the claimants and I so find.

224 Mr Robinson noted that the late Woodley King, one of the primary Yindjibarndi witnesses in the Daniel claim, said that Yindjibarndi country went "far, far on, all the way in that way" from Cheedy Station towards Wittenoom. He also noted that Cherrie Cheedy said Banjima country was "on the other side of Hamersley [Ranges] I think". Additionally, the late Guiness Gilbie, who had lived at Mulga Downs Station at one point, testified that "Hooley Yindjibarndi country, Mulga Downs Yindjibarndi country".

225 Mr Robinson said there was also evidence that Yirdiminara marked the south-eastern boundary of Yindjibarndi country, although he acknowledged it did not address the extent to which Yindjibarndi interests might exist along the Fortescue or the Hamersley escarpment to the south-west.

226 Mr Robinson also noted that he gave evidence in the Daniel claim to the effect that the southern boundary of Yindjibarndi country lay along the northern and eastern escarpments of the Hamersley Range, referring to the fact that he had been told that some Yindjibarndi people claimed that Yindjibarndi country went as far as Auski roadhouse. He said this was consistent with information given to Tindale by Peter Maiebong.

227 Mr Robinson expressed the opinion (Mr Robinson's first report at [208]) that it is possible that there were overlapping interests in this part of the claim area, given its position and resources. He thought it may be a case where people of the lowlands were joined by the Banjima "in the pursuit of the resources" or where "bands made up of members of this group foraged over the same country with permission". (I understand Mr Robinson's "bands" to be groups like the "residence groups" discussed above.)

228 On the other hand, Mr Robinson noted that comments made to Tindale that there was animosity between the Banjima and the Palyku suggests that there was conflict between the groups. He acknowledged, however, that this was not necessarily an "either/or situation"; there might have been a degree of conflict and co-operation over resource use as well. Mr Robinson further noted (at [210]) that the literature did not establish that the Banjima exclusively held the land north of the Hamersley Range at sovereignty and it is possible that this was an area of shared resources. But it is also possible that Banjima connection to that part of the claim area occurred in the post-sovereignty period, or at least that there was a transformation of prior sharing and co-operation arrangements towards ownership by a process akin to succession.

229 In this regard, Mr Robinson noted that in a heritage survey conducted by Stephen Brown in 1983 it was stated:

> The area of land for which the Pandjima are currently spokesmen extends to Munjina Gorge and across the Fortescue Valley to the foothills of the Chichester Ranges. It is difficult to ascertain whether, immediately prior to European settlement, Pandjima people occupied these latter areas or whether they gained rights as spokesmen for

them following settlement on Mulga Downs station.

230 In respect of the evidence from the Daniel claim and the other data here noted, Dr Palmer agreed that, on the basis of Mr Robinson's presentation of the materials taken from the transcripts of the Daniel claim, what he suggests was said is so. But Dr Palmer (in his first supplementary report at [62]) said that the evidence from those with whom he has worked would appear to be at odds with the evidence from those with whom Mr Robinson has worked, some of whom gave evidence in the Daniel claim. He assumed also that the evidence provided to the Court did not have "the benefit of any input from Banjima witnesses". He assumed further that the evidence Mr Robinson himself gave was without the benefit of data gathered from any of the Banjima claimants.

231 Dr Palmer noted that in considering contradictory evidence, Mr Robinson suggested that it may flag a dispute over country. He noted Mr Robinson accepted that the Fortescue Valley north of the Hamersley Range may have been "an area of shared resources", but that he adds it is also possible the Banjima came to the area post-sovereignty. Dr Palmer stated that, from his reading of what Mr Robinson stated, he found him to express "considerable lack of certainty about the identity of the language group who for the most part occupied the Fortescue Valley in the vicinity of Mulga Downs at the time of sovereignty".

232 Dr Palmer further stated that, interestingly, had Tindale been less selective over his use of his field data, he too might have come to the same conclusion.

233 While Dr Palmer also accepted that the Daniel claim evidence lends support to Tindale's 1974 placement of Yindjibarndi and Banjima boundaries, as stated by Mr Robinson, the Daniel evidence does not lend support to those parts of Tindale's data that appear to demonstrate that members of the Palyku language group had interests in that area. Accordingly, Dr Palmer said consideration of the Tindale materials requires that all of his data be considered and not just his 1974 published account.

234 Dr Palmer also referred (Dr Palmer's first supplementary report at [66]) to the conference between himself and Mr Robinson in March 2011, when the issue of the northern boundary was discussed. Mr Robinson then made reference to a field trip that Dr Neale Draper had undertaken in recent times with members of the Banjima and

Yindjibarndi language groups, and confirmed that the trip had taken place and that material had been collected that might be relevant to their consideration of the northern boundary issue. He had not viewed this information, however, although he was of the view that consideration of that data might assist in formulating his view on the matter.

235 It was in this context that the anthropologists thus recorded their points of agreement about the northern boundary (Fortescue Valley) that, in summary, included agreement between them that, on the basis of the Banjima evidence, as they read it, there is support for Banjima rights in the Fortescue River Valley in the vicinity of Mulga Downs; that some country may be "shared" between groups, including members of different language speaking groups – but that areas may also be contested; and that there is ground for concluding that Toby Dingoman may have had traditional rights over some parts of Mulga Downs Station associated with the area known as Nyiya, but there was no evidence that any of his descendants asserted any claims presently.

236 In the joint report Mr Robinson confirmed it was his view, based upon the anthropological literature, that it was likely that Yindjibarndi and Palyku people occupied and held land north of the northern escarpment of the Hamersley Range at sovereignty. He also pointed to evidence from the Daniel claim. Additionally, he referred to material from his own research for the Daniel claim. But he confirmed that, in his opinion, it was not possible to say whether these lands were held exclusively or were shared and that he remained of that view.

237 Dr Palmer, acknowledging the data on which Mr Robinson expressed his views, noted in the joint report that his problem lay with the emphasis in all accounts on boundaries and tribes. He again noted how it may be that members of a language group, other than the Banjima, may have asserted rights to the Mulga Downs area. He confirmed his earlier view that, if such rights were based on ritual status, they would not be transmissible. Dr Palmer also confirmed that he agreed with the views expressed by Mr Robinson, by reference to what Radcliffe-Brown had said on the matter, how "boundaries" can provide an impediment to a proper understanding of customary systems of land tenure. In particular, he accepted that areas on the borders of country may have been the subject of use and occupation by members of more than one language speaking group, as Radcliffe-Brown had noted as early as 1912-13.

238 Dr Palmer also accepted that, in the event that there was evidence that there is a descent of rights according to a customary system for the descendants of the late Toby Dingoman, this could support the conclusion that the descendants of that man may share rights in the Mulga Downs area with the Banjima claimants.

239 In the concurrent evidence session Mr Robinson confirmed his views and indicated that he considered the data he referred to left "unanswered questions". As an anthropologist, he felt he was unable to draw a firm conclusion about the northern boundary area. He considered he would merely be speculating if he were to do so.

240 By contrast, during the concurrent evidence session Dr Palmer considered that the evidence was sufficient to develop an understanding of the customary system of the "relationships of rights" in that boundary area. He thought the problem may be that Mr Robinson was seeking "definitive certainty about the nature of bounded groups", when that is not possible.

241 Dr Palmer added that the implication of that is that the naming of language groups in relation to boundaries is, to his mind, a misunderstanding of the way the systems work, and that while there were necessarily exclusive rights in areas that could be bounded by a hard line drawn on a map, this is not necessarily reflective of the complex inter-relationship of rights that operate. Thus, he was prepared to go further than Mr Robinson and provide that as an explanation as to why there is an apparent difficulty in agreeing the northern boundary.

242 Mr Robinson said in the concurrent evidence session that the disagreement between him and Dr Palmer was not concerning the understanding about the systems that might operate in boundary areas, as explained by Radcliffe-Brown. Mr Robinson thought both he and Dr Palmer agreed that, in essence, when you come to consider people's relationships to country, the answers are to be found, essentially, in genealogical matters, and matters of kinship and who belongs where are first and foremost, rather than in group labels.

243 Mr Robinson expressed the concern (which the Court particularly understood to be made in relation to the descendants of Toby Dingoman) that the evidence "points in the direction of there being people and families who have rights under traditional laws and

customs to that area. That's the first question. The question of which bounded group or which named group they might belong to, I think, is a further question".

244 Mr Robinson added that, in the first instance, as an anthropologist, his concern was that there were assertions being made that certain people have rights and interests in that part of the country, and that those interests may be overlapping or contested or shared, but we do not know. He said:

> … that's my difficulty: there's not enough information, I don't believe, to reach a concluded view about that, if it is, indeed, a question of reaching a decision about whether one group has superior claims to another, because it may, indeed, be the case that lots of groups or individuals have varying kinds of rights and interests. But we don't know the answer to that because we don't have enough information.

245 Dr Palmer, in dealing with that view, emphasised in the concurrent evidence session that the point he had in mind in relation to what was written in the points of agreement section of the joint report concerning the northern boundary was that the customary system of the claimants for gaining rights to country involves the exercise of choice and there have to be other requirements for people to realise and achieve rights to country, particularly in cases of mixed marriages, marriages between members of one language group and another, and the like. Thus, for Dr Palmer the question of genealogical descent is one thing but that does not necessarily mean that a person who is descended from Toby Dingoman today asserted rights in a particular area of country.

246 Dr Palmer emphasised that there are many circumstances where people have left a particular side of their family behind and have gone on "my father's side", or "my mother's side", in relation to a different country. In relation to those possibilities, Dr Palmer agreed that there was no information upon which he could form a view as to whether that was what had happened in this case in relation to any descendants of Toby Dingoman.

247 Mr Robinson considered that the points made by Dr Palmer in this regard were "very much my point", that is to say, "that we don't know". As a result, Mr Robinson did not see how he could form a concluded view about the matter; he considered there was a gap in the evidence.

248 At the hearing of this proceeding the question of Dr Draper's meeting in 2008 involving both Banjima and Yindjibarndi people was raised. This evidence, and also other

evidence in the proceeding, highlights that no Yindjibarndi people have come forward to dispute the claims made by Banjima people that Banjima people have rights and interests in accordance with Banjima traditional law and custom in the northern boundary (Fortescue Valley) areas in relation to which Mr Robinson has raised the possibilities that the Banjima may not at sovereignty have had rights or that, if they did, they may have been "shared" with other language groups, such as the Yindjibarndi.

249 The claimants submit that a detailed analysis of the evidence concerning the northern boundary given by key Aboriginal witnesses supports the following propositions:

- That a Banjima connection to the entire northern section of the claim area at sovereignty is strongly supported by the evidence of all of the Aboriginal witnesses in the proceeding, being the children and grandchildren of Banjima apical ancestors living in the claim area at the time of effective sovereignty, as well as from a broader "jural public" which included Yindjibarndi, Nyiyabarli and Palkyu people. There was also evidence that the connection of Banjima people to the area was legitimated by reference to the Wardirba law associated with the Fortescue River. No witnesses were called to contradict their evidence and there is no competing claim by other Aboriginal people as claimants or as a respondent party.
- The early ethnography is generally unhelpful to the Court on the question of whether Banjima occupied the northern portion of the claim area at sovereignty. That ethnography should not be accepted to the extent to which it is inconsistent with the evidence of Aboriginal witnesses, many of whom were born in the 1940s and 1950s and whose parents were alive and living on Mulga Downs at the time Tindale collected his material at Mt Florance in 1953.
- The hearsay evidence from deceased Yindjibarndi people largely supports Banjima connection to the claim area and in particular supports locations such as Mt King and Yirdiminara as boundary markers.
- To the extent that the hearsay evidence from deceased Yindjibarndi was that an area known as Nyiya west of a line from Mt King to Yirdiminara was Yindjibarndi/Banjima mixed and associated with the family of Toby Dingoman, it is not inconsistent with the evidence of the Aboriginal witnesses, understood in the

context of the expert report of Dr Palmer regarding boundary evidence and transition zones.

- To the extent that some of the hearsay evidence may suggest that Yindjibarndi country went further east than this imaginary line from Mt King to Yirdiminara, the evidence can be given little weight as it is in the nature of hearsay on hearsay, contains internal contradictions and ambiguity, potentially confuses the country the law travelled through, with language group boundaries, and was provided late in the proceeding after the taking of evidence of Aboriginal witnesses. It should not be accepted as outweighing the evidence of the Aboriginal witnesses in the proceeding to the extent that it is inconsistent with that evidence.

250 The State commenced their submissions challenging the extent of Banjima country on the northern boundary on the basis that Aboriginal history post-sovereignty is "replete with examples of the movement of Aboriginal peoples into country not theirs earlier". Thus, the State placed particular emphasis on the early ethnographic record and the opinion of anthropologists, and rather less on the evidence of the Aboriginal witnesses.

251 The State also placed particular weight on evidence "about the move of Bob and Jacob Tucker" (this being a reference to the apical ancestor Bob Tucker Wirilimura and his son, Jacob) from Bottom End to Top End in the vicinity of Mulga Downs.

252 The State also raised the rule in *Jones v Dunkel* (1959) 101 CLR 298 (***Jones v Dunkel***), contending that there are witnesses who would have been expected to be called (both in relation to the northern boundary and the eastern boundary) by the claimants, but who were not, that the evidence from the witnesses would have elucidated a relevant matter, that the failure to call the witnesses was unexplained, and therefore the Court should draw an inference that the evidence of the witnesses would not have assisted the party.

253 Thus, in relation to the northern boundary in the Fortescue Valley from Mt Marsh to Manjangu (site 74) the State contend that the ethnography shows that the eastern half of the Fortescue Valley was previously said to be Palkyu by Tindale and that the failure of the claimants to call a person of Palkyu descent is a matter going to onus; as is Dr Palmer's "failure to examine Balgu (Palkyu) descendants".

254 Similarly, the State said that some of the claimants' witnesses said that the Banjima had a common boundary with the Kariera, and that there was an onus on the claimants to lead evidence from reliable Kariera sources of the boundary and Dr Palmer was "obliged to enquire" and did not.

255 The State additionally submitted that the Wardirba does not mention any place in the Chichester Ranges and so this does not legitimate that area being Banjima country.

256 As to the western portion of the Fortescue Valley, the State said that connections with the Yindjibarndi are here raised. It particularly refers to the evidence from the Daniel claim that Mr Robinson regarded.

257 The State again said that the failure of the claimants to call any Yindjibarndi person to deal with the questions raised should count against them, as should Dr Palmer's failure to "interrogate any Yindjibarndi person and, until pressed by Mr Robinson … to address the historical and anthropological literature". Indeed, the State expressly submitted that the report by Dr Palmer should not be accepted in this respect because:

- He converts the earlier anthropological finding that "the country of the Pand'ima lies to the south of the Fortescue River" into the proposition that the Banjima were located "in upper Fortescue River…".
- His attack on Tindale is "not balanced".

258 The State in their written closing submissions (at [271]-[280]) raised particular submissions about what the evidence shows or does not show. For example, that the Wardirba does not mention Pigeon Camp and so does not sanction it as a boundary marker. That Yindjibarndi were recorded on Mulga Downs. That Alec Tucker indicated that at the time Bob Tucker Wirilimura went to Mulga Downs there were already Nyiyabarli and Wyloo in the native camp on Mulga Downs and, prior to then, he had no rights at Mulga Downs. That Mulga Downs residents included Yindjibarndi, that some witnesses who lived at Mulga Downs were only taught about the Top End area. That the late Mr K Jerrold was Yindjibarndi and the evidence given suggested evidence of the Yindjibarndi being driven out of Mulga Downs. That the Nyiyabarli and Banjima were always in the Fortescue together. That Bugertman Wally was Yindjibarndi. That a drawing made by a deceased Yindjibarndi

elder, Yilbi Warrie, in 1997 shows Youngaleena as Yindjibarndi and the Marduthunera places in the Fortescue closer to the coast. That Yilbi Warrie was a direct descendant of Toby Dingoman. That the affidavits received into evidence of the late Pixie Christian, Wobby Parker and Herbert Parker do not establish that the area or all places in it are Banjima country.

259 The State said that a *Jones v Dunkel* issue also arises in that a direct descendant of Toby Dingoman could have been called by the claimants to give evidence but was not.

260 The State also said that given the status of the Wardirba law and the failure of the evidence to disclose particular places east of Barimuna, "the Court should find that the claimants have failed to prove, even on their own law, that Banjima country extends east beyond Barimuna". Similarly, that because the most westerly place in the Fortescue Valley mentioned in the Fortescue Banjima Wardirba is Bowilinha Claypan, the Court should find that "even on their own law, land west of that, including Pigeon camp is not Banjima land".

261 The State placed particularly emphasis on the early ethnographic record and the analysis made of it by Mr Robinson.

262 Lastly, the State said the story of Bob Tucker Wirilimura's move is the most important of lay evidence and referred in particular to the evidence of Alec Tucker, one of the most senior Banjima men, which it is said was not contradicted on this issue and was to the effect that:

- The Banjima started out all together in Juna Downs
- Some went to Mulga Downs to become "Pantikurra" while others stayed and become "Milyaranba".
- At the time of the move Bob Tucker's sons were born.
- Upon the move Jacob Tucker "started his family off in Mulga Downs".
- Alec Tucker does not say that Bob made the move but that Jacob did.
- But Alec says that Bob Tucker Wirilimura moved from Juna Downs to Mulga Downs. This is when the sons moved. The evidence would suggest that this was in the early twentieth century.

- Wirilimura took his ritual gear with him and that act is a reason why Alec Tucker now has rights in Mulga Downs.
- Alec Tucker implies that a "brand" was created to the Pantikurra, which the State submits was a "newly formed" group.
- The Pantikurra had no rights at Mulga Downs before that time.

263 The Pastoral respondents submitted that the evidence of Banjima witnesses concerning the northern boundaries is not cohesive or united and that no less than five alternative formulations of the northern boundary of Banjima country were given, being somewhere within or to the south of Mulga Downs pastoral lease, the cadastral boundary of Mulga Downs pastoral lease, somewhere between the Mulga Downs pastoral lease boundary and the formal boundary on the amended form 1 application, the formal boundary itself, or somewhere beyond the formal boundary.

264 The Pastoral respondents submitted that there is compelling evidence indicating the northern boundary of traditional Banjima country is somewhere within or to the south of Mulga Downs pastoral lease. Reference is made to Tindale's 1974 map, the transcript in the Daniel claim, notes recorded about the Banjima in the late 1990s and the evidence of Alec Tucker concerning the migration of Wirilimura from Juna Downs to Mulga Downs. In this the Pastoral respondents relied on the State's written closing submissions.

265 The Pastoral respondents submitted that the only proper construction to be placed on the inconsistent evidence was that the northern section of the formal boundary is a post-sovereignty construct. That is to say that it does not reflect the sovereignty boundaries of the Banjima people.

266 Finally, the Pastoral respondents said that whether or not a determination of native title is made by the Court, there is an insufficient evidentiary base to include the land covering the Mt Florance and Hooley pastoral leases as part of any determination.

267 In considering the submissions made, particularly those of the State challenging a Banjima connection in the area of the northern boundary, it is necessary to have regard to the whole of the evidence given by Aboriginal witnesses and to take account of context before drawing conclusions. It is well understood that in any neighbourhood, community or society

there may be a range of opinion about such things as the extent of land or country. It may also be accepted that some individuals will be more precise or brief, some more general and expansive, that some may be dry and others more colourful in the giving of their evidence and that some speak very much from their own perspective. It is by reference to the whole of the evidence, as well as the general status and level of appreciation, and sources of knowledge and perspectives, of witnesses that become important in this process. It is also important to understand evidence in context; what is said, what is not said.

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

269 Slim Parker, in his witness statement, referred to many of the senior Yindjibarndi people, including those such as the late Woodley King, Mr K Jerrold, Guiness Gilbie and Yilbi Warrie and said he had never heard any of them say that Mulga Downs was Yindjibarndi country.

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

271 Arju was the daughter of Yinini. She was the mother of Nina who was married to Percy Tucker (and is the mother of Gladys Tucker and grandmother of Mervyn Smith and Steven Smith). Arju was born at Milyambri, as explained by Marie-Anne Tucker.

272 Maggie Nyukayi was the mother of Carey Andrews, who was born at Cowra. Carey Andrews' grandson, now deceased, participated in the men's evidence at Hope Downs in April 2008. Maggie's son, Richard Simmons, was the father of Trevor Parker, who led the men's restricted evidence during one of the hearings.

273 Sam Coffin was shown by the evidence to have a special place at Wadugara. He lived at Mulga Downs, according to the evidence of Gladys Tucker, and was buried near Mulga Downs Station homestead, as explained by Dawn Hicks (as explained below he may be accepted as a Banjima person).

274 Marndu was said by Alec Tucker to be boss for the law at Mulga Downs.

275 As to Bob Tucker Wirilimura, many witnesses said he belonged to Mulga Downs, for example, Charles Smith, Marie-Anne Tucker and Mrs J Injie.

276 There is also evidence to show that Mt King was a boundary marker between the Banjima and the Gurama: that of Mr G Tucker and Archie Tucker.

277 The evidence of Maitland Parker and G Tucker supports the view that water flowing out of Hamersley Gorge into the Fortescue Valley marked the divide between Banjima to the east and Yindjibarndi to the west.

278 Timothy Parker said that he was told by the late Yindjibarndi elder, Woodley King, that the South Fortescue flowing to Pigeon Camp was the boundary in his Banjima country. That Mr K Jerrold may have had a traditional connection to this place may be accepted, but plainly that arises through his Banjima ancestry, and so strengthens, not reduces, the Banjima connection to the area.

279 Slim Parker and Maitland Parker said that the late Cheedy Ned, a Yindjibarndi elder, had referred to Mt King (Burrana) as a marker for the north-eastern boundary of Yindjibarndi country – and did so as recently as 2008 at a meeting at Windamurra.

280 There is also a map produced by Mr H Parker (now deceased) showing Rio Creek as a boundary marker in the Hamersley Range.

281 Yirdimanara – a series of springs in the Chichester Range was identified by many witnesses as a boundary marker between Banjima and Yindjibarndi. Slim Parker said his uncle was born there. Dr Palmer said when he was taken there in the course of his fieldwork, J Parker (deceased) and Maitland Parker greeted the country and collected bush foods.

282 Again, the late Cheedy Ned is said to have observed on a number of occasions that Yirdimanara (Ngurrbanha) was a boundary marker for Yindjibarndi country, including at the 2008 meeting.

283 Alec Tucker was also recorded by Mr Robinson as having told him that Mulga Downs is Banjima country and the boundary is Yirdimanara.

284 The late Woodley King's evidence in the Daniel claim was that from Cheedy Station, Yindjibarndi country went as far as Yirdimanara.

285 Many Banjima witnesses also named sites and places between Mt King and Yirdimanara, including Pigeon Camp (Bunthurunna), Government Well/Boundary Mill, Malay Well, Marra (an old Law ground), Milyarndu, Manarn, Banjilamuna (also spelt Banyjilamu and Bunjella Well), Windamurra, Youngaleena (also Yungalina), Winjawarra (Winyjuwarranha), Nyiya.

286 The notes of Mr John Laurence put into evidence from field work were also consistent with Yindjibarndi country going as far as the old Mulga Downs Station and some of these places just mentioned.

287 White Springs and the Chichester Ranges (Birdilya) were also shown by a range of evidence of Aboriginal witnesses to be boundary markers. Archie Tucker named a series of outcamps, creeks and gorges along the Ranges boundary markers, explaining that where the water flowed south of the Chichester Ranges into the Fortescue it was Banjima country. On the other side of the Ranges following markers like Yirdimanara the water flowed north. He said that Banjima country goes north up to Chichester. Birdilya (Birdirla) is the name used for the Chichester Range or tablelands.

288 Maitland Parker and Slim Parker also named White Springs as a northern most point of Banjima country, as did Archie Tucker – it actually being outside the claim area.

289 There was also some evidence that the north-eastern boundary marker for Banjima country was Gorman's Claypan in the Fortescue Marsh, which is outside the claim area.

290 Maitland Parker's evidence said that Milimbirinya is an important site for Banjima because it is where the water goes underground and comes up again at Millstream in Yindjibarndi country.

291 Milimbirinya is an area, Mervyn Smith said, associated with the descendants of apical ancestor Arju who is said to have been Banjima/Nyiyabarli and born at Milimbirinya.

292 It is to be noted that Radcliffe-Brown collected the name of a Palkyu person said to be identified with Milimbirinya.

293 The evidence shows Cowra was an outstation of Mulga Downs and is a name that comes from the bush guwara which grows near there, the leaves of which are used when rituals of initiation are staged to smoke initiates. Horace Parker lived there and his son, Timothy Parker, was born there. Blanche Tucker, the mother for G Tucker and Archie, used to work there. Maitland Parker, Timothy Parker, Dawn Hicks and Marnmu Smyth all lived there as children. Whitehead is buried at Cowra. It is said to have been part of her country. Cowra is mentioned by Brandenstein in 1966 as being a place for the Marduidja Banjima.

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

295 What the analysis of the evidence, both early ethnographic, early anthropological, more recent anthropological (particularly that of Tindale) and much more recent anthropological including that of Dr Palmer and Mr Robinson in this proceeding, together with the direct evidence of the Banjima witnesses in this proceeding, demonstrates, is that

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

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

297 For example, the account of old Peter Maiebong given to Tindale suggests that Banjima country may not have extended as far as Banjima people today say it does, but given the range of opinion, both contemporary with, or before or soon after that expressed to Tindale by Peter Maiebong, as identified by Dr Palmer, that does not agree with that account, I am not satisfied that Maiebong's account should be accorded some superior, privileged or veto status or that it should dictate the analysis to be made.

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

299 There is indeed much to be said in support of the submissions made on behalf of the claimants that caution should attend any consideration of what was said in the Daniel claim. The transcript of the hearing relied upon took place in the north-west of the claim area and the claim area was not part of the Daniel claim; and indeed the claim area stopped a long way from the boundaries of the present Banjima claim area. The claimants note that the area in between was subsequently filled by the current Yindjibarndi No 1 claim. Further, witnesses who gave evidence in the Daniel claim were not called to give evidence in this proceeding and some of them have passed away. To the extent that there may be contrary statements (for example Guiness Guilbie saying that Mulga Downs was Yindjibarndi country) they are generalised. It may also be accepted that witnesses sometimes give indicative directional evidence as to the extent of country when sitting in another place. The evidence of Archie Tucker and Slim Parker also located places mentioned in the Daniel claim transcript as outside the Banjima claim area.

300 Further, as to a video tendered of a meeting at Windamurra in 2008 to discuss the boundary between Banjima and Yindjibarndi, it also appears that there was a similar meeting in 2003. Slim and Maitland Parker gave evidence that what was said at that meeting, particular by the late Cheedy Ned, generally supported their understanding of the boundary between Banjima and Yindjibarndi. The claimants also reasonably draw attention to Mr Robinson's statement in his supplementary report that, based on discussions with Michael Woodley, a Yindjibarndi man, the 2008 meeting was concerned with ownership of sites within an area to the north-west of a line between Mt King and Yirdimanara.

301 I accept the submission made by the claimants in respect of the notes made by Mr Laurence, that caution must attend consideration of those notes as Mr Laurence was not called to give evidence, and his work has not been published or made the subject of a report. Additionally, Dr Palmer has identified shortcomings in the methodology used to produce the notes. Mr Robinson acknowledged that some of the material was contradictory, for example Bridget Warrie said Yindjibarndi country finishes at Hooley.

302 The claimants also reasonably note that, in relation to Mr Robinson's conclusion that the implications of the material he collected for the Yindjibarndi No 1 connection report were that Yindjibarndi people believed in 2008, when their report was lodged, that they had rights in sites south of the southern claim boundary, within the area between Mt King and

Yirdimanara in the north-east, but that no overlapping claim was ever lodged by the Yindjibarndi people following that research.

303 So far as additional materials referred to by Mr Robinson are concerned, while it should not be doubted they are generally relevant to the matters now in issue, they, like the evidence given in the Daniel claim, were not prepared for the purposes of this proceeding and do not on their face address with any great particularity the question of where Yindjibarndi country intersects with Banjima country in this northern boundary area. The note and the sketch made in connection with Yilbi Warrie, for example, invite further interrogation as to their meaning. They may be considered to raise questions but on their own they do not answer them. As the claimants submit, Mr Robinson's interpretation of the data is but one way of interpreting it. For example, a circle on the sketch with the words "Youngaleena, Milimbirinya, Toby Dingoman country" with the letter "Y" in brackets underneath, may be taken as a reference to old Mulga Downs Station, which is a long way from Milimbirinya, which may make it implausible that one man's country or estate could cover such a huge expanse.

304 I also accept the observation made on behalf of the claimants that the note and the sketch were produced in the context of discussions about the Fortescue River as a shared resource for a number of Aboriginal language groups, not in relation to the boundaries of Yindjibarndi country.

305 Additionally, there is, as the claimants submit, difficulty in taking the late Mr D Daniel's statement as to the extent of Yindjibarndi country as final, he being a Ngarluma man.

306 Similarly, in relation to the attempt to promote a map made by the late Mr K Jerrold to determinative status, I accept the claimants' observation that Mr Jerrold was attempting to show Yindjibarndi land did not exist in isolation but was part of the larger whole within a mythological continuum from the coast to the desert at Jigalong, each extremity outside Yindjibarndi country. The fact that his biological father was Banjima may well have influenced his views. Again, these are issues not now able satisfactorily to be interrogated.

307 So too, in my view, the notes of Dr Edward McDonald, an anthropologist, seeking to record the views of deceased Yindjibarndi men raise questions but are not determinative.

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

309 The claimants reasonably point out that Toby Dingoman was not referred to in Mr Robinson's first report and the first mention of his name was in Mr Laurence's notes, which were provided shortly before the on country hearing of the proceeding.

310 In cross-examination Slim Parker and Maitland Parker said they did not know Toby Dingoman. Given that he was likely born in the late 1880s this is not surprising. There was no cross-examination as to whether they knew his descendants the late George Toby, the late Yilbi Warrie and others and, if so, as to their language group identity.

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

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

313 These issues have arisen, in one sense, late in the pre-trial processes and principally through Mr Robinson. Apart from the data produced by Mr Robinson, no person comes forward to contradict the claim made on behalf the Banjima, even though on the evidence, including of the Windamurra meetings as late as 2008, Yindjibarndi people have been aware of the proceeding. The evidence shows that the Yindjibarndi have lodged a claim in Yindjibarndi No 1 up to the claimed Banjima boundaries in this proceeding, but not beyond. All of this suggests that there is no apparent intent on the part of any other individual, community or group among the Yindjibarndi to assert traditional rights or interests in the claimed northern boundary area.

314 This is not a case where, in my view, it can be said that the rule in *Jones v Dunkel* has any application. I do not consider that this is a circumstance where the claimants were bound to call upon Yindjibarndi people or any other mentioned language group to give evidence in relation to the issues raised in respect of the northern boundary. There is no obligation for the claimants to cause a native title inquiry to be conducted, in effect, on behalf of the Yindjibarndi, for example, in relation to the possible interests of any descendants of Toby Dingoman. I accept, as the anthropologists have stated, that the Court may have been better informed if there had been more data concerning the interests of persons such as Toby Dingoman and any interested descendants, but that does not mean that the Court should draw an inference that, by reason of the failure of the claimants to ascertain who the descendants of Toby Dingoman may be, and to call them if there are any to ascertain whether or not they claim continuing interests in the area, should lead to a conclusion that they could not have given evidence which would have helped the claimants' case.

315 Nor do I accept the accompanying complaint made by the State that Dr Palmer ignored these potentially competing interests or that he failed to meet his responsibilities to the Court as an expert witness in investigating these other possible lines of inquiry or ignoring data. The fact of the matter is, as noted above, that these potential lines of inquiry were identified by Mr Robinson at a relatively late stage before the hearing. Dr Palmer in his first supplementary report and subsequently also explained that he did touch on points concerning Maiebong's accounts of territory and did not intend to obscure them. I accept he did so and his explanations. Further, just as it is not for the claimants in effect to conduct a native title inquiry as to the potential interests of neighbouring language groups in relation to a claimed area, nor was it in all the circumstances necessary for Dr Palmer to do so. There

may be circumstances, but I do not consider that they currently exist, where the failure of an expert in a proceeding to explore some obvious line of inquiry in the course of forming an opinion for the purposes of a proceeding will adversely reflect on that witness's credit and thus the basis and value of an opinion expressed. As I say, I do not consider that this is such a case. I therefore reject the State's submission that the opinion of Dr Palmer in relation to the claimed northern boundary area should be rejected or discounted for this reason.

316 In all of these circumstances, the evidence points in one direction, which is the direction pointed to by the Banjima witnesses. I find, on the balance of probabilities, that the northern boundary (Fortescue Valley) areas in respect of which Mr Robinson (and the State) have raised questions, was an area in respect of which the evidence shows that Banjima people at the time of contact with British settlers, and by inference at sovereignty, had native title rights and interests pursuant to their laws and customs.

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

318 I am satisfied, therefore, on the balance of probabilities, and find that the Banjima held rights and interests in the northern boundary (Fortescue Valley) area at sovereignty.

319 ***Eastern boundary (Weeli Wolli and Yandicoogina)***: In relation to the eastern boundary (Weeli Wolli and Yandicoogina) the anthropologists record the following outcome in relation to the proposition that country to the west of Weeli Wolli Creek and extending as far as Barimuna are areas in which members of the Nyiyabarli language group hold customary rights:

> Mr Robinson is of the view that, based on the available literature, there is no ground for concluding that Nyiyabarli had rights in the Weeli Wolli and Yandicoogina Creek at sovereignty.
>
> Dr Palmer's view is that the proposition relies on an assumption over the nature of tribal groups which is untenable.

320 This is in the area that Aboriginal witnesses called Milyaranba Banjima country. In his first report Dr Palmer explains that he gained data as to the extent of Milyaranba Banjima country from a field trip as well as from interviews with senior claimants. In that regard Mrs A Smith provided him with information reflected in a sketch map that he prepared (which is included as figure 7.2 at p 119 of his first report).

321 Mrs A Smith's first account commenced from Birdibirdinya (site 22, old Mt Bruce Station, now the site of the Karijini Rangers' residences). She told Dr Palmer it went "right across" to the highway, being the Port Hedland to Mt Newman road, and from there to "Area C", which is a term that witnesses in the proceeding use for those areas of Yandicoogina and Marillana Creeks subject to mining by BHP Billiton and RTIO. Mrs A Smith conveyed to Dr Palmer that the northern scarp of the Hamersley Range, overlooking the Fortescue River, marked the northern boundary of her country. Thus, the gorges of the Karijini National Park were considered by her to be within Milyaranba Banjima country.

322 Dr Palmer received what he considered to be a "fuller account" from Mrs A Smith in two subsequent interviews at which she indicated whether a number of places were either "inside" or "outside" of "her boundary". Dr Palmer said that her account did not provide a "neat circular account" of her boundaries. She only mentioned some places that she regarded as significant features.

323 For present purposes there is no particular need to discuss the detailed account that Mrs A Smith provided Dr Palmer, or the other data that Dr Palmer received at various times from members of the claim group. Rather, it is appropriate to note that at [415] of his first report, Dr Palmer made the assessment that the data collected from Mrs A Smith, May Byrne, Steven Smith and others showed substantial similarities, as he would expect from a group who gained much of their information from Mrs A Smith, acknowledged to be the most senior member of the group.

324 Dr Palmer noted, however, there were four areas of difference in the accounts provided. First, May Byrne, Steven Smith and others may view Milyaranba Banjima country as extending further south than the Mungarunya Range. In turn, Mrs A Smith's account may

place the furthest southern extent of Milyaranba Banjima country at the junction of Wayaru (Spring Creek) and the Turee River.

325 Second, Mrs A Smith's first account of her northern boundary was consistent with that provided by the others, being the Hamersley Range or Karijini. However, on a subsequent occasion she described her northern boundary as being the Binbuyungu range of hills which, by her account, runs south of Hamersley Range and includes Mt Oxer.

326 Third, Alice considered that her eastern most boundary was identified by a creek to the west of Barimuna and therefore did not include the lower waters of Marillana Creek or Yandicoogina Creek, as they are now named on the map.

327 Fourth, Nellie Jones stated that Banjima country extended west to include Rocklea Station, something not claimed by other members of the claim group. However, she had also told Dr Palmer on an earlier occasion that Rocklea Station was identified with the Innawonga language group. As a result Dr Palmer stated that he had some reservations about her statements and commented that they may have been influenced by her having been born at Rocklea Station and having had a long term association with that area.

328 By reason of her seniority and knowledge Dr Palmer placed substantial reliance on Mrs A Smith's account.

329 Dr Palmer then considered the position of the Nyiyabarli and Weeli Wolli Creek issues. He indicated that the issue in question related to the boundary of country which members of the Nyiyabarli language group identified. The issue had been brought to attention as the result of research carried out by two other anthropologists, Dr Daniel Vachon and Dr Sandra Pannell in relation to the Nyiyabarli application for determination of native title. As a result, Dr Palmer undertook field work in April 2010 with Dr Vachon and a number of IB, MIB and Nyiyabarli claimants.

330 Dr Palmer considered that the data he collected on the field trip from Banjima informants for the most part replicated information he had gained on previous visits. There continued, however, to be a difference of opinion as to the eastern boundary of Banjima country.

331 One group, that included representatives of the IB group, favoured a more westerly boundary identified by reference to Barimuna Hill (site 86). That was also the view of Nyiyabarli language group members present. Others, principally the MIB claimants, took the view that Weeli Wolli Creek (site 88) represented the eastern boundary.

332 Dr Palmer stated that Alec Tucker told him that the eastern boundary of Banjima country was marked by a gorge which he named Gunadayanah (site 100). The gorge is also known as Rock Hole Bore. It runs in a southerly direction into the range to Barimuna Hill. Alec Tucker stated that the boundary ran north, crossing the Roy Hill to Auski roadhouse road and into the Fortescue Marsh to Milimbirinya (site 94), which is also a boundary marker and a significant site in the Wardirba mytho-ritual tradition. Dr Palmer said that those present at that time told him that Milimbirinya itself was considered to be associated with the Nyiyabarli language group, although the Banjima had also "some responsibility" for it, "because this is where the water starts". It was said that members of the two groups, "were together here the two tribe. They came to share things. They gave each other wives here". Maitland Parker later told him that he had always understood that Milimbirinya was "country for Nyiyabarli".

333 Dr Palmer further stated that members of the Nyiyabarli language group present on that trip (who included David Stock and Gordon Yuline) were also of the view that the Nyiyabarli boundary was west of Weeli Wolli Creek. They informed him that this was what old men now deceased, including Punda Bob and Gordon MacKay, had told them in years gone by and that the boundary was "always west of Barimuna". David Stock told him that from Barimuna the boundary went south to Gundawana Claypan (site 47) and to Mt Robinson (site 48). Others suggested that the boundary was a short distance to the west of Barimuna on Flat Rock or Split Rock Creek. Dr Palmer said that on a separate occasion Mrs A Smith confirmed her former view that Barimuna and in particular the area to its immediate west known as Flat Rock Creek, was the boundary with the Nyiyabarli to the east.

334 Dr Palmer noted (at [426] of his first report) that the contrary view, expressed with equal conviction as to its authenticity and customary endorsement, was that the boundary ran down Weeli Wolli Creek to Milimbirinya. Maitland Parker, for example, stated that the boundary should follow the Weeli Wolli Creek to Milimbirinya, which was itself Nyiyabarli.

Trevor Parker stated that it was the old people who had told them that the boundary was Weeli Wolli Creek.

335 Dr Palmer said that when he and others visited Jinardi (site 101, Kennedy Yard) located on the eastern side of the Weeli Wolli Creek during the field trip, Jinardi and the adjacent hill of that name were pointed out by some as being on the boundary between Nyiyabarli and Banjima. Maitland Parker was one of those.

336 Dr Palmer said that Brian Tucker stressed that command of country was legitimated by command of esoteric ritual knowledge. In that regard he told Dr Palmer that when they sang the Wardirba songs progressively identifying areas of country, the one that was associated with Weeli Wolli Creek marked the transition in the responsibility for the singing from Banjima to Nyiyabarli. Trevor Parker similarly stated that, "it all goes by the song. There's responsibility too for all that". Brian Tucker agreed. He added that: "It's the song that takes you there. It's a shared law. And this was shared by the rule of the old people. We shared the water". Dr Palmer said he understood that both men considered Weeli Wolli as a boundary that was legitimated by reference to spiritual ordination, although individual exclusivity was not a feature of the command of ritual knowledge and territory jurisdiction.

337 Thus, Dr Palmer considered that there was then some indication that the area between Weeli Wolli Creek and Barimuna might be understood as "shared country". In that regard reference was made to the Gumala organisation set up as a result of the mining agreement for the Yandi mine and which reflected the ideal that all Aboriginal groups in that area would share – gumala being the Banjima phrase "to share".

338 David Stock had indicated, said Dr Palmer, that he had customary rights to the Yandi area west of Weeli Wolli Creek and that this had been established many years ago at a big meeting at Youngaleena (Yungalina) at which the old people had supported him. David Stock told him: "They were all from Mulga Downs, where they had been living together. I was the boss, but I never said that because I said, 'Share it because we've always been together'".

339 Dr Palmer, having regard to his earlier discussion in Ch 12 of his first report as to the descendants of Yandiguji married to Tharu, expressed the opinion that those descendants

(including David Stock) would appear to have grounds for asserting familiative rights in the areas west of Weeli Wolli Creek. Mrs A Smith, he considered, endorsed that view.

340 Dr Palmer noted, however, that the idea that the country was shared was not accepted by all present. One MIB claimant (Johnny Parker) told Dr Palmer that, while David Stock had Banjima ancestry, he had made a choice to follow his Nyiyabarli forebears and had given up any claim to Banjima country. Dr Palmer also noted that Gordon Yuline, as a Nyiyabarli claimant, stated that while the Banjima people would have been free to use the area to the east of Barimuna for hunting and gathering, they would be required to acknowledge the proprietorship of the area by the Nyiyabarli.

341 In the light of these materials, in his first report Dr Palmer made the following observations:

- First, there is evidently an unresolved dispute between members of the Nyiyabarli language group and some members of the Banjima group as to the eastward extent of Banjima country and the westward extent of Nyiyabarli country. Broadly speaking, the dispute is between members of the MIB and members of the IB and Nyiyabarli groups. The former MIB group assert a boundary that follows Weeli Wolli Creek, the latter generally accepting the Nyiyabarli boundary as being west of Weeli Wolli Creek and associated with Barimuna and related places north and south of there.
- Second, the dispute is tempered to some extent by a tentative view that the area between Weeli Wolli and Barimuna may have been "shared country". The organisation of the Gumala Association was at least in part a reflection of the fact that benefits should be shared between members of the two language groups. That view of shared country has also been put forward by other researchers. Dr Palmer considered the idea that some areas of country are shared is consistent with his view that the customary arrangements whereby rights to country were articulated provided for claims to multiple areas of country. Moreover, rights were unlikely to be exclusive to one lineage, but would be shared by a number of individuals or descent groups who together comprised the country group.
- Third, David Stock asserts familiative rights to the area between Barimuna and Weeli Wolli Creek. While he is generally associated with the Nyiyabarli language group, he also has Banjima ancestry. This illustrates the difficulty with making

language group identity a focus or a determinate for identifying rights to country. In Dr Palmer's view, it is this dispute which is a product of an attempt to project a language group identity onto specific areas of country and thus to mark the "cartographic boundary" between them. Language group identity on a border may be subject to debate. However, those individuals who assert rights are evidently identifiable, if contested.

- Fourth, the issue invites discussion in respect of general problems attendant upon defining boundaries as lineal cartographic constructs.

342 As to Weeli Wolli and Yandicoogina, Mr Robinson (in his first report at section 4.2) considered that, if there is scant information about the Fortescue Valley area, there is even less in the early literature about the Weeli Wooli and Yandicoogina areas. The Nyiyabarli did not appear in the literature until after the Second World War.

343 Mr Robinson said it could be that Clement and others conflated the Palyku and Nyiyabarli and that their references to the Palyku should be read to include the Nyiyabarli as well, but that view cannot be tested. He notes, however, that Tindale in 1974 believed that the Palyku and Nyiyabarli were "closely related" and have "now mixed freely", but does not say what led him to that conclusion. Mr Robinson notes that Tindale stated that the Nyiyabarli (his "Niabali") were on the headwaters of the Oakover and Davis Rivers and the "middle waters of the Fortescue River" and "on Weeli Wolli Creek north of the Opthalmia Range". He also noted that in about 1890, "pressure by Kartudjara forced Niabali to retreat from the northern vicinity of Savoury Creek to a boundary on the head waters of Jiggalong Creek".

344 Mr Robinson said the idea of a westward movement is supported by Tonkinson, who states that Jigalong was originally in Nyiyabarli territory but by the time desert people began to arrive there in the 1930s, most of them had "already drifted to sheep and cattle stations further west". He noted that Dr Robert Tonkinson conducted a heritage survey in the Weeli Wolli Creek with the archaeologist Dr Peter Veth and reported that Banjima land had "Weela Wolli Creek as its boundary". This was in 1986.

345 Mr Robinson considered that the heritage surveys that have taken place over the past 30 years seem to be in basic agreement that there is a boundary between the Banjima and

Nyiyabarli people at Weeli Wolli Creek. He also noted that in 2001 Nicholas Green and Pamela McGrath placed the boundary between the "Top End of Banjima" and Nyiyabarli at the Area C deposit with Jarjirlingu (Werribee Range) and Mt Robinson as points on the boundary.

346 He noted that several writers report that land is shared in the Weeli Wolli Creek area. Rory O'Connor in 1994, for example, reported that Weeli Wolli Creek was a "transitional zone" between the Banjima and the Nyiyabarli. Dr Tonkinson and Dr Veth in 1986 were told that the area was "mixed-up" between Nyiyabarli and Banjima. In 1992, Angela Murphy and others were told that Banjima and Nyiyabarli both had rights to speak there and there was a "collective responsibility" for the area.

347 He also noted Dr McDonald in 1997 recorded that informants on a survey of Hope Downs "emphatically referred to Weeli Wolli Creek as being one of the main meeting places between the two groups". He also noted that there had been a strong historical relationship between Banjima and Nyiyabarli and intermarriage. Kim Barber in 1996 considered that the area around what is now the Yandicoogina project was owned by a closely related coalition of "Inawongga/Ngarla, Bandjima and Nyiabali people".

348 Mr Robinson also noted what Dr Palmer reported, as set out above, as a result of the additional 2010 fieldwork undertaken with Dr Vachon. He noted that Dr Palmer made a number of observations and appears to favour a view that this was an area of multiple interests.

349 Ultimately, based on the literature, old and new, Mr Robinson (at [229]) expressed his belief that there is anthropological support for a Banjima boundary at Weeli Wolli Creek, with a likely sharing of country with their Nyiyabarli neighbours to the west of the creek. He added, however, that "[t]here is a question whether the traditional neighbours here were the Nyiyabarli or Palkyu at sovereignty" but believes it would be now very difficult to resolve that question.

350 It was in these circumstances that the anthropologists in their joint report, in relation to the proposition that country to the west of Weeli Wolli Creek and extending as far as

Barimuna are areas in which members of the Nyiyabarli language group hold customary rights, agreed the outcome:

> Mr Robinson is of the view that, based on the available literature, there is no ground for concluding that Nyiyabarli had rights in the Weeli Wolli and Yandicoogina Creek at sovereignty.
>
> Dr Palmer's view is that the proposition relies on an assumption over the nature of tribal groups which is untenable.

351 I accept the outcome expressed by Dr Palmer and Mr Robinson and the basis for it. I accept the Banjima have native title rights and interests in the area in question and so their "boundary" extends that far.

352 The preponderant evidence given by Banjima claimants at trial was consistent with the view that, in this eastern boundary area, it is persons, including David Stock, with Banjima language group connections who hold the native title rights and interests. Evidence and questioning in some respects focussed on Barimuna. Brian Tucker in his evidence said it was Banjima country and that a song related to it, although he accepted that people who identify as Nyiyabarli also sing that song. Alec Tucker, Maitland Parker and Archie Tucker gave evidence consistent with that given by Brian Tucker about Barimuna.

353 The claimants observe that the evidence that Weeli Wolli is the boundary in this area is particularly strong for various reasons including that:

- Brian Tucker identifies as both Banjima on his father's side and Nyiyabarli on his mother's side. Timothy Parker's mother is also Nyiyabarli.
- Timothy Parker and Slim Parker both gave evidence that they gained their knowledge of country from both Banjima and Nyiyabarli old people both as children and in the context of heritage work with elders visiting Weeli Wolli Creek.
- The Banjima connection to the Weeli Wolli boundary is legitimated by references to the Wardirba tradition that celebrates the water flowing down the creek into the Fortescue River.
- In accordance with their laws and customs, the Banjima people are active in visiting and looking after country and water associated with Weeli Wolli Creek and Barimuna.

354 The claimants accept, however, that Mrs A Smith, a senior Banjima woman, suggests that Barimuna was Nyiyabarli. They also make the reasonable observation that she identifies primarily as a Top End Banjima person and, as a woman, cannot talk about Wardirba. Mrs A Smith also recognised David Stock was the right person to speak for Barimuna and that he had a Nyiyabarli mother.

355 In the concurrent evidence session Mr Robinson confirmed his view that the evidence for the Nyiyabarli presence in that area at sovereignty was not there, but the evidence of the current interest was. Mr Robinson accepted there was an abundance of evidence about both Banjima and Nyiyabarli interests in that area today, although the Palyku do not figure presently.

356 As to David Stock, Dr Palmer said that he is recognised as having rights in the area. Dr Palmer added that he said that regardless of the language name by which David Stock identifies. He considered and understood that both he and Mr Robinson agreed with that.

357 As to whether the evidence disclosed Nyiyabarli interests in this area at sovereignty, Dr Palmer considered that the situation at sovereignty is the subject of very slim ethnographic evidence. As to what the arrangements might have been, especially given misunderstandings in the literature about the nature of tribes and boundaries, he considered it would be very hard to come up with anything that he could put any weight on.

358 As far as David Stock, Barimuna and the traditional interests held in the Barimuna area are concerned, I consider the preponderant evidence is this proceeding nonetheless is that David Stock is a person with interests in that area and while he has Nyiyabarli connections through his mother, he obtained those interests through his Banjima ancestry, and that Barimuna was also an important place for Banjima people.

359 Having regard to the evidence referred to, and the opinions expressed by the anthropologists concerning the importance of not confusing “tribal” identification with the way in which traditional rights and interests are derived, particularly in boundary areas, which I accept, I am satisfied that Barimuna is traditionally connected to the Banjima and that persons with Banjima ancestry, including David Stock, have recognised interests under Banjima law and custom in that area. The celebration of Barimuna in the Wardirba song

cycle may not be definitive proof that a place falls within Banjima territory, but in this case taken with all the other evidence, including that of the anthropologists, I am well satisfied on the balance of probabilities that Weeli Wolli and Yandicoogina Creeks constitute the eastern boundary of the claim area.

360 I find, therefore, that the Banjima held traditional rights and interests in the eastern boundary in the vicinity of Weeli Wolli and Yandicoogina.

Maintenance of Connection

361 In their joint report the anthropologists, Dr Palmer and Mr Robinson, agreed with the proposition that members of the Banjima society together hold and observe laws and customs that show continuity with the laws and customs likely to have been observed by their forebears at the time of sovereignty. Notwithstanding this agreement, the State contends that there has been such a degree of change and adaptation in the practices of the Banjima today that continuity with the laws and customs likely to have been observed at the time of sovereignty by their forebears cannot be demonstrated. The State contends that from 1829 to now the following changes are discernible:

(1) from the rights held at the level of "estates" to the level of either the Banjima as a whole or to Top and Bottom End Banjima;

(2) from patrilineal to cognatic descent; and

(3) from some other internal subdivision to Top and Bottom End subdivision.

As a result, the State submits that rights at sovereignty were dependent on "one regime" of laws or customs but are now dependent on a "new regime".

362 The State also contends that the chain of possession since sovereignty has been broken by a "substantial interruption" in the observance of laws and customs and that there can be no revival of a lost title, regardless of the reasons for the interruption. In particular, it is said by the State that the relevant "interim facts" are that the vast majority of, if not all, Banjima people were absent from their land for the bulk of the twentieth century; were dispersed separately in that period to Onslow, Roebourne, Port Hedland, Nullagine and stations in the Pilbara; mixed culturally and socially with other groups; and formed "different collectives" from those at sovereignty.

363 It is further contended by the State that it is necessary for the claimants to establish that native title rights and interests subsist throughout the claim area and this cannot be demonstrated by proving that an activity occurred in some other locality. Thus, the State submits, it cannot be shown that native title rights persist in Juna Downs (for example) by proving activity occurred in Mulga Downs; and that, a fortiori, native title in the claim area cannot be proved by activity in Onslow and Roebourne.

364 In this vein the State also contends that it is necessary that rights that attached to particular land in 1829 can survive today only in respect of the same land, and that this is lacking in the Banjima as to the Fortescue Valley and Yandicoogina. In light of my findings above concerning the boundaries disputed by the State, this particular contention necessarily falls away.

365 The State finally contends that there has been no establishment of any exclusive possession of native title rights or interests.

366 In short, the State, referring mainly to *Yorta Yorta HC*, contends that the Banjima have failed to prove that:

(1) Their laws and customs relating to land are traditional.

(2) Their alleged rules are normative for the claimants.

(3) Their alleged society and rules have vitality.

(4) There is one law in which they unite by observance.

(5) The Top and Bottom End Banjima have the same laws

(6) Any communal rights exist.

(7) There is an "emic view" of one society.

(8) Traditional laws or customs relating to land ownership have endured.

(9) The traditional society has endured.

(10) There were pre-sovereignty Banjima rights in the Fortescue Valley and Yandicoogina.

(11) Laws or customs and society have endured at Juna Downs, Packsaddle, Mt Bruce, Marillana Station, Chichester Range and Karijini National Park.

367 The expressions "native title" and "native title rights and interests" are defined in s 223(1) NTA as:

> (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.

368 It will be observed that the "connection" requirement arises under para (b) and, necessarily relates back to the rights and interests described in para (a), that is to say, those "possessed under the traditional laws acknowledged, and the traditional customs observed, by" the relevant people, because it is "by" those laws and customs that the Aboriginal peoples must have a connection to the claim area. This was emphasised in *Yorta Yorta HC*.

369 In *Yorta Yorta v Victoria* [2001] FCA 45; (2001) 110 FCR 244 (***Yorta Yorta FC***) at [108] the majority in the Full Court considered that para (c) of s 223(1) incorporated into the statutory definition of native title the requirement that, in the case of a claimed communal title, the holders are members of an identifiable community "the members of whom are identified by one another as members of that community living under its laws and customs" and that the community has continuously since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land. In *Yorta Yorta HC*, the plurality (Gleeson CJ, Gummow and Hayne JJ; with whom McHugh J agreed) explained that the questions which arose on the appeal in the High Court turned more on a proper understanding of para (a) and what was meant by "possessed under the traditional laws acknowledged, and the traditional customs observed" by the relevant people, than they did on para (c).

370 In the High Court the claimants argued that emphasis needed to be given to the traditional laws *presently* acknowledged and traditional customs *presently* observed, an argument that did not find favour with the Court. The plurality observed what was said in

Fejo v Northern Territory [1998] HCA 58; (1998) 195 CLR 96 (***Fejo***) at [46], to the effect that native title has its origins in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title and it is neither an institution of the common nor a form of common law tenure, but is recognised by the common law. It is, therefore, "an intersection of traditional laws and customs with the common law". In *Fejo*, the plurality said, in relation to the arguments pressed on the appeal:

> [I]t is critically important to identify what exactly it is that intersects with the common law. Is it a body of traditional law and custom as it existed *at the time of sovereignty*? Is it a body of law and custom as it exists *today* but which, in some way, is connected with a body of law and custom that existed at sovereignty? How, if at all, is account to be taken of the inescapable fact that since, and as a result of, European settlement, indigenous societies have seen very great change?

371 In *Yorta Yorta HC*, the plurality emphasised (at [34]) that the connection to be identified for the purposes of the NTA is one "whose source is traditional law and custom, not common law". Their Honours observed (at [38]) that when it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters), it is clear that the laws or customs within which those rights or interests find their origins "must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system – the body of norms or normative system that existed before sovereignty".

372 Continuing with the concept of "intersection", their Honours stated (at [38]) that the relevant intersection is an intersection of "two sets of norms". That intersection is sometimes expressed by saying that the radical title of the Crown was "burdened" by native title rights, but undue emphasis should not be given to this form of expression. Their Honours noted (at [39]) that to speak of an intersection of two sets of norms, or of "two normative systems", does not identify the nature or content of either.

373 The plurality (at [41]) said that to speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke jurisprudential debate about the difference between what the legal philosopher HLA Hart referred to as "merely convergent habitual behaviour in a social group" and legal rules. Their Honours said that the reference to traditional customs might also invoke debate about the difference between "moral obligation" and "legal rules". Their Honours said, however, that a search for parallels between traditional law and traditional customs, on the one hand, and the conception

of a system of laws offered by another legal philosopher, John Austin, as a body of commands or general orders backed by threats which are issued by a sovereign or a subordinate in obedience to the sovereign, "may or may not be fruitful". Likewise, to try to distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive. Their Honours thereby recognised that there is no real need to distinguish between what is a traditional *law* and what is traditional *custom*. But, their Honours said, they must be rules having "normative content".

374 The plurality (at [43]) stated that, on the Crown acquiring sovereignty the normative or law-making system which then existed could not thereafter develop or create new rights or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not be given effect by the new law of the new sovereign. Their Honours said, however, that is not to deny the new legal order recognised then existing rights and interests in land. Nor is it to deny the efficacy of rules of transmission of rights and interests under traditional laws and traditional customs which existed at sovereignty where those native title rights continued to be recognised by the legal order of the new sovereign. Their Honours said the rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests.

375 Additionally, nor is it to say, their Honours added, that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Indeed, their Honours said account may have to be taken of developments at least of a kind contemplated by the traditional law and custom; and they noted that some of the respondents in the appeal accepted that there could be "significant adaptions", as had been described by the majority in *Yorta Yorta FC* (at [67]).

376 The plurality then engaged in a discussion of what the word "traditional" in s 223(1) meant in context. Their Honours (at [46]) noted that it is a word apt to refer to a means of transmission of law or custom and is one which has been passed from generation to generation in a society, usually by word of mouth and common practice. In the context of the NTA, they said, it carries with it two other elements in its meaning. First, an understanding of "the age of the traditions". Secondly, the reference to rights and interests being *possessed* under traditional laws acknowledged and traditional customs observed requires that the

normative system is one which has had a "continuous existence and vitality" since sovereignty. Their Honours said (at [47]) that:

> If the normative system is not existent throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

377 Their Honours observed (at [50]) that if the "society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality".

378 Thus, the plurality (at [52]) considered that the questions that arose in the circumstances of the appeal before them were:

- Has the society ceased to exist?
- Does not the survival of knowledge of the traditional ways suggest that it has not?
- Or is it shown that, although there is knowledge, there has been or is no observance or acknowledgment?

379 Of these questions, the plurality observed more generally (at [52]):

> These may be very difficult questions to resolve. Identifying a society that can be said to continue to acknowledge and observe customs will, in many cases, be very difficult. In the end, however, because laws and customs do not exist in a vacuum, because they are socially derivative and non-autonomous, if the society (the body of persons united in and by its observance and acknowledgment of a body of laws and customs) ceases to acknowledge and observe them, the questions posed earlier must be answered, no.

380 To similar effect, their Honours stated (at [53]) that if the content of the former laws and customs of one society is later adopted by some "new society", those laws and customs will then owe their new life to that other, later, society and so will not be recognised under the NTA.

381 Their Honours ultimately considered (at [55]) that the laws and customs and the society which acknowledges and observes them are inextricably linked. Their Honours said (at [56]) that it would be wrong to confine an inquiry about native title to an examination of

the laws and customs now observed in an indigenous society or to divorce that inquiry from an inquiry into the society in which the laws and customs in question operate. It would also be wrong to confine the inquiry into connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown *now* to be acknowledged and observed. Rather, it would be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.

382 The plurality then considered the reasons of the primary judge and those of the Full Court and the particular contentions made on the appeal before them. Their Honours (at [79]) said that "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the NTA deals as rights and interests "rooted in pre-sovereignty traditional laws and customs".

383 The plurality recognised (at [80]) that in many cases, perhaps most, claimants will invite the Court to infer from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore, turn on what evidence is led to found the drawing of such an inference.

384 The plurality said (at [82]) that it is, however, important to notice that demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult in cases, like that before them, where it is recognised that the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement. Their Honours said that difficult questions of "fact and degree" may emerge, not only in assessing what, if any, significance should be attached to the fact of change or adaptation, but also in deciding what it was that was changed or adapted. Their Honours recognised that it is "not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant".

385 The plurality, however, said (at [83]) that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests between sovereignty and the present will not "*necessarily* be fatal" to a claim (emphasis in original). Nonetheless, their Honours said that change and interruption in exercise may "in a particular case" take on considerable significance in deciding the issues presented by an application for determination of native title. They added that:

> The key question is whether the law and custom can still be seen to be traditional law and traditional custom.

386 The plurality (at [84]) recognised that interruption of use or enjoyment presents more difficult questions. They accepted that the exercise of native title rights or interests may constitute "powerful evidence" of both the existence of those rights and their content. They also accepted that evidence that there was some non-exercise of rights "does not inevitably answer" the relevant statutory questions. The questions are directed to the "possession" of rights or interests, not their exercise, and are directed also to the existence of a relevant connection between the claimants and the land or waters in question.

387 Their Honours also accepted (at [85]) that account must be taken of the fact that both paras (a) and (b) of s 223(1) are cast in the present tense. The questions thus presented are about *present* possession and *present* connection. That is not to say, however, that continuity of the chain of possession and the continuity of the connection is irrelevant.

388 Thus, the plurality said (at [87]) that acknowledgment and observance of the laws and customs must have continued "substantially uninterrupted" since sovereignty. Their Honours observed (at [89]), that the qualification "substantially" is not unimportant. It recognises that proof of continuous acknowledgment and observance over the many years that have elapsed since sovereignty of traditions that are oral traditions is very difficult. It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, "inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement". Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the

society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a "body united by its acknowledgment and observance of the laws and customs".

389 For the plurality (at [94]) the critical question was whether any errors of law made at trial affected the primary judge's critical findings of fact that the evidence did not demonstrate that the claimants and their ancestors had "continued to acknowledge and observe, throughout the period from the assertion of sovereignty in 1788 to the date of their claim, the traditional laws and customs in relation to land of their forebears", and that before the end of the 19th century, the ancestors "had ceased to occupy their traditional lands in accordance with their traditional laws and customs".

390 The plurality found that these findings were about *interruption* in observance, not about the content of or changes in the law and custom. They were findings rejecting one of the key elements of the case which the claimants sought to make at trial. Having made this point (at [95]) the plurality added that, more fundamentally, they were findings that the society which had once observed traditional laws and customs "had ceased to do so" and so no longer constituted the society out of which the traditional laws and customs sprang. On those findings, the plurality found that the claimants must fail.

391 By contrast, Gaudron and Kirby JJ, in a joint judgment, considered (at [119]) that although lack of continuity of community is directly relevant to the question whether native title exists, for present purposes the relevant questions were whether traditional laws and customs were acknowledged and observed and whether, by those laws and customs, the claimants had a connection with land and waters in the claim area. Their Honours said those questions were not answered by the majority in the Full Court. They also said that might not prove an obstacle to their being answered on the appeal, were it not for the fact that the primary judge did not find that the Yorta Yorta people had ceased to exist as "an identifiable community, the members [of which lived] under its laws and customs". Moreover, neither the primary judge nor the majority in the Full Court considered the question whether, throughout the period, there were persons of Aboriginal descent who identified themselves

and others as Yorta Yorta people bound together by ancestry and by shared beliefs and practices.

392 Like the plurality, their Honours said (at [112]) the word "traditional" ordinarily signifies that which may be described as being handed down from generation to generation, often by word of mouth. Similarly, their Honours observed (at [113]) that, as and when it occurred, European settlement almost certainly rendered the observance of traditional practices impracticable in a number of respects. They observed this was recognised by the NTA preamble. Their Honours added (at [114]) that:

> What is necessary for laws and customs to be identified as traditional is that they should have origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.

393 Callinan J also dismissed the appeal. He too discussed the meaning of the expression "traditional". His Honour said (at [186]) that it seemed to him that the critical elements of traditional laws and customs are "rights and interests" in the sense and context in which the words are used in s 223. The rights and interests must be definable with sufficient clarity to enable them to be enforced by the common law. They must, for the same reason, his Honour said be held in relation to defined land. And that, for their enjoyment, a physical presence is essential. These observations of Callinan J including the statement that "Tradition requires a high degree of continuity" are not observations to be found in the plurality judgment or supported by McHugh J. Nor are they supported by the joint judgment of Gaudron and Kirby JJ.

394 Following the decision in *Yorta Yorta HC*, and the plurality's references to the "normative system" of a "society", attention has been given in a number of claimant applications under the NTA to the word "society", as it has in the submissions of the State in this proceeding. A question has been raised whether a claimant group must prove its existence as a "society". It may reasonably be observed that where the plurality referred to the concept of society, it did so in the course of a jurisprudential explanation of why a group's current practices must be rooted in the past, and why there may not be a substantial interruption in the relevant connection of the group with their country. A similar point was made in *Northern Territory v Alyawarr* [2005] FCAFC 135; (2005) 145 FCR 442

(***Alyawarr FC***) where (at [78]) the Full Court considered that the term "society" deployed by the plurality did not require "arcane construction", was not a word that appeared in the NTA, but was "a conceptual tool for use in its application". The Full Court added that it did not introduce into judgments required under the NTA, "technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies'".

395 That dicta of the Full Court was recently applied by Finn J in *Akiba v Queensland (No 3)* [2010] FCA 643; (2010) 204 FCR 1 (***Akiba (No 3)***) at [162]. Finn J noted (at [163]) that while the plurality in *Yorta Yorta HC* used the expression "society", in a footnote it explained that the word was used rather than "community" to emphasise the close relationship between the identification of a group and the identification of the laws and customs of that group. His Honour (at [164]) also reasonably observed that what is to be noted in this is that, while it is the society whose laws and customs are to be acknowledged and observed, that society as such may or may not hold communal native title rights and interests under those laws, as explained in *Alyawarr FC* at [79]-[80] and in *Bodney v Bennell* [2008] FCAFC 63; (2008) 167 FCR 84 at [149]-[153]. Rather:

> All depends on the body of normative rules of the society which gives rise to native title rights and interests.

396 In relation to the NTA and the reference to "communal, group or individual" rights or interests found in s 223(1), Finn J (at [167]) emphasised that, merely because the members of a native title claim group in aggregate hold all of the native title rights and interests possessed under their laws and customs, this does not necessarily mean there exist "communal" rights and interests. Nonetheless, Finn J (at [168]) accepted two things that are, with respect, worthy of note:

(1) That laws and customs arise out of and go to define a society and, notwithstanding the "close relationship" emphasised in the *Yorta Yorta HC* footnote, this does not suggest that the defining characteristics of a particular society and of its laws and customs may not admit of considerable diversity in the groups constituting the society and of differential application of, and local differences in, the laws and customs that relate to such groups. Thus, his Honour rejected the Commonwealth's submission that the claimants must establish a body of laws and customs which "united" people. His

Honour noted the society is required only to be united in and by its acknowledgment and observance of a body of law and customs.

(2) The question considered by the plurality judgment in *Yorta Yorta HC* touching on what are laws and customs is helpful but not conclusive and regard should also be taken of what HLA Hart more fully said on the topic, as explained in *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1 at [996] by Lindgren J. As a result, Finn J (at [173]) settled upon the following working definition of "custom" suited to the distinctive circumstances of the matter before him: that "customs" are accepted and expected norms of behaviour, the departure from which attracts social sanction (often disapproval especially by elders).

397 On the subsequent appeal in *Commonwealth v Akiba* [2012] FCAFC 25; (2012) 204 FCR 260 (***Akiba FC***) these factors identified by Finn J were not in issue. The issues which remained controversial in the appeal were: whether the Commonwealth and State licensing regimes for commercial fishing extinguished the native title right to take fish and other marine life for commercial or trading purposes; the geographic boundaries of the area of sea in which any native title rights and interests subsisted; and the nature and extent of subsisting native title rights and interests. The first and third of these issues were also considered on the further appeal to the High Court, *Akiba v Commonwealth* [2013] HCA 33; (2003) 87 ALJR 916 (***Akiba HC***), where the appeal of the claimants was allowed and the determination of Finn J restored.

398 In this case, not only does the evidence show that there has long been, from sovereignty, a group, community or society of Banjima people, that their traditional country is at least co-extensive with the claim area in this proceeding, and that the current traditional laws and customs of the Banjima help to identify a Banjima society rooted in the past, right back to sovereignty, but also that there has been no substantial interruption of the connection of the Banjima with their country, over that time, by their laws and customs. No doubt, as the evidence discloses, the introduction of pastoral industry in the 1880s had a real impact on the way in which the Banjima lived their lives and that they were obliged to adapt to accommodate those impacts, but that does not mean, and the evidence does not disclose, that the connection of the Banjima, by their laws and customs, with their traditional country was substantially interrupted between the 1880s and today.

399 In particular, the simple proposition, as advanced by the State that, because from the 1950s and 1960s many Banjima people were obliged to leave their "employment" on pastoral stations in or near the Banjima claim area and commenced living with their families in towns like Onslow, Roebourne and Port Hedland where their children were able to go to school, does not necessarily mean that the connection of the Banjima with their traditional country by their traditional laws and customs was substantially interrupted. They knew who they were, they spoke their own language and they inculcated their children and grandchildren in the traditional ways of the Banjima. Practise of the ritual and ceremonial laws of the Banjima did not cease. Boys were still put through the Law. The Wardirba did not cease to be practised. Knowledge of country was imparted and religious connection with country celebrated. People did all they could, whenever they could, to get back on their own country and maintain their practical connection with that country, for example, through camping, hunting, using traditional resources and visiting and protecting sites, as their ancestors always had.

400 What happened after first contact, as Dr Palmer explained, was that what might be described as the "classical" social organisation of sovereignty times, by which people economically exploited their traditional country in "residence groups" and fundamentally "spoke for country" in "country groups" or "estate groups" in more religious terms, was adapted to the new settler circumstances. People slowly but surely ceased to be the traditional bush Aboriginals about whom Straker reported, and came to be more settled on particular pastoral stations on or near their traditional country; but still maintaining quite traditional lives. Those who had what were recognised as traditional rights to speak for particular parts of Banjima country continued to assert primary rights to "speak for" particular parts of country (parts that came to be identified more with the boundaries of the pastoral stations on which lived their day-to-day lives) and to economically use and exploit the whole of Banjima country when they were able in practical terms to gain access to it.

401 The fact that pastoralists, miners and officials administering government regulations and the like may have inhibited the exercise by the Banjima of their traditional rights and interests from the 1880s to the present time, does not mean that there was any substantial interruption to the connection by the Banjima people with the whole of their traditional lands and the possession of their rights. The evidence shows the Banjima never abandoned their country or pronounced the forfeiture or loss of possession of their rights.

402 The fact that hunting, gathering, camping, fishing, use of traditional resources or ceremonial activities may have been conducted on Banjima country at a particular place or particular places at different times over the ensuing years, as the evidence shows it was, does not mean that connection was only maintained with that place or those places and not others in the traditional country of the Banjima. Rather, taking the evidence as a whole, the religious as well as the economic, the claimants have demonstrated that they have relevantly maintained their connection with the whole of the claim area.

403 It is necessary to refer to only some of the extensive connection evidence given in this regard by the claimants, at risk of making an already long judgment even longer. Much of the relevant evidence is otherwise usefully summarised in Sch 4 of the claimants' closing submissions.

404 In relation to the rights and duties to country, an aspect addressed by both the anthropologists, the first thing to observe, as has already been observed above in relation to the boundaries questions (particularly in relation to the northern and eastern boundaries of the claim area), is that Banjima people today have detailed knowledge of the extent of Banjima country, a knowledge that I consider has been demonstrated, on the evidence, to have emanated from their old people. The contentions of the Pastoral respondents that there were inconsistencies is not a reason to reject the evidence. Overall it has a basic consistency. Knowledge of the extent of country is one of those factors, whilst not determinative on its own, that bespeaks an association, a connection with country.

405 Allied to the knowledge of the extent of country is an awareness of the rights to country that Banjima people have today as their forebears did in the past. Again, rights are shown to attach primarily to persons who are members of one sub-group or another sub-group – the Top End Banjima and the Bottom End Banjima. In some cases people are members of both groups and so consider themselves having primary rights to the whole of Banjima country. This issue has been discussed at length above in relation to the question whether there are and were at sovereignty sub-groups of Banjima. This again demonstrates the traditional law underlying and supporting the rights asserted today by Banjima people.

406 Particular expression or content of the rights and interests was canvassed at some length in the course of the hearing by Banjima witnesses, and is the subject of further

discussion below of rights and interests in land. It is appropriate at this point, however, to note that many witnesses spoke of the right to speak for country that their ancestors left them, as well as the right to do certain things on their country. The right to speak for country is attached to the groups, Top End and Bottom End, and their main, or senior representatives. Brian Tucker, for example, spoke about his rights and responsibilities in Mungarda or Fortescue Banjima country left for him by his fathers. He added that it was his right and responsibility to speak for Banjima country because he has gained knowledge of Banjima country through Banjima law. He further said, however, that Banjima law men have a responsibility to look after and speak for country and it is important that law and culture be passed down to the next generation. He said that by learning that knowledge and teaching it to the best of your ability you can rest peacefully and die proud because you taught those ways to be in the country and what is right and what is wrong. In particular, he drew his interests from those of his great grandfather Bob Tucker Wirilimura from Juna Downs and Packsaddle area and also from his involvement in the Law in the Mulga Downs area. Brian Tucker was clear that through his great grandfather he had rights in the whole of Banjima country. Nonetheless, Brian Tucker was at pains to point out that he primarily spoke for Bottom End country but that he had every right to speak for Packsaddle and Juna Downs country and if he was acknowledged by the old people and given that right in respect he would take that up.

407 Brian Tucker explained that speaking for country can include saying what things can and cannot be done, like digging a mine. Brian Tucker also explained that bajarli and yurlu are the names by which the country of your ancestors is called. Yurlu can mean a camp or your country. Bajarli and yurlu basically refer to the same thing.

408 Maitland Parker spoke additionally about the right to hunt and fish. He explained that in modern times with the ability of Aboriginal people to travel around the Pilbara, Aboriginal people tend to hunt and fish in many places. He said that in the old days this was only done by permission. But he added that the right thing to do these days is to let people know when you are going into their country. If you are a senior man, you have to talk to someone at the same level in the Law. In this regard, Maitland Parker explained that when he was at Nanutarra and Cane River (outside Banjima country) his family got permission from the old people there and learnt about the country and the sacred places and spots. He said you could

not just go anywhere in someone else's country and take trees and the like and you must show respect for the people.

409 Accordingly, he said, other people have to ask the Banjima if they want to disturb the country, take resources, bury someone, or put a boy through the Law in their country. He said in Banjima country he was free to go anywhere because he knows the country.

410 Mr G Tucker said that Banjima people can move all around Banjima country. They can camp, hunt and gather food and medicine because there is one Banjima people. He said his responsibility was to look after Banjima country at Barimuna and he now looks after all meeting grounds around the Mulga Downs area.

411 Mr G Tucker said he can stop other Aboriginal groups coming on to his Banjima land if they are doing something wrong to it. If a Yindjibarndi man wanted to come into Banjima country he would have to ask permission from the elders. He said he knows some people from Roebourne who often ask him whether they can come to shoot in Banjima country and he gives them permission. He says that it is the Banjima people's right to be asked.

412 Mr G Tucker said that just because a person is born in a certain country does not give that person rights to be there. They have to have some family from a place and be taught for that country by the old people.

413 Mr G Tucker also said that to speak for country a person has to go through the initiation process. As a law man he is often invited to meetings where he was called by his name Wirilimura and not by his name, G.

414 Like Brian Tucker, Mr G Tucker said that Wirilimura and his descendants have rights all across Banjima country including Mulga Downs Station, Marillana Station, Munjina Station, Mt Bruce Station, the gorges of the Hamersley Range, the area north of and including Karijini Visitors Centre, the area east of Great Northern Highway, Hope Downs, Weeli Wolli Creek, Fortescue River, Marilana Creek and Yandicoogina Creek.

415 He added that to speak for Banjima country a person must be a bajarli and have been given authority from the elders which is given to a person through initiation.

416 Alec Tucker said that women may also have rights to speak for Banjima country if they have knowledge after sitting down and learning from old people. His evidence concerning the right to speak for country echoed that given by others. He emphasised that the main right to speak for country comes through the bloodline.

417 Alec Tucker also confirmed the respect rules that require other "tribes" to ask permission before coming into Banjima country to get a kangaroo or gather wood for a boomerang. He said that if they do not ask permission and go to a dangerous place they could get hurt by mabarn powers. He said that when he was young he learnt from the older people where he could go and where he could not go and how he might be in trouble with the spirits if he went to the wrong places.

418 He confirmed that Banjima women cannot go to men's areas.

419 He also explained the rules that govern boys going through the Law.

420 Mrs A Smith said that as a Banjima elder she could speak for Banjima country and only Banjima elders can do so. She said that when she is gone she passes the right to her oldest son. The eldest one in the family speaks. She added that if people get a kangaroo or something else on Banjima country they are supposed to share it with the people who speak for that country.

421 Mrs A Smith also said she taught her children to follow the right way. She says she has never had any trouble in Roebourne, where she lives, because she understands that that land belongs to the Ngarluma and she respects that. She teaches her sons and daughters about Banjima culture.

422 She added that the place where a Banjima person is born might be important to that person and they are allowed to go and look at that place. She was born on Rocklea Station on Gurama country, but her own country is around Juna Downs on Banjima country. That was her mother's and grandmother's country.

423 Mrs A Smith's son, Charles Smith, said that Banjima families have always moved around hunting and gathering and he can move around his country freely and it is safe to do

so. But he will not go into a forbidden area or a sacred area. Nor is he free in other people's country and he must ask people from that country out of respect before he goes in.

424 Marnmu Smyth said that the place where she was born, Marnmu, is special to her and she passes that history on to her children and grandchildren. She said that where you were born is important, but just because you were born there does not mean anything if you were just born there. You have to have a connection through your family.

425 Marie-Anne Tucker said her yurlu was Mulga Downs and that is where she belongs with her old people. She also confirmed respect and permission rules when people from other language groups entered Banjima country. She also confirmed that the Top End mob talk for Mt Bruce Station and that Top End Milyaranba talk for the gorges of the Hamersley Range too.

426 She confirmed that on Banjima country she was free to hunt and camp around the place but must remember where the old Law grounds are and where she should not go.

427 Similar extensive evidence about the rights to speak for country and hunt and gather and use country was also provided by Mr D Black, Steven Smith, Juliette Pearce-Tucker, May Byrne, Archie Tucker, Gladys Tucker, John Todd and Mervyn Smith.

428 In the course of discussion of the nature of rights all these witnesses emphasised that in realising rights as a Banjima person, the person must be able to establish that they are descended from an old Banjima ancestor, that is to say have Banjima ancestry, and that simply being born in Banjima country as an Aboriginal person does not provide that person with rights and interests under the traditional law and culture of the Banjima, unless they have a Banjima ancestor. These witnesses all explained that it is by learning more about country, the Law, the sacred places and with age, that a person grows more senior in the Law and is accorded respect and the particular right for a group to speak for their country. It is on the passing of a person that particular rights to speak for country will be handed down the line to the next senior person.

429 Extensive evidence was also given about particular sites and the spirits associated with them. For example, Brian Tucker gave evidence about a kurrumundu jilbaba in

Nilimba Gorge, a snake jilbaba in Yampire Gorge, a jilbaba at Buthanmara and how he was taught to call out to them.

430 Maitland Parker explained that there were a number of significant men's sites that are referred to in the Wardirba law.

431 Many other places were identified as meeting and camping and hunting grounds by Maitland Parker.

432 Slim Parker explained that Barimuna is a place of great significance to the Banjima people and that they do not talk publicly about it. This helps to protect it. He also explained that Barimuna comprises three separate hills and is associated with three women who were sisters. It is part of restricted men's business but was aware that there is also some restricted women's business to do with the area as well.

433 Slim Parker said that there was a Dreamtime story for that place where the rainbow serpent goes underground and the place is called Thulabunta.

434 Mr G Tucker, Alec Tucker, Timothy Parker all gave evidence about special places. So too did senior claimant Mrs A Smith. She spoke of places where the nuga would visit you at night time and you could be killed if you go there. She explained that Mt Bruce is a dangerous place and that there is also a dangerous place on Juna Downs where there is a jardi in the ground, as well as there being a dangerous place in a cave in Birdibirdi. Men's gear was kept at that place and women were not allowed to go there. She also spoke of other economic use places such as a grinding place on Juna Downs. And she mentioned ngulu grounds or men's Law grounds which are sacred sites that she should not go to.

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

next country going over. They are about Banjima country. The songs are also about water which is important to everybody.

436 Brian Tucker explained that he has participated in the Law of others. He said he has participated in some Nyiyabarli Law, because of his Nyiyabarli connections through his mother. He knows some Nyiyabarli songs and some of those songs were over the same part of the country as Banjima songs. He said the Banjima Wardirba songs are based on Karijini and Pidiru (Hamersley Range) and Mungardu (Fortescue floodplain). What he has learnt has been passed down to him by older men from a long time ago. He explained that the songs were learnt at Cane River and were taught by Banjima people who were no longer with them.

437 Brian Tucker is a Law man respected by his community. He explained that the Wardirba involves knowing how animals go about, so you can know how to stalk them, track and hunt them. If you did not know about those animals you would never survive. He said that you have to remember water is the most precious of things, birds and animals come to that water.

438 He explained that there were also animals sung about in the Wardirba. The animals have skins (sections) the same as people. For example, one song is about the badjari (or hill kangaroo). The skin of that badjari is milangga. The skin of bandawari is banaga. The plain kangaroo's skin is banaga. The crow is banaga. The wedge tailed eagle is banaga. The gurrumandu is garrimara. The animals travel all over Banjima country in the songs.

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

440 Many other men qualified to do so supported Brian Tucker in the evidence he gave about the Wardirba, including Mr G Tucker and Alec Tucker.

441 Charles Smith also gave evidence about the Wardirba and explained there are two Wardirba, one for the Fortescue floodplains and one for the Top End, but the two are basically the same. They cover different geographical areas.

442 Charles Smith also explained that the Walajingka Law is the law practised when boys are taken to the bush. When the boys are brought out of the bush the Wardirba is the ritual then practised. The Wardirba is just for the men to talk about. When the men are dealing with the Wardirba, as Marie-Anne Tucker explained, women sit up all night and shake the tins so that they do not hear the Wardirba being sung. She said if the women heard those songs they would get sick.

443 Slim Parker described the relationship between the Walajingka and Wardirba as follows:

> They – what we have is law, traditional law from Mungarn; Mungarn from dreamtime from creator who gave us our Walajingka law and our Wardirba law and to Badijudarras [sic Bathu Gudarra] make reference to the Wardirba law and the other law. It's all within the Walajingka law and that's a Milgu and that's a ceremony. When that process is finished then we go into the Wardirba and then we conduct the Wardirba. So therefore then it's all part and parcel of the Walajingka and the Wardirba law together.

444 Maitland Parker explained:

> The first part of the Law is Walajingka, the initiation Law when malulu go through men's business. The second stage or second part is our Wardirba Law. The songlines connected with Wardirba relate to places in country, animals, the stars, the moon, the rain, man and woman, adolescents and everything that is in the world and has been made. We sing it as the last stage when we are bringing the boys back to their mothers.

445 Archie Tucker explained how he went through the Banjima Walajingka Law at Nanutarra in the 1970s with others such as Charlie Coffin and Eric Parker. It was old Wobby Parker (deceased), Archie Tucker's gundu, who put him through.

446 Steven Smith explained that going through Law makes you aware and identifies where you fit in. Law, he said, is "like going to school, university and then college and one day you end up a professor, it is learning, you are always learning".

447 Marie-Anne Tucker explained how the women and the men and families all support each other when Law business is conducted.

448 May Byrne, like Marie-Anne Tucker and Juliette Pearce-Tucker, also explained about the Walajingka and Wardirba Law. She said that when everyone was "pushed off the

stations" the Law grounds started up at Onslow. She has participated in the Law since she was a little girl on the old reserve in Onslow. She gave extensive evidence about how her family and she had participated in the Walajingka law.

449 The evidence of many of these same witnesses dealt as well with the question of family and kinship. Brian Tucker explained how he had to respect his gudja, Alec Tucker, because he was his oldest brother and he is the oldest son of their fathers. The oldest daughter is called thurru. He said you show respect for your father's brother by calling your father's brother bunayi. He explained that the word for respect is wiyurulbala.

450 Brian Tucker explained that everyone should be with one voice and that one system of kinship is the most important thing in country because that is the way life is: "You have kinship ties with the neighbouring groups and you show that acknowledgment and respect".

451 Brian Tucker explained that when Banjima children grow up they know they have a cousin or uncle in each of the four next door neighbouring groups. This is important because a person may have come from a distance and it is important to know his family and know that country that belongs to him.

452 Brian Tucker's evidence helps to emphasise something that Mr Robinson explained in his evidence, that there are differences between kinship, on the one hand, and the section (or skin) system on the other.

453 Slim Parker also explained how the system of social categories controls roles in ceremonies and in marriage.

454 Evidence was also given about the skin system, for example, by Maitland Parker who explained that the sections are banaga, milangga, burungu and garimarda. He explained how at ceremonies depending on one's skin people had different jobs to do.

455 Mrs A Smith also explained about skin colour and how it controls marriage practices and said that people who do not marry properly get into trouble. Mrs A Smith also explained the range of family names of mother, father, paternal aunt and uncle and maternal aunt and other relationships.

456 Charles Smith and a number of other witnesses also emphasised the skin rules.

457 May Byrne in particular gave extensive evidence concerning the skin group system and birthing practices.

458 Gladys Tucker, like other senior female witnesses, said that her son-in-law calls her nyidi and she calls him nyidi. She is not supposed to talk to him and he is not supposed to talk to her. They have to sit down and the mother comes over and blows on the son-in-law's hands and ears and then he will sit down and cry and then the mother-in-law can talk freely with that son-in-law. This is not required if they live in the same house these days. But at the Law camp or at a gathering they would keep right away from each other and not talk.

459 Throughout all of this evidence, the witnesses mentioned many of the Banjima words for persons, places, relationships and the like. The evidence demonstrated that the Banjima language is alive and well.

460 In this regard, Brian Tucker explained that he speaks both Banjima and Nyiyabarli. He said that Banjima is more slow than Nyiyabarli and you can hear the difference. One has a low tone and one a high tone.

461 He said it was important to be able to speak Banjima when in your Banjima country because of the old people (spirits) in the land. By speaking it you show respect for your country. He said the Banjima language was brought into being by old people a long, long time ago.

462 Maitland Parker also speaks Banjima, he learnt it when he was growing up with his parents and extended family and continues to speak it today. He teaches his language to his children and grandchildren, his maalis and gabarlis.

463 Maitland Parker said that language gives a Banjima person their ancestral identity and connects with them their yurlu, making them a ngurrarra, that is to say, a person who belongs to their yurlu or country. That then gives a Banjima person their Law, culture, customs and way of life.

464 He noted that Mrs A Smith and her sons, Charlie and Marshall, speak Banjima but in a slightly different way to him.

465 Slim Parker speaks Banjima and said that if you have language you can practise your Law. Language and Law go together. You cannot have Law without language. To know the language you have to be able to speak with each other, know the names of plants, animals and important places. He said that if you have fluent language and practise your own Law as in milgu and Wardirba and sing your songs associated with your country, ngurra, you will know the boundary of your ngurra.

466 Mr G Tucker emphasised that Banjima language is different from Nyiyabarli, Palkyu, Yindjibarndi, Gurama and Innawonga languages. He said although Nyiyabarli and Banjima people understand each other's languages, he cannot speak Nyiyabarli. He speaks Banjima and teaches his kids the Banjima language and he and his family talk Banjima, especially when on country. His granddaughter, Katherine, is always asking him what this and that are and learns Banjima from him in that way.

467 He considered that the Milyaranba speak a dialect of the Banjima language. He said the only difference is the pitch of the language, which is higher for some people, especially the Smith family.

468 Alec Tucker too thought that Bottom End and Top End Banjima have a different dialect and that Aboriginal people can pick up a slight difference.

469 Timothy Parker speaks Banjima but learnt Yindjibarndi too.

470 Mrs A Smith said that Banjima use one language all the time, although a few words were a little bit different, which she provided examples of. She said that even though there were some different words between Top End and Bottom End Banjima they understand each other. Only some of the words for animals and plants are different but they understand each other's words. She said that all of Banjima, the same mob, they have the same rules, like not to go up hills. All her daughters and sons use that same Banjima language.

471 She said she still speaks the Banjima language and all of her children speak it too. She said her grandchildren have started talking Banjima as well. They understand her when she talks to them in Banjima. She said that in Roebourne, while it is Ngarluma country, mostly Yindjibarndi and Banjima languages are spoken there today. She said Banjima can also understand the Palkyu and the Nyiyabarli. She said that the proper way is to speak Banjima on Banjima country.

472 Mrs A Smith said she learnt the Banjima language when she was a young girl. Old Banjima people would tell her the names of places in the country and what language that place name was. She said Bunurru (Mt Bruce) was a Banjima language name.

473 Mrs A Smith said her mother showed her places in Banjima country that marked the boundaries with other groups like Innawonga. She learnt about how far Banjima country went from her elders.

474 The evidence of these and other witnesses demonstrates that the Banjima today speak their own language and teach their children the language. May Byrne confirmed this evidence and how the young are taught today, as did Ronnelle Hicks who speaks Banjima and teaches the Banjima language. She teaches middle and upper years, not only Aboriginal children, but others as well in her teaching position. She said all her uncles are fluent in the language, so is her family. She learnt Banjima from her relatives. She explained that it is through learning about country, the plants and places, that she has a stronger Banjima language. It is all connected to the knowledge her grandmother passed on to her. Without that knowledge her language would be less useful.

475 So far as economic and day-to-day connection to country is concerned, extensive evidence about hunting, fishing, gathering, bush medicines and camping was given by such witnesses as John Todd, Mrs A Smith, Timothy Parker, Marnmu Smyth, Charles Smith, Dawn Hicks, Marie-Anne Tucker, Maitland Parker, Alec Tucker, Brian Tucker, Steven Smith, Juliette Pearce-Tucker, May Byrne, Archie Tucker, Mr G Tucker, Mervyn Smith and Mr D Black, Gladys Tucker, Ronnelle Hicks, Slim Parker.

476 Knowledge of ritual and customary practices in respect of country was given by Mr G Tucker, Alec Tucker, Timothy Parker, Mrs A Smith, Charles Smith, Marnmu Smyth,

Marie-Anne Tucker, Mr D Black, Steven Smith, Juliette Pearce-Tucker, May Byrne, Gladys Tucker and Joyce Injie.

477 Evidence concerning sites and the importance of looking after and respecting country was given Brian Tucker, Maitland Parker, Slim Parker, Mr G Tucker, Alec Tucker, Timothy Parker, Mrs A Smith, Charles Smith, Marnmu Smyth, Marie-Anne Tucker, Mr D Black, Steven Smith, Juliette Pearce-Tucker, May Byrne, Archie Tucker, Gladys Tucker and Mervyn Smith.

478 Evidence concerning spirits and spiritual places was given by Brian Tucker, Maitland Parker, Slim Parker, Mr G Tucker, Alec Tucker, Mrs A Smith, Charles Smith, Marnmu Smyth, Marie-Anne Tucker, David Tucker, Mr D Black, Steven Smith, Juliette Pearce-Tucker, May Byrne, Archie Tucker, Gladys Tucker, Mervyn Smith and Dawn Hicks.

479 Numerous senior members of the claim group gave evidence as to how they continued to teach young Banjima people about the traditional ways of the Banjima. The evidence of teaching was most impressive.

480 The anthropologists also gave evidence to the effect that, in their opinion, Banjima people had maintained connection with their country by their laws and customs. Dr Palmer in his first report (at [870]-[880]) summarised his findings regarding the continuity of laws and customs, accepting that some changes had taken place. Items that indicated to him continuity with past systems were:

- Rights and duties to country;
- Allocation of rights;
- Realising of rights;
- Religious beliefs and practices;
- Social organisation;
- Descent from ancestors in possession of the claim;
- Use and knowledge of country.

481 Dr Palmer concluded (at Ch 8) that a system of rights to country, based on the principle of descent as described by the claimants, found substantial support in the scholarly literature. He explained (at [494]) that he drew a distinction now made between rights holders and "strangers". He said a cognatic system of descent, favoured by most claimants, was supported by other writers in other areas of Aboriginal Australia. He found that while families today are usually associated with areas of country, such areas are probably now larger and less clearly defined than was the case when country groups exploited "estates" as members of residence groups. While this was a development and a change to the likely original system, it was, nonetheless, based upon a customary arrangement.

482 Dr Palmer concluded (at Ch 9) that the claimants today can be understood to differentiate between what he called "use rights" and "fundamental rights". Dr Palmer considered that such a distinction, with some variations, is supported by writers in respect to other areas of Aboriginal Australia. He concluded that rights were likely to have been exercised over more than one area of country in times past. He noted that the claimants today assert rights to what may have once been more than one estate of country. He considered such an arrangement is based on a customary system whereby rights to multiple estates were permissible.

483 Dr Palmer also discussed the requirement to realise rights prior to their exercise and said that this had been demonstrated for other areas of Aboriginal Australia. He concluded that such a realisation was a part of a customary process that may have privileged the realisation of patrifiliative fundamental rights. He said that other conclusions related to matters of permission, danger, exclusion and invitation, all part of the claimants' culture with respect to the exercise of rights to country. Dr Palmer noted that, while the early literature relevant to the Pilbara makes no mention of these matters, they have been addressed by other writers for other areas of Australia and it is most likely that such concepts and actions were based upon customary systems and processes.

484 Dr Palmer discussed aspects of the claimants' current religious beliefs and practices in Ch 10 of his first report. He was unable to find much assistance in the early literature as to the continuity of these beliefs and practices. However, he considered that other scholarly work gave support for the customary nature of concepts in the creative era (the Dreaming) the

significance and continuity of narrative traditions, “clever men” and a number of ritual practices.

485 Dr Palmer’s own work with groups in the Pilbara north of Banjima country enabled him to compile detailed accounts of the concept of the Dreaming including descriptions of how natural objects as well as some man-made products were believed to be both imbued with the Dreaming spirituality and to be derived from the activities of that time. The concept of “the Law” includes both the practise of ritual believed to have been ordained in the Dreaming, as well as those rules and normative regulatory references that are understood, ideally, to govern aspects of social interaction, behaviour and practice. Based on his work in the region, Dr Palmer was of the view that these comments and understandings would apply, generally, to Banjima culture. Certainly there was a considerable body of evidence in the present case which would support and reinforce Dr Palmer’s conclusion that the Banjima claimants consider the claim area to be redolent with spirituality and that spirituality is commemorated by senior male claimants through mytho-ritual traditions, including the Wardirba.

486 Dr Palmer said he witnessed enactments associated with rituals of circumcision which he reported in his 1981 doctoral thesis. The ritual he described took place at Cane River and involved participants from that community, including Banjima-speaking people, who were then living there. Dr Palmer recorded that the ritual activity included singing and dancing a mytho-ritual sequence known as yuna (one of the ritual dances described by Clement). It also involved a mytho-ritual sequence called bundud which is associated with the Fortescue River and Banjima-speaking people, amongst others.

487 Dr Palmer was of the view that the concept of the Dreaming, the belief in mythological beings and the principle of totemic attachment to country seem likely to reflect customary (ie pre-sovereignty) convictions. He bases this view on the nature of his data and its correspondence to material collected by others from different areas of Aboriginal Australia. He was consequently of the view that it represented an account of customary belief and practice that would probably have typified religious credence at the time of sovereignty.

488 Dr Palmer noted that for this region ritual continuity is framed by reference to the ideal of the unchanging nature of the Dreaming and the Law. In such contexts, oral tradition is conservative, stressing replication of past forms rather than innovation and continuity of promulgation rather than flexibility. He stated that while it is possible, speculatively, to suggest that the content of such ritual activities may have changed over time, it seems to him to be unlikely that such changes would be either very fast or very substantial. Accordingly, it was Dr Palmer's view that the ritual traditions which he recorded in the 1970s which are relevant to the claim area are likely to bear substantial similarity to those likely to have been observed at the time of sovereignty.

489 He explained the mytho-ritual tradition that characterises contemporary religious observances amongst the claimants is called "Wardirba". It is a series of songs and accompanying exegesis, sung in connection with circumcision rituals. It is understood to relate directly to Banjima country through the association of the various subjects of the songs (mostly natural species) with named places in the countryside. Much of the information about Wardirba (and associated rituals) is esoteric and restricted in its dissemination to ritually qualified men.

490 Dr Palmer was told that there are several types of Wardirba, which relate to Bottom End Banjima country, Top End Banjima country as well as to Nyiyabarli country to the east. The two traditions of the Wardirba are differentiated by the language of the song and the country each celebrates. The language of the songs presumably reflects the dialect identified with the area celebrated in the oral tradition.

491 Concurrent with these accounts of difference, Dr Palmer was also told that the two versions of Wardirba are conceived as being "the same" and that there was only one Banjima Law. In Dr Palmer's view, the two types of Wardirba might be best understood as being different parts of the same belief and practice. This is confirmed by the use of the same name "Wardirba". The conjoint practice of the two components of the Wardirba similarly indicates that they are conceptualised as being two or more parts of a single corpus of Law. The interchangability of practitioners between the observances of these different styles of Wardirba similarly indicates a sharing of mytho-ritual traditions and its concomitant cultural precepts and conventions that govern social action. All this led Dr Palmer to conclude that

with respect to the practice of ritual, the two Banjima groups adhere to tenets and practices that comprise a single system of Law while recognising intramural diversity.

492 He also noted that rituals associated with dalu places (renewal or increase sites) were no longer part of customary processes, although knowledge of the spiritual potentialities of dalu places remained strongly represented in his ethnography. Some details of ritual practice were recalled. Overall, he formed the view that religious belief and practice as recorded from claimants was founded upon customary process and it was reasonable to conclude that there was a continuity of these beliefs and practices from times long past and probably from the time of sovereignty.

493 Dr Palmer discussed social organisation in Ch 11. It was his view (as explained in [704]) that the claimants' present manner of organising social categories is the same as that recorded 95 years ago, as well as by others since that time. He concluded that the kinship system as explained by the claimants was consistent with that recorded by some earlier writers, although the accounts he relied upon were collected in the 1970s and published in 1980. His finding (as discussed in [708]) was that the fundamentals of the classificatory system were likely to have been a feature of Banjima kinship arrangements in much earlier times. With respect to authority, he relied on writers treating materials taken from areas of Aboriginal Australia other than the Pilbara. It was his conclusion based on a consideration of these sources that the system of authority, as he had come to understand its operation amongst those with whom he worked, was based on customary principles.

494 Dr Palmer concluded in Ch 12 that claimants traced descent from ancestors who were associated with the claim area in times past. It was his view that, with one exception, all apical ancestors were born at or prior to the date of effective sovereignty (as discussed at [819]). It was his conclusion, as a result, that their forebears, now lost to memory, were, it may reasonably be assumed, associated with the claim area and in possession of their country or "estates" at or before the time of sovereignty.

495 Dr Palmer considered in Ch 13 that he had demonstrated that there was a continuity of use and knowledge of the claim area. In this he relied upon information provided by claimants during fieldwork. He also showed that the claimants continued to possess knowledge of the plants, animals and other natural resources of the claim area. He

considered this information comprised a substantial body of cultural knowledge. It was his conclusion that it may reasonably be supposed that such knowledge has remained substantially unchanged since the time of sovereignty.

496 Dr Palmer considered that the accounts he had provided of the private cultural beliefs and practices of the claimants showed that there had been some changes to their culture. For example, the hunting and gathering way of life is now gone, he considered, as a means of pursuing a subsistence economy. He considered this has meant a consequential reduction in some artefacts, like spears and boomerangs, except those manufactured for ceremonial or display purposes. Gone too, he considered, is the lithic technology, for example, and that modern equipment, guns, axes and chainsaws have replaced stone tools. Similarly, he said, the residence group is no longer a feature of the economic system, except perhaps during relatively short hunting and gathering expeditions mounted from the claimants' permanent places of residence today. Perhaps, he surmised (as explained in [438] and [499]), as a result of the cessation of intensive exploitation of the countryside, the members of country groups became less focussed on specific estates, resulting in what he called "coalesced" estates. It was Dr Palmer's view, however, that such amalgamations of country and rights were and are based upon a customary system.

497 Dr Palmer said that while these and other changes may be apparent, there remains much which shows a substantial continuity with past practice.

498 In Dr Palmer's considered opinion, all of this is "no slight ethnography". He considered its detail and complexity speaks to its "fundamentals". In his view, it is so rich because it is customarily informed. It is also, in his view, in its essentials as well as in much of its detail, founded on and rooted in what may reasonably be concluded to be customary principles and practices. Based on his field data, Dr Palmer was of the view that these practices and beliefs show continuity through time. He stated that just as they are part of the cultural appurtenances of the claimants, he considered it reasonable to conclude that they were likewise a substantial part of the culture and customary practices of their ancestors at the time of sovereignty.

499 Mr Robinson in his supplementary report (at [256]) noted that his brief asked him to provide an opinion on the extent to which people asserting Banjima identity constitute a

"society" in anthropological terms and are "united in and by their acknowledgement and observance of a system of law and customs" and, in either case, constitute a continuation of the society/ies existing at sovereignty. He was further asked in each case to describe which laws and customs, if any, served to unite those persons and which laws and customs, if any, serve to distinguish between any separate groups of Banjima persons. Mr Robinson reasonably noted that the questions overlap with the question concerning the existence of Banjima sub-groups, an issue which has been dealt with above.

500 In relation to laws and customs, Mr Robinson noted that the rights claimed in the proceeding included rights to country through cognatic descent, the concept of the ancestral family or bajarli, importance of birth place, spiritual beliefs and ritual associated with Banjima land (including Wardiba tradition), rules relating to permission to use Banjima country and rules concerning resources, including foraging.

501 Mr Robinson considered, having read the witness statements and transcript of evidence from the July hearings and having also discussed the evidence on this topic in his earlier report, he was of the opinion that the laws and customs described in the evidence are acknowledged and observed by the witnesses. He added that, from reading the material and from his own knowledge of Aboriginal culture generally and in the Pilbara, it was his view that there is a "continuity of traditional laws and customs from the society at sovereignty, albeit in ways that have been modified to suit the modern circumstances of the claimants and the physical environment".

502 In relation to the expression that formed part of his brief, "united in and by their acknowledgment and observance of a system of laws and customs", Mr Robinson said he understood this to be derived from the treatment of the High Court in *Yorta Yorta HC* of the concept of "society". He said he was unable to provide an expert opinion on what the law might interpret such an expression to mean "and it is not one that anthropologists would ordinarily use in their treatment of the topic". He added, however, that he believed that the idea of unity of acknowledgment and observance is implicit in the anthropological concept. Mr Robinson said he would take it to refer to the ways in which members of a society would see themselves having a common identity and mutually recognise a body of social rules. On his reading of the evidence, Mr Robinson considered the Banjima do see themselves as united in acknowledgment and observance of common social rules, even though there might be

internal distinctions on the basis of lineage, location and cultural attributes such as language, style and ritual performance.

503 He also considered that the laws and customs of Banjima society were sufficiently distinctive to set them apart from other regional Aboriginal societies. In particular, they possess their own language and practise initiatory rites which, although structurally the same as those performed by their neighbours, are uniquely Banjima in content. Banjima ritual, he said, on the basis of the evidence and from what he knows of the area as an anthropologist, is anchored in mythology and song cycle sequences that relate specifically to places believed to be on Banjima country. Mr Robinson noted that Innawonga witnesses (for example, David Cox) gave evidence about Banjima and some of the differences between the two. On the question of recognition of Banjima society and land by other groups, Mr Robinson nonetheless thought it would have been helpful if there had been evidence from others. Mr Robinson drew attention to what the anthropologist, Dr Peter Sutton, has described, usefully in Mr Robinson's estimation, as "underlying and proximate customary titles". He said that "underlying titles" may be described as those held by groups within a regional system while "proximate titles" may be described as those held by smaller groups resembling what Dr Palmer had described as "country groups". Mr Robinson suggested there is a relationship between the two whereby those who hold proximate titles do so under the wider recognition of underlying title, which in this case would be the Banjima society. Mr Robinson noted that, in Sutton's view, there is a regional "jural public" whose elders help define and maintain the system of underlying title. It is essential then, in Mr Robinson's view, in understanding the customary basis on which a group such as the Banjima can legitimate its claims to country, to hear from this wider jural public, although in relation to this claim, he considered this to be largely silent.

504 When one regards all of the evidence given by Banjima people and considers also the anthropologists' assessments and understandings of the significance of that evidence, which I generally accept, there is no doubt that the Banjima people, today and since first contact with settlers in the 1880s, and whether they primarily identify as Top End Banjima or Bottom End Banjima or both, comprise a single group, community or society of the type envisaged by the plurality in *Yorta Yorta HC* and have maintained a connection with their traditional country by their traditional laws and customs which has not been substantially interrupted.

505 I reject the State's submissions that there is no relevant "society", as properly understood from the decision in *Yorta Yorta HC*, because there is no set of "norms" that the claimants could be united by and/or because there is today two groups within the Banjima known as the Top End and the Bottom End which cannot be considered to be traditional divisions of a traditional society. Rather, as discussed above, I accept the analysis and assessment provided by Dr Palmer, in particular, that there was a community or society of Banjima people at sovereignty comprised of sub-groups and that there is a community or society of Banjima people today, as clearly disclosed by the evidence, albeit that there are two sub-groups – the Top End Banjima and the Bottom End Banjima – that comprise that society.

506 I accept the submission made on behalf of the claimants that the effect of the evidence regarding one Banjima society properly understood does not deny the existence of distinctions between groups of Banjima people but serves to emphasise the close connection through marriage, kinship, language identity and country affiliations which cuts across any differences and provides strong evidence of a single unified Banjima society.

507 The culture of the Banjima is shown by the evidence to be vital, rich and steeped in the traditional laws and customs and practices of the Banjima people. There have been some changes, particularly in relation to the presumptive patrifilial descent rules, so that cognatic descent today is a widely recognised rule by which rights and interests according to traditional laws and customs are derived in land and waters by Banjima people. But the cognatic descent rule does not represent some fundamental break from the past. It is a linear development of a rule that is rooted in sovereignty practices, but which at sovereignty had no need for any routine application. By contrast, events in the post-contact period, particularly with the coming of the pastoral industry in the claim area, caused greater emphasis to be placed on the acquisition of rights and interests under customary law through rules of cognatic descent through fathers and mothers.

508 The fact that there is a Wardirba law practiced in both the Top End and the Bottom End areas of the claim area by the Top End and Bottom End Banjima sub-groups respectively, rather than indicating some fundamental break with law and culture of the past, in fact strongly supports the view that traditional law has been maintained from the past to the present era. Some sub-group variation in the performance of that ritual is, as the

anthropologists agree, irrelevant. The song-cycle celebrates by ritual the creative forces that gave the Banjima their language and their traditional territory. The differences as they may be in the performance of that ritual and the content of that ritual is neither the reason to find that there is no traditional law today and thus, as the State would have it, no "society" that derives from the sovereignty society, nor to find that there are two distinct "societies" for the purposes of native title law.

509 The fact that there is some internal disputation between members of the Banjima people, between some members of the Top End Banjima and some members of the Bottom End Banjima, as to who according to traditional law and custom "speaks for" and so makes decisions about the use of particular places or areas within the claim area, does not demonstrate that traditional law and custom has fractured or broken down, or has fractured or broken down to the point that there is no longer a relevant "society". Rather, it is plain from the evidence, including the evidence that Mr Robinson has relied upon in referring to his northern boundary concerns, that there may be contests between one Aboriginal group and another, or indeed within an Aboriginal group, as to who rightly has the authority to speak for country or portions of country at any given time. That there is such disagreement may indeed be seen as evidence of the vitality of the laws and customs that bind the Banjima. The fact that the Top End Banjima and the Bottom End Banjima came together to combine their claims, may also be seen as a direct demonstration of their unity as a single group bound by traditional Banjima law and culture.

510 The evidence presented in this case may, therefore, be seen to be quite different from the way the evidence in *Yorta Yorta HC* was characterised. As the plurality noted (at [65]), the primary judge described the effect of European settlement in the area as having had "a devastating effect" on the Aboriginal population and attached considerable significance to a petition presented to the Governor of New South Wales in 1881 by forty-two Aboriginals, many of whom were known to have been resident at, or otherwise connected with the Maloga Mission, which recorded that "all the land within our tribal boundaries has been taken possession of by the government and white settlers" and sought a grant of land. As the plurality noted (at [69]), the primary judge in the face of all the evidence adduced in Court concluded that the claimants had "ceased to observe those laws and customs based on tradition which might otherwise have provided a further basis for the present native title claim". That case is not this case. The evidence in this case leads to an entirely different

conclusion. The claimants here are shown by the evidence to have maintained over time a connection with their traditional country by their laws and customs; by their Law and customary practices. They have never conceded a loss of possession of their traditional country. They have never forfeited their rights to country. Rather, they have actively maintained their connection to their country right from the 1880s to today without substantial interruption.

511 I find, therefore, that the claimants have relevantly satisfied the connection requirements of s 223(1)(b) NTA.

Claim Group Identification and Membership

512 ***Generally***: The amended form 1 application for determination of native title in this proceeding lists 10 long-deceased persons as ancestors of the claimants who were in possession of the claim area at sovereignty. The evidence of the claimants and the genealogies prepared with the assistance of Dr Palmer largely go to make that claim good.

513 The anthropologists in their joint report in relation to the proposition that there is evidence that the 10 ancestors listed on the amended form 1 are apical ancestors for the claimants and that they were in possession of the claim area at sovereignty, agree the outcome that those noted in Table 1 to their joint report are apical ancestors of the claimants and that, in their expert views, data supports the conclusion that they were in possession of parts of the claim area at or about the time of effective sovereignty or before.

514 Table 1 lists eight such apical ancestors, namely: Bob Tucker Wirilimura; George Marndu; Whitehead; Yinini (Arju); Gawi; Sam Coffin; Yidingganin; Maggie (Nyukayi). Because these old people have been deceased for such a long period there is no cultural requirement to not mention their names in full and hereafter they are just referred to by their common English or Aboriginal names without any further indication they are now deceased.

515 As to George Marndu, Yinini (Arju), Gawi and Yidingganin the anthropologists agree without any qualification or comment that they are such apical ancestors.

516 As to Bob Tucker Wirilimura, the anthropologists agree that he is such an apical ancestor and merely comment that they differ on the strength of evidence demonstrating his customary links with Mulga Downs.

517 As to Whitehead, Dr Palmer said she was believed to be a Banjima ancestor by claimants and witnesses. He considers there is a question of reliability concerning her death certificate and he notes descendants may claim a Banjima identity via cognatic descendant pathways. Mr Robinson was uncertain as to her ancestry and thought she may be Palyku and or from south-east of the Banjima area. By way of comment, the anthropologists stated in Table 1:

> Experts agree the death certificate states Whitehead born outside of Banjima trial area. Experts agree this is contrary to the evidence of Banjima witnesses who affirmed she was a Banjima person and ancestor. The experts agree there is no reason to give more weight to the death certificate than to the evidence of the Banjima witnesses in terms of the significance of her identity and customary law reckonings.

518 I should further note that, in the case of Whitehead, Mr Robinson expressed the view, recorded in [57] of the joint report, that he and Dr Palmer agreed concerning some aspects of the data concerning her "but our respective views are a matter of emphasis rather than difference".

519 In relation to Sam Coffin, Dr Palmer agrees that he is Banjima, but Mr Robinson was uncertain and thought he may be Yindjibarndi. In their comment in Table 1 the anthropologists state:

> The experts agree that evidence of claimants is that he was Banjima.

520 In relation to Maggie (Nyukayi) each of the anthropologists agree she is Banjima. Dr Palmer further notes that it is the view of claimants that Carey and her mother, Maggie, both belonged to the Banjima language group and so, by implication, originated from Banjima country. In their comment in Table 1, the experts state:

> Identification of additional ancestor Alice Gubarangu whose language was Banjima and whose country was Mulga Downs

521 It may be seen that in these circumstances the anthropologists consider there is no doubt about any of the eight, with the exceptions of Whitehead and Sam Coffin and in

relation to those two they pay particular regard to the evidence by members of the claim group that those two were also Banjima by reputation. In the result, of the 10 apical ancestors listed in the form 1, only Daisy Yijiyangu and Yandiguji presented particular complexity for the anthropologists.

522 In all the circumstances, having regard to the detailed genealogical evidence of claimants, as well as the data produced and analysed by the anthropologists, which I discuss further below, I am satisfied, on the balance of probabilities, that both Whitehead and Sam Coffin are properly to be regarded as ancestors of members of the claimants who were in possession of native title rights and interests in the claim area at sovereignty and are properly to be regarded as Banjima. The questions left primarily concern Daisy Yijiyangu and Yandiguji.

523 As to whether the Court needs to make determinations about those claimed ancestors, or indeed any ancestors, the claimants submit that strict biological descent or any particular form of descent, such as patrilineal descent, is not necessary to establish the necessary links and continuity with the relevant pre-sovereignty "society". They note that in *De Rose v South Australia* [2003] FCAFC 286; (2003) 133 FCR 325 (***De Rose (No 1)***) at [198] the Full Court quoted with approval the following passage from the judgment of Beaumont and von Doussa JJ in *Western Australia v Ward* [2000] FCA 191; (2000) 99 FCR 316 (***Ward FC***) (at [232]):

> …we think it plain that his Honour was not intending to lay down as an invariable requirement that there be strict 'biological descent'. Rather, we understand Brennan J to be expressing a requirement that there be an identifiable community with an entitlement to the present enjoyment of native title rights in relation to land arising from the adherence to traditionally based laws and customs. A substantial degree of ancestral connection between the original native title holders and the present community would be necessary to enable a group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty.

524 The claimants note the experts are in agreement that at least seven and probably eight of the 10 Banjima apical ancestors were in possession of parts of the claim area at or about the time of effective sovereignty or before. The claimants submit that this is more than sufficient to establish a "substantial degree of ancestral connection" between the claimants and the original native title holders and so the Court need not determine the status of those apical ancestors about whom the anthropologists are in some doubt.

525 The claimants also say that, in oral evidence, Mr Robinson said that, in his view, the core of a society in this area, in an anthropological sense, is kinship. In his opinion, it is clear from the genealogical evidence in this case that the present day group of people who now constitute the claimants are descended from the set of ancestors and a whole host of other relatives in between that have continued lineally since sovereignty. Thus the claimants submit, it would be sufficient for the Court to make a determination that the "Banjima people" are the group of persons who hold either the communal or the group rights comprising the native title. In the alternative, they submit, the Banjima people as defined in Sch A to the form 1 are the group of persons who hold the communal or group rights. In either case, it is unnecessary for the Court to determine whether or not the two doubtful apical ancestors, Daisy Yijiyangu and Yandiguji, were Banjima. Rather, that is an issue that may be left for the claimants and not the Court to determine. The claimants in this regard seek to draw some support from *Aplin on behalf of the Waanyi People v Queensland* [2010] FCA 625 at [267] (Dowsett J).

526 The claimants submit the claimed ancestors thought to be uncertain may be seen to have Banjima ancestry in any event.

527 In dealing with these submissions, I note that s 225(a) NTA requires the Court to provide a description of the people who hold the rights and interests comprising the native title. The requirement is expressed in terms of making a determination of "who the persons, or each group of persons, holding the common or group rights comprising the native title are". Relatively recently, having regard to earlier decisions on this point, a Full Court (Moore, North and Mansfield JJ) in *Moses v Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148 (***Moses FC***) at [370] said of this requirement that:

> Section 225(a) requires that persons who hold individual rights and interests be specified in the determination and groups of persons holding group rights be specified in the determination. In the case of group claims, s 225(a) will ordinarily be satisfied if the name of the group is provided. There is no automatic requirement that the determination set out in detail how the group membership is constituted or the criteria by which membership is attained.

Similar dicta and outcomes may be found in *Daniel v Western Australia* [2004] FCA 849; (2004) 138 FCR 254 (***Daniel 2004***) at [49]-[53] and *Gumana v Northern Territory* [2007] FCAFC 23; (2007) 158 FCR 349 (***Gumana FC***).

528 The claimants further submit that, similarly, so long as the rights of native title holding groups are expressed in detail, it is not necessary for the determination to identify expressly which particular individuals or groups or sub-groups are entitled to exercise particular rights; or otherwise to address the intramural or internal relations of the native title group. In this regard, the claimants draw particular attention to what Mansfield J more recently held in *Starkey v South Australia* [2011] FCA 456; (2011) 193 FCR 450 (***Starkey***) at [62]-[63] to the following effect. Firstly, that there is nothing in s 223 NTA which requires the Court to address the intramural or internal relations of the holders of native title. Secondly, neither the definition of native title nor the requirements of a determination under s 225 require the consideration of or the resolution of any intramural or internal issues about the respective status, or relative responsibilities of, individual members of the claim group. These are matters that should be left to the prescribed body corporate to determine. The observations of Mansfield J reflect the dicta of the Full Court in *Gumana FC* at [152]-[160].

529 I should say, with respect, that I agree with the statements of the Full Court in *Moses FC* and what Mansfield J said in *Starkey* concerning construction and principle. Nonetheless, in any given case there may be a question concerning the broad description of the peoples or the group and the criteria for its membership. In such a case it would ordinarily appear appropriate, if not necessary, for the Court to deal with such a question should it arise. In this proceeding such a question does arise. One way it arises is by the State's contention that there is a "new society" post sovereignty demonstrated by the fact that some members of the claim group, said generally to be Banjima people, cannot trace their biological descent to forebears who were Banjima who had rights and interests in the claim area at the time of sovereignty.

530 I should say that, to the extent that the State suggests that the determination in *Ward v Western Australia* (1998) 159 ALR 483 and *Ward FC* that the "Miriuwung and Gajerrong people" was a sufficient description for the purpose of the NTA should not be followed, there is nothing in what was said in the Full Court at [212]-[214], or in *Western Australia v Ward* [2003] HCA 28; (2003) 213 CLR 1 (***Ward HC***), to suggest that in appropriate circumstances such a determination may not be made.

531 The State contend that, in the present case, the term "Banjima" has no ascertainable meaning and the description of the claim group is so broad that it would be impossible to

ascertain that a particular person is "Banjima", especially since there was no evidence establishing who most of the claim group were.

532 However the determination is made, the State submit that it is not appropriate to describe a group within which may be found persons who hold title, but within which are also are to be found persons who do not. On that basis, the State further contends that to say the group comprises the "descendants" of certain named ancestors cannot on its own suffice. In this case the State say that the descendants of the ancestors listed in the application would include many who were not members of the Banjima language group, giving as an example a man identified as Yindjibarndi (the late Mr K Jerrold) but also said by the evidence to have interests (through a Banjima ancestry that he shared) at a particular place within Banjima country.

533 In my view, this particular example given by the State serves to demonstrate why the latter approach contended for by the State should not be adopted. It may well be, in accordance with traditional custom and law, that such a person with Banjima ancestry would, nonetheless, have some recognised traditional interest within the norms of the Banjima society. What particular status should be accorded such a person should not be determined by the Court, as the Full Court in *Gumana FC* explained and the authorities there relied upon establish.

534 In my view, in a case such as the present where issues of ancestry have been directly raised, it is, however, appropriate that the Court should determine whether particular claimed apical ancestors are made out on the evidence. I should state though that the determination of this issue is relevant only to the question of the final description of the claim group for the purposes of the determination to be made under the NTA. It does not effect the connection question because, regardless of the outcome of these identity issues, the maintenance of a connection of the claim group as a whole has otherwise been well established, as discussed above.

535 ***Sam Coffin*****:** The genealogy attached to Dr Palmer's first report shows that Sam Coffin was married to Whitehead. Sam's father was shown as Billy and his mother, Winnie. Dr Palmer (at [784]) noted that Sam and Billy were generally considered to have identified as Banjima, noting that the late Wobby Parker had said this and it was also

recorded in a book by Noel Olive in 1997 at p 47. The descendants of Sam and Whitehead were shown to include Wobby Parker and Evelyn Parker, both now deceased. Dr Palmer noted that until he died in 2007, Wobby Parker was considered the most senior claimant in the MIB group.

536 The genealogy also suggests that Sam Coffin had four children with a woman called Biddy whose great, great grandmother was Gawi, Gawi being one of the other accepted ancestors mentioned above.

537 Dr Palmer said in his first report (at [785]) that members of the late Johnny Parker's family also told him about Sam Coffin and said he was their maarli (father's father). They said he was known by two names, Marndajiwarda and Warnyinya and was born at Tambrey Station. They also told Dr Palmer that his spirit had come from Wadugara (Mt Lockyer) (site 77). They said he gained his spirit from his father and his father's father. They said Mt Lockyer and the area including Munjina (site 59) were his country. They said Wobby Parker, their father, had told them this before he died.

538 Dr Palmer said that he was also told by the same claimants that Sam Coffin lived at Mulga Downs where he was initiated and where he was married and that he lived and worked at Munjina. They also said he possessed the powers of a mubarn and that senior male members of the family have continued spiritual connection with Bilaribinda, a gorge in the Hamersley Range where he temporarily lost his mubarn powers in a shooting accident.

539 Dr Palmer estimated that Sam Coffin may have been born in either 1893 or 1904 and died in 1961 and was buried on Mulga Downs Station.

540 He was able to gain less information about Billy Coffin but from data available it appeared he died at White Springs Station. Claimants were of the view that Sam's association with Mt Lockyer derived from that of his father, Billy. Dr Palmer thought it reasonable to conclude that Billy is likely to have been associated with the same area of country as Sam. If Sam were born in 1893, Billy may have been born in the 1870s.

541 Mr Robinson in his first report noted that there were some differences in the genealogical reports that had been provided respectively for the IB and the MIB claims as the

MIB claimants claim descent from Winnie, the person said to be Billy Coffin's wife, and not from Billy Coffin.

542 He noted that Dr William Day had stated the late Wobby Parker said Sam Coffin's biological father was Afghan but Wobby nonetheless identified him as Banjima. Dr Day also said a Marillana Station report stated Sam "is from Daniel Well near Millstream, he was an Injibandi man". Wobby also said Sam was born near Gregory Gorge, in Yindjibarndi country. Mr Robinson said that the suggestion by Dr Palmer that Sam Coffin derived his association with Mt Lockyer from his father did not sit easily with evidence that Sam may have been Yindjibarndi.

543 Thus Mr Robinson concluded that the information about these various apical ancestors was "problematic".

544 In his first supplementary report, Dr Palmer emphasised that while there is a lack of corroborating archival materials (as is common with many accounts of ancestral connection in his experience) the claimant evidence suggests that Sam Coffin and his father, Billy, are Banjima.

545 In his supplementary report, Mr Robinson noted that the claimants are of the view that Sam Coffin was Banjima. He concluded that, in the absence of further information, he remained uncertain whether he was a Banjima person. He left open the question whether, in light of the data referred to earlier, Sam Coffin had a Yindjibarndi identity.

546 As noted above, in their joint report the anthropologists agreed that the evidence of claimants is that Sam Coffin was Banjima.

547 In my view the evidence in the proceeding when fairly assessed leads to the conclusion, on the balance of probabilities, that Sam Coffin, and indeed his father Billy Coffin, were of the Banjima group. The archival and ethnographic material available in the case of Sam Coffin, for example, may be considered to raise the sorts of queries that Mr Robinson notes, but they do not cause me to think the material that suggests that Sam Coffin was, for example, Yindjibarndi is all that weighty; rather it is quite slim. In circumstances where the evidence of claimants is that he was Banjima, and there is no reason

to doubt the authenticity of that evidence, as I consider to be the case, it is appropriate to conclude, on the balance of probabilities, that Sam Coffin (and his father) were Banjima apical ancestors as claimed.

548 ***Whitehead***: A number of claimants, particularly amongst the Parker families, claim Whitehead as a Banjima apical ancestor. As in the case of Sam Coffin, the ultimate question is whether there is any reason not to be guided by their evidence, which I accept as authentic.

549 Dr Palmer in first report (at [768]) recorded that claimants told him Whitehead was a Banjima woman whose country was Mulga Downs. Maitland Parker (for whom Whitehead was his father's mother, FM), Johnny Parker (for whom Whitehead was his FM), Eric Carey and Slim Parker (for whom Whitehead was his FM) all provided this advice. Maitland Parker and Slim Parker confirmed this in their evidence. Elizabeth Lapthorne told Dr Palmer that Whitehead was a senior law woman.

550 A person called Butha was described as being the mother of Whitehead by most claimants with whom Dr Palmer discussed the matter although not by all. There was an agreement that Butha's country was Mulga Downs as well as the northern areas of the Hamersley Range to the south of the Fortescue River. She was buried at Cowra Outstation, as was Whitehead.

551 The genealogical information attached to Dr Palmer's first report also suggested that Butha was the daughter of Bob Tucker Wirilimura, and had Whitehead by a man called Nyiliya.

552 It also appears from all the evidence that Whitehead had three partners: by Sam Coffin she had Wobby and Evelyn Parker; by George Parker she had Ginger, Bluegum and Horace; and by Ronald Parker she had Herbert.

553 Senior claimants Trevor, Margaret, Maitland, Marjorie, Slim and Guy Parker are descendants of Ginger, Horace and Herbert.

554 Dr Palmer records in his first report that in a statement made in his lifetime by the late Wobby Parker he stated that the father to Whitehead was buried at Stonehut and that "he was Banjima. He belonged to Cowra through Mulga Downs".

555 In light of this information Dr Palmer said he was of the view that it would be reasonable to conclude that this man who may have been called Nyiliya was associated with what is now generally called Bottom End Banjima country.

556 He noted also that the late Wobby Parker stated that the mother of Whitehead was a woman called "Poodanya". Given the phonetic similarities, this likely is the same woman identified as "Butha".

557 Wobby Parker also stated that Bob Tucker's (Wirilimura) son was a brother to Butha. He asserted this, Dr Palmer said, by stating that Wirilimura's oldest son was "Grandfather" to him (the late Wobby Parker).

558 Dr Palmer also noted that the late Horace Parker stated that his mother's mother was Thuranha and his mother's father was Nathanha. He noted that in the genealogies to his first report Thuranha is an alternative for Butha.

559 Accepting some unreliability in these accounts Dr Palmer thought it possible that Butha was a daughter of Wirilimura and sister to Tommy and Jacob Tucker. If this were accepted then descendants of her daughter Whitehead could potentially make a claim to the ancestral country of Bob Tucker Wirilimura. Dr Palmer accepted claims made by reference to Wobby Parker's mother's father (Nyiliya) support affiliations with a Banjima identity but are otherwise too imprecise to be of much assistance.

560 Dr Palmer noted that there was no evidence available to him relating to Butha's birth date. He expressed that she may have been born around 1873-1878. But these calculations he said were highly speculative.

561 Mr Robinson (Mr Robinson's first report at section 5.2.10) in the course of discussing Nathanha, dealt with Whitehead noting the differences between Dr Palmer and Dr Day about

Whitehead's parents and accepting that the names Butha and "Thuranha" had phonetic similarities

562 In the event, having regard to all the data, Mr Robinson felt he was unable to form a view about the apical ancestor named Nathana. He said, however, that although Whitehead was not listed as an apical ancestor (as she then was not), she is pivotal in the reckoning of descent for the Parker descendants and her status and lineage were unclear.

563 In his first supplementary report, Dr Palmer agreed that Whitehead's status and lineage demanded attention. In that regard he referred to the discussion in his first report. He emphasised the statements made by claimants.

564 In his supplementary report Mr Robinson noted a report from the Protector of the Department of Native Affairs from August 1939 which provided support for a woman named Whitehead being at Mulga Downs. The list included a person named "Wabi" which he said may be a reference to Wobby Parker. The report also referred to "George and Whitehead" as "bush natives". Mr Robinson thought that this reference might suggest they were not part of what was regarded as the regular Mulga Downs Aboriginal workforce. Indeed in a death certificate tendered at the hearing she was described as "Nomad Native" born at "Jigalong via Meekatharra".

565 Mr Robinson suggested these materials suggested Whitehead was not from Mulga Downs but that Dr Palmer observed that Jigalong settlement would not have been established when Whitehead was born. Mr Robinson thought the entry of her birth place should not be taken literally and it is better to suggest that she came from an area where Jigalong was later situated.

566 Mr Robinson said the gap between her date of death on 14 April 1951 and the Coroner's Inquiry held on 10 January 1952 is explainable by the method for recording deaths at that time in remoter parts of the State. The practice was for all deaths to be recorded initially in a register held for the purpose in the clerk of courts office in Port Hedland. Subsequently a death certificate was produced at Perth. These were then added to the original information to produce a final certificate.

567 Mr Robinson further stated, however, that while these records suggest Whitehead was not from the Banjima claim area, Mr Laurence's field notes on the face of it appear to provide support for an association with Mulga Downs. Mr Laurence recorded Bridget Warrie as saying that her mother had told her that Whitehead was her grandmother and that she was a Palyku woman from country on Mulga Downs.

568 Mr Robinson also noted that Joyce Injie, an elderly Innawonga woman who gave evidence in the proceeding, said she had seen Whitehead at ceremonies on Mulga Downs

569 Ultimately Mr Robinson was of the opinion that "independent evidence" about Whitehead's Banjima ancestry is not strong and it is possible she came from outside the Banjima claim area. From the evidence of the Banjima witnesses, however, he accepted it was clear that she is believed to be a Banjima person and important ancestor of people who claim Fortescue Banjima identity.

570 In my estimation, as in the case of the ancestry of Sam Coffin, questions are raised by the archival or ethnographic materials as to Whitehead's ancestry. The death certificate adduced in evidence adds to that uncertainty. The experts, however, in their joint expert report agree that there is no reason to give more weight to the death certificate than to the evidence of the Banjima witnesses in terms of the significance of her identity in customary law reckonings. I accept that is so. A death certificate from long ago recording some personal details of an Aboriginal woman who died in a remote part of Western Australia should not too quickly be assumed accurate in all respects.

571 In all of these circumstances, having regard to the strength of the evidence of the Banjima witnesses who say that Whitehead was Banjima, I am satisfied, on the balance of probabilities, that she was Banjima and an apical ancestor for claimants as claimed.

572 ***Daisy Yijiyangu***: Daisy produces a much more difficult case than either Sam Coffin or Whitehead, as there is not unanimity among the Aboriginal witnesses that she was Banjima, the archival external and independent data suggests she was not Banjima, and the anthropologists express doubt as to her Banjima identity.

573 Not all of the Aboriginal evidence is supportive of the claim that Daisy was Banjima, although there is some powerful support within sections of the claim group for accepting that Daisy was a Banjima woman. Charles Smith, for example, gave evidence that his mother had told him about old Banjima people that she knew when she was young. He said, "[m]y mum told me that Yijiyangu (Daisy) was a Banjima woman from Mulga Downs". It is important to note in this regard that Mr Smith's mother, Mrs A Smith, is the oldest claimant in the Banjima native title claim group and has a deep genealogical knowledge. Similarly, Joyce Injie, an 84 year old Innawonga woman gave evidence that she knew Billy Swan (Daisy's son) and that he was a Banjima man.

574 John Todd gave evidence as a direct descendant of Daisy. He said that his grandmother Susie was the daughter of Daisy Yijiyangu. Susie was the sister of Ivy, Billy Swan and Jack Swan (also known as Jackie Parker). All the siblings had the same mother Daisy Yijiyangu who was a Banjima woman. James Swan was a white man and was married to Daisy. James Swan was the father of Billy, Ivy and Susie. After James Swan passed away Daisy married Jack's dad and she passed away not long after that. When he was growing up Mr Todd knew his grandfathers Billy Swan and Jackie Swan (Parker) and said that, "[Jackie] only taken the name Parker when he married Nana Una".

575 John Todd stated that he spent a lot of time with Billy Swan and Jackie Parker when he was a kid, he would spend most of the school holidays with Jackie Parker. Billy Swan and Jackie Parker were Banjima men and they used to come into town and collect Mr Todd and take him back to Mulga Downs Station. He said Billy Swan was a senior Law man, the head Law man for Mulga Downs.

576 Another old person that John Todd spent time with as a child and as a young adult was Ned Dhu. Ned Dhu was the oldest child of Susie Dhu (nee Swan) and he was born and worked on Mulga Downs Station. Mr Todd gave evidence that Uncle Ned had a lot of knowledge of Banjima country. Uncle Ned learnt a lot from Ivy, another of Daisy's children, when he was living at Derschaw's Outcamp on Mulga Downs Station. Ned passed on knowledge about Banjima country to Mr Todd. He camped in the riverbeds on Mulga Downs and Cowra with Ned.

577 May Byrne did not give evidence about Daisy but she did give evidence about Daisy's oldest son Billy Swan. She stated that in the 1970s her grandmother Gardilbiddi (Annie Black) told her that Billy Swan was a Banjima man. Ms Byrne also stated that her mother told her that Billy Swan was related to her Banjima mother's father Kunga. May's mother lived with Billy Swan's family at Cowra Station.

578 Dr Palmer in his first report discussed Daisy at [790] and following. He noted that Daisy is the apical ancestor cited by members of the Dhu and Derschaw families when supporting their claims to ancestral connection to Banjima country. He noted that Dr Day in 2004 reported that Daisy was married to a man called Jimbangu, who may have identified as a member of the Nyamil language group. He noted Dr Day describes Daisy as a Banjima woman and that three of her four children took the name of James Swan, a station worker on Mulga Downs, although Dr Palmer thought it was unclear whether Dr Day considered him to have been their biological father. A fourth and last child (Jackie Parker) was born to a European station owner. Dr Palmer noted that Daisy has many descendants that include members of descendants of the Swan, Dhu and Derschaw families. He received, he stated at [791], some "limited information" about Daisy from the Dhu and Derschaw families. He noted that some thought she was generally associated with Mulga Downs and that her son, Billy, was an important ritual leader there. Bill Dhu told him that he could remember his mother's mother, Daisy, from when he was a young boy and that she spoke the Banjima language and used to travel from Mulga Downs to Roy Hill Station. She died at Roy Hill during one of those visits. He was also told that Daisy's mother may have identified as Nyiyabarli, but details were not known by those with whom he spoke.

579 Dr Palmer noted that members of the Dhu and Derschaw families were "adamant" as to the Banjima identity of Daisy, although others amongst the claim group had questioned this, stating that she may have been Nyiyabarli.

580 Dr Palmer said (at [793]) that he was also advised by Dr Vachon, an anthropologist who had worked with the Nyiyabarli, that Nyiyabarli informants had told him that Daisy's mother was of the Nyiyiaparli language group, but her father, Puurna, identified as Banjima. According to this account, Dr Palmer said, Daisy's country was in the vicinity of Milimbirinya (site 94).

581 Dr Palmer (at [794]) stated there was insufficient data available to him to form a concluded a view as to the country or language identity of Daisy Yijiyangu. Based on that limited data, however, he expressed the opinion that it is likely that Daisy lived on Mulga Downs for a part if not the majority of her life. She may also have spoken the Banjima language and enjoyed close social and cultural relationships with others living at Mulga Downs and Cowra. Dr Palmer considered that the little information he had gained regarding her filiative links with country suggest an association with an area on the boundary between what is regarded as Banjima and Nyiyabarli country.

582 Mr Robinson in his first report dealt with Daisy at section 5.2.6. He considered (at [319]) there is "scant evidence" about her. He noted that Dr Palmer had concluded there was insufficient data to form a concluded view about her country or language identity. Having regard to the same data, in particular Dr Vachon's observations recorded by Dr Palmer, Mr Robinson expressed the view (at [321]) that he did not believe there was anthropological support to establish that Daisy and her descendants were Banjima persons with rights in the claim area. He noted that the question whether they were members of the Nyiyabarli or Palyku groups had not been explored.

583 Dr Palmer in his first supplementary report returned to Daisy at [84] and following. He recorded that he and Mr Robinson would appear to be in agreement concerning Daisy although he (Dr Palmer) was "probably more open to the possibility of a Banjima ancestry".

584 He then noted that he had received additional information from Dr Vachon regarding her parents, which he then set out. Having regard to that further information from Dr Vachon, particularly the possibility that Daisy's father may have been a member of the Banjima language group, he said there was "some evidence of Daisy's Banjima ancestry". In these circumstances, Dr Palmer expressed the view that, given the limited archival materials, attention must be paid to the claimant evidence. He noted again that the Dhu and Derschaw families were adamant as to Daisy's Banjima identity. He accepted, however, that in light of the view of others that she was Nyiyabarli and the additional information he had received, it was possible that Daisy's mother was Palkyu or perhaps Nyiyabarli and her father Banjima.

585 Dr Palmer later filed a second supplementary report. In it he again dealt with Daisy. He said (at [8]) his earlier view that her mother may have been Palkyu or perhaps Nyiyabarli

and her father Banjima, was now "highly qualified". He then sought to explain his position. He stated (at [8]):

> It is, in my view, possible that Daisy's father was Banjima. However there would now appear to be no evidence beyond the conflicting statements of the claimants, to support this conclusion. I am therefore of the view that is not possible to state with any degree of certainty or probability that Daisy traced a Banjima ancestry.

586 The further information which caused this change of position came from Dr Vachon and was set out at [5] of Dr Palmer's second supplementary report, to the effect that Dr Vachon advised him that Bonnie Tucker had informed him that Daisy's mother was Nyiyabarli, and that it was Daisy's "sister" who was married to a Banjima man, Puurna, and that he was not the father of Daisy or her siblings. Credence obviously was given to Bonnie Tucker as an informant.

587 In his supplementary report Mr Robinson made reference to Dr Palmer's second supplementary report and the information provided by Bonnie Tucker to Dr Vachon which caused Dr Palmer to conclude that there was now "no certainty as to the language group identity of Daisy Yijiyangu or the exact extent of her country". Mr Robinson agreed with the conclusion reached by Dr Palmer. Mr Robinson (at [222]) noted, as did Dr Palmer, that there was conflicting evidence from the witnesses at the July hearings about the status of Daisy and her descendants. Like Dr Palmer, however, he also thought "the possibility" that Daisy's descendants have rights in parts of the Banjima claim area "could not be discounted".

588 In their joint report, by way of outcome concerning the language group identification of Daisy Yijiyangu, the anthropologists (at [64]) stated as follows:

> The experts agree that it is not accepted by all claimants that Daisy was a member of Banjima language group, although some evidence was provided in support of this [footnote 15 referring to the evidence of Charles Smith and John Todd; as well as the contrary views of Archie Tucker and Maitland and Slim Parker]. Materials considered by Palmer provide no certainty of her Banjima identity. The experts agree that on the basis of description in the Form 1 (Attachment A – claim group description), the absence of a Banjima identity would mean that neither she nor her descendants were members of the native title claim group. However, the experts agree that it is possible that she and consequently her descendants had rights and interests in at least part of the Banjima trial area under traditional laws and customs.

589 In the concurrent evidence session Dr Palmer confirmed his view that it was "difficult to come to a firm conclusion about this ancestor [Daisy]". He confirmed that he agreed with

Mr Robinson that it was "possible" that she and her descendants had rights and interests in at least part of the Banjima claim area.

590 He confirmed the difficulty was that gaining rights to country in this culture requires probably three things: descent, the realisation of rights through the exercise of choice in a cognatic system, and the endorsement of the "jural public" – an expression referred to above and attributed at least in part to Dr Sutton, meaning, in Dr Palmer's explanation, those people who were generally in the area, not necessarily Banjima but able to speak with some authority. In this case, Dr Palmer noted there was a conflict over whether the jural public gave the endorsement required. He drew attention to the question of social acceptance and said however much a person wanted to be something, they are not going to be unless those around them are accepting of that, particular if it has to do with identity and social status, "and that seems to me to be a difficulty for this issue".

591 Mr Robinson agreed with what Dr Palmer said, except to say that it was possible that rights "can be contested", and can be overlapping. So he did not think that it was necessarily the case that in every instance there has to be agreement from a jural public. He understood "jural public" in a slightly wider sense, as not just the particular society we are talking about but perhaps the neighbours as well. In the sense used by Dr Sutton he explained that the underlying system of title that exists in a region is supported by both the people within the group and those around it.

592 Dr Palmer indicated agreement with that wider sense as explained by Mr Robinson by reference to Dr Sutton's work.

593 Dr Palmer said that the genealogical connection of a person to an area on its own is not sufficient in a customary system, in his view, for people to be recognised and actually having rights in country. There might be potential rights that could be realised. But in a cognatic system there is an exercise of choice which has to be made. Otherwise the system would not function as a normative system.

594 Mr Robinson agreed that genealogy is important and indeed fundamental. He added that it is fundamental in the sense that Aboriginal societies are based on kinship and "people's interconnectedness through kinship". These are societies where status is ascribed:

"You become a member of the society as a result of who you're descended from, not how you achieve it. Your achievements during life might add or take away some of those rights or restrict them in some ways, but the very fact of descent … fundamentally gives an individual certain rights which cannot be taken away." So he placed more emphasis on genealogy than Dr Palmer would.

595 For the Court it is a very difficult thing to have to decide at this distance of time from when Daisy was born and lived whether Daisy was a member of the Banjima language group, that is to say had Banjima ancestry. It is understandable that, as a woman who apparently lived on Mulga Downs station for many years, which I accept (as noted above) is part of traditional Banjima country, and may have spoken the Banjima language, she may have been considered by some, if not many, as a Banjima woman for general cultural purposes. Her children and their children may well have grown up mixing with Banjima people and considering Daisy's identity was Banjima.

596 If one looks for independent ethnographic data to show that Daisy had any Banjima ancestry, however, the evidence is lacking. The data provided by Dr Vachon to Dr Palmer strongly suggests Daisy's father was not Puurna, a Banjima man, as some in the group had previously thought. Rather, he was married to a "sister" of Daisy and was not the father to any of Daisy's siblings. Neither of the anthropologists have doubted the veracity of this data and the Court also accepts it is proper to regard it as reliable.

597 There are some circumstances in which the lack of an independent ethnographic record supporting the inclusion of a claimed apical ancestor amongst the ancestors who may be taken to have possessed native title rights in the claim area at sovereignty may be of relatively little moment, and the evidence of claimants themselves concerning the reputation of a claimed apical ancestor will be determinative and lead to a finding that the claimed apical ancestor was indeed an ancestor for native title purposes – as indeed I have found above in the cases of Sam Coffin and Whitehead. In this particular instance, however, there is no clear agreement amongst members of the claim group themselves as to Daisy's identity. There are those who emphasise Daisy's Nyiyabarli ancestry and those who say she was Banjima.

598 The Court accepts that, for native title purposes, it is not enough that a community or segments of a community of Aboriginal people acknowledge a person as part of their group if that person does not also have a relevant ancestry within that group by their law and custom, as Mr Robinson and Dr Palmer explained in their evidence. It is not enough, if a person's ancestry is in question, for example, merely to show that a person has lived for many years in the relevant claim area and been involved in the relevant community's cultural activities, if there is some real doubt about their ancestral connection or traditional incorporation within that community. This is one of the difficult issues governing native title claim group membership.

599 Based on the evidence as a whole, the Court is unable to conclude, on the balance of probabilities, that Daisy had any relevant ancestral connection to the Banjima people. The tipping point in the weighing process is the serious doubt conveyed by the data provided by Dr Vachon to Dr Palmer, which has also plainly influenced the serious uncertainties about her ancestry expressed by the anthropologists.

600 What can be said, as indeed the anthropologists have concluded, is that there is a "possibility" that Daisy had Banjima connections. However, in the light of all the evidence, that possibility does not enable the Court to conclude, on the balance of probabilities, that she had a Banjima ancestry.

601 The Court must, therefore, conclude, for the purposes of the NTA and this proceeding, that Daisy Yijiyangu is not an apical ancestor as claimed in the application.

602 ***Yandiguji***: The evidence from Banjima witnesses was very strong concerning old Yandiguji being a Banjima ancestor. Marie-Anne Tucker gave evidence that David Stock, whose name is also Yandiguji from that old ancestor, had a Banjima father and talks for the area east of the Great Northern highway. She said David Stock's father was related to Mrs Tucker's father. Mrs Tucker says that David Stock talks for Jundaru jilbaba (a honey increase place near Hope Downs) for Banjima side.

603 Brian Tucker also gave evidence that David Stock's father was Banjima and he was entitled to be one of the persons to speak for Barimuna for this reason. Much of this evidence was considered above in relation to the eastern boundary issue.

604 Maitland Parker said that the right person to speak for Barimuna is David Stock as he is a Banjima man. Mr Parker went on to explain that: "From all our knowledge from our elders is that David Stock's father is a Banjima person".

605 Regarding the eastern area of Banjima country, Charlie Smith stated in evidence, "David Stock's father is Murrewurra and Murrewurra is a Milyaranba Banjima person and he has the right to speak for Barimuna and Yandiguji".

606 In cross-examination when it was put to him that David Stock asserts rights in the Barimuna area, Slim Parker stated that David Stock asserts rights and interests in the eastern end of Banjima country as a Banjima man.

607 Juliette Pearce-Tucker gave evidence that: "I can speak about Yandicoogeena along with my brother David Stock on his father's Banjima line, because he taught me about the significance of this area as being his father's and my father's area".

608 Dawn Hicks stated in evidence that when travelling around and camping in Banjima country with her family, "[a]t Weeli Wolli we would meet up with other families ... [like] Dad Yandi (David Stock) (Nyiyarparli/Banjima)".

609 Bundu (David Cox), an Innawonga man who gave evidence in the trial as a Banjima neighbour, stated that "David Stock's mother is a Nyiyiparli and his father was a Banjima".

610 David Stock's claim to have customary rights to the eastern portion of Banjima country was also endorsed by Mrs A Smith to Dr Palmer. Indeed, it is significant that all of the Banjima families who gave evidence said they considered David Stock to be Banjima through his father and that he has a right to speak for the eastern portion of Banjima country.

611 This evidence concerning David Stock bears on Yandiguji, the claimed apical ancestor, as David Stock's family line may be traced from that old man.

612 In his first report Dr Palmer dealt with Yandiguji, the apical ancestor, at [795] and following. Dr Palmer said he had undertaken limited work in relation to this family, speaking only with David Stock during his April 2010 period of fieldwork and that additional research might clarify some of the issues raised.

613 Dr Palmer noted that the genealogical materials provided to him showed a man called Tharu was married to a woman called Yandiguji. They had two sons. One was called Kip Stock. The other was called Woodstock Paddy, also known as Paddy Stock and Matathata. It appears some of this additional data was provided to Dr Palmer by Dr Vachon who, as noted above, had undertaken research in relation to the Nyiyabarli. Woodstock Paddy's son was shown as a man called Yandiguji or David Stock, named after his father's mother. As discussed above, David Stock is said to have rights to the Yandicoogina area. David Stock told Dr Palmer that his own father's mother was called Yandiguji and that this was his "Banjima line".

614 Dr Palmer explained that another group of the claimants (Maitland Parker, Brian Tucker and Trevor Parker) told him old Yandiguji was buried at the junction of Marillana Creek and Weeli Wolli Creek. Mrs A Smith told him that the country east of Barimuna (site 86) was country in which David Stock had customary rights. That old Yandiguji had rights to country in the Yandicoogina area was also confirmed with Dr Palmer by Brian Tucker, Trevor Parker and Maitland Parker. They too said that Yandiguji's son, Woodstock Paddy, was Banjima.

615 It appears from the genealogy that Kip Stock married Ivy Swan, who was the daughter of Daisy (being the Daisy discussed in the previous section). Ivy had a son with Kip Stock, called Felix Derschaw. Dr Palmer assumes Felix took that surname because he was adopted by Ivy's husband, Frank Derschaw (senior). Dr Palmer says that, if this is so, then Frank and his descendants can be considered along with the forebears discussed above who trace ancestry through Ivy to Daisy. Felix had seven children. At that time Dr Palmer had no field data relating to them.

616 Dr Palmer then stated (at [801]) that his assessment of this data was that while there is some doubt as to the language identity of Tharu, Yandiguji identified as Banjima, as did her son Woodstock Paddy. Country identified through this lineage is generally called Yandicoogina, comprising an area extending east from Barimuna Hill to approximately Weeli Wolli Creek and north and south to an extent he was unable to ascertain.

617 Dr Palmer estimated that Felix Derschaw was born in 1926 and David Stock in 1932, Ivy Swan in 1902 and so Kip Stock, brother to Paddy Woodstock, may have been born in the

1890s, assuming that he was older than his partner, Ivy Swan. On the assumption that Woodstock Paddy was also born in the 1890s, his mother Yandiguji may have been born in the 1870s and Woodstock Paddy's father, Tharu, in the same decade. Dr Palmer said he had a death date for Tharu of 1963, and assuming it correct, thought a birth date earlier than that unlikely.

618 Mr Robinson in his first report expressed the view (at [333]) that on the available evidence he had concluded that the person named Yandi or Yandiguji should not be considered an apical ancestor for either the then IB or MIB claimants. Mr Robinson said, however, that this conclusion should be reviewed if any of the descendants should express a desire to be included in the claim group as Banjima people.

619 In his first supplementary report in response to the first report of Mr Robinson, Dr Palmer (at [90]) considered Mr Robinson's conclusion to be "strange" as he had set out details of discussions he had had with David Stock in which he had made clear his customary rights to areas to the east of Barimuna.

620 In Mr Robinson's supplementary report he dealt in more detail with Yandiguji at section 2.3.8. Mr Robinson explained that a particular problem with the Yandiguji genealogy was that while Dr Palmer identified Yandiguji as a woman, Dr Day had identified Yandiguji (his "Yandikutji") as a man. He said that according to Dr Day a Banjima person named Yandikutji married a Banjima woman named Dardana and they had two sons, Paddy and Kip. David Stock is one of the two children from Paddy Stock and a Nyiyabarli woman named Walaba. Dr Day cited his sources as "Barber and Stock", which Mr Robinson took to be a reference to the anthropologist Dr Barber and David Stock. On the other hand, Mr Robinson noted, Dr Palmer identified Yandiguji as a Banjima woman who married a man called Tharu, who had two children named Kip and Paddy.

621 It appears that at the conference of the anthropologists in March 2011 they agreed that further research or information would be helpful in relation to Yandiguji, particularly in relation to gender. Dr Palmer then filed his second supplementary report, in which he disclosed (at [9]) that Dr Vachon had since advised him that based on interviews with Nyiyabarli claimants, Yandiguji was in fact a *man* who they identified as Banjima. His

conclusion was that further research was required although his initial conclusions were not affected by the gender debate.

622 In his supplementary report, Mr Robinson noted that David Stock had not been called to give evidence in the proceeding and so there was not direct testimony from him to help clarify the question. He therefore considered that Yandiguji should not be regarded as an apical ancestor.

623 In the joint report of the anthropologists Mr Robinson's view and the basis for them, as set out above, was recorded. Dr Palmer's views, as expressed above but further developed, were also set out. In the result, the anthropologists recorded the following outcome concerning Yandiguji and whether or not that person was an apical ancestor for the claimants or some of them and was in possession of the claim area at sovereignty:

> We are not in agreement over whether Yandiguji is an apical ancestor for the Banjima claimants. Mr Robinson is open to modifying his opinion in this regard, but on the information so far presented is unable to agree that the Yandiguji is an apical ancestor. He is of the view that if David Stock verifies the new information collected by Dr Palmer, it would be possible to recognise Yandiguji as a Banjima apical ancestor.

624 The new information from Dr Palmer referred to was as follows. Dr Palmer notes in the joint report that when giving evidence to the Court in July 2011, Maitland Parker stated that Yandiguji, being the present David Stock, was a Banjima man. Charles Smith stated that David Stock's (Yandiguji) father is Murrewurra, and that his father was Milyaranba Banjima person, and has the right to speak Barimuna and Yandiguji (or Yandicoogina). Dr Palmer also noted that David Stock had told him that his father's mother was also called Yandiguji, from whom he gained his name and that this was his Banjima line.

625 Dr Palmer said he examined two genealogical accounts provided to him that were called the descendants of Yandiguji. He assumes one to have been developed by Dr Day. This account shows a man called Yandiguji married to a woman called Dardana, both shown as being of the Banjima. Dardana was buried at "Yandi" and her country was shown as "Yandicoogina Creek, Weeli Wolli area".

626 They also showed Yandiguji and Dardana had a son called Paddy Stock, also known as Matukarra or Mardathada, whose country was Yandicoogina and who was Banjima. He

married a woman called Walaba, shown as Nyiyabarli from Mt Newman. Paddy and Walaba, according to this account, had two children, Dollican Stock and David Stock (Yandiguji).

627 The second genealogical account was provided to him by Dr Vachon, as a result of his anthropological research on the Nyiyabarli native claim. It dated from 2005 and notations suggest that Mark Chambers also assisted.

628 In summary, Dr Palmer stated Dr Vachon's genealogical account shows a man called Yandiguji married to a woman called Tharu. They were shown as Banjima. They had a son called Matathata, also known as Yantikujingura and Woodstock Paddy. Dr Palmer considers it likely that Yantikujingura conveys the meaning "Yandiguji country", that is to say Yandicoogina was his country, a name that might be applied to others who also were of the area. Woodstock Paddy's language was said to be Banjima, as was that of his brother, Kip Stock. Woodstock Paddy married Walaba or Yurawalypa, whose language was Nyiyabarli. They had a daughter, Dolly, and a son, David Stock. Neither was assigned a language group on this genealogical account. David was noted, however, as being of the language group "Nyiyarbali/Banjima".

629 Dr Palmer noted that both accounts agree that Yandiguji, the ancestor, was a man. Dr Palmer assumes he gained his name because it signalled his country. He notes that Dr Day has it that he married Dardana, but that Dr Vachon has it that he married Tharu. Dr Palmer says it is possible that Tharu is an alternative name for Dardana or that one is incorrectly recorded. It is also possible that Yandiguji had two wives. The accounts agree, however, that both were of the Banjima language group, that Dr Day has it that Dardana's country was the Yandicoogina and Weeli Wolli Creek areas, and that she was buried at Yandicoogina. Dr Palmer thinks it possible that this woman may be the person he was told was buried at the junction of Marillana Creek and Weeli Wolli Creek. It is also possible that she was referred to by claimants as "Yantikujingura", as was David Stock's father. This would explain some of the confusion over the sex of persons identified as Yandiguji.

630 Dr Palmer considered both accounts support the conclusion that Matathata (David Stock's father) was identified with the Banjima language and that his country was Yandicoogina. Dr Day, he considers, shows he gained this country specifically from his

mother, Dardana. Similarly, both accounts show that Matathata married a woman who was called Walapa or Yurawalypa of the Nyiyabarli language group and had a son called David Stock.

631 Dr Palmer concluded in the joint report (at [78]) that based on this data he was of the view that old Yandiguji was a man, father to Matathata and father's father to David Stock. He was married to a Banjima woman who was Dardana or Tharu. These data further support the conclusion that Yandiguji and Tharu/Dardana identified with the Banjima language and their country was Yandicoogina Creek and the Weeli Wolli Creek areas. He considered it a reasonable assumption that rights to these areas passed to their son, Matathata, and so to his children, including David Stock.

632 Further, Dr Palmer considered, based on Dr Vachon's materials discussed above, that the term "Yantikujingura" may be used to name a person whose country was Yandicoogina. This may explain why he recorded the woman buried at Yandicoogina as "Yandiguji" and thereby wrongly identified Yandiguji, the claimed apical ancestor, as female. Regardless of this possible error, Dr Palmer considered these data provide support for the conclusion that David Stock now asserts ancestral rights to the Yandicoogina area by reference to filiative links to Banjima ancestors.

633 Dr Palmer said, in relation to the fact that David Stock did not give evidence in the proceeding, that for practical reasons he had not been able to check the genealogy with David Stock, though doing so would likely remove any uncertainty regarding the account and would have been his preferred course of action.

634 As noted above, Mr Robinson indicated that he was open to modifying his opinion but, plainly, wished to hear from David Stock directly before considering doing so.

635 In the concurrent evidence session, Mr Robinson was asked whether, if the "new information" that Dr Palmer relied upon as having provided by David Stock were confirmed, was it the case he would adopt Dr Palmer's view of the evidence. Mr Robinson said that he would. Before providing that answer he hesitated for a moment. Mr Robinson said he only hesitated because the previous evidence seemed to be so conflicting and he was simply being

"cautious and conservative". The only way he could be "absolutely certain" would be to hear from the person himself.

636 Dr Palmer was then asked whether his current view was a "clear view". Dr Palmer indicated that "clarity" was perhaps a relative term. He was asked whether uncertainty would be removed by hearing more evidence, from Mr Stock himself. Dr Palmer indicated that if he were able to check the genealogy with Mr Stock himself, that might remove any remaining uncertainty.

637 He also referred to the additional genealogical information he had been able to collect and had organised under his comments, as set out above, in the joint report. He said he did not know whether that changed the issue and added that the question that he was attempting to answer was whether Yandiguji should be accepted as an apical ancestor of the Banjima people. He considered there was little doubt, from the ethnography, that he is generally to be regarded as a Nyiyabarli person, but then "we're back to this difficulty that we all have with language speaking groups". Reference was then made to the material provided by Dr Vachon, showing the language affiliation as Nyiyabarli and Banjima, reflecting Banjima on the father's side.

638 Mr Robinson did not have any further observations about the evidence.

639 If David Stock were to have given evidence in the proceeding, in all likelihood this would have helped in the resolution of the immediate question whether Yandiguji was a relevant apical ancestor of some of the claimants. Mr Robinson plainly would have been assisted in that regard and so too would have Dr Palmer. Be that as it may, in my view, the data provided by way of evidence by Dr Palmer and the evidence of senior Banjima claimants noted above enables the Court to conclude, on the balance of probabilities, that Yandiguji was indeed an apical ancestor who held native title rights at relevant times.

640 At this distance from the events of the birth of old Yandiguji and his more immediate descendants, it is not entirely surprising that there might have been some initial confusion as to the gender identity of Yandiguji, as Dr Palmer experienced. I am satisfied, again on the balance of probabilities, that from all the data provided, particularly that provided by

Dr Vachon to Dr Palmer, which the anthropologists rely upon and I rely upon, as well as the direct evidence of the claimants set out above, that Yandiguji was a man.

641 I also conclude on the balance of probabilities that Yandiguji was of the Banjima language group and so had Banjima ancestry. The data relating to his son, Matathata, tends to confirm that view. Whatever the other indications concerning connections of this family to the Nyiyabarli, or the current language group identification of David Stock, its ancestral connections to the Banjima are, in my view, well established on the balance of probabilities

642 It is precisely this sort of case where the analysis provided by Dr Palmer and Mr Robinson about the importance of not making findings in native title proceedings simply on the basis of "tribal" classifications, but by understanding the importance of the language group relationships to land, becomes important. In this case, it appears that it is through their Banjima ancestry that a number of claimants, including David Stock, enjoy traditional rights and interests in the Yandicoogina and Weeli Wolli Creek area today. To make the point by way of corollary, that a person such as David Stock, who apparently identifies as Nyiyabarli, has such an interest in this area does not mean that the area is therefore Nyiyabarli country. As I found above in relation to the eastern boundary of the claim area, that is an area in which the Banjima had traditional native title rights at sovereignty.

643 On this basis, I am satisfied that Yandiguji is an apical ancestor as claimed in the form 1 application.

644 ***Claim group description*:** In light of the above discussion concerning claim group membership and the finding concerning Daisy Yijiyangu, this is not a case where I consider it appropriate simply to find that the group holding native title rights and interests should simply be described by their general language group description. In other words, I do not think it appropriate in this case to determine that "the Banjima people", without qualification hold native title.

645 Instead, I would determine, as the application proposes, that the claim group comprises descendants of the ancestors named in the application save for Daisy Yijiyangu.

Nature and Extent of Native Title Rights

Areas A, B and C

646 The claimants claim rights and interests in relation to three areas or categories described in the application:

- Area A – land not previously the subject of any Crown grant or areas to which ss 47, 47A, 47B or 238 NTA apply;
- Area B – nature reserves; and
- Area C – balance of the area where native title rights and interests exist.

647 Area A exclusive rights: In Area A the claimants claim what might be called exclusive possession rights. In the application these rights are claimed rights (1) to (5) formulated as follows:

(1) The right to possess, occupy, use and enjoy the areas against the world;

(2) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title group belong;

(3) A right to control access of others to the area;

(4) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor; and

(5) A right to control the taking, use or enjoyment by others of the resources of the area.

In their written submissions the claimants mention only (1), (2), (3) and (5) but not (4). However elsewhere they claim (4) as a "qualified right to control access".

648 The claimants submit that, if one reads those several iterations of a right as together describing the fullest beneficial interest capable of existing at common law, subject to other rights which may exist lawfully alongside them, in areas where there is no other grant to be taken into account, then the claim is uncontroversial and consistent with the law as set out in *Ward HC*.

649 In Area A, they say, incidents of those more broadly described rights, such as the several rights to take resources, which are described with particularity elsewhere in the application, subsist as part of the exercise of the broad rights flowing from a full beneficial interest in the land.

650 Area B limited rights: In relation to Area B, the Area A rights are not claimed, only non-exclusive rights – but no rights are claimed with respect to hunting, fishing or otherwise taking fauna or traditional resources

651 Area A, B and C non-exclusive rights: A large collection of disparately pleaded use rights are otherwise claimed in relation to each of Areas A, B and C, subject to the understanding there is no need to articulate them in relation to Area A if rights are found as expressed above. Included among these non-exclusive rights are rights to make decisions about the use of the area and control the use of the area and its resources, invite or permit use of the area or employ means for the protection of places and objects of importance to the native title claimants.

652 The claimants make submissions setting out the basis for contending that, to the extent that any of those rights are identified as a "qualified right to exclude others", such a qualified right to exclude was an incident of the native title held by the claimants' predecessors at the time of accession to British sovereignty and is capable of recognition by the common law.

653 The claimants say they have pleaded different non-exclusive rights separately in order to allow for the possibility that the Court may not be satisfied as to one, but be satisfied as to another. However, in many instances several of them fall into categories for which the justification for asserting them is the same, and they can be the subject of a composite phrase in the determination.

654 Thus, in their application, the claimants claim the following non-exclusive native title rights and interests in relation to Areas A and C, but not Area B:

(6) A right to hunt in the area.

(7) A right to fish in the area.

(8) A right to take traditional resources, other than minerals, and petroleum from the area.

(9) A right to take fauna.

655 The claimants claim a number of other, non-exclusive native title rights and interests in relation to each of Areas A, B and C:

(10) A right to occupy the area.

(11) A right to use the area.

(12) A right to enjoy the area.

(13) A right to be present on or within the area.

(14) A right to make decisions about the use of the area by members of the Aboriginal society to which the claim group belongs.

(15) A right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong.

(16) A right to invite and permit others to have access to and participate in or carry out activities in the area.

(17) A right of access to the area.

(18) A right to live within the area.

(19) A right to erect shelters upon or within the area.

(20) A right to camp upon or within the area.

(21) A right to move about the area.

(22) A right to engage in cultural activities within the area.

(23) A right to conduct and participate in ceremonies and meetings within the area.

(24) A right to visit, care for and maintain places of importance and protect them from physical harm.

(25) A right to take flora (including timber).

(26) A right to take soil.

(27) A right to take sand.

(28) A right to take stone and/or flint.

(29) A right to take clay.

(30) A right to take gravel.

(31) A right to take ochre.

(32) A right to take water.

(33) A right to control the taking, use and enjoyment by others of the resources of the area including those referred to in paragraphs 25-32 (inclusive) other than minerals and petroleum and any resource taken in exercise of a statutory right or common law right, including the public right to fish,

(34) A right to manufacture traditional items from the resources of the area.

(35) A right to trade in the resources of the area.

(36) A right, in relation to any activity occurring on the area, to:

(i) maintain;

(ii) conserve; and/or

(iii) protect;

1. significant places and objects located within the area, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object.

(37) A right, in relation to any activity occurring on the area, to:

(i) maintain;

2. (ii) conserve; and/or

3. (iii) protect;

4. significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means, any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.

(38) A right, in relation to any activity occurring on the area, to

(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs;

(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs;

5. in relation to significant places and objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area, by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the area and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.

656 Final formulation of claimed rights: As foreshadowed above, the claimants propose that the claimed rights should or could be aggregated or reformulated (the final formulation) as follows:

(1) In areas where there is no extinguishment, or extinguishment is to be disregarded, the native title rights should be determined as follows:

(a) The right as against the whole world to possess, occupy, use and enjoy the land and waters.

(b) A right to make decisions about the use of the land and waters by persons who are not members of the Aboriginal society to which the native title group belong.

(c) A right to control access of others to the land and waters.

(d) A right to control the taking, use or enjoyment by others of the resources of the land and waters.

(2) In other areas the rights should be determined as follows:

(a) The right to occupy the land and waters by having access to and moving about the land and waters, being present on the land and waters, living on the land in camps and shelters, and engaging in cultural activities on the land and waters including conducting and participating in ceremonies and meetings.

(b) The right to take the resources of the land and waters, other than minerals and petroleum owned by the State as defined in and for the purposes of s 9 *Mining*

Act 1978 and s 9 *Petroleum and Geothermal Energy Resources Act 1967*, including to hunt and take fauna, gather and take flora, take fish, and take stones, timber, ochre and water.

(c) The right to manufacture and trade the resources of the land and waters.

(d) A right, in relation to any activity occurring on the land and waters, to:

(i) maintain;

(ii) conserve; and/or

(iii) protect

6. significant places and objects located within the land and waters, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or object.

(e) A right, in relation to any activity occurring on the land and waters, to:

(i) maintain;

(ii) conserve; and/or

(iii) protect

7. significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the land and waters which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.

(f) A right, in relation to a use of the land and waters or an activity within the land and waters, to:

(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs;

(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs;

8. in relation to significant places and objects within the land and waters or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the land and waters by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with

information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the land and waters and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.

(g) A right to visit, care for and maintain places of importance on the land and waters and protect them from physical harm.

(h) A right to make decisions about the use of the land and waters by members of the Aboriginal society to which the native title claim group belong.

(i) A right to invite and permit others to have access to and participate in or carry out activities in the land and waters.

(j) A right to control the use of the land and waters by persons who are not members of the Aboriginal society to which the native title claim group belong, other than such use in exercise of a statutory right or common law right, including the public right to fish.

(k) A right to control the taking, use and enjoyment by others of resources of the land and waters, including flora, soil, sand, stone, flint, clay, gravel, ochre and water, other than minerals and petroleum and any resources taken in exercise of a statutory right or common law right, including the public right to fish.

657 It is understood, however, that not all these rights are said to exist in Area B and so those described in claimed rights (6)-(9) would need to be excepted in relation to Area B.

Exclusive possession in Area A

658 As to the claimants' claims to exclusive possession rights in Area A, those in claimed rights (1)-(4)/final formulation (1), the State generally submits that:

(1) Exclusive possession should not be determined anywhere in the claim area because the claimants have never historically exercised exclusive possession.

(2) In the alternative, exclusive possession should not be found in those parts of the claim area which, on the evidence, are subject to the interests of people who identify as Nyiyabarli, Palkyu or Yindjibarndi and are hence excluded from the claim group.

(3) Alternatively, those areas which the Court accepts were "shared" should not carry Banjima exclusive possession so as to defeat such traditional laws concerning shared country.

659 As to the exercise of possession, the State submits that, unlike in many native title trials, the evidence here does not suggest any *early* acts of exclusive possession. Dr Green's report, for example, contains none and the lay witnesses mentioned none. Reference is made to Dr Green's history report (at [92]) where he quotes a 1892 report in which Straker notes that natives from the Hamersley Range killed large numbers of sheep and cattle and otherwise caused "a lot of trouble by coming in & loafing on the shepherds as they consume their rations & lead them into all sorts of mischief". It is submitted, that is not consistent, however, with any inference that the Hamersley natives intended to drive people off their land – "loafing on the shepherds" suggests a different motivation.

660 The State says Straker's report does not suggest active resistance to settlement. Apart from the above, Dr Green does not suggest this, and was not asked about it. This is the sole such report in evidence, occurring many years after settlement, and does not appear to evidence resistance to the fact of settlement on particular land. The State suggests that Straker would have reported any suspicion that the actions were primarily directed at driving the settlers off the land. In any event, it was a mere threat, with no evidence of any attempt to implement the threat.

661 The State refers also to Straker's note that the Hamersley natives threatened to "kill all the white men & the native men & take away the women. This upsets the natives who are at work very much & it also makes the Chinamen much afraid". It is said that could not evidence an effort to exert possession of the "Hamersley natives'" land because it is directed also at resident natives. In any event, many different provocations are possible explanations.

662 Further, the State submits the history is one of successive entries, occupations and land uses by third parties without seeking or obtaining permission, and without resistance. These include the entries by:

(1) Pastoralists;

(2) Miners;

(3) Wittenoom residents and visitors;

(4) Wittenoom race-goers (including other Aboriginal people); and

(5) Visitors to Karijini National Park.

663 The State says, even if the Banjima law supported exclusive possession, there has been insufficient physical presence to exercise that right. The State refers to examples in the evidence of Banjima witnesses who were either not born on Banjima country or did not or do not live on Banjima country for long periods. That evidence, the State says, generally points to an absence from Banjima country for the period circa 1960 to the present, and occasional and sparse occupation before that.

664 Further, the State contends, evidence of residence before the 1960s focussed on Mulga Downs. A physical presence on Mulga Downs is ineffective for the exercise of exclusive possession in the Hamersley. As a matter of law, the State contends, the claimants cannot prove continuity of exercise of a right (here a right of exclusive possession) at Juna Downs by proving it only at Mulga Downs.

665 The evidence, the State contends, is supported by academic writings uninfluenced by native title litigation. The State refers to the Masters thesis of Dr Dench, submitted in 1981, and the evidence of Dr Green to the effect that:

- In the period from circa 1890 to circa 1960, the Aboriginal populations of the region was highly mobile.
- The shift away from country into the towns began in the 1950s.
- There is no evidence for a Banjima presence in the late nineteenth and early twentieth century in the Fortescue Valley, which for present purposes means on Mulga Downs.

666 The State contends that, in any event, at Mulga Downs in 1922 there is no evidence of a Banjima group in residence.

667 The State says there is no evidence or inference that Mulga Downs was staffed by Banjima in the early days:

(1) Dr Green's table at Attachment 1b shows at 1922 no person who appears to be listed among the claimants' apical ancestors or genealogies

(2) Straker's and others' reports around the turn of the century speak of natives coming in from the hills (who were Banjima) and terrorising the shepherds (who are therefore unlikely to have been Banjima).

668 Also, the State says, the evidence of claimants about seeking permission is recent, and a matter of courtesy rather than rights of entry. For example:

(1) Timothy Parker said: "In regards to other people that what I cut trees in our country it's only courtesy that they get permission of the people that belong to this area".

(2) Alec Tucker said it is a matter of respect.

(3) On Charles Smith's explanation there is no suggestion that the Banjima would punish trespassers – there is only the possibility of spiritual intervention. He says that the sole reason for permission is (a) in the case of different language groups because one does not know the country and might be harmed; and (b) in the case of top/bottom so as not to stumble into cultural activities.

(4) Charles Smith said that rights to participate in the Law transcend local interest. He says that all Aboriginal people in the region can attend, regardless on whose land and irrespective of permission.

(5) Charles Smith said asking permission by Top End into Bottom End land and vice versa is a matter of respect.

(6) Mr D Black said Nyiyabarli can come onto Banjima country without asking.

(7) Juliette Pearce-Tucker said that one does not need permission to enter Banjima land for hunting, but does for chopping trees. She does not need permission to camp or hunt in Karryarra or Ngarluma country if she is "comfortable to go into there". Only consequence is spiritual.

(8) Maitland Parker did not identify any dangerous place on Banjima country.

(9) Juliette Pearce-Tucker said there is a way to enter another's land and protect yourself.

669 In any event, asking permission is a recent re-introduction, the State submits, referring to Slim Parker's evidence. Mr D Black said he would ask before hunting at Mulga Downs, but would ask Charles Smith, not the Tuckers, and would ask the Parkers just to be "safe".

670 The evidence about spiritual danger is irrelevant to exclusive possession, the State submits, being "wholly inutile" as against non-indigenous peoples. In any event, there was no evidence that spiritual dangers were ever engaged by Banjima people in order to evict or deter entry. Rather, on the evidence, the spirits acted of their own accord.

671 The State also contends an issue of fact arises in respect of the place called "Pigeon". There was evidence that Mr K Jerrold held interests there. He was a Yindjibarndi. However, Mr McIntyre led evidence in re-examination of Slim Parker that Mr K Jerrold's "biological father is of Banjima descent". The State suggests this was led apparently to prove that the place called Pigeon was held exclusively by people of Banjima descent. The evidence of Dr Palmer, however, is that certain areas exist, usually on the outskirts of a claim area, in which a group of people hold land rights but which group may comprise people from two or more different language groups. That is to say, the re-examination appears not to accept that Dr Palmer's view holds sway at Pigeon, but that even Mr K Jerrold was relevantly Banjima. However, the claim is on behalf of "those persons who are recognised as descendants of [named people] and who are members of the Banjima language group". Mr K Jerrold could not be said to be a member of the Banjima language group. Nor could David Stock.

672 The State submits that, once it is accepted, as it must be, that people who are not Banjima have rights in land, that land cannot be the subject of Banjima exclusive possession. For example, David Stock has rights in Yandicoogina but is not Banjima, and hence would be excluded from exercise of those rights if the Banjima had exclusive possession of Yandicoogina. In the Hope Downs video, Timothy Parker says on cross-examination that the relevant area is shared with the Nyiyabarli people. That view cannot be contradicted, the State says, by suggesting that the Yindjibarndi and the Palyku have abandoned the Fortescue without investigation of those groups and calling representatives, which the claimants failed to do. This applies to the claim area north of the northern escarpment of the Hamersley Range and the area between Barimuna and Weeli Wolli Creek.

673 The BHP Billiton respondents say, in relation to the rights and interests held by what they describe as the "descent groups" (which I take to be a reference to the Top End and Bottom End Banjima groups), as follows. These respondents say the rights supported by the evidence are what may best be described as "use" rights; such as the right to occupy, use and be present within the claim area and the right to enjoy the resources of the area. Rights to "speak for" country or control activities within different parts of the claim area, which Dr Palmer described as "fundamental" rights, and which would once have been exercised at a local level (and as is still evident in witnesses identification of particular relationships with particular areas of the claim area) did not, and do not, exist at the level of the Banjima society. Any such rights would have existed at a local level. The evidence does not, however, enable the Court to identify who the holders of any such rights (if any) are. In that regard, the evidence generally does not support a finding that any native title rights and interests that have continued since sovereignty are "exclusive" (in the sense of conferring control of the land for all purposes).

674 In any event, these respondents submit, whether any of the rights and interests established by the evidence can be described as "exclusive" will depend upon an analysis of the interaction between those rights and other rights in the claim area, including previous and existing land tenures that have extinguished native title in whole or in part. Accordingly, the BHP Billiton respondents submit that it is premature to identify the precise nature of the existing rights and interests until the evidence in relation to prior and existing tenures has been completed.

675 The RTIO respondents repeat the submission of the BHP Billiton respondents.

676 The claimants join issue on the occupation evidence and question whether rights must be enforceable against others before they are found to be exclusive. They note there has been some evidence in the present case that, on occasions, other Aboriginal people access and use Banjima country without asking permission. It is important to note, it is submitted, that it is not necessary for native title claimants to establish that particular rights or interests are, or have been in the past, enforced against others. The Full Court in *Alyawarr FC* referred (at [72]) with approval to an important observation made in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Commonwealth v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1 (***Yarmirr HC***) at [16], that no a priori assumption can or should be made that the only

kinds of rights and interests referred to in para (a) of s 223(1) NTA, are rights and interests supported by some communally organised and enforced system of sanctions. The full passage in *Yarmirr* HC to which the Full Court referred states:

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

677 The claimants note the definition of native title and of native title rights and interests in s 223(1) is directed to the possession of the rights or interests, not their exercise. If the purpose of the Parliament in enacting the NTA was to recognise, support and protect native title, as it is submitted it is, they say it would be extraordinary if a claim seeking recognition of a native title right or interest could be defeated on the basis that the claimants had not previously been successful in enforcing that right or interest within a broader Australian society and a legal system, which did not recognise that right.

678 The claimants say therefore a right is a non-mandatory entitlement. It exists independently of its exercise and certainly independently of the existence of any present opportunity or capacity to exercise it. The existence of a right does not presuppose any power to enforce it or to have it recognised outside those who acknowledge and observe the laws and customs from which it derives. In this regard, the following observations made by Sundberg J in *Neowarra v Western Australia* [2003] FCA 1402 (***Neowarra***) at [310] in relation to the claimed right to be asked for permission to enter or use land, are said to be to the point:

> In determining whether the custom of being asked for permission to enter a strangers land has been modified or terminated, it is appropriate to take into account all the circumstances in which claimants are placed. These include dispersion from their traditional locations consequent upon European settlement, their migration to Church and government settlements, the lack of significant employment opportunities outside the pastoral industry, and the trend towards living in Aboriginal communities. The nature and extent of the claim area is also relevant. In all those circumstances, it

> would be unworkable and unreasonable to expect the observance of a custom such as being asked for permission to enter land, which was established when Aboriginal people lived next to other Aboriginal people in the adjacent dambuns, all of whom acknowledged the relevant custom, to continue unaltered in the changed situation of uneven Aboriginal distribution across the Kimberley and the intrusion of white people who are strangers to the society. A normative system containing such a custom does not cease to embody that custom simply because some members of the society flout the rule. Most Aboriginal people respect it, though the dispersal of the community resulting from the changed face of the Kimberley means that there are often practical difficulties in the way of observing it. After all, many people drive their cars in excess of the speed limit. They do not thereby cease to be part of a society that requires compliance with speed limits. The permission for access is still observed for the purposes of s 223(1)(a). It would be wrong to approach the analysis on the basis of whether or not non-Aboriginal people respect the custom.

679 The claimants say a similar point was made by Mansfield J at first instance in *Alyawarr v Northern Territory* [2004] FCA 472; (2004) 207 ALR 539 (***Alyawarr***) at [156]:

> The evidence about controlling the access of others to the claim area, so as to assert exclusively the right to control access to the claim area and to occupy and use it, is not so clear. It does not suggest that there have been significant instances of persons other than the claim group seeking to come onto the claim area or to use its resources either with or without the permission of the claim group. There is of course significant evidence of persons such as Warlpiri persons, and others, who came onto and worked around Hatches Creek during the time that it was functioning as a mine. There is no evidence that those persons sought the permission of members of the claim group to do so, or that members of the claim group took any action to prevent their coming onto that part of the claim area. Apart from that illustration, however, in a context which is readily understood, the evidence was that Aboriginal people from other regions and non-Aboriginal people should ask the applicants for permission to enter the country...

680 Also, in *Rubibi Community v Western Australia (No 6)* [2006] FCA 82; (2006) 226 ALR 676 at [115]-[116], Merkel J found that the traditional requirement for permission to be sought by strangers before accessing the claimant group's country continued to exist as a native title right or interest, despite the fact that, due to "colonisation and modern realities", the requirement was no longer enforced:

> There can be little doubt that the evidence establishes that there is a traditional requirement for permission to be sought by strangers to access Yawuru country and that requirement is sourced in the Bugarrigarra. However, as a result of both colonisation and modern realities, the requirement cannot be, and is not being, enforced.
>
> In *Neowarra* … Sundberg J explained why he rejected the state's submission that, as the claimed right to give permission is not being enforced, the right should no longer be recognised. As was the case in *Neowarra*, I am satisfied that the evidence ... of the interim reasons establishes the existence of the right and its content, ...

681 The claimants submit that, in the present case, there has been a significant body of evidence which is to the effect that strangers should ask permission before carrying out any activity on Banjima country. Banjima country is redolent with spiritual dangers for those who are not Banjima. Those who do not seek and obtain permission risk serious harm from the spirits in the country. That evidence would justify the Court in making a finding, subject to the issues of extinguishment, that the Banjima people have a native title right of exclusive possession as the following passage in *Griffiths v Northern Territory* [2007] FCAFC 178; (2007) 165 FCR 391 (***Griffiths FC***) at [127] demonstrates:

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

682 The claimants contend that what flows from the above passage is:

(1) it is not a necessary condition of the exclusivity of native title rights and interests that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country";

(2) the control of access to country which flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry can support a characterisation of the native title rights and interests as exclusive; and

(3) it is not necessary to exclusivity that the native title claim group require permission for entry onto their country on every occasion that a stranger enters "provided that the stranger has been properly introduced to the country by them in the first place".

683 The first argument put by the State is that the evidence in this proceeding does not suggest any early acts of exclusive possession. I reject that submission. The proper inference to be drawn from all the evidence, both the historical contained in Dr Green's report and that to be inferred from the evidence of older claimants such as Mrs A Smith, as well as the reports of the anthropologists, Dr Palmer and Mr Robinson, is that at the time of first contact between Banjima people and settlers or inspectors like Mr Straker, the Aboriginal people exclusively occupied their traditional territory.

684 Whether or not there was any evidence to show that the Aboriginal inhabitants of the claim area at the point of contact "drove others off their land" is, in my view, irrelevant, yet that is the particular submission made on behalf of the State. The State in their written submissions make reference to an 1892 report of Straker which reports that natives from Hamersley Range killed large numbers of sheep and cattle and otherwise caused "a lot of trouble by coming in & loafing on the shepherds as they consume their rations & lead them into all sorts of mischief". The State focuses on the expression "loafing on the shepherds" to suggest that this was an activity not consistent with an intention by the Aboriginal inhabitants "to drive people off their land". Whatever that statement by Straker was intended to mean, it does not provide a basis for the submission made on behalf of the State. The other evidence in the reports of Straker, some of which was referred to earlier in these reasons when dealing with the question of Banjima society, shows that indeed there seems to have been real resistance by Aboriginal people in the Hamersley Range to the settlement of their country.

685 As to the further submission made by the State that the evidence is that, following pastoral settlement, a range of pastoralists, miners, town residents at Wittenoom and other people such as visitors to Karijini National Park entered the claim area without seeking the consent of the Banjima, none of which is consistent with exclusive possession, I also reject that submission. As has been demonstrated now in a number of decisions, referred in the

claimants' submissions, a right to exclusive possession of land is not dependent upon evidence that permission must always be demanded; that the right must always be enforceable against others. As Sundberg J observed in *Neowarra* (at [310]), it would be unworkable and unreasonable in a post-settlement context to expect the observance of a custom, such as being asked for permission to enter land, to continue unaltered. As his Honour there observed:

> A normative system containing such a custom does not cease to embody that custom simply because some members of the society flout the rule. Most Aboriginal people respect it, though the dispersal of the community resulting from the changed face of the Kimberley means that there are often practical difficulties in the way of observing it.

686 In this case there has been ample evidence of the custom of the Banjima to expect others to seek permission to be or do things in Banjima country. Recognition of some people as "strangers" is part of that custom. The reports of Straker go to show that the Hamersley Aborigines were apparently prepared to expel people from their country. In a subsequent, post-settlement setting, the ability of the Aboriginal inhabitants to continue to act in that first contact way obviously was inhibited, not the least by the new criminal laws of the new sovereign. Nonetheless, the evidence shows that the need for strangers to seek permission to be in Banjima country has remained strong and is not a re-introduced custom. Not the least of the reasons for this custom is the understanding by Aboriginal people that the country carries dangers and spirits and must be respected by Aboriginal and non-Aboriginal peoples alike. Seeking permission to be on country from the traditional owners is one way of avoiding pitfalls. It is also an important way of ensuring that sacred or religious sites created in the Dreaming are not violated.

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

688 Again, to mention but a few of the witnesses who gave evidence that Banjima country is redolent with spiritual dangers for those who are not Banjima, may be mentioned

Mr G Tucker, Steven Smith, Mr D Black, Alec Tucker, Mrs A Smith and Gladys Tucker. Again this may be inferred to be an ancient custom.

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

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

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

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

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

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

694 The BHP Billiton respondents, supported by the RTIO respondents, make a different primary submission concerning the exclusive possession claims of the claimants. In essence these respondents emphasise that in more classical times, as explained by Dr Palmer in his evidence, local groups (which might be called "country groups" or "estate groups") had the right to "speak for" local areas and control activities within them, a range of rights which might be called "fundamental", as against the "use" rights of an economic nature that "residence groups" (or "bands") may have had. In relation to the control of activities therefore, these respondents contend those fundamental rights existed at a "local level" and the evidence does not now enable the Court to identify who the holders of any such rights are. It is also submitted that the evidence generally does not support a finding that any native title rights that have continued since sovereignty are "exclusive" in the sense of conferring control of the land for all purposes.

695 I reject those submissions. As explained in the discussion above, the inferred social organisation of the Banjima people at the time of first contact was by way of a number of local (country or estate) groups and residence groups (or bands). The primary responsibility of the local groups was more religious in nature and involved obligations to protect country and particular sites and, in that context, to "speak for" country and thereby to make decisions

about and to control activities within country. Members of these local (country or estate) groups on a day-to-day level, in different formations, were likely to have been members of residence groups (or bands) that made "economic" use of the Banjima land, that is to say, lived their ordinary lives on wider tracts of Banjima territory. The evidence suggests that people travelled across Banjima country as members of residence groups (or bands) and were not confined to a "country" or an "estate" within Banjima country.

696 Post-sovereignty, with the establishment of the pastoral industry and other introduced settler activities, the local groups and the residence groups appear to have "coalesced" (as Dr Palmer put it in the discussion above). The result, put generally, was that local country areas or estates were at some point, in effect, redefined to reflect larger areas, often co-extensive with the area of the pastoral station where the descendants of the earlier local groups rights holders then lived, and the people who once economically exploited the wider Banjima country in residence groups in customary ways then found themselves doing so primarily on the pastoral station area on which they lived. At holiday time and Law time, however, they would often continue to assemble in other areas, whether in Banjima territory or nearby, to celebrate rituals and be together. One thereby observes the coalescence of local groups and residence groups into larger groupings. Thus, Top End Banjima people and Bottom End Banjima people gave evidence that addressed both their right to "speak for" particular areas of Banjima country and to economically use or exploit Banjima country in customary ways. None of that means, as I apprehend the submissions of these respondents to suggest, that the right to "speak for" country was lost or that any right to exclusivity was thereby abandoned or that the people who exercise the rights to speak for country cannot now be identified. They can be, as generally they reflect the members respectively of the Top End Banjima and Bottom End Banjima. As I have found above, they have continued to possess a wide range of rights to speak for country (to make decisions about it) and to use it and its resources in customary or usufructuary ways.

697 The BHP Billiton and RTIO respondents further submit that whether any of the rights and interests established by the evidence can be described as "exclusive" will depend upon an analysis of the interaction between those rights and other rights in the claim area, including previous and existing land tenures that have extinguished native title in whole or in part. Accordingly, they submit that it is premature to identify the precise nature of the existing rights and interests until the evidence in relation to prior and existing tenures has been

completed. Broadly speaking, that is right. While I have found above that exclusive rights might continue, and that the broader conceptual and evidential points raised by the respondents should not be accepted, the claimants also accept that there is a legal issue as to whether or not some of the rights and interests which have been claimed could have survived the grant of a pastoral lease. These are issues which are dealt with below in the course of considering extinguishment. I accept the same should be said in relation to any exclusive rights that might be said to exist, in the broad. Account ultimately must be taken of the grant of other interests that may affect exclusivity as a matter of law.

698 In these circumstances, but subject to findings made following consideration of the extinguishment submissions and what is stated below about a claimed "qualified right to control access" and the appropriate terms in which the rights found should be expressed, I consider exclusive possession rights are made out. I should indicate now, however, that for reasons given below, I do not accept the claimants' claim to a "qualified right to control access".

699 As to the form of the determination, including in relation to any exclusive possession rights, the State submits that the determination should not include any right in the form: "A right to make decisions about…", for the following reasons. First, it is submitted the law is clear that rights of native title must be expressed in terms of activities, and in terms of activities on the land. A purported right to make decisions meets neither criterion.

700 Secondly, it is said, the purported right is too vague. In each instance, the purported right is expressed in a manner that reflects an interpretation, merely, that an individual may make a decision, or even that a collective may make a decision. On the other hand, the claimants may intend by these purported rights that there is a concomitant, implied right that the decision makers have a right to enforce their decision. If so, then that further claimed right should be expressed and the issue subjected to submissions and judicial scrutiny and possible appeal – it should not be left vague. There is a possibility (indeed a high probability in this case) that two different individuals or groups may make contrary decisions about the use of the land that can be made by others. If the claimed right is intended to apply to bare decision making, this is of no moment, but if it is intended to include the concomitant right of enforcement, then there arises a question of competing rights. Such competition can be resolved by a prescribed body corporate if the relevant right is joint possession of the land

(resolved by a vote, for example), but not if the right is expressed as an individual or group right to a right of self-executing decision-making.

701 Thirdly, the bare right to decide has no utility. No-one could, or would wish to, oppose such an instance of free speech. It is this lack of utility that raises a suspicion that a concomitant right is intended, but left vague.

702 Fourthly, a right to have decisions enforced has an extremely wide potential ambit. Claimed right (2)/final formulation (1)(b), in Area A for example, would then be taken to mean that a mere decision to oppose a government objective is enforceable. Such government objectives might include environmental conservation, fire control, feral animal control, mining of the State's minerals, and warrants. No holder of fee simple or leasehold can validly oppose such controls. The usual course for any holder of exclusive possession is to obtain a court order for a remedy in respect of trespass, subject only to the rules as to reasonable self-help and self-protection. There is no valid reason for native title holders to enjoy a wider exemption from the rule of such laws.

703 Further, the State submits it is open to any holder of exclusive possession to allow entry on conditions. Breach of the conditions will terminate the invitation. This can be formalised to any extent agreed. Holders of exclusive native title may allow mining for example, subject to such conditions. Therefore, the claimed right to make decisions is not required in order to impose conditions on entry. The claimed right goes too far in this respect.

704 It is also convenient here to note that the State submits that, in the case of non-exclusive native title, a purported right to make decisions suffers all those defects and is legally unsustainable for the additional reason mentioned below in respect of pastoral leases; namely, in *Ward HC* (at [52]) the plurality said that without a right as against the whole world to possession of land, "it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead".

705 In summary, the State submits if the Court determines a right of possession, then that carries with it a utility in making decisions and a legal mechanism to enforce decisions, so

that a separate right to decide is unnecessary and confusing: see *Sampi v Western Australia* [2005] FCA 777 (***Sampi***) at [1072]. If the Court determines there is no right of exclusive possession, then there should be no right to decide the use by others of the land.

706 The claimants observe that the "right to decide" claimed is not expressed in the abstract fashion which the State suggests. It is a "right to make decisions about the use of the area". It therefore has the characteristics which the State contends it must have, that is, it is a right related to activities on the land.

707 The right only applies where the native title confers possession, occupation, use and enjoyment to the exclusion of all others, unaffected by any extinguishing acts. The decisions are then enforceable as an exercise of such native title. Contrary to the State's submissions, the existence of such native title does not exempt native title holders from the sovereign power of the State to affect the property interests of its citizens by enacting laws or implementing powers which affect property interests, except to the extent the powers of the State are circumscribed by the *Racial Discrimination Act 1975* (Cth) (***RDA***) and the NTA.

708 As to a right to "control access" (claimed right (3)/final formulation (1)(c)), the State says to similar effect that holders of exclusive possession (including fee simple, lease, vested lands and sovereign plenum dominium) have the right to obtain court assistance to protect or retrieve their possessory rights. They also have conditional rights to fence property to physically exclude others. With very limited exceptions, relating to self help and self protection, they have no right to otherwise personally control the access of others. By statute, many third persons have rights of access to such lands despite the landowner's wishes – various inspectors for specified purposes, police and welfare agencies in certain circumstances, public work authorities, and others. These matters are all well known incidents of owning land in a society ruled by law. There is no reason to except native title-holders from that regime. A right of "possession, occupation, use and enjoyment" (if evidenced) would accord to native title holders rights akin to other holders. Further, even if there were evidence of the claimants excluding anyone, there is no evidence of them attempting to exclude anyone who has entered under cover of statutory authority.

709 By expressing a right to control access of others separately from the right of possession, the State suggests an interpretation is suggested under which some right in addition to possession is intended. That interpretation should not be left open.

710 The State also submits that the area must be identified in which a right can be exercised, and in that regard it must be borne in mind that the present claim area is marked by disagreement among claimants – as between Top End and Bottom End, and within each of those groups. The State says it must also be borne in mind that some do not even claim rights to the whole area and others say that they should obtain permission to access some areas within Banjima territory. Further, it is relevant that the Mulga Downs and Yandicoogina areas may be subject to the rights of others. For those reasons, the Court should confine the articulation of rights of groups and individuals to those areas in which there is evidence of a right for and its exercise by that group/individual.

711 Further, and more generally, the State contends *Bennell v Western Australia* [2006] FCA 1243; (2006) 153 FCR 120 is authority that rights and their exercise must be evidenced in all parts of the claim area. This is subject of course to a de minimis non curat lex rule, but the Court should not treat as de minimis, for example, that evidence of fishing was site specific or that there was no evidence of taking ochre on Banjima country.

712 The State says a right to control "other Banjima" cannot be included in a determination. It has to be borne in mind that this right has nothing to do with excluding people from the claim area – ex hypothesis, it is aimed at governing other Banjima present on the land. There can be no native title right to, essentially, uphold Banjima laws and customs as against people; native title rights and interests are by definition rights and interests in relation to land or waters.

713 The State also cautions that some claimed rights of native title may be inconsistent with recognition by common law under s 223(1)(c) NTA. It says that at sovereignty, the common law of England or Western Australia could not have recognised a right in Aboriginal people to exclude the Crown. Regardless of the legal nature of the acts of sovereignty and settlement, the common law could not have allowed the indigenous peoples (of conquered or settled lands) to obtain court orders to drive out the Crown or its representatives. A right to exclude the Crown therefore was never recognised for the purposes of s 223(1)(c) NTA.

Further, the common law could not have recognised a native title right to prevent or frustrate the Crown's right to its property in minerals. The Crown held prerogative rights to precious metals, that is, regardless of statute. Later, by virtue of the vesting provisions in s 3 *Western Australia Constitution Act 1890* (UK), and s 117 *Mining Act 1904* (WA) (***Mining Act 1904***) and s 9 *Petroleum Act 1936* (WA) (***Petroleum Act 1936***), full beneficial ownership of all minerals specified and petroleum was vested in the Crown. Thus, the common law could not have recognised any right, either at sovereignty (in respect of the British Crown's property in precious metals) or post 1890 or 1904 (in respect of other minerals), that derogated from the Crown's interest in its property.

714 In this regard, the State also relies on *Newcrest Mining (WA) Pty Ltd v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513.

715 The claimants join issue with the State's contention that native title rights can only be established by specific evidence of exercise of rights and all else belongs to the State. In *Ward HC* (at [14]) the plurality said:

> As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J said that: 'the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole'.
>
> It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, ...
> (Emphasis added)

716 One, therefore, starts, the claimants say, with the proposition that native title, in accordance with traditional law and custom, was, at the time of acquisition of British sovereignty, a fully-comprehensive right to the land and its resources (possession, occupation, use and enjoyment to the exclusion of all others). The High Court confirmed in *Ward HC* at [20] that "it is from the traditional laws and customs that native title rights and interests derive".

717 As the High Court noted in *Ward HC* (at [22] and [29]) and in *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik*)**, per Toohey J at 133 it is only when the court is

required to determine whether there was any extinguishment of native title rights that the "particular content of native title rights and interests" must be established to determine which of them "yield" to the extent of their inconsistency with rights conferred under the statutory grants.

718 The State asserted its right as sovereign to minerals and petroleum by s 117 *Mining Act 1904*, s 9(1)(a) *Mining Act 1978* (WA) (***Mining Act 1978***) and s 9 *Petroleum and Geothermal Energy Resources Act 1967* (WA) (***Petroleum and Geothermal Energy Resources Act 1967***). Section 9(1)(a) *Mining Act 1978* declares that "precious metal[s] existing in [their] natural condition" are the property of the Crown, and s 9(1)(b) that "all other minerals … are the property of the Crown". "Minerals" are defined in s 8 as not including soil or, "if it occurs on private land - (i) limestone, rock or gravel; or (ii) shale other than oil shale; or (iii) sand, other than mineral sand, silica or garnet sand; or (iv) clay, other than kaolin, bentonite, attapulgite or montmorillonite". The claimants contend that by that exercise of legislative power, the State has expended its radical title to full beneficial ownership to the extent provided by the legislation. Except to that extent, the rights and interests of the Banjima People under their traditional laws and customs to possess, occupy, use and enjoy the claim area subsist as a burden on the radical title of the Crown.

719 The claimants submit a native title holder is not the equivalent of a lessee of the State, with native title rights limited to those demised and the balance vesting in the lessor, as contended by the State. Compare *Ward HC* at [20].

720 As to the claimants' claim to a right in Area A to control the taking, use or enjoyment by others of the "resources of the area" (claimed right (5)/final formulation (1)(d)), the State submit this right cannot be part of a determination as expressed. First, the resources of the area include its minerals, which are owned by the State. There is a constitutional guarantee that the State will not be deprived of that property except on "just terms": s 51(xxxi) Commonwealth *Constitution*. State ownership is acknowledged elsewhere in the claimants' claim. Nevertheless, this particular claimed right should not be expressed to implicitly include minerals. Further, while the claimants appear to assert that native title to resources subsists subject to the Crown's right from time to time to grant rights to others, this is incorrect. The Crown owns the minerals and petroleum products in its own right, and grants of tenements to third persons is a form of licence to extract the Crown's pre-owned resources.

The claimants appear to accept Crown ownership prevents native title to minerals. They appear to say that the Banjima have everything that is not State owned or State granted. However, the proper process is to establish the rights of native title by specific evidence of their exercise, and what (if anything) is left over from that exercise belongs to the State, not vice versa.

721 Secondly, more generally, the State contends a right of native title in respect of resources must be confined to each resource for which there is specific evidence. If the only evidence for, say, seeds, is the right to exclusive possession, then that right should be the only determined right. If on the other hand there is evidence specific to seeds, which adds to the rights of exclusive possession, then such right might also be expressed. It is said this second point is merely an example of a general submission that rights must reflect the evidence.

722 Further, the State says the claimed right extends beyond control of "taking" resources to control of the "use and enjoyment" of resources. First, if validly taken, there can be no native title right to thereafter control use or enjoyment. Such a post-taking right is unsustainable. Second, a right to control the use or enjoyment of resources in situ is wholly encompassed by a right of possession, and in Area A is unnecessary and confusing. Such a right in a non-exclusive area is inconsistent with the jurisprudence of non-exclusive rights: see *Ward HC* at [52].

723 As to the claimants' contention that a right to take resources is an incident of occupation, use and enjoyment, the State says that is incorrect. No other holder of exclusive possession has a right to take minerals. No leaseholder has a right to take anything unless specifically authorised independently of the demise itself. Also, native title is said by the High Court to be "highly fact-specific" (for example, in *Ward FC* at [458]), by which is meant that each right must be specifically evidenced. It is the opposite of that principle to suggest that a right to take resources is implicit in a right to occupy, especially if "occupy" does not mean possession.

724 In my view, if the claimants are entitled to a determination that includes a right to exclusive possession, generally speaking, in respect of any portion of Area A then they would be entitled to a determination at least in terms of final reformulation (1)(a), namely, the right as against the whole world to possess, occupy, use and enjoy the land and waters.

725 As has been pointed out in a number of earlier decisions, an expression of a right in those terms comprehends that a claimant group has such an array of traditional rights and interests in relation to land and waters claimed that the right formulated in those terms is appropriate.

726 I accept, however, that a right "to make decisions" about the use of the land and waters is a helpful aspect of that exclusive possession right and should be articulated as the claimants propose in the right in (1)(b), if exclusive possession is made out, and accept the claimants' submissions in this regard.

727 Similarly, a right to control access of others to the land and waters is an appropriate further articulation of that exclusive possession right, as proposed by the claimants in (1)(c), if exclusive possession to any area is made out.

728 However, I am uncertain about the meaning and implications of proposed right (1)(d), to control the taking, use or enjoyment by others of resources of the land and waters. It may mean there is a right, following authorised taking, to control the use made of the taken resource; which would seem unusual. I am not at all certain that a right to that effect is reflected by any of the evidence. It would also not seem to be one in relation to land or waters. I consider (1)(d) is repetitive or redundant in any event of the rights proposed in (1)(a), (b) and (c).

729 In those circumstances if there is any area within Area A in respect of which the claimants are entitled to exclusive possession rights, I would make the determination in respect of the rights proposed in final formulation (1)(a), (b) and (c), but not (d).

730 I reject the State's express or implicit submission that if exclusive possession rights exist, then they need to be articulated in detail, including (in effect) whether a right to hunt encompasses a right to take wild cats, dogs, foxes, rabbits, camels, horses or any other wild animals that may or may not have been present on Banjima country in 1829, not to mention migratory birds; and on what areas of land or waters. Such a submission does not accord with authority; nor is it reflected in most earlier determinations of the Court under the NTA.

The right to occupy, use and enjoy

731 The right "to occupy" is claimed in various claimed rights, both as part of the exclusive possession rights (claimed right (1)/final formulation (1)(a)) and as part of the non-exclusive possession rights (claimed right (10)/final formulation (2)(a)). "Use" and "enjoyment" rights are also claimed (claimed rights (1), (11), (12) for example) although they are not employed in the same way in the final formulation and so much of the issue has perhaps been dissipated.

732 The claimants contend the extent of the right to occupy is dependent upon the meaning which is attributed to the word "occupy". The Shorter Oxford Dictionary, for example, gives the term a number of meanings: "To take possession of, seize ... To take possession of (a place) by settling in it, or by conquest ... To reside in ... to dwell, reside; to stay, abide…".

733 They note the term "occupy" is often used as part of a composite phrase, such as in *Sampi* at [1072], where French J expressed the view that:

> The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others…

734 In *Attorney-General (NT) v Ward* [2003] FCAFC 283; (2003) 134 FCR 16 (***A-G (NT) v Ward***) the Full Court (at [17]) was of the view that the expression "occupy, use and enjoy" was too reminiscent of the expression "occupation, use and enjoyment" in s 225(e) NTA and omitted the word "occupy" from para 5 of the determination.

735 Where the concept of the right to "occupy" is used independently of the concept of possession and separately from the connotation of the right to make decisions about access by others, then, the claimants submit, it is unexceptional. The right to occupy, they say, as claimed, is best placed in a context which accords it the narrower meaning of "the right to reside, stay, dwell or abide".

736 The determination may best be expressed, according to the claimants, by drawing together several of the sub-paragraphs of the claimed rights and determining that the native title holders have the "*right to occupy the land and waters by having access to and moving about the land and waters, being present on the land and waters, living on the land in camps*

and shelters, and engaging in cultural activities on the land and waters, including conducting and participating in ceremonies and meetings": thereby drawing together claimed rights (10), (13), (17), (18), (19), (20), (21), (22), (23). This is expressed in reformulated proposed right (2)(a) above.

737 Having placed that qualification as to the means of occupying the land upon the right to occupy, the claimants suggest the concern expressed by the Full Court in *A-G (NT) v Ward* in relation to the phrase "occupy, use and enjoy" is similarly overcome by placing the right to "occupy, use and enjoy" in the same qualifying context, so that the right is expressed as the "right to occupy, use and enjoy the land and waters by having access to and moving about the land and waters, being present on the land and waters, living on the land in camps and shelters, and engaging in cultural activities on the land and waters, including conducting and participating in ceremonies and meetings" (adding to the composite description the claimed rights numbered (11) and (12)). They note that in *Alyawarr FC* (at [122]-[133]) the Full Court considered an objection that the right to permanent settlement is inconsistent with a pastoral leaseholder's rights (although the leases were no longer current) and concluded that is not.

738 The State contends that the right to "occupy" is not made out in any area because:

- the area was not occupied pursuant to tradition between circa 1900 and the 1990s; and
- evidence of communities is of presence on pastoral properties or contemporary communities only and evidence of contemporary camping is sporadic and is insufficient to establish rights to live, erect shelters or camp within the area.

739 The State also contends that the right to engage in cultural activities and the right to conduct and participate in ceremonies and meetings within the area have ceased to exist because of a hiatus in the practice of the same in Banjima country.

740 The claimants submit these contentions of the State are contrary to what was acknowledged in *Moses FC* at [238], *Ward HC* at [64] and *De Rose (No 1)* at [303], [313] and [316], namely:

(1) that use of every part of the land or waters in the claim area is not required to be proved to establish the geographical extent of native title rights and interests for the purpose of s 223 NTA; and

(2) that absence of physical contact with the land does not answer the question posed by s 223 as to whether traditional connection with the land has been maintained.

741 The claimants also refer to the case law which makes it clear that the existence of a right is not dependent upon its exercise.

742 By contrast, the State emphasises that the right to occupy attaches to a right to exclusive possession. If the Court determines exclusive possession, there is no objection to reference also to a right to occupy. However, if there is no exclusivity, then the determination should not refer to a right to occupy, because "occupy" carries connotations of possession: *A-G (NT) v Ward*. The State says that, there, it was the use of "occupy" where no possession is conferred that was disapproved of by the Court (at [17]):

> As was pointed out by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court (at [89]), the expression 'possession, occupation, use and enjoyment', used in s 225(e) of the Act, 'is a composite expression directed to describing a particular measure of control over access to land'. The words of the proposed determination, 'occupy, use and enjoy' are not identical to, but are reminiscent of, this composite expression. They might be understood as conveying the notion discussed by their Honours, including control of access. This would be inappropriate in this case. The right of absolute control of access must have been extinguished by the grant of the pastoral leases. There might be a surviving right to make decisions, pursuant to Aboriginal laws and custom, about the use and enjoyment of the land by Aboriginal people. That right would not be affected by the grant of a pastoral lease. However, that matter is specifically addressed by subpara (e) of para 5. We think the word 'occupy' should be omitted from the opening words of para 5.

743 The upshot the State submits, is that where no right of exclusive possession is found, the determination should not mention a right to occupy, but might include a non-exclusive right to reside. Contrary to the claimants' submissions if a right to reside is intended, it should be so expressed; the Court should not express this as a right to occupy regardless of whether it is conditioned or not as suggested.

744 The BHP Billiton and RTIO respondents submit the following principles have been applied in previous cases in respect of the recognition of particular native title rights:

(1) The degree of specificity required in a determination will depend upon the nature and extent of the native title rights and interests and is likely to vary from case to case, depending upon the evidence: *Ward FC* at [205].

(2) The rights and interests claimed must be separately identified and particularised: *Daniel 2003(1)* at [136], citing *Ward HC* at [35], [39] and [40].

(3) A right may be expressed as a broad right, followed by specific examples of the exercise of the right (see for example, the determination in *Daniel v Western Australia* [2005] FCA 536 (***Daniel 2005***) at [6(f)]: "A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, sea turtle [etc] …), limited in the case of water fauna to coastal waters landward of the low water mark and inland water courses").

(4) The Court is not bound to adopt the formulation of native title rights and interests put forward by the claimants: see *Daniel 2003(1)* at [67]-[69].

(5) It is preferable to express the rights by reference to the activities that may be conducted, as a right, on or in relation to the land or water: *Daniel 2003(1)* at [136], citing *Ward HC* at [52].

(6) The Court may limit a right where there is insufficient evidence to support it. In *Daniel 2003(1)*, for example, the claimants claimed a right to build houses but the Court only recognised a right to build shelters: see *Daniel 2003(1)* at [260].

745 I consider that, in light of the submissions made by the claimants, and indeed by reason of a number of objections made on behalf of the State to a degree of repetition in the rights as claimed in the application, it is appropriate to aggregate and refine a number of the rights, in the way the claimants have attempted in the final formulation, where they have been made out by the evidence (but subject of course to any extinguishment of such rights by particular tenures and in particular parts of the claim area).

746 Generally speaking I am satisfied that the right in final formulation (2)(a) is made out by the evidence in the proceeding.

747 I accept, however, the concerns expressed by the State that if the concept of "occupy" adds nothing to the articulation of a particular right by reference to a particular usufructuary

right or activity then it would be best not to employ it in order to avoid any confusion that might arise from ambiguity.

748 From the claimants' point of view, as made clear in other submissions below, including with respect to the claimed qualified right to control access, the claimants' view of their rights is that they have all the rights that the Banjima traditionally had at the time sovereignty was asserted by the British over their traditional territory, save for any rights that have been extinguished. Their view otherwise is that many of those traditional rights at sovereignty have merely been regulated or "qualified" by subsequent legislation of the Western Australian Parliament and grants of tenure made by the Western Australian Government over many years.

749 Nonetheless, having regard to the authorities relied on by both the claimants and the respondents as to the formulation of rights, the process of articulation of rights should not become some high art form. Expressed rights should, in my view, reflect the evidence and be expressed in terms not likely to cause unnecessary subsequent debate or litigation due to ambiguity.

750 Thus, in these circumstances I am inclined not to preface the articulation of the particular usufructuary rights or activities identified in para (2)(a) of the final formulation of rights by reference to a "right to occupy the land and waters by having…". I would simply express (2)(a) in the following terms:

> (a) the right to access and move about the land and waters, be present on the land and waters, live on the land in camps and shelters, and engage in cultural activities on the land and waters including conducting and participating in ceremonies and meetings.

751 In my view, the particular usufructuary rights or activities referred to are established by the evidence. That such rights existed at the time of sovereignty on the evidence is, in my view, undoubted. That such rights continue to be possessed thereafter is ample. Whether a particular activity can be exercised in the light of inconsistency with the rights and interests of others under grants of tenure may be in issue, but does not lead to the conclusion that the rights claimed are not possessed and continue to exist or that they are extinguished.

752 Evidence relating to the conduct of Law ceremonies over many years in and near by the claim area and access, moving about and camping in the claim area, including by making shelters is well established. Most recently it is established through the late twentieth and twenty-first century activities of houses built at Wirilimura Block and at Youngaleena. But the evidence, taken as a whole – even if sometimes, as the State says, it is not specific as to the precise location where bough sheds and the like were built – supports the activities mentioned in the final formulation (2)(a) as having been carried out in various parts of the claim area over many years and I so infer. The possession of the rights claimed has not been abandoned or lost.

753 As to conduct of ceremonies, the State (in relation to claimed right (23) in the application) says the only ceremonies practised within the claim area are law ceremonies at Youngaleena, Wirilimura Block and 5 Mile/Windell Block. Maitland Parker does not recognise the Law ground at Wirilimura block and nor does Margaret Parker. The Youngaleena Law ground was first used in the mid-1990s. Both these places are on Mulga Downs. Mr G Tucker said that the Youngaleena Law ground has been shut for 10 or 12 years. Use of the Law ground at 5 Mile/Windell Block is recent as well. Prior to the establishment of the recent Law grounds, there was a long hiatus when no Law was practised in Banjima country. It moved from Hooley Paddock and Windamurra (each on Mulga Downs) to Cane River and Onslow when all the Banjima people left Mulga Downs. That was around the 1950s. Previously, there were no Law grounds in the Hamersley Range ("up top").

754 The State says the evidence shows there has been a disruption to the practise of ceremony in Banjima country such that the rights to practise ceremony have ceased to exist. The Law grounds at Wirilimura Block and Youngaleena are not in Banjima country. The only jilbaba, or increase site, of general familiarity to the claimants is the janduru (honey) jilbaba near Hope Downs. This site was the subject of the 2008 preservation evidence hearing and familiarity with this site may be due to that hearing and associated surveys for mining. There is no evidence of actual use of any jilbabas.

755 The evidence shows that at the time of settlement (by inference from evidence from many of the older claimants) and in more recent times there have been various meetings and ceremonies conducted by the Banjima and their neighbours, that various parts of the claim

area have been used for Law grounds and that dalu sites were recognised and protected (at least in the past and there is still knowledge of them today). When combined with the evidence of more recent cultural activities and ceremonies and meetings, as well as the main Law practised by Banjima men, there is sufficient evidence to support the determination of these claimed rights as set out in the final formulation (2)(a). It should also be understood that the various places where ceremonies were held were not, on the evidence, created by mythological figures in the Dreaming but were, as they still are, created to meet exigencies and the convenience of the Banjima people. Ceremony has not been interrupted in any sense, contrary to the State's submissions. For a period it was conducted off Banjima territory, due to exigencies, but now it is again held on Banjima territory in various places. The possessed right was never lost.

756 I would therefore, subject to extinguishment issues, determine a right, without the reference "to occupy", in the form indicated above.

Right to take resources

757 The claimants submit the right to take resources of various kinds from the area is best understood as incidental to the occupation, use and enjoyment of the area, in the sense referred to above and this is how it appears in final formulation (2)(b). The right claimed to take various forms of resources (flora (including timber), soil, sand, stone, flint, clay, gravel, ochre, water) is currently encapsulated in claimed rights (25), (26), (27), (28), (29), (30), (31) and (32). Paragraph (2)(b), it is said, is merely a particularisation of the right to take the resources of the area.

758 The claimants say the reason for any focus upon particular forms of resources is that some specific resources are claimed by others, and so may not remain open to be taken as an exercise of a native title right. The State asserted its right as sovereign to minerals and petroleum by s 117 *Mining Act 1904*, s 9(1)(a) *Mining Act 1978* and s 9 *Petroleum and Geothermal Energy Resources Act 1967*. Section 9(1)(a) *Mining Act 1978* declares that "precious metal[s] existing in [their] natural condition" are the property of the Crown, and s 9(1)(b) that "all other minerals … are the property of the Crown". "Minerals" are defined in s 8 as not including soil or, "if it occurs on private land - (i) limestone, rock or gravel; or (ii) shale other than oil shale; or (iii) sand, other than mineral sand, silica or garnet sand; or (iv) clay, other than kaolin, bentonite, attapulgite or montmorillonite". Native title holders at

sovereignty had all rights in relation to the taking and use of resources. They now have what remains, after excluding that which has been taken from them by acts of the British sovereign.

759 The claimants note a common form of determination made is for a right to "use the natural resources (including water) of the area for personal, domestic and non-commercial communal purposes": *Lardil, Yangkaal, Gangalidda and Kaiadilt Peoples v Queensland* [2008] FCA 1855; *Ngadjon-Jii People v Queensland* [2007] FCA 1937; *King v Northern Territory* [2007] FCA 1498 (***King***); *Ward v Western Australia (No 4)* [2006] FCA 1848; *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (***Rubibi (No 7)***; *Mundraby v Queensland* [2006] FCA 436 (***Mundraby***). In some cases, specific resources are included as examples: ochre (*Rubibi (No 7)*) or "food, medicinal plants, wild tobacco, timber, stone and resin" (*King*). In other cases the "domestic" uses are extrapolated upon and specified, for example as "social, cultural, religious, spiritual, ceremonial" uses (*Mundraby*).

760 They note in *Lardil, Kaiadilt, Yangkaal and Gangilidda Peoples v Queensland* [2004] FCA 928, [7(1)] and [7(5)(a)] of the determination respectively provided for:

(1) the right to access the land and waters seaward of the high water line in accordance with and for the purposes allowed by and under traditional law and custom of the Lardil, Kaiadilt, Yangkaal and Gangalidda peoples;

(2) the right to access the waters of the Albert River for the purposes of hunting, fishing, and gathering living and plant resources in the river for personal, domestic and non-commercial consumption in accordance with and for the purposes allowed by and under the traditional laws and customs of the Gangalidda peoples.

761 The emphasis in that determination, they say, was on the purpose of the access and the limitation upon the right was that it did not include "commercial" purposes. The source of that limitation is not traditional laws and customs but statutory regulation of commercial activity. Thus, the claimants submit, what is being sought to be done in such cases is to identify the distinction between the rights of the native title holders and the rights of others or the limitations placed on rights by state law. Essentially, if the native title exists it carries with it the right to exploit the resources associated with the area, subject to limitations placed upon that right by competing rights sourced to the British sovereign.

762 The claimants in the application have claimed separately, as claimed rights (6), (7), (8), (9) in Areas A and C (but not Area B):

- a right to hunt in the area;
- a right to fish in the area;
- a right to take traditional resources, other than minerals and petroleum, from the area; and
- a right to take fauna.

763 It is submitted by the claimants that these rights overlap with one another. The right to hunt or fish is the right to engage in an activity. Hunting or fishing, of course, are means of taking fauna, and traditional resources include fauna. The specification of rights of this kind is merely a particularisation or exemplification of the right to use the area and its resources, subject to statutory prohibition. That is why there is a qualification in relation to minerals and petroleum and rights to hunt and fish or otherwise take fauna and other traditional resources are not claimed in nature reserves, where the taking of flora and fauna are prohibited by statute. It is not necessary, therefore, that particular resources be specified in order for the right to take resources to exist.

764 The claimants submit evidence of the taking of some resources, for example, ochre, bush tucker and medicines, is sufficient to establish the general right to take resources.

765 The claimants reject any contention that continued use of ochre obtained in the claim area is necessary to establish the right to take traditional resources, such as ochre, and say it is inconsistent with *Moses FC* at [238], *Ward HC* at [64] and *De Rose (No 1)* at [303], [313] and [316].

766 They say the State's contention that the area where individuals and groups can hunt "must be articulated" is also inconsistent with those cases.

767 The State contend for a determination of rights in relation to the taking of resources that reflects customary activities carried on today as confirmed by the evidence and identifies the areas in which they may be carried out.

768 As to the claimants' submission that other determinations restrict native title to "non-commercial' uses, and that such restriction is a result of post-sovereignty statutory regulation, the State says this is not correct. If at sovereignty the Banjima extracted water for no purpose except drinking it, making ochre paste etc, then there cannot subsequently be a native title right to sell it commercially.

769 The State says a right to take flora for personal, domestic or non-commercial communal purposes may be recognised, but contends there was no evidence of exercise of rights to take soil (26), sand (27), clay (29) or gravel (30). It is noted that as to "stone and/or flint", claimed right (28), Mrs A Smith said that old people used grinding stones to make damper, but she has never done so herself. She and May Byrne had knowledge of how to use stones to prepare kangaroo and emu in a traditional way. Mrs A Smith knew how to make a knife using a rock. But, the State submits, knowledge of how to do something is not observation of custom or acknowledgement of law so as to continue to support a right to do it. Mr G Tucker said his mother used grinding stones for preparing meat. However, there was no evidence of his use or other contemporary use of stones for this or any purpose.

770 As for ochre, claimed right (31), the State says only Marie-Anne Tucker and Alec Tucker stated that there is ochre in Banjima country. Alec Tucker, Gladys Tucker, Marie-Anne Tucker and May Byrne say that ochre is used for painting "brands" in law ceremonies, but do not state that ochre is taken from within Banjima country. Mrs A Smith said that it was taken from the Paraburdoo area, but is no longer taken at all. G Tucker suggested that ochre is found outside of Banjima country. The State submits there is insufficient evidence to establish a right to take ochre.

771 The State also says there is very limited evidence of the exercise of a right to take water, claimed right (32) (although there is evidence for blowing water from the mouth when approaching water holes).

772 As to claimed rights (25)-(32) the State appears to accept that, subject to proof, these types of usufructuary or personal rights may be accepted. The State would accept the right to take flora, but says there is no evidence of the exercise of rights to take soil, sand, clay or gravel. It also takes issue with the right to take stone or flint and ochre.

773 The BHP Billiton respondents submit no evidence was led as to the existence of a right to take soil, sand, stone, flint, clay or gravel, or to the taking of those things. In the absence of any evidence, the Court should not make a determination of such rights. If it can be said that the use of these items is incidental to the exercise of other rights of which there is evidence, then such limited use would fall within the scope of those rights. But that does not require expression. For example, evidence was given of the use of stones in the cooking of kangaroos (see oral examination of Mrs A Smith, transcript page 39, at line 29).

774 I am satisfied that there is sufficient evidence concerning the use of natural resources such as flora and fauna, the use of bush medicines, the making of spears, the preparation of bush tobacco, and food to be found in the bush, the making of boomerangs, the camping on country, digging a soak, making a boughshed, generally living off the land, visiting water courses and using ochre and stones, both in the past and presently to support a determination that these rights are possessed today.

775 Accordingly, I reject the submissions that there is no evidence of the right to do all of these things. The evidence overall establishes that the right to hunt and take fauna is well established. Plainly it was a set of rights of a usufructuary nature that existed at the time of sovereignty. There is ample evidence to show that hunting and the taking of fauna in customary ways continues today. Similarly, the customary practice of gathering and taking flora is well established historically and presently. The right to take fish is the subject of less contemporary evidence, but the right to take fish in the claim area is still exercised and clearly established as a right possessed by the claimants both historically and presently. It is not a right or activity that the evidence suggests has been abandoned. Similarly the right to take stones, timber, ochre and water is another right possessed by the claimants even though the evidence of current exercise of those rights is relatively limited. In many of these instances it is not simply a case of claimants "remembering" old activities, but a case where the need to conduct old practices, in contemporary times, is limited. This does not mean the rights have been abandoned. They are still possessed. However, there is an issue as to articulation as a general unqualified right "to take resources".

776 In *Akiba (No 3)*, Finn J on the evidence before him (at [540]) found that the group members of the respective individual island communities in the Torres Strait had the following traditional rights in their owned or their shared marine territories:

(1) the rights to access, to remain in and to use those areas; and

(2) the right to access resources and to take for any purpose resources in those areas.

777 To this finding his Honour added (at [540]) that in exercising those rights the group members are expected to respect the marine territories and what is in them. And that, importantly, none of those rights conferred possession, occupation or use of the waters to the exclusion of others; nor did they confer any rights to control the conduct of others.

778 In relation to the latter proposition, Finn J noted (at [537]) that it was not open in his view, on the basis of *Alyawarr FC* (at [148]) to partially extinguish an unqualified form of a right controlling access of all people to a qualified right to control the access of some. His Honour drew a distinction between a qualified exclusive possession right of control and a non-exclusive "maintain and protect" right in respect of a rock cave drawing, as discussed in *Sampi v Western Australia* [2010] FCAFC 26; (2010) 266 ALR 537 (at [121]-[125]) or a right to engage in particular practices, as in *Neowarra* (at [484]).

779 In *Akiba (No 3)*, submissions were made on behalf of the Commonwealth and other respondents that any right to use resources should be qualified, as it had been in other cases, to a right to take resources "for personal, domestic or non-commercial needs". His Honour noted (at [525]) that, while the Commonwealth had conceded "the breadth of what could be accessed and taken", it denied explicitly any "right to trade" or "to use for commercial purposes". This was apparently for reasons of non-recognition by the common law.

780 His Honour further noted (at [526]) that the use of resources in trade had a "long and well chronicled history" and that the claimants were "avid traders". At [528], his Honour noted that the evidence established beyond question that the islanders sold marine resources for money and were, and are, trading fish.

781 It was on the basis of that evidence that his Honour made the determination concerning "the right to access resources and to take for any purpose resources in those areas".

782 While (by a majority) a Full Court upheld an appeal against the determination of the right to take resources in these terms, considering that the right to take resources for

commercial purposes had been extinguished by successive Commonwealth and Queensland Acts (*Akiba FC*) the High Court of Australia in *Akiba HC* reinstated the decision of Finn J, emphasising that, on the evidence, his Honour had found there was a right to take all manner of resources and that, in respect of that traditional right, subsequent legislation requiring a person to hold a licence to commercially fish, for example, merely regulated, but did not extinguish the native title right so found.

783 In my view, unlike the position in *Akiba (No 3)*, it is not open to conclude on the evidence in this case that the claimants were entitled to take all manner of resources from the claim area. Evidence of trade in resources, as discussed below, is limited. The situation is not akin to the circumstances in which the claimants in *Akiba (No 3)* were found traditionally to take whatever resources they found in the sea and were apt to trade and use it however they could. As much as the claimants and especially their forebears at sovereignty may have exercised dominion over all that existed in their traditional territory, native title law under the NTA requires the identification of rights in relation to land and waters exercised under traditional law and custom.

784 Here, because the evidence shows that particular resources were taken for particular uses I consider it inappropriate to make a determination of a right in the broad terms proposed in final formulation (2)(b).

785 I would, however, accept, on the basis of the evidence, that there is a right in the following terms:

> The right to hunt and take fauna, gather and take flora, take fish and take stones, timber, ochre and water.

786 In those circumstances, I would be prepared to determine a right in such terms, subject to the question of extinguishment, and save to the extent they are not claimed in respect of Area B.

Right to manufacture and trade

787 The claimants note the right to trade or engage in economic activity with the resources of the area has been addressed in a number of determinations: for example, *Mualgal People v Queensland* [1999] FCA 157 – the right to "exercise and carry out economic activities on the

determination area including to grow, produce and harvest" ([3(c)(ii)]); *Congoo v Queensland* [2001] FCA 868 – the right to "exercise and carry out economic life on the area, including harvesting, fishing, cultivating, management and exchange of economic resources" ([4(c)(vi)]); *Western Yalanji or "Sunset" People v Pedersen* [1998] FCA 1269 – the right to "exercise and carry out economic life on the determination area including the creation, growing, production, husbanding, harvesting and exchange of natural resources and that which is produced by the exercise of the native title rights and interests" ([6C]).

788 Consequently they now claim a right in final formulation (2)(c), "to manufacture and trade the resources of the land and waters".

789 The claimants say the right to trade is a right to use resources taken from the land for a particular purpose, and in that way it is a right in relation to land: *Alyawarr FC* at [155]. For the right to be recognised there must be evidence of the activity of trading in exercise of a right: *Alyawarr FC* at [155].

790 The claimants submit the evidence of Brian Tucker, a senior Banjima man knowledgeable in traditional law, of the practice of trading between neighbouring groups is sufficient to establish the right.

791 They also contend the act of manufacturing goods from the resources of the land is analogous to trading them and is able to be recognised as a native title right for the same reasons. Where the evidence of trade is evidence of trade of manufactured objects then it serves also as evidence of the right to manufacture those goods

792 They submit the evidence of the contemporary exercise of the right to trade or manufacture is not necessary to establish the existence of the right.

793 By contrast, the State submit no right to manufacture or trade should be recognised.

794 Also, these rights (even if evidenced) are unnecessary – just as a right to take fauna and flora makes unnecessary a separate right to eat it.

795 Alternatively, if rights to trade and manufacture are to be included, the rights must be confined to the evidence as to the particular goods traded or manufactured on country. It is

insufficient to establish a general right to trade (in water for example) that Brian Tucker gave evidence of (for example) trading in kangaroo meat.

796 The BHP Billiton and RTIO respondents submit the only evidence of a right to trade in the resources of the area was given by Brian Tucker. Brian Tucker refers to Banjima people, in the past, meeting with neighbouring groups on the boundary of Banjima country to trade meat or shells. There was no contemporary evidence of the exercise of such a right to trade resources. The limited evidence of only one witness of past practices should be regarded (which can be contrasted with the evidence of other rights such as "a right to camp in the area"). It is submitted that the Court should not make a determination of a right to trade on such limited evidence.

797 As to the claimants' submissions concerning the right to manufacture and trade goods, those respondents say it has no basis and, in the absence of any evidence in relation to the trade of manufactured goods, should not be accepted. Again, the only evidence filed in relation to a right to trade was by Brian Tucker when he spoke of meeting with neighbouring groups on the boundary of Banjima country to trade meat or shells. In addition, there is no evidence that the meat or shells were in any way manufactured goods or objects.

798 In my view, having regard to the evidence overall, the respondents' submissions concerning a claimed right to manufacture and trade the resources of the land and waters should be accepted.

799 So far as the right to trade the resources of the land and waters is concerned, I refer to the discussion above, emanating from *Akiba (No 3)* at first instance and in the High Court. There is insufficient evidence of a right in the claimants to trade in the resources of the land and waters.

800 Indeed, as pointed out, there is very limited evidence of a right to trade at all. Brian Tucker did mention that in the past people would trade in meat and shells with neighbouring groups. Little other evidence was given about trade and the topic was not dealt with in any direct way by either of the anthropologists. Sharing of resources with countrymen was disclosed, but not trading in a commercial sense.

801 In these circumstances, there being very little evidence of contemporary trading of such resources or any evidence of trading in such resources in the intermediate period between the present and sovereignty, I am not satisfied on the balance of probabilities that there was, or if there was, that there still is a right to trade in such resources possessed by the claimants today.

802 Similarly, I consider there is little evidence concerning the right to manufacture the resources of the land and the waters in this case sufficient to support a finding to that effect.

803 As the State intimate, however, the right to take specified resources would not inhibit a person exercising an activity in relation to the manufacture of resources taken pursuant to a customary right.

804 In these circumstances, I would not determine a right expressed in accordance with final formulation (2)(c).

Right to protect sites by lawful means

805 The claimants have claimed a right to protect places and objects within the claim area by lawful means (claimed rights (36), (37) and (38)).

806 The final formulation of those rights in (2)(d), (e) and (f) is now as follows:

(d) A right, in relation to any activity occurring on the area, to

9. (i) maintain;

10. (ii) conserve; and/or

11. (iii) protect;

12. significant places and objects located within the land and waters, by preventing, by all reasonable lawful means, any activity which may injure, desecrate, damage, destroy, alter or misuse any such place or objects.

(e) A right, in relation to any activity occurring on the area, to:–

(i) maintain;

(ii) conserve; and/or

(iii) protect;

13. significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing, by all reasonable lawful means any activity occurring on the land and waters which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practice.

(f) A right, in relation to a use of the land and waters or an activity within the area, to:

(i) prevent any use or activity which is unauthorised in accordance with traditional laws and customs;

(ii) prevent any use or activity which is inappropriate in accordance with traditional laws and customs;

14. in relation to significant places and objects within the land and waters or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the land and waters by all reasonable lawful means, including by the native title holders providing all relevant persons by all reasonable means with information as to such uses and activities, provided that such persons are able to comply with the requirements of those traditional laws and customs while engaging in reasonable use of the land and waters and are not thereby prevented from exercising any statutory or common law rights to which that person may be entitled.

807 By final formulation (2)(g) the claimants also claim a right to visit, care for and maintain places of importance on the land and waters and protect them from physical harm.

808 In *Hayes v Northern Territory* [1999] FCA 1248; (1999) 97 FCR 32 (***Hayes***), the primary judge found as follows:

> [56] There is a strong theme running through much of the evidence to the effect that the traditional laws and customs of the claimant groups require them to take special care to protect the integrity of places which are of spiritual importance to them; and the evidence contains many references to specific occasions when members of the claimant groups have been actively involved in endeavouring, sometimes but not always successfully, to prevent the destruction or degradation of such places Indeed, the law of the Northern Territory in the form of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) provides some recognition of the importance in Aboriginal culture of sites associated with the spiritual beliefs of the indigenous people and the

> Commonwealth has also legislated in the same field. Any form of native title which did not recognise the need to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land. Each of the rights expressed in subparas (e)(v), (vi) and (vii) of the proposed determination would be a normal adjunct of the recognition of native title rights and interests in land but the exercise of such rights would of necessity be subject to any valid executive or legislative act affecting those rights.

809 The determination of native title in *Hayes* included the following rights:

(1) the right to protect places and areas of importance in or on the land and waters within the determination area;

(2) the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area.

810 In *Daniel 2005* (see also *Daniel v Western Australia* [2003] FCA 1425 (***Daniel 2003(2)***)) it was determined that there was:

> A right to protect and care for sites and objects of significance in the … area including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm, but not including a right to control access or use of the land by others) [paras 6(k) and 7(k) respectively].

811 In *Daniel 2003(1)* the following were not established as rights but were established as duties incidental to claim (at [1164]):

> A right to maintain, conserve and/or protect sites and objects of significance by preventing by all reasonable means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such place or object.

and

> A right to maintain, conserve and/or protect by all reasonable lawful means places and objects located within the area of social, … ceremonial, ritual … significance to the native title holders from use or activities which are unauthorised or inappropriate use or activities, in accordance with the traditional laws and customs of the native title holders.

812 In *Alyawarr FC* the Full Court upheld (at [136]-[140]):

> …the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements [para 3(d)].

813 The Court there noted that the "rights determined [were] expressly stated ... to be not exclusive of the rights and interests of others in relation to the land".

814 In *A-G (NT) v Ward*, the Full Court (on remittal from the High Court) considered a submission by the Commonwealth that the word "protect" would give native title holders an entitlement to exclude others from the land. The Court said (at [25]):

> We do not agree. The notion of protection of significant Aboriginal sites is well understood. It may involve physical activities on the site to prevent its destruction, but it also extends to control of ceremonial activities Particularly having regard to the existence of subclause (e), we do not think the words would be read as implying a general control of access.

815 I have already noted above that in *Akiba (No 3)*, Finn J recognised a distinction between an impermissible "qualified" exclusive possession right of control and a permissible non-exclusive "maintain and protect" right.

816 The claimants reject any suggestion the right to protect culture, especially in terms of (2)(e) and (f), is an intellectual property right, and not one relating to land or waters. They say such a view overlooks the fact that while the right is directed to protecting ceremonies, artwork and the like, it is limited to protecting them in circumstances where an activity on the area of land the subject of the native title may affect them. That is the element of the right claimed which gives it the necessary connection to the land to be recognised as a native title right. In *Alyawarr FC* at [135] the Full Court said: "The right to teach the physical and spiritual attributes of places and areas of importance, if specified as a right to teach on the land, requires access to and use of the land for that purpose. So defined, it is a right in relation to the land".

817 The claimants also claim a right "visit, care for and maintain places of importance and protect them from physical harm" (claimed right (24) and final formulation (2)(g)). A right expressed in that form is, it is submitted by the claimants, is clearly a right which can be recognised in accordance with the authorities cited above.

818 The State contends that these claimed rights are "qualified rights of exclusive possession" where exclusive rights cannot exist due to their extinguishment and cannot be established as a matter of law.

819 The State objects that rights expressed in the form of (2)(d), (e) and (f) are to protect or prevent by "lawful means", and the determination must itself assist to explain what is lawful, that is, what can be done as of right. If a place is under threat of injury, and a right of exclusive possession is determined, then the right to protect is inherent, by self-help, injunctions and the like. Whether or not there is a right of exclusivity, protection is afforded by emergency application under the State or Commonwealth heritage legislation. The form of determination suggested by the claimants does not explain what further actions might be invoked under cover of native title.

820 The State says the form of determination in (2)(d) also extends to "objects" which are moveable. It is not clear by what mechanism a right of native title might assist to protect a moveable chattel.

821 The State also contends the suggested rights are too vague to be included in a determination. A right to prevent any "inappropriate" activity ((2)(f)(ii)) is an example. This obscurity is compounded by the suggestion that such inappropriate activity extends to activity associated with "artwork, song cycles, narratives, beliefs, or practices". Such a right is impossible to articulate in a fashion that accords with native title.

822 The State says if title is exclusive, then those who act inappropriately can be evicted. If title is not exclusive, then there is no right of native title to control others' activities.

823 As to the claimants' submission that the proper distinction is that, while intellectual property cannot be protected under colour of native title, activity on the land in respect of artwork etc can be controlled, the State submits it is activity of others that cannot be controlled under a non-exclusive title, and can only be controlled under an exclusive title by ejection. Thus the State, in this respect, objects to the creation of what it sees as a qualified right to control access.

824 The BHP Billiton and RTIO respondents appear to recognise the right to protect sites by lawful means does not necessarily involve the assertion of exclusive possession or a right to control access: *Alyawarr FC* [136]-[140]. They say opposition to developments on the land may be evidence of the claimants asserting a right to protect and care for sites and

objects: *Daniel 2003(1)* at [295]. But here, they submit, there is no evidence of opposition to development.

825 The BHP Billiton respondents submit that the protection of rights relating to "ceremonies, artworks, song cycles, narratives, beliefs or practices", however, are not rights in relation to land. The right to protect cultural knowledge goes beyond what can be claimed as part of native title because it is not a right in relation to land. The right to maintain, conserve and protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices is unsustainable as per *Ward HC* [57]-[60] and *Daniel 2003(1)* at [296] to the extent the claim is an assertion of a right to control others imparting traditional knowledge.

826 I accept the respondents' submission that rights articulated in final formulation (2)(e) and (f) are essentially in respect of the protection of intellectual property and are not reasonably capable of being characterised as rights in relation to land or waters and would not determine that such rights exist.

827 The State also says claimed right (24)/final formulation (2)(g) and claimed right (36)/final formulation (2)(d) are essentially the same thing, and accordingly should not both be recognised.

828 As to the evidence in support of the claimed rights, the State say only Mr G Tucker, Timothy Parker and Slim Parker asserted a need to protect Barimuna (Three Sisters); Mr G Tucker (and no others) said that Alec Tucker was responsible for Barimuna. There was no evidence that anyone actually did care for it. Mrs A Smith said that water holes are cleaned out but there was otherwise little evidence of any steps actually being taken to protect sites in claim area. A right to clean out water holes can be accepted, along with rights to visit. But in the absence of evidence, there can be no rights to care for or protect any site, alternatively a right only in respect of Barimuna and water holes.

829 I reject these submissions made on behalf of the State. So far as the evidence is concerned it is that sites are important under Banjima tradition and culture, that particular people in the two sub-groups "speak for country", and that custom requires respectful activity in country and in relation to particular sites. All the evidence goes to show that these rights

are actually exercised and were in the past. There is little doubt that they are "possessed", whatever may be the evidence of exercise at particular times.

830 I consider, however, that a determination should not be made in terms of both (2)(d) and (2)(g) of the final formulation. I consider that a right to maintain and protect expressed in different terms would concur both with authority and the evidence. I would express such a right along the lines of that expressed in *Alyawarr FC*, to the following effect:

> The right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites, stone arrangements and the like provided however that such rights are not exclusive of the rights and interests of others in relation to the land and waters the subject of this determination.

831 I will, however, hear from the parties as to the final form of expression of such a "maintain and protect" rights.

Right to control members of the Aboriginal society

832 The claimants claim a "right to make decisions about the use of the area by members of the Aboriginal society to which the native title claim group belong" (claimed right (14) and final formulation (2)(h)).

833 Noted above are the State's general objections to any determination of a "right to make decisions about…".

834 The claimants submit this right is unobjectionable if it is understood as applying to the members of an Aboriginal society comprising the Banjima people. It is uncontroversial that the Banjima are entitled to govern their own society. The Full Court in *A-G (NT) v Ward* upheld a right in the following terms, which might be thought to be of similar effect:

> 5(e) The right to make decisions about the use and enjoyment of the NT determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders.

835 However, the Full Court in *Alyawarr FC* at [151] said of that right:

> Although par 5(e) of the determination in *Ward FC 2* had the sanction of the Full Court in that case, it is not without difficulty. There is a risk that it may be seen as creating a criterion for exclusion based in part upon Aboriginality. In any event it does not appear in this case that there are persons other than the native title holders who are bound by their traditional laws and customs. The position would be

> different were the native title holders a subset of a wider society incorporating other groups bound by the same traditional laws and customs. An example of such a case is *De Rose v South Australia* [2002] FCA 1342 where the native title holders were found to be a subset of a society comprising the Western Desert Bloc. To the extent that the native title holders could collectively exclude particular members from particular areas, such as women from law grounds, that is a matter best left to the intramural workings of the traditional laws and customs. It is not a matter requiring determination as a distinct native title right.

836 In the present case, the claimants say in accordance with the criteria suggested in *Alyawarr FC*, such a right is appropriate to be accorded to the Banjima people. They submit the evidence in this case establishes that the Banjima People are surrounded by neighbours, such as the Nyiyaparli to the east, the Palkyu to the north-east, the Yindjibarndi to the north-west, the Gurama to the west and the Yinnawongka to the south, who are bound by the traditional laws and customs acknowledged and observed by the Banjima native title holders, and in relation to whom this right may have some application, beyond "the intramural workings of the traditional laws and customs".

837 The BHP Billiton and RTIO respondents do not agree with the claimants' submission that the evidence in this case establishes that the Banjima People are surrounded by neighbours who are bound by the traditional laws and customs acknowledged and observed by the Banjima native title holders. They submit that the evidence does not establish that the Banjima are a subset of a wider society incorporating other groups bound by the same traditional laws and customs (as, for example, in *De Rose v South Australia* [2002] FCA 1342).

838 The State say this claimed right should be dismissed regardless of the evidence because it is too vague and ambiguous. It might be taken to mean that each individual has a right to decide how every other individual can act on Banjima land. It could be seen as a form of internal exclusive possession. In any event, there is no evidence that such a right has ever been exercised. Dr Palmer says that there is no right held at the level of society, so this right cannot be exercised at that level, or by a prescribed body corporate, and the claimed right is problematic at all other possible levels.

839 I accept the State's primary submission. It is one thing to make a determination that recognises a traditional Aboriginal right of access, control, use and occupation (whether exclusive or not) on the understanding that the evidence discloses there are internal or

intramural arrangements between the native title holders that govern the exercise of those rights. It is another to articulate a right in terms of claimed right (14)/final formulation (2)(h) which would, arguably, have the effect that the members of the claim group, as a corporate group, could make decisions about the use of the area. Such a corporate group right would be liable to conflict with rights recognised by the evidence. Because, therefore, of concerns as to the possible relationship between a right articulated in terms of claimed right (14)/final formulation (2)(h) and the related rights otherwise identified by the evidence, I would not determine a right in terms of claimed right (14)/final formulation (2)(h). Put another way, this claimed right is either otiose, in light of related rights to make decisions about use, or a right not proved by the evidence.

Right to control use by others

840 The claimants claim a "right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim group belong" (claimed right (15)). The claimants also claim a "right to invite and permit others to have access to and participate in or carry out activities in the area" (claimed right (16)). See also (2)(j) and (i)).

841 Again, the State's general objection to the determination of any rights "to make decisions about…" is noted above.

842 The claimants contend these two claimed rights, in so far as they are expressed generally to apply to persons beyond those who may comprise the society bound by the traditional laws and customs of the Banjima people, can exist in those parts of the area where there are no interests granted by the Crown which are inconsistent with the continuity of that right. In relation to parts of the claim area where rights have been granted by the Crown, such as pastoral leases, such rights exist subject to a qualification with respect to persons who have an entitlement at law to use the area, to have access to the area or to participate in activities in the area.

843 In relation to these contentions, the State relies on its submissions above concerning the right to control others' access and use. It also says the claimants go further here to seek a right to "invite and permit others to have access to and participate in or carry out activities in the area", and seek to make the point that a native title determination should articulate those

persons who have rights of native title and their rights. The sought additional right, it is said, would have the effect of extending rights of access and use to others who have no right of native title whatsoever in the claim area.

844 In addition to its "jurisprudential defects" in this regard, the State contends this claimed right is particularly problematic where the native title sits alongside the rights of pastoral lessees and mining tenement holders. A right to "invite" appears to incorporate a right in the invitee by virtue of the invitation, which right appears exercisable against third parties.

845 I accept the primary submission of the State in relation to these two claimed rights to control use by others. In my view, they are not relevantly rights in relation to land or waters that exist independently of related rights that I consider should be recognised. Such rights appear in many ways to be reformulations of a claimed qualified right of exclusive possession which I have indicated I do not accept exists.

846 In other respects, the claimed rights would empower the claimants to bestow a particular status on third parties who are not members of the Banjima claim group. Such a right has been found to be incapable of characterisation as a right in relation to land or waters: *Akiba HC*.

847 I would not make a determination of the rights claimed in (2)(i) and (j).

Right to control taking and use of resources

848 The claimants claim a "right to control the taking, use and enjoyment by others of resources of the land and waters including flora, soil, sand, stone, flint, clay, gravel, ochre and water other than minerals and petroleum and any resources taken in exercise of a statutory right or common law right, including the public right to fish" (final formulation (2)(k), reflecting claimed right (33)). The right claimed would exclude the taking of resources in exercise of a common law or statutory right. In other words the claimants seek to acknowledge the Crown's radical title and sovereign power to accord rights and the rights which may flow from that. The claimants claim that, apart from the State's power to lawfully grant rights, a native title accords to the native title holder the capacity to *manage* the resources contained within the area of the native title. That right, as proposed above,

expressed without qualification, does not include resources held by the Crown and can exist, the claimants submit, in those parts of the area where there are no interests granted by the Crown which are inconsistent with the continuity of that right. In relation to parts of the claim area where rights have been granted by the Crown, such as pastoral leases, however, such rights exist subject to a qualification with respect to persons who have an entitlement at law to use the area, to have access to the area or to participate in activities in the area.

849 The State oppose such a right on the basis of the discussion above, including as to the claimed general right to take resources.

850 An apparently related right to control the use of the land and waters by persons who are not members of the Aboriginal society to which the native title claim group belong, other than such use in exercise of a statutory right or common law right, including the public right to fish, is claimed in final formulation (2)(j).

851 For the reasons given in relation to claimed rights (15) and (16)/final formulation (2)(j) and (i), I would not make a determination of rights in these terms.

Summary of rights found

852 The following summary of rights found might then be provided:

(1) In relation to any land or waters that are found to fall within Area A, and subject to extinguishment findings below, the exclusive rights to be recognised in the determination should be expressed in terms of final formulations (1)(a), (b) and (c) but not (d).

(2) The following non-exclusive rights in Areas A, B and C (save to the extent that the rights include claimed rights (6)-(9) which are not claimed in respect of Area B):

(a) The right to access and move about the land and waters, be present on the land and waters, live on the land in camps and shelters, and engage in cultural activities on the land and waters including conducting and participating in ceremonies and meetings;

(b) The right to hunt and take fauna, gather and take flora, take fish and take stones, timber, ochre and water;

(c) The right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites, stone arrangements and the like provided however that such rights are not exclusive of the rights and interests of others in relation to the land and waters the subject of this determination.

Summary of Connection Issue Findings

853 The following is a brief summary of the connection issue findings:

(1) the claimants constitute a single group, which is generally known as the Banjima language group or people;

(2) the claim area was part of the traditional country of the Banjima at sovereignty;

(3) the claimants and those from whom they are descended have since sovereignty maintained a relevant connection with their traditional country in accordance with and pursuant to their traditional laws and customs;

(4) subject to particular findings, including about extinguishment, native title exists in the claim area and is held by the claimants;

(5) in the final determination, the native title holders should be expressed to be the descendants of the ancestors named in the application, save as to Daisy Yijiyangu;

(6) in relation to any land or waters that are found to fall within Area A, and subject to the extinguishment findings below, the exclusive native title rights to be recognised in the determination should be expressed in terms of final formulation (1)(a), (b) and (c) (but not (d);

(7) in relation to any land or waters found to fall within Areas A, B and C, save to the extent that the rights are not claimed in Area B and subject to the extinguishment findings below, the non exclusive native title rights to be recognised in the determination should be expressed as follows:

(d) The right to access and move about the land and waters, be present on the land and waters, live on the land in camps and shelters, and engage in cultural activities on the land and waters including conducting and participating in ceremonies and meetings;

(e) The right to hunt and take fauna, gather and take flora, take fish and take stones, timber, ochre and water;

(f) The right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites, stone arrangements and the like, provided however that such rights are not exclusive of the rights and interests of others in relation to the land and waters the subject of this determination.

EXTINGUISHMENT ISSUES

The Evidence

854 The evidence in relation to extinguishment issues is principally contained in the electronic data on the second tenure DVD, which is annexure LRM1 to the affidavit of Lee Rex Morgan sworn 20 May 2011 and formally read in the proceeding. Other evidence relating to extinguishment is contained in the affidavits filed by various parties and formally read in the proceeding. These are identified and briefly summarised in Sch 2 to the claimants' written closing submissions on extinguishment filed 27 February 2012 and need not be listed here. To the extent that formal orders may not have been made receiving the various affidavits mentioned into evidence, the Court hereby notes and orders that they may now all be treated as having been read into evidence. I have considered objections to admissibility made by the claimants but would admit the materials into evidence notwithstanding as the information in my view is generally relevant to the matters in issue.

Principles and Approaches to Extinguishment Issues

855 The claimants contend that the starting point for considering extinguishment issues is the NTA and the complementary *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (***TVA***). It is only when the NTA and TVA have no application that attention should be given to the common law principles of extinguishment: see *Wilson v Anderson* [2002] HCA 29; (2002) 213 CLR 401 (***Wilson v Anderson***) at [45]-[47] (Gaudron, Gummow and Hayne JJ).

856 The claimants also state that under the common law, extinguishment will only occur where rights granted or created by the Crown are inconsistent with native title rights. That is an objective inquiry which requires identification of and comparison between two sets of

rights, sometimes called the inconsistency of incidents test. In particular it requires a careful analysis as to the nature and extent of the rights which Parliament intended to create under a relevant statutory provision: see *Ward HC* at [78], [82], [149], [151]; *Wilson v Anderson* at [6]-[11] (Gleeson CJ).

857 There is also a question as to what extinguishment if any occurs when the grant of a tenure does not necessarily extinguish all native title rights and interests and subsequently, pursuant to that grant, land is used or development occurs on it in ways that are inconsistent with the exercise of native title rights. In this proceeding, as explained further below, I take the view, consistent with the decision of the Full Court majority (Greenwood J and Barker J in separate judgments) in *Brown v Western Australia* [2012] FCAFC 154; (2012) 208 FCR 505 (***Brown FC***) that in certain circumstances the exercise of rights under the relevant tenure will prevail over, but not extinguish, any relevant native title rights and interests. In that regard, the Court does not consider, in light of *Brown FC* that the decision of *De Rose v South Australia (No 2)* [2005] FCAFC 110; (2005) 145 FCR 290 (***De Rose (No 2)***) to the contrary should be followed and does not accept submissions made on behalf of the State and some other respondents that this Court should decline to apply *Brown FC* on that point of principle.

858 The claimants principally seek a determination that native title exists in the claim area and that the native title rights and interests can include possession, occupation, use and enjoyment of the Banjima people to the exclusion of all others. However, this is made subject to two major qualifications:

(1) First, that it is necessary to identify those areas which are excluded from the claim within the terms of Sch B of the application dated 1 June 2011. The claimants say those areas are identified in Pt D of its written closing submissions on extinguishment filed 27 February 2012.

(2) Secondly, in order to address issues of partial extinguishment in areas where are there non-exclusive pastoral leases and other extinguishing acts, it is necessary to address the several native title rights and interests which the claimants contend would, but for extinguishment, make up its "bundle of rights": as to which see s 61A(3), s 225(e) NTA; and *Ward HC* at [94]-[95]. That has been done above where the Court has

summarised primary native title rights found to exist, but for extinguishment considerations.

859 The claimants say those two qualifications are themselves the subject of two qualifications:

(1) First, that native title cannot be extinguished, and an area putatively the subject of a wholly extinguishing act does not exclude it from the claim area, if the act is invalid under:

(a) the laws of Western Australia; or

(b) the RDA and/or the NTA, and is not validated under the NTA and the TVA.

15. The claimants identify the acts that they contend fall within those categories in Pt B of their closing submissions on extinguishment;

(2) Any extinguishment is to be disregarded in areas to which s 47A and s 47B NTA apply, and such areas are expressly included in the claim: see form 1 Sch B para [4]. The claimants say those areas are identified in Pt C of its closing submissions on extinguishment.

860 I generally approach consideration of extinguishment issues on the basis of these various principles, approaches and qualifications.

Validity Issues

Special leases

861 The claimants challenge the grant of any relevant interests under the following 19 "special leases" claimed by the State: 3116/2290; 3116/2925; 3116/3715; 3116/3859; 3116/4379; 3116/4397; 3116/4423; 3116/4690; 3116/4817; 3116/5141; 3116/5362; 3116/5414; 3116/5755; 3116/5790; 3116/6202; 3116/6851; 333/571; 333/632 and 333/677.

862 The claimants say that there is no evidence of a formal instrument of lease having been issued under the *Land Act 1933* (WA) (***Land Act 1933***) in respect of any of these purported leases.

863 In that regard, the evidence of Alison Frances Gibson, by affidavit sworn on 25 January 2012 (Ex 65) filed on behalf of the State is positively to the effect that in relation to 16 of these leases (that is, all but 3116/3715, 3116/4379 and 3116/5362) "no formal lease was issued".

864 In relation to those 16 leases, save for 3116/2290, no particular reason is advanced or is evident from the material produced by Ms Gibson to explain why no formal lease was issued.

865 In relation to 3116/2290, a reason is advanced. Ms Gibson says she is advised that the practice of the then Department of Lands and Surveys in 1957 was not to issue a formal lease unless a lessee requested same.

866 That explanation may or may not explain why no formal lease was issued in respect of the other 15 special leases, but so too may the relevant position under the general law at the time concerning the grant of leases.

867 As to 3116/3715, 3116/4379 and 3116/5362, the evidence of Ms Gibson is that they are missing and appear to have been destroyed and the Department has no documents with respect to any of these leases, with the exception of register entries.

868 In all of the circumstances and having regard to the evidence concerning the other 16 leases, I would infer that no formal lease was issued in respect of any of these three additional purported special leases either.

869 In these circumstances, no question arises as to whether the Court should infer that the 16 other leases were the subject of formal lease instruments which, for example, have been misplaced, destroyed or lost. The proposition simply is that no formal lease was issued in any case.

870 I proceed therefore on the same basis in respect of all 19 special leases in contention, that no formal leases were issued.

871 The single issue then, raised by the claimants, but with which the State joins issue, is whether there was any requirement at material times for any of the special leases to be the subject of a formal lease.

872 The leases in question were purportedly granted between April 1954 and May 1978 under variously s 33, s 116 and s 117 *Land Act 1933*. None of the leases was in force on 23 December 1996, therefore none can be a relevant act for the purposes of s 12I(1) TVA and so any extinguishment, if it occurred, will be in accordance with common law principles and subject to the operation of the RDA.

873 In all cases, save for 3116/2290 purportedly issued under s 116 (which was for a period of one year), the leases were for periods in excess of three years.

874 The starting point for consideration of the issue is s 7 *Land Act 1933*, which as of April 1954 provided as follows:

> (1) The Governor is authorised, in the name and on behalf of His Majesty, to dispose of the Crown lands within the State, in the manner and upon the conditions prescribed by this Act or by regulations made thereunder.
> (2) All grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with this Act shall be valid and effectual in law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned.
> (3) The Governor is authorised to make such grants and other instruments, upon such terms and conditions as to resumption of the land or otherwise as to him shall seem fit.
> (4) The Governor is authorised to agree with the Governor General of the Commonwealth for the sale or lease of any Crown lands to the Commonwealth and to execute any instrument or assurance for granting conveying or leasing the land to the Commonwealth.

875 The only amendments to this provision between April 1954 and May 1978 (none of which were material) were that:

- On 18 December 1956, s 7(4) was amended by adding after the word "Commonwealth" in line two the words, "or other appropriate authority of the Commonwealth".

- On 28 November 1977, s 7(1) was amended by deleting the words "in the manner and upon the conditions prescribed by this Act or by regulations made thereunder" and substituting the words "in accordance with the provisions of this Act".

876 When construing the relevant requirements of the Act in respect of each type of lease, and generally in construing the Act, the terms of ss 13, 33, 116 and 117 *Land Act 1933* at material times should also be considered:

> **13**. All approvals to applications, permits to occupy, leases, licenses, transfers, instruments, and notices required to be served on the Registrar of Titles, except Crown grants, disposing of Crown lands shall be signed, or signed and sealed, as the case may require, by the Minister or by an officer authorised in that behalf by the Governor.
>
> Provided that every such document which may by this section be signed by such authorised officer, and which prior to the commencement of this proviso has been signed by an officer of the Department of Lands and Surveys not in fact authorised by the Governor, shall be as valid and effectual as if such officer had been duly authorized.
>
> …
>
> **33**. (1) (a) In this section, unless the context otherwise requires–
> 'land' means land reserved pursuant to the provisions of this Act;
> 'Order' means Order in Council;
> 'person' means any municipality, constituted pursuant to the provisions of the Municipal Corporations Act, 1906-1947, and road board, constituted pursuant to the provisions of the Road Districts Act, 1919-1947, any other body corporate or any other persons;
> 'purpose' means the purpose for which the land is reserved pursuant to the provisions of this Act.
> (b) Every Order made in pursuance of the provisions of this section shall–
> (i) be published in the *Gazette* so soon after being made as is practicable;
> (ii) commence to take effect upon publication in the *Gazette*;
> (iii) describe the land affected by the Order;
> (iv) specify the purpose for which the land affected by the Order is reserved, or may be leased or granted in fee simple;
> (v) name the person–
> in whom land is directed to be vested; to whom a lease of, or the fee simple in, the land is directed to be granted by the Order;
> (vi) specify the conditions and limitations subject to which the Governor–
> confers any power to lease or sub-lease the land;
> directs the grant of a lease of, or the fee simple in, the land by the Order.
> (2) By Order the Governor may direct that–
> any land shall vest in and be held by any person for the purpose–
> and by the same or any subsequent Order the Governor may, subject to such conditions and limitations as the Governor shall deem necessary to

ensure that the land is used for the purpose–

confer upon that person, power to lease for the purpose the whole or any part of the land.

(3) (a) By Order the Governor may direct that–

any land shall be leased for the purpose, by instrument of lease in accordance with the form in the Fourth Schedule to this Act, to any person.

(b) (i) The person to whom the land is leased pursuant to the provisions of the last preceding paragraph may, with the consent of the Governor, sublet, for the purpose, the whole or part of the land, or mortgage for the purpose, the whole of the land.

(ii) The consent of the Governor may be given subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose and the consent shall be endorsed on the instrument of sublease or mortgage, as the case may be.

(4) (a) By Order the Governor may direct that–

any land shall be granted in fee simple to any person subject to the condition that the person shall not lease or mortgage the whole or any part of the land without the consent of the Governor and subject to such other conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose.

(b) The consent of the Governor may be given subject to such conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose.

(5) When the mortgagee of any land mortgaged with the consent of the Governor, whether before or after the commencement of the Land Act Amendment Act, 1948, completes the exercise of the power of sale or foreclosure pursuant to the mortgage, the land shall by force of this enactment be freed from any trust, condition, limitation, or other restriction, created or imposed in relation to the purpose.

(6) The provisions of this section shall apply in respect of all land reserved pursuant to the provisions of this Act prior to or after the commencement of the Land Act Amendment Act, 1948.

…

116. On receiving application in the form of the Twentieth Schedule, the Governor may grant leases of any Crown land in the form of the Twenty-first Schedule, for a term not exceeding twenty-one years from the date thereof, at a yearly rental of not less than two pounds, and on payment by the lessee of the cost of survey, for any of the following purposes (that is to say):—

(1) For obtaining and removing therefrom guano or other manure;

(2) For obtaining and removing therefrom stone, gravel, sand, or earth;

(3) For sites for hotels, stores, smithies, or similar buildings;

(4) For sites for bathing-houses, bathing-places, bridges, or ferries;

(5) For sites for tanneries, factories, saw or other mills, stores, warehouses, or dwellings;

(6) For sites for wharves, jetties, quays, and landing places, or for sites for the depositing of materials;

(7) For the working of mineral springs or artesian wells;

(8) For sites for ship and boat-building, or repairing and marine and general engineering works;

(9) For the collection and manufacture of salt;

(10) For taking, diverting, conserving, and using water for mining, agricultural, industrial, and other purposes;

(11) For works for supplying water, gas, or electricity;
(12) For market gardens;
(13) For fishing stations, and for the purpose of drying, canning, or preserving fish;
(14) For any other purpose approved by the Governor by notice in the *Gazette*:

Provided that in all cases where it is proposed to grant a lease for a longer term than ten years, notice of the application for such lease and of the purpose and term for which it is proposed to be granted shall be published in four consecutive ordinary numbers of the *Gazette*, the first publication being at least one month before the grant of such lease.

117. The Governor may lease any town, suburban or village lands on such terms as he may think fit.

877 There was one immaterial change to s 116 between April 1954 and May 1978, being an amendment to reflect the transition to decimal currency.

878 The claimants' argument focuses on the requirement in s 7(2) that all grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate "*made in accordance with this Act*" shall be valid and effectual in law etc. They contend there cannot be a grant "in accordance with" the Act unless other requirements in it are satisfied. They say s 13 suggests that there must be an instrument, drawing attention to the requirement that the Minister or an authorised officer should sign "All approvals to applications, ... leases … except Crown grants". So too, they say, does s 33(3)(a) contemplate that an instrument will be issued as it provides that the Governor by Order may direct that "any land shall be leased for the purpose [of the vesting under s 33(2)] by instrument of lease in accordance with the form in the Fourth Schedule"; as does s 116 by providing that leases under this provision may only be granted "in the form of the Twenty-first Schedule". Thus, the claimants submit that the requirement for an instrument in or substantially in the appropriate form in each case is a firm requirement intended by Parliament, and it is not satisfied by pointing to the application made for a relevant estate in land which is approved and made the subject of an entry in a register book.

879 In *Daniel 2003(1)*, Nicholson J had occasion to consider a number of special leases under the *Land Act 1933* and its predecessor, the *Land Act 1898* (WA) (***Land Act 1898***). First, he considered special leases said to have been granted under s 116 *Land Act 1933*. The claimants submitted the absence of lease documentation made it impossible to find that native title was extinguished. His Honour (at [617]) noted that s 116 authorised the Minister to

grant leases in the form of the twenty-first schedule. He said that, once granted, they would have the effect of extinguishing native title as found in *Ward HC*. His Honour said that, having examined the documentation in evidence and relying on the presumption of regularity, he considered "it can properly be inferred in relation to each one that a lease was granted under s 116 and so in the form of the 21st Schedule". His Honour added (at [617]) that his view was "strengthened by reference to ss 145(6) and 144(2) which indicate the issue of a lease document was not a necessary element in the grant of a lease".

880 Section 145(6) and s 144(2) respectively provided, at relevant times:

> 145(6.) On the registration of a transfer of a mortgage, the lease or license if issued must be produced.
>
> …
>
> 144(2.) On the occasion of every transfer or sub-lease the lease or license or occupation certificate, if issued, must be produced, and the transferor and transferee or sub-lessor or sub-lessee shall each, on demand, receive a certificate in the form of the Twenty-fifth Schedule.

(There was only one minor change to s 145(6) between April 1954 and May 1978, being an amendment to reflect the transition to decimal currency.)

881 His Honour (at [624]-[625]) next dealt with two leases claimed to have been granted under s 152 of the earlier *Land Act 1898*, in respect of which no lease instrument was produced. Section 152 was in terms similar to s 116. His Honour inferred that each lease was made; although his Honour held an extinguishing effect was not made out for one of the leases as it was made over an area which exceeded the maximum area allowed and so did not represent a "valid exercise of power", referring inter alia to *Ward HC* at [166] and [180].

882 His Honour then dealt with a further lease purportedly granted pursuant to s 153 *Land Act 1898* but which could not be produced. His Honour (at [627]) again inferred from registry entries and other documentation that a lease was made but because of the terms of the section (identical to s 117) and the absence of a lease document he was not prepared to infer that the lease had been conferred in terms of exclusive possession. So his Honour did not find extinguishment in that instance.

883 The question was apparently not raised with his Honour as to whether a particular lease instrument was required to validly exercise power in any of those instances. I should

say, immediately, that it is not clear to me whether his Honour in dealing with the s 116 leases merely inferred the existence of relevant leases in the scheduled form (in which case the reference to ss 145(6) and 144(2) would appear unnecessary) or was suggesting it did not matter whether a lease instrument was actually issued in any case under the *Land Act 1933* to effect a valid grant.

884 The claimants submit, in any event, that his Honour's reliance on ss 145(6) and 144(2) does not properly reflect the position at law and should not be followed in this case. First, it is submitted, the reasoning is inconsistent with s 7 as applied in *Ward HC*. Secondly, ss 144 and 145 applied generally to leases and licences under various provisions of the *Land Act 1933* and should not be taken to be relevant in the case of a special lease. For example, s 43 provided that:

> On payment by the purchaser of town or suburban lands of the first prescribed instalment of the purchase money, a licence in the form or to the effect of the Sixth Schedule may be issued on application entitling the holder to occupy the land, and such licence may be mortgaged or transferred in the manner prescribed by this Act.

(This was the language used in s 43 as originally enacted; the wording was subsequently amended to refer to a licence in a prescribed form.) In respect of such a provision, the statutory language and context is different to s 116 and more readily supports a conclusion that a licence may have been granted without a formal instrument being issued. Section 7 did not apply to a licence of that kind, as it made reference to estates in land (of which a special lease under s 116 was one) but not to licences. Thirdly, s 43 (as originally enacted) referred to a licence in a form or to the effect of a schedule to the *Land Act 1933*, whereas under s 116 (as originally enacted) a special lease was required to be in the form scheduled to the Act. (It is also noted that the words "if issued" in ss 144 and 145 appeared in the *Land Act 1933* as originally enacted.) Accordingly, it is submitted, the reference in s 144(2) to a "lease or licence or occupation certificate, *if issued*" (emphasis added) has no necessary application to s 116. That is, the reference to "if issued" may be construed as referring to licences, occupation certificates or other forms of leases which could have come into existence without an instrument in the required form having been issued. The same applies, it is said, to s 145(6). The existence of those words in the statute does not require the conclusion that under s 116 a special lease could come into existence absent the issuing of a lease instrument.

885 In my view, there can be little doubt that at material times, by ss 7, 13, 33, 116 and 117 a special lease could not be conveyed under the *Land Act 1933* except by deed, save in the case of a short lease for a term less than three years in the circumstances explained below.

886 Section 7(1) and s 7(2) each indicate that either a grant (for a fee simple) or an instrument (for a less estate, such as a lease) was required.

887 Section 13 then required, "All approvals to applications, permits to occupy, leases, licenses, transfers, instruments, and notices required to be served on the Registrar of Titles, except Crown grants, … shall be signed, or signed and sealed, as the case may require, by the Minister or by an officer authorised…". No party suggests the words "all approvals to" qualifies any word or words other than "applications", so that the requirement of s 13 is that a range of relevant documents, including "approvals to applications" and "leases" (but not Crown grants) *must* be "signed, or signed and sealed, as the case may require", by the Minister or authorised officer.

888 The reference to "signed and sealed" in s 13 obviously alludes to the case where, under the general law at material times in Western Australia, a relevant interest could only be conveyed by deed. At material times under the general law, a lease was required to be conveyed by deed unless (1) it took effect in possession; (2) for a term not exceeding three years and (3) for best rent (which type of lease may be referred to as a short lease): see *Real Property Act 1845* (UK) that applied in Western Australia at relevant times until it was repealed by the *Property Law Act 1969* (WA) (***PL Act***) (see *Property Law Bill 1969*, Explanatory Memorandum p 6 dealing with cll 32-36); Megarry & Wade *The Law of Real Property* (Seventh Ed) [17-032]-[17-034]; s 4(a), Sch 1 PL Act. Under the general law, such a short lease did not need to be in writing: ss 1-2 *Statute of Frauds 1677* (UK) (***Statute of Frauds***).

889 The exception as to leases, tenancies or assurances that were not required by law to be made in writing did not change upon the enactment of the PL Act: see s 33(2)(d) PL Act.

890 Thus, at material times, a leasehold interest for more than three years, including under the *Land Act 1933*, was required to be conveyed by deed, save in the case of a short lease. In the case of a short lease, however, the s 13 requirement for signing applied, by force of law, notwithstanding the *Statute of Frauds* provisions.

891 The requirement in s 33 that the relevant land "shall be leased … by instrument of lease in accordance with the form of the Fourth Schedule to this Act" (s 33(3)(a)), and the s 116 empowerment of the Governor to "grant leases … in the form of the Twenty-first Schedule…" in each case reflects these understandings. They made plain that the leases granted should be in a particular form. In the case of s 116, in context, the use of the word "may" does not connote a discretion as to the terms, but specifies the terms on which the lease is to be granted, if approved.

892 Section 117 special leases, however, could be on any terms and are not restricted to the terms of any schedule to the Act. As Nicholson J appears to have assumed in *Daniel 2003(1)*, those terms possibly might not confer exclusive possession in general law terms.

893 I am of the view, therefore, that a special lease under ss 33, 116 and 117 could only be validly granted if there was a lease instrument. Further, a lease for more than three years needed to be "signed and sealed" and a short lease needed to be "signed".

894 In light of what I consider to have been the clear requirements for the valid exercise of the lease granting power for special leases, whether under s 33, s 116 or s 117, the terms of ss 145(6) and 144(2) should be construed to avoid ambiguity and to promote the primary requirements of the *Land Act 1933* as to the valid exercise of the lease granting power. I accept the claimants' submissions as to how ss 145(6) and 144(2) should be construed to avoid ambiguity.

895 I should add that having regard to the text of the relevant provisions, the general context and the general law at relevant times, I consider Parliament intended that a leasehold interest could only be created in the prescribed manner and form: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 555 (***Project Blue Sky***). In these circumstances, the ameliorating provisions of s 74 *Interpretation Act 1984* (WA) are of no assistance to make the purported leases valid as no attempt was made to follow the prescribed manner and form: *Swann v R* [1999] WASCA 106 at [30].

896 In these circumstances, I find that because no formal lease was issued in respect of any of the 19 purported special leases granted under the *Land Act 1933*, the power to grant

such leases was not validly exercised and no relevant grant of lease was valid or effectual in law, as provided for by s 7(2). It follows that none of the purported 19 special leases effected any extinguishment of native title under the general law.

897 It is unnecessary in these circumstances to deal with the alternative issue identified in *Daniel 2003(1)* that because no s 117 lease has been produced, it cannot be assessed, if there were a s 117 lease, that it conveyed exclusive possession and so would have effected total extinguishment. Had it been necessary, however, I would have accepted Nicholson J's findings at [627] on this point.

898 In summary, therefore, I find that none of the 19 special leases identified above, whether issued under ss 33, 116 or 117 *Land Act 1933* had the effect of extinguishing native title.

Reserve 1470

899 Reserve 1470 is located in the vicinity of Mulga Downs Station and remains current. It appears the reserve was created initially under reg 32 *Land Regulations 1887* (WA) (***Land Regulations 1887***) (not the 1882 regulations as originally thought by the claimants) which relevantly stated:

> THE Governor is hereby authorised, subject to such conditions and limitations as he may think fit, to except from sale, and either to reserve to Her Majesty, her heirs and successors, or to dispose of in such other manner as for the public interest may seem best, such lands, whether surveyed or not, as may be required for the following objects and purposes:
> (n) Any other purpose of public health, safety, utility, convenience, or enjoyment, or for otherwise facilitating the improvement and of the Colony.

900 The State notes that *Western Australia v Sebastian* [2008] FCAFC 65; (2005) 173 FCR 1 (***Sebastian FC***) considered the creation of a reserve under the similar reg 29 *Land Regulations 1882* (WA) (***Land Regulations 1882***) for the purpose of "public purposes, adjoining Broome, Roebuck Bay". Regulation 29(13) allowed the creation of a reserve for "any purpose of safety, public utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement of the colony". The Full Court held (at [251]) that the language of reg 29(13), and in particular the reference to "[a]ny purpose of" requires

the particular purpose or purposes of safety, public utility, convenience, or enjoyment, or for otherwise facilitating the improvement and settlement of the Colony, to be identified.

901 The State submits that in *Sebastian FC* the Court's concern was that a purpose of ''public purposes" was insufficiently specific, and was inconsistent with the fact that each of the identified purposes in reg 29 were ''public purposes". However, it was clear that had the reserve been for the purpose of ''public utility", it would have been valid. The State contends that the slightly altered wording of reg 32(n) *Land Regulations 1887* does not in this case otherwise alter the ratio of *Sebastian FC*.

902 The State submits that the proposition that a reserve for the purpose of ''public utility" is valid is also supported by a reading of *Ward HC*, where at [219], the Court stated:

> Nevertheless, by designating land as a reserve for a public purpose, even a purpose as broadly described as 'public utility', the executive, acting pursuant to legislative authority, decided the use or uses to which the land could be put.

The Court held (at [219]-[220]) that such reserves extinguished a native title right to control access.

903 On this basis, the State submits any native title right to control access over the area of reserve 1470 was extinguished at the time of grant; and as the reserve is still current, s 47B NTA does not apply with respect to the reserve.

904 The claimants submit that reg 32 *Land Regulations 1887* is not distinguishable for present purposes from reg 29 *Land Regulations 1882* considered in *Sebastian FC* and that the reasoning in *Sebastian FC* (at [251]) is also indistinguishable. The notice in this case failed to identify the particular purpose of utility, as required by the regulation.

905 The claimants contend reference to *Ward HC* at [219] does not assist. The majority in the High Court was there addressing the effect of reservation of land under statute generally, not the interpretation of the reg 32(n) *Land Regulations 1887* so far as questions of validity are concerned. No issue of the kind raised here was before the High Court in *Ward HC*. This Court is accordingly bound by the decision of the Full Court in *Sebastian FC* on this issue.

906 I accept the submissions that the reasoning in *Sebastian FC* applies to the proper construction and application of reg 32. In other words to validly create a reserve under reg 32

one of the particular public interest objects or purposes mentioned in para (n) of reg 32 must be specified.

907 It is plain from the discussion in *Sebastian FC* (at [249]-[252]), that is was the failure to nominate one of the particular purposes specified in reg 29(13), which included "public utility", that led to the finding that the reserve in question was not validly created.

908 In this case, however, reserve 1470 has not been established for "public purposes" without definition, but rather for the particular purpose of "public utility" which is one of the precise objects or purposes in relation to which a reserve may be created under reg 32.

909 In these circumstances I reject the claimants' challenge to reserve 1470 and find reserve 1470 was validly created.

Reserve 46724

910 The reserve 46724 was created in 2004 for the purpose of "Water Supply". It is within the Wittenoom town site and is the subject of a management order in favour of the Water Corporation with a power to lease. The area of the reserve had been the subject of earlier pastoral leases and other interests.

911 The claimants contend the creation of the reserve was a "future act" not validated under the NTA.

912 The State denies the creation of the reserve was a future act. It notes the reserve was created by order of the Minister under s 41 *Land Administration Act 1997* (WA) (***Land Administration Act 1997***) on or about 30 July 2004 for the purposes of "Water Supply". On the same day, the care, control and management of the reserve was placed with the "Water Corporation of 629 Newcastle Street, Leederville, WA 6007" pursuant to s 46 *Land Administration Act 1997*, subject to the following conditions:

> (1) To be used for the purpose of 'Water Supply' only.
> (2) Power to lease (or sub-lease or licence) for the designated purpose is granted for the whole or any portion thereof for any term not exceeding twenty one (21) years from the date of the lease subject to the approval in writing of the Minister for Lands being first obtained to each and every lease or assignment of lease, pursuant to the provisions of Section 18 of the Land Administration Act 1997.

913 Section 233 NTA states that an act is a future act in relation to land or waters if:

> (a) either:
> (i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
> (ii) it is any other act that takes place on or after 1 January 1994; and
> (b) it is not a past act; and
> (c) apart from this Act, either:
> (i) it validly affects native title in relation to the land or waters to any extent; or
> (ii) the following apply:
> (A) it is to any extent invalid; and
> (B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and
> (C) if it were valid to that extent, it would affect the native title.

914 An act is defined in s 226(2)(e) NTA to include "the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation", which would on its face include the acts of creation of the reserve and making of the management order. I accept that proposition.

915 "Past act" is defined in s 228 NTA. I accept the proposition that the creation of the reserve was not a past act.

916 The State submits the creation of the reserve and/or making of the management order will therefore be a *future act* if it *affected* native title, whether validly or *invalidly*: s 233(1)(c). The State observes "invalidly" here refers to s 10(1) RDA, at least in relation to the State; however, whether or not the RDA renders an act invalid, it will be a future act if it *affects* native title. An act which would otherwise be invalid due to s 10(1) RDA may be validated by the future act regime. I accept these submissions.

917 Section 227 NTA states that "An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise".

918 The State notes native title cannot be "affected" (by either extinguishment or inconsistency) if it does not exist, including due to prior extinguishment.

919 The State therefore submits, first, that being north of the northern escarpment of the Hamersley Range, there can be no native title in the area of the reserve and so its creation did not *affect* native title, and was not a future act. Having regard to the findings made above in relation to the northern boundary of the claim area, this submission fails.

920 The State contends, secondly, that if it is held that native title exists in this area, it is necessary to precisely identify the native title rights which existed within the area of the reserve as at 30 July 2004. Only those native title rights could have been affected by the creation of the reserve. Accordingly, this requires an examination of the history of prior extinguishment in the area. It should be noted that the rights found above include the rights to hunt, gather and conduct ceremonies, subject to extinguishment issues.

921 As to prior tenure, the State notes the whole of the area of the Wittenoom townsite was subject to a resumption under s 109 *Land Act 1933* by proclamation published in the Gazette on 5 May 1950. The proclamation stated:

> WHEREAS by section 109 of the Land Act, 1933-1948, the Governor may resume for any purpose as in the public interest he may think fit, any portion of land held as a Pastoral Lease; and whereas it is deemed expedient that the portion of Pastoral Lease 394/1034, as described in the Schedule hereunder, should be resumed for the purpose of a 'Townsite': Now, therefore I, Sir James Mitchell, Governor as aforesaid, with the advice and consent of the Executive Council, do by this my Proclamation resume portion of Pastoral Lease 394/1034 for the purpose aforesaid.

922 Section 109 *Land Act 1933* provided as follows:

> Subject as hereinafter provided, the Governor may resume, enter upon, and dispose of the whole or any part of the land comprised in any pastoral lease, for agricultural or horticultural settlement, or for mining, or any other purpose as in the public interest he may think fit.

923 Section 109A prescribed the preliminary procedural steps with respect to pastoral lessees.

924 Also on 5 May 1950 a notice was published in the Gazette proclaiming Wittenoom as a town under s 10 *Land Act 1933*:

> LAND ACT, 1933-1848.
> New Townsite – Wittenoom
> Department of Lands and Surveys,
> Perth, 2nd May, 1950.

Corr. 3602/48.

IT is hereby notified that His Excellency the Governor in Executive Council has been pleased to approve, under section 10 of the above Act, of the land described in the Schedule hereto being classified as 'Town and Suburban', and of such town site being hereafter known and distinguished as 'Wittenoom'.

Schedule

[description of area]

925 Section 10 *Land Act 1933* stated:

The Governor may, by notice in the *Gazette* –
(1) Constitute and define the boundaries of any new districts and townsites, and distinguish each townsite by name as a town.
(2) Declare that any district or townsite shall cease to exist as such.
(3) Extend or diminish the area of any district or townsite.
(4) Alter the boundaries or name of any district or townsite.
(5) Define or alter the name of any street, square, terrace, road, lane, or way.
(6) Divide any district into two or more districts, and give each a distinguishing name.
(7) Set apart any Crown lands, or any lands within a townsite, as suburban lands.

926 The powers under s 10(1) and 10(7) were exercised.

927 The State notes resumptions under s 109 *Land Act 1933* were considered in *Ward HC* at [206]-[208], where it was held that the resumptions in question did not extinguish native title because they "did not give the Crown any larger title to the land than the radical title acquired at sovereignty". However, the Court there effectively indicated that the situation would be different if there was a dedication of the land, by observing:

If there was no dedication of the land, and was only a resumption, both before and after that resumption the land was Crown land.

928 In this case, the State submits, the resumption of the land coupled with a simultaneous constitution of the land as a townsite amounted to a dedication of land for the purpose of "Townsite". Such dedication extinguished any native title within the whole of the area of the townsite in 1950, including, in respect of the area of reserve 46724. I reject this submission. There is nothing in either act or in their combination, that necessarily extinguished all native title.

929 Further, the State submits a large part of the area of the reserve had been the subject of two freehold titles prior to the creation of the reserve. The grant of a freehold estate being a *previous exclusive possession act* as defined by s 23F NTA, these titles would have extinguished any native title over the part of the reserve they overlapped that may have survived the resumption and dedication of the land for a townsite. This submission would appear to be correct as a matter of fact and so extinguishment in the subject area would follow.

930 Additionally, the State says, the whole of the area of the reserve had previously been covered by the following tenures prior to the creation of the reserve:

(1) Oil Prospecting Area 20H, granted under s 6 *Mining Act Amendment Act 1920* (WA) (***Mining Act Amendment Act 1920***) on 6 April 1921;

(2) Permit to Explore 37H, granted under Div 1 of Pt IV *Petroleum Act 1936* on 10 February 1954;

(3) Temporary reserve 70/1807, rights of occupancy of which were granted on 29 March 1960 pursuant to s 276 *Mining Act 1904*.

(4) Pastoral lease 69/0033, granted under reg 69 *Land Regulations 1887* on 15 July 1891;

(5) Pastoral lease 336/96, granted under s 96 *Land Act 1898* on 15 September 1908;

(6) Pastoral lease 3353/96, granted under s 96 *Land Act 1898* and registered on 10 February 1923;

(7) Pastoral lease 394/1034, granted under ss 94 and 114 *Land Act 1933* on 18 March 1937.

931 The State submits that these historic pastoral leases extinguished at least any native title right to control access: *Ward HC* at [192]; s 12M(1) TVA. The grant of the petroleum titles would also have had this effect. So would the grant of rights of occupancy over the temporary reserve. So much may also be accepted at this point.

932 The State submits that historical pastoral leases and rights of occupancy also extinguished certain non-exclusive native title rights over the area of the reserve. However, it says, the point is that only certain non-exclusive native title rights would have survived the grant of the earlier tenure. For it to be concluded that the creation of the reserve (and/or

making of the management order) was a *future act*, the State says these surviving rights must be identified and compared with the rights created by the reserve and the claimants have not attempted any such analysis. However, in light of the native title rights found above, it may be assumed at least that such rights as those to hunt, gather and conduct ceremonies subsisted at material times.

933 The State notes in *Ward HC* (at [219]-[222]), the effect of the creation of reserves on native title (including where there had been prior pastoral leases) was held to be:

(1) The creation of a reserve was inconsistent with any continued exercise of power by native title holders to decide how the land could or could not be used (at [219]).

(2) Whether a native title right to use the land continued unextinguished (ie whether any non-exclusive native title rights survived), depends upon other considerations, particularly what, if any, rights in others were created by the reservation or later asserted by the executive (at [220]).

(3) The designation of land as a reserve for certain purposes did not, without more, create any right in the public or any section of the public which, by reason of inconsistency and apart from the TVA, extinguished native title rights and interests (at [221]).

934 Further, at [222], the Court described the effect of the RDA on the creation of reserves after 31 October 1975, when there had and had not been a prior pastoral lease:

> However, in the case of reserves created after 31 October 1975, account must be taken of Div 2 of Pt 2 of the NTA. Creation of a reserve, being the exercise of executive power of the Crown ... fell within the definition of 'act' in the NTA (s 226(2)(e)). Because it was inconsistent with the continued existence of the native title right to control the use of or access to land, it was an act which could have affected native title (s 227). Questions of the operation of the RDA could then arise. The considerations differ according to whether the reservation was of land that was then or had at any time been held under a pastoral lease or of land that was always vacant Crown land. In the case of land that was, or had been, held under a pastoral lease any right which native title holders may once have had to control the use of or access to the land would have been extinguished by the grant of the pastoral lease. The subsequent reservation of the land could not affect that right and no question would then arise under the RDA. *In the case of reservation of land not earlier held under a pastoral lease, reservation, being inconsistent with the continued existence of a native title right to control the use of or access to the land, would extinguish that right and, by hypothesis, it would affect only that native title right.*
> (Emphasis added)

935 It follows from this reasoning, the State submits, that the mere creation of a reserve over land that had previously been the subject of a pastoral lease would not "affect" native title rights at all, and so could not be a future act. The situation may be different if the creation of the reserve comprised additional rights, or if the executive asserted rights in the area of the reserve, but there is no evidence of such rights having been created or asserted in relation to this particular reserve. Accordingly, the creation of reserve 46724 and the making of the management order did not affect native title, and these acts were not future acts.

936 As to an argument that native title must have been affected by virtue of the fact that the management body (the Water Corporation) was given a power to lease pursuant to the management order, the State says the mere conferral of such a power did not have an additional effect on native title. This is because, first, any native title right to decide how the land was to be used had already been extinguished, and, secondly, only an exercise of that power could affect native title. There is no evidence that the management body in fact granted a lease over the area of the reserve (which would have had an additional effect on native title).

937 The claimants contend, however, that, in this instance, the creation of the reserve is a future act because the full enjoyment and exercise of the rights created by the reserve would be inconsistent with the full enjoyment and exercise of the native title rights. For example, the construction of a water treatment plant on the reserve would be inconsistent with the continued right to exercise a native title right to hunt or perform a ceremony on the land on which the water treatment plant was built. As found above, subject to extinguishment, native title includes such rights. (They also note the State does not contend that the reserve is valid under Pt 2 Div 3 NTA.) The trouble with this submission is that mere reservation does not involve construction of a water treatment plant or any development.

938 I accept the State's submission and find that the creation of the reserve and the management order, in the circumstances, relevantly did not affect any subsisting native title at that point.

939 I note that the claimants also submit that even if the creation of the reserve is not a future act, there is no provision of the NTA which declares that the rights under the reserve prevail over native title. Accordingly the native title rights recognised under the NTA will, to

the extent of any inconsistency in their exercise, prevail over the rights created by State law in respect of the reserve: *Native Title Act Case* at 453, 464-470, 488 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ)). This should be reflected in the determination under s 225(d). The result is the same whether or not there is a finding that the reserve is an invalid future act.

940 The same conclusion applies, in the claimants' submissions, in respect of reserve 46723 created in 2002 for the purpose of "Water Supply Depot".

941 For the reasons given above, I find there is no future act. In short, the creation of the reserve and the management order cannot have had any greater extinguishing effect than the historical pastoral leases.

942 I also accept the State's submissions the freehold grants referred to will have extinguished native title rights over much of the area in any event.

943 I will hear from the parties as to the appropriate determination to be made in light of these findings.

BHP Billiton's Chichester regrade miscellaneous licence L45/147

944 ***Background***: It appears that the proponent of this interest (BHP Billiton) and the State had initially proceeded on the basis that the grant of L45/147 would be an act to which Subdiv M (acts passing the freehold test) of Div 3 of Pt 2 of the NTA would apply. The supposition was that its grant would, in that respect, be covered by s 24MD(6B)(b) as an act that passes the freehold test (s 24MB) on the basis it involves the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (defined in s 253 to include a railway) associated with mining.

945 Where Subdiv M applies to an act, s 24MD(6A) provides that registered native title claimants must have the same procedural rights (defined in s 253) as the holders of other titles, and s 24MD(6B) stipulates certain consequences if the relevant act to which Subdiv M applies involves, inter alia, the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining. Section 24MD(6B)

requires, in that respect, notification of the act, an opportunity for native title parties to object to the act, and for the independent hearing of any objection.

946 In accordance with para (d) of s 24MD(6B) the claimants, after notification under para (c), objected to the grant so far as it affected their registered native title rights and interests. On 1 August 2008, BHP Billiton requested the Department of Industry and Resource to issue a "30 day letter" requesting the claimants to withdraw the objection or refer it to an independent person for determination under of s 24MD(6B)(f). Unless certain exceptions apply, a determination made by the referee must be complied with by the State (s 24MD(6B)(g)).

947 What happened subsequently, however, was that the Mining Warden under the *Mining Act 1978* proceeded to exercise her powers under that Act in light of objections to a tenement being granted under that Act and decide whether to make a grant under that Act. On 26 June 2009, the Mining Warden published reasons for decision on the objection to the application: *BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui-Itochu Iron Ore Pty Ltd v Martu Idja Banyjima (MIB) Native Title Claimants* [2009] WAMW 6 (***BHP Billiton v MIB Claimants***). The Mining Warden (at [104]) concluded:

> … I dismiss Objection KR 95/056 and subject to compliance with the Native Title Act and subject to the standard conditions, grant the Application for a miscellaneous licence 45/147, subject to the terms of the Minute of Consent Orders in relation to Objections 100/056…

948 In light of the Mining Warden's decision, the State advised BHP Billiton that if a proposal for the grant of L45/147 were approved under the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) (***Newman Agreement Act***), the State would switch tack and proceed on the basis that it involved "a pre-existing right" under Subdiv I (renewals and extensions etc) of Div 3 of Pt 2 NTA. This appears to have prompted BHP Billiton to submit, on 1 December 2009, what was described as a proposal for the design, construction, operation and maintenance of the Chichester Rail Deviation and associated infrastructure expansion.

949 On 10 December 2009, the Minister informed BHP Billiton that:

> Pursuant to clause 20(3) of the *Iron Ore (Mt Newman) Agreement Act 1964*, I

> approve the proposed Chichester Rail Deviation as a variation to prior approved proposals.
>
> The Department of State Development will now advise the Department of Mines and Petroleum that the Miscellaneous Licence (L4/147) can be issued.

950 On 14 December 2009, the Director wrote to the claimants and advised that:

> Pursuant to clause 20(3) of the *Iron Ore (Mount Newman) Agreement Act 1964*, the Minister responsible for the Agreement recently approved the proposed Chichester Rail Deviation and L45/147 has been nominated as the required tenure for the purpose of Clause 8.

951 The letter went on to state that as s 24IB NTA applies to the grant of the miscellaneous licence, the notice previously issued under s 24MD(6B)(c) "now has no effect and, as a consequence, L45/147 was granted on 11 December 2009".

952 The claimants are now understandably aggrieved and say that they have been deprived of their rights under s 24MD(6B). Thus questions are raised as to the efficacy and, more important, validity of L45/147 granted in such circumstances.

953 Relevant to this issue is the *Newman Agreement Act* approving the scheduled Newman State Agreement as varied (s 3), for the establishment of iron ore mining operations at Mt Newman and associated infrastructure that included the construction of a railway for transporting ore from the mineral lease to Port Hedland for treatment and shipment. The Newman State Agreement was made on 26 August 1964 and took effect on 14 December 1964 on the commencement of the *Newman Agreement Act*.

954 During what is termed Phase 1, the proponent, (termed "the company" in the Agreement) was required to submit to the Minister by 31 December 1964 (or by any extended date fixed under cl 7 of the Agreement) detailed proposals for mining operations and for the transport and shipment of iron ore to be mined, with details of the design and construction of a railway between the mining areas and the wharf to be constructed at Port Hedland (cl 5(2)(a)(ii)). Within two months of receiving the proposals, the Minister was required, under cl 6(1), to give notice of his approval or of any alterations or conditions he desired. The company could then elect to refer to arbitration any dispute about the Minister's desired changes to the submitted proposals. If the arbitral award was decided in the company's favour, the award took effect as if it was an approval given by the Minister. If the

award was decided against the company, it could elect to satisfy the Minister of the matters the subject of the award and obtain an approval, or to terminate the Newman State Agreement (cl 6(1)).

955 Approval by the Minister, or determination by arbitration, of the detailed proposals in accordance with cl 6 fixed the "commencement date" (cl 6(7)) for Phase 2. Clause 8 relevantly stipulated the following obligations after the commencement date:

> **Phase 2. Obligations of State**
>
> 8. (1) As soon as conveniently may be after the commencement date the State shall —
>
> **Mineral lease**
>
> (a) after application is made by the Company for a mineral lease of any part or parts (not exceeding in total area three hundred (300) square miles and in the shape of a parallelogram or parallelograms) of the mining areas in conformity with the Company's detailed proposals under clause 5(2)(a)(A) hereof as finally approved or determined cause any necessary survey to be made of the land so applied for (the cost of which survey to the State will be recouped or repaid to the State by the Company on demand after completion of the survey) and shall cause to be granted to the Company a mineral lease thereof for iron ore in the form of the Schedule hereto for a term which subject to the payment of rents and royalties hereinafter mentioned and to the performance and observance by the Company of its obligations under the mineral lease and otherwise under this Agreement shall be for a period of twenty one (21) years commencing from the commencement date with rights to successive renewals of twenty one (21) years upon the same terms and conditions but subject to earlier determination upon the cessation or determination of this Agreement PROVIDED HOWEVER that the Company may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State all or any portion or portions (of reasonable size and shape) of the mineral lease;
>
> **Under Company's proposals**
>
> (b) in accordance with the Company's proposals as finally approved or determined under clause 6 hereof and as require the State to accept obligations —
>
> **Lands**
>
> (i) grant to the Company in fee simple or for such terms or periods and on such terms and conditions (including renewal rights) as subject to the proposals (as finally approved or determined as aforesaid) shall be reasonable having regard to the requirements of the Company hereunder and to the overall development of the harbour and access to and use by others of lands the subject of any grant to the Company and of services and facilities provided by

the Company —

for nominal consideration — townsite lots;
at the peppercorn rental — special leases of Crown lands within the harbour area the townsites and the railway; and

at rentals as prescribed by law or are otherwise reasonable — leases rights mining tenements easements reserves and licenses in on or under Crown lands

under the Mining Act the *Jetties Act 1926* or under the provisions of the Land Act modified as in subclause (2) of this clause provided (as the case may require) as the Company reasonably requires for its works and operations hereunder including the construction or provision of the railway wharf roads airstrip water supplies and stone and soil for construction purposes; and

Services and facilities

(ii) provide any services or facilities subject to the Company's bearing and paying the capital cost involved and reasonable charges for maintenance and operation except operation charges in respect of education hospital and police services and except where and to the extent that the State otherwise agrees —

subject to such terms and conditions as may be finally approved or determined as aforesaid PROVIDED THAT from and after the fifteenth anniversary of the export date or the twentieth anniversary of the date hereof whichever shall first occur (provided that the said twentieth anniversary shall be extended one (1) year for each year this Agreement has been continued in force and effect under clause 5(4) hereof) the Company will in addition to the rentals already referred to in this paragraph pay to the State during the currency of this Agreement after such anniversary as aforesaid a rental (which subject to its being payable by the Company to the State may from time to time at the option of the Company be payable in respect of such one or more of the special leases or other leases granted to the Company under this paragraph and remaining current) equal to two shillings and sixpence (2s. 6d.) per ton on all iron ore and iron ore concentrates in respect of which royalty is payable under clause 9(2)(j) hereof in any financial year such additional rental to be paid within three (3) months after shipment sale use or production as the case may be of the iron ore or iron ore concentrates SO NEVERTHELESS that where in respect of any such year the additional rental so payable is less than a minimum sum of one hundred and fifty thousand pounds (£150,000) the Company will within three (3) months after the expiration of that year pay to the State as further rental the difference between one hundred and fifty thousand pounds (£150,000) and the additional rental actually paid in respect of that year but any amount so paid in respect of any financial year in excess of the rental payable for that year at the rate of two shillings and sixpence (2s. 6d.) per ton as aforesaid shall be offset by the Company against any amount payable by it to the State above the minimum amounts payable to the State

> under this paragraph in respect of the two (2) financial years immediately following the financial year in respect of which the said minimum sum was paid; and

956 Clause 9 obliged the company to construct, within three years following the commencement date, the things needed for its mining and transportation operations, including by subcl 9(1)(c), railways along a route "approved or determined under Clause 6."

957 Clause 20(3) provided that:

> … the Minister may from time to time approve variations or require reasonable variations in the detailed proposals relating to any railway or harbour site and/or port facilities or dredging programmes or townsite or town planning or any other facilities or services or other plans specifications or proposals which may have been approved pursuant to this Agreement and in considering such variations shall have regard to any changes consequent upon joint user proposals of any such works facilities or services and any other relevant factors arising after the date hereof.

958 Clause 24 required the parties to submit to arbitration any dispute or difference arising out of the Agreement, or any agreed variation or addition to the Agreement, or as to any matter to be agreed between the parties.

959 ***Issues***: The issues now requiring consideration are:

(1) Whether L45/147 is a future act to which Subdiv I of Div 3 of Pt 2 NTA applies, a proposition which the claimants would appear to presume, but the State and the BHP Billiton respondents do not accept.

(2) If L45/147 was a future act, whether it was a pre-existing right-based act within the meaning of s 24IB NTA in respect of which grant Subdiv P did not apply, so that the grant was valid pursuant to s 24ID(1)(a); propositions that are not accepted by the claimants.

(3) If Subdiv I did not apply, whether Subdiv M applied to make the grant valid pursuant to s 24MD(1), as the State would contend, but the claimants would not accept.

(4) Whether s 24MD(6B) applied to the grant of L45/147 and, if it did, whether the failure to comply with s 24MD(6B) invalidated the grant of L45/147, as the claimants would, in those circumstances, contend.

(5) Whether s 116 *Mining Act 1978* operates to ensure the validity under State law of L45/147 in any event.

960 ***Whether the grant of L45/147 was a future act***: The State contends that, for the purpose of the definition of "future act" in s 233 NTA, while the relevant act, the grant of L45/147, took place on or after 1 January 1994 (having been granted on 11 December 2009), it cannot be said not to be a "past act" and, in any event, apart from the NTA it could not be said that it validly affected native title in relation to the land or waters concerned to any extent.

961 In relation to the question whether the grant of the miscellaneous licence is a past act, the State refers to s 228(3)(b) and contends that the grant of the tenement would not have been rendered invalid by s 10 RDA at material times because any exclusive native title rights had already been extinguished over the area before the grant of the tenement and in this regard relies on *Ward HC* (at [309] and [321]) and *James v Western Australia* [2010] FCAFC 77; (2010) 184 FCR 582 (***James FC***). In this regard, the State says this was a *Gerhardy v Brown* (1985) 159 CLR 70 (***Gerhardy***) category 1 case of the type considered in *Ward HC* at [309]-[321]. Consistent with the reasoning in *James FC*, I consider this submission, on the facts relating to this grant and the nature of this tenement, should be accepted. L45/147 could not have extinguished more than a native title right to control which had earlier been extinguished.

962 The State further contends that the grant of the miscellaneous licence cannot have validly affected native title for the purposes of s 233(1)(c)(i) in any event. For the reasons given in relation to a similar or the same argument in relation to BHP's Yandi mining lease AM70/270 below, I would reject this argument.

963 I consider, consistent with the finding in relation to AM70/270 below, that the grant of the miscellaneous licence in this case would have been partly inconsistent with the "continued existence, enjoyment or exercise" of subsisting native title rights to hunt, gather and conduct ceremonies and the like and so affected native title in the manner described in s 227 NTA.

964 On the basis of the s 10 RDA analysis, I find, however, that the grant of L45/147 was a past act and so not a future act.

965 ***Alternatively, whether the grant of L45/147 was a pre-existing right-based act within the meaning of s 24IB NTA, Subdiv P not applying to the grant so that the grant is valid, pursuant to s 24ID(1)(a)***: If the grant were, despite my primary finding, a future act the question arises whether it is validated by Subdiv I in any event. Subdivision I of Div 3 of Pt 2 is headed "Renewals and Extentions etc". By s 24IA(a) the subdivision applies to a future act which is a "pre-existing right-based act".

966 Section 24IB provides that:

> **24IB Pre-existing right-based acts**
> A future act is a ***pre-existing right-based*** act if it takes place:
> (a) in exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid (including because of Division 2 or 2A); or
> (b) in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made.

967 In this case, the relevant future act, the grant of the miscellaneous licence is said by the State and supported by BHP Billiton, to have taken place in exercise of the legally enforceable right created by the earlier *Newman Agreement Act*; or otherwise in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, namely, the Newman State Agreement, and so to be a pre-existing right-based act.

968 Section 24ID provides for the effect of Subdiv I applying to such an act. Section 24ID(1) relevantly provides as follows:

> (1) If this Subdivision applies to a future act:
> (a) subject to Subdivision P (which deals with the right to negotiate), the act is valid; and
> Note: Subdivision P applies only to certain renewals of mining leases etc.: see subsections 26(1A) and 26D(1).
> (b) if the act consists of the grant of a freehold estate, or the conferral of a right of exclusive possession, over particular land or waters—the act extinguishes any native title in relation to the land or waters; and
> Note: The only acts to which this paragraph applies are certain acts covered by section 24IB.
> (c) in any other case—the non extinguishment principle applies to the act; and
> (d) in any case—the native title holders are entitled to compensation for the

act in accordance with Division 5.

969 The State notes the proposal for the tenure was submitted under cl 20(3) of the Newman State Agreement in December 2009, and was approved by the Minister for State Development by letter dated 10 December 2009.

970 In submitting that the future act here in question is a validated pre-existing rights-based act under s 24IB, the State contends that the circumstances are not unlike those that prevailed in *Daniel v Western Australia* [2004] FCA 1388; (2004) 212 ALR 51 (***Daniel 2004***) where Nicholson J held that a State agreement ratified by the *North-West Gas Development (Woodside) Agreement Act 1979* (WA) had created a legally enforceable right for the purposes of s 228(3)(b)(i) – a provision which in material respects is identical to s 24IB. In that case, the proponent submitted a proposal for "housing and accommodation" under cl 9 of the relevant State agreement on 21 September 2000. It proposed the grant of a lease. The Minister advised in accordance with cl 8 of the Agreement that he approved the proposal on or about 8 November 2000 and the lease was granted on 23 April 2002. Nicholson J held that the conclusion of the agreement on 27 November 1979 caused it to fall within s 228(3)(b)(i). He found it was the agreement which created the legally enforceable right for the purposes of the provision. His Honour considered that the legally enforceable right existed because cll 9 and 19 imposed mandatory obligations on the State to grant tenure when requested and the Minister did not have a discretion to refuse tenure in accordance with approved proposals.

971 In this case, particular attention is paid by the parties to the terms of cl 8 of the Newman State Agreement. The State says it emphasises the obligation of the Minister to grant the miscellaneous licence. The claimants, however, say that the Minister retains a discretion and is under no obligation to issue the tenure.

972 In my view, the terms of cl 8(1)(b) oblige the State to provide the appropriate tenure, including the miscellaneous licence, in circumstances where a proposal has been finally approved or determined under cl 6. Under cl 6(1), within two months of receiving a proposal the Minister is required to give notice of approval or any alterations or conditions desired. The company could then elect to arbitrate any dispute about the Minister's desired changes to the submitted proposals. If the matter went to arbitration and the award was against the Minister's decision, the award took effect as if it were an approval given by the Minister. If

the award went against the company, it could elect to satisfy the Minister of the matters the subject of the award and obtain an approval or terminate the State Agreement, pursuant to cl 6(1).

973 In circumstances where the first option, the approval of proposal option, applies, it seems to me that the Minister was effectively obliged to grant the requested tenure. The fact that the tenure issued must be "reasonable having regard to the requirements of the Company" does not seem to me to introduce any discretionary elements into the tenure granting process such that there can be any real doubt that the company is entitled to press for the requested tenure as a matter of contractual obligation.

974 In those circumstances I do not think it is necessary to consider whether cl 20(3) should be construed in ways that also suggest that the company is entitled to have tenure such as the miscellaneous licence through processes that allow for variations of proposals.

975 In my view, the company at material times had a legally enforceable right to obtain tenures in accordance with approved proposals. That right arose when the Newman State Agreement was concluded on 26 August 1964. In this case a proposal was submitted and approved. It resulted in L45/147. In those circumstances, in my view, L45/147 was issued in exercise of a legally enforceable right created by an act done before 23 December 1996 that is valid (there being no challenge by the claimants to the validity of the Newman State Agreement).

976 In those circumstances, I do not find it necessary to consider whether it could also be said that the grant of a miscellaneous licence was an act done in good faith to give effect to or otherwise because of an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996 and of which there is written evidence created about the relevant time. As an aside, it is difficult to see how the terms of the Newman State Agreement could properly be categorised as an "offer" or an "arrangement or undertaking", although possibly it might be called a "commitment" given its contractual nature. The issuing of the tenure could then be seen to have occurred "because of" that commitment, although it might not necessarily have been done in order to give effect to it. But, as I say, the consideration of the application of s 24IB(b) is in the circumstances redundant given my finding that s 24IB(a) applies in the circumstances.

977 The next question that relates to the application of s 24ID(1)(a) concerns Subdiv P. By that provision, if Subdiv I applies to the miscellaneous licence, which I have found it does, then by para (a), "subject to Subdivision P (which deals with the right to negotiate), the act is valid".

978 Subdivision P by s 26 applies to a future act in a number of circumstances, which include by subs (1)(c)(i):

> (c) subject to this section, the act is:
>
> (i) the creation of a right to mine, whether by the grant of a mining lease or otherwise, except one created for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining…

979 The State contends that the ordinary meaning of the expression "a right to mine" does not comprehend the grant of a miscellaneous licence for the purpose of planning, design, construction, commissioning, operation and maintenance of a railway and associated infrastructure. The meaning of "mine" as defined in the NTA and as it should generally be understood in the context of the NTA is further discussed below, which discussion is also relevant here.

980 It may be accepted that in particular statutory contexts the concept of "mining" may mean more than the singular physical act of winning a mineral from the ground, or the like. In that regard, as the claimants emphasise, in *Regional Director of Customs (WA) v Dampier Salt (Operations) Pty Ltd* (1996) 67 FCR 108 the Full Court of this Court concluded that the term "mining operations" in a statute could encompass activities including transportation up to the point where a saleable product, which is the object of mining operations, is produced. To similar effect in *BHP Billiton v MIB Claimants* the Mining Warden held that a miscellaneous licence was directly concerned with mining operations on the basis that the railway was for the purpose of transporting ore from the mine for further processing and stockpiling at the port. See also *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45; (2008) 236 CLR 145 (***BHP Billiton v National Competition Council***) at [5]-[7].

981 The difficulty with the claimant's argument is that the expression "mining operations" which was given that broad construction is different from the expression "the creation of a right to mine, whether by the grant of a mining lease or otherwise". The primary focus is on

the words "right to mine". Does L45/147 create a right to mine? On the face of it, as the respondents contend, it does not. Undoubtedly it is a tenure that is granted to facilitate the transportation of product to port for sale, and may be part of a mining operation as defined generally or for the purposes of the NTA. It may also be an "infrastructure facility … associated with mining". In that regard, "infrastructure facility" is defined by s 253 NTA to include "a road, railway, bridge or other transport facility". The railway falls within that definition and would appear to be associated with mining on any view. The tenure would also appear to have been granted for the "sole purpose" of the construction of the railway associated with mining.

982 In the result, however, it seems to me to involve impermissible reasoning to say that, because the grant of the right to construct the railway is associated with mining, it is therefore "mining". Unless one can construe the words of subs (1)(c)(i) are to be taken to mean that a grant *not* for the sole purposes of construction of a tenure infrastructure associated with mining, involves "the creation of a right to mine", which I do not think one can in the overall context of the NTA, then the claimants' argument must fail.

983 In any event, even if it is possible to treat the grant of L45/147 as the creation of a right to mine comprehended by s 26(1)(c)(i), it is difficult to see why the exception should not apply in that the grant would appear to be "one created for the sole purpose of the construction of an infrastructure facility … associated with mining".

984 I would find therefore that the grant of L45/147 was not affected by Subdiv P. As a result, the grant would be valid under s 24ID(1)(a) NTA if it were a future act.

985 ***Whether Subdiv M applied***: Even if the claimants were right about the application of Subdiv P to the future act this does not necessarily mean that the grant of the miscellaneous licence would not be valid under Subdiv I. It might be that Subdiv P can be said to apply but there can be no doubt that Subdiv M did apply because, I accept, the relevant act fell within s 24MD(6B)(b). As a consequence, the "other consequences" set out in subs (6B) would apply, including (f) requiring the hearing of an objection by an independent person or body; something not here done.

986 ***Failure to comply with s 24MD(6B) issue***: The respondents place particular emphasis on the fact that in *Lardil Peoples v Queensland* [2001] FCA 414; (2001) 108 FCR 453 (***Lardil FC***) the Full Court found that a failure to satisfy the right to negotiate did not result in the invalidity of the act in question. The claimants, however, seek to distinguish *Lardil FC* in that regard saying that it does not apply in circumstances such as the present.

987 I accept the submissions of the respondents that in *Lardil FC* at [58], French J appears to have accepted that the subdivisions which provide for prior notification to registered native title claims and others do not appear to condition the validity of the future acts to which they apply upon compliance of that requirement. Dowsett J (at [117]) is to similar effect. Additionally, in *Daniel 2004* Nicholson J (at [63]) proceeded on a similar understanding.

988 As French J noted in his judgment, s 24ID(3) imposes a particular notification requirement in respect of a future act to which subs (1)(b) applied; although that is not relevant here. By subs (3) it would appear there is a mandatory notification procedure. There is no similar mandatory notification procedure provided in respect of other acts to which Subdiv I applies.

989 Thus, as French J found, Subdiv C to M inclusive of Div 3 do not impose procedural requirements that condition validity (save, one may suggest, for a provision such as s 24ID(3)). His Honour considered Subdiv P to be of a different character because certain provisions state that non-compliance will result in invalidity: see s 25(4) and s 28(1). Dowsett J found to similar effect (at [117]). As the Full Court recognised, Subdiv M, for example, could have contained such provisions but does not. Nor does Subdiv I.

990 In these circumstances, I accept that authority supports the view that failure to comply with s 24MD(6B)(f) cannot invalidate the grant of tenure in this case, as contended by the claimants.

991 ***Mining Warden's "condition"***: As to the claimants' further submission that the miscellaneous licence should be considered invalid because a condition attached to its grant by the Mining Warden was designed to ensure compliance with the NTA, I accept the submission of the State and the BHP Billiton respondents, in effect, that such a condition was

redundant and had no effect at law. The Mining Warden did not have the relevant power to impose such a "condition" (if it can properly be characterised as such) under the Act. Its recording on the grant of the miscellaneous licence is, in my view, of no legal effect although it may have some practical usefulness in that it was designed to remind parties of their obligations more generally; and I suspect that probably was its purpose.

992 ***Section 116 Mining Act 1978 issue***: In these circumstances, I find no need to consider the further submission on behalf of the BHP Billiton respondents that to the extent that the claimants assert invalidity of State law, it is overcome by s 116 *Mining Act 1978*.

993 ***Finding***: The Court finds that the grant of L45/147 is not a future act; alternatively, it was an act within Subdiv I but not Subdiv P; to which Subdiv M applies in any event; and no question of invalidity arises by respect of non-compliance with Subdiv P (right to negotiate) or by reason of non-compliance with the Mining Warden's "condition" of its grant.

BHP's Yandi rail leases K843924 and K843925

994 ***Background***: The rail leases are in common form. Each was granted on 3 February 2009 for a term commencing on 1 January 2007 and expiring on 3 September 2012, with provision for two further 21 year terms. Extensions of the terms were registered on 4 November 2011. The claimants challenge the validity of the rail leases.

995 The leases contain an acknowledgement that the lessee has been in occupation of the land from 5 June 1991 (cl 6.1(c)).

996 Under the Marillana State Agreement the lessee applied for the grant of a lease of the land for the permitted use in accordance with the approved proposals and the Marillana State Agreement.

997 The leases define "Approved Proposals" to mean the proposal or proposals approved by the relevant Minister under the Marillana State Agreement. The *Iron Ore (Marillana Creek) Agreement Act 1991* (WA) (***Marillana Agreement Act***) commenced on 27 May 1991. It ratifies, and authorises the implementation of, the Marillana State Agreement and the First, Second and Third Variation Agreements. Power to make lands available for the mining operation is conferred by cl 22(1) of the Marillana State Agreement, which reads:

The State shall in accordance with the Company's approved proposals grant to the Company … for such periods and on such terms and conditions including rentals and renewal rights as shall be reasonable having regard to the requirements of the Company, leases and where applicable licences easements and rights of way for all or any purposes of the Company's mining activities hereunder including any of the following namely … railspur … power transmission lines, radio and communication sites…

998 By cl 22(2)(f), the *Land Act 1933* is deemed to be modified by:

…the inclusion of a power to grant leases or licences for terms or periods and on such terms and conditions (including renewal rights) and in forms consistent with the provision of this Agreement in lieu of the terms or periods, the terms and conditions and the forms referred to in the Land Act.

999 An "approved proposal" means a proposal approved or determined under the Marillana State Agreement (cl 1).

1000 By cl 7:

(1) Subject to and in accordance with the [*Environmental Protection Act 1986* (WA)] and any approvals and licences required under that Act the Company shall on or before 31 October 1991 and subject to the provisions of this Agreement submit to the Minister to the fullest extent reasonably practicable its detailed proposals … with respect to the production up to 5,500,000 tonnes of iron ore per annum for transportation from the land to be the subject of the mining lease and the transport and shipment of iron ore produced which proposals shall make … provision (as the case may be) of each of the following matters, namely –

(a) the mining and recovery of iron ore…

…

(g) transportation of iron ore by rail;

…

(j) any other works, services or facilities desired by the Company;

…

(l) any leases, licences or other tenures of land required from the State; and

(m) an environmental management programme…

(2) Each of the proposals pursuant to subclause (1) may with the approval of the Minister or if so required by him be submitted separately and in any order as to the matter or matters mentioned in one or more of the paragraphs (a) to (m) of subclause (1).

1001 Clause 8(1) relevantly provides that:

Subject to the [*Environmental Protection Act* 1986 (WA)] in respect of each proposal pursuant to subclause (1) of Clause 7 the Minister shall –

(a) approve of the proposal without qualification or reservation; or

(b) defer consideration of or a decision upon the same until such time as

> the Company submits a further proposal or proposals in respect of some other of the matters mentioned in subclause (1) of Clause 7 not covered by the said proposal; or
>
> (c) require as a condition precedent to the giving of his approval to the said proposal that the Company make such alteration thereto or comply with such conditions in respect thereto as he … thinks reasonable…
>
> PROVIDED ALWAYS that where implementation of any proposals hereunder have been approved pursuant to the [*Environmental Protection Act 1986* (WA)] subject to conditions or procedures, any approval or decision of the Minister under this Clause shall if the case so requires incorporate a requirement that the Company make such alterations to the proposals as may be necessary to make them accord with those conditions or procedures.

1002 A decision by the Minister to defer or impose conditions may be submitted to arbitration (subcl 8(4)). If the dispute is decided in favour of the company, the arbitral award takes effect as an approval by the Minister (subcl 8(5)(b)). In the event of non-approval by the Minister, or an arbitral award adverse to the company, the Marillana State Agreement shall cease and determine (subcl 8(5)(a) and (6)). Subclause 8(7) provides that;

> Subject to and in accordance with the [*Environmental Protection Act 1986* (WA)] and any approvals and licences required under that Act the Company shall implement the approved proposals in accordance with the terms thereof.

1003 The Marillana State Agreement provides for additional proposals (cl 10), limits on mining (cl 11), and the grant of the mining lease (cl 12). Those clauses are considered further below in the context of the grant of the Yandi mining lease and subsequent approvals to expand the mine. Clause 11 appears to anticipate the existence of a lease for the rail spur. It provides that any approved increase on mining limits cannot require variations of the term of the mining lease or the rail spur lease or rental thereunder without the consent of the company (cl 11(2)(b)(i)).

1004 Clause 23 makes provision for the construction and use of the rail spur. Subclause 23(1) provides that:

> Subject to and in accordance with approved proposals the Company shall … construct along the route specified in the approval proposals … a standard gauge railway specified in the approved proposals connecting the mining lease to the Newman-Port Hedland railway and shall also construct *inter alia* any necessary deviations loops spurs sidings crossings points bridges signalling switches and other works…

1005 On the cessation or determination of the Marillana State Agreement, improvements erected on any land then occupied by the company under the mining lease or any other lease, licence, easement, grant or other title become the property of the State (cl 35(2)). The State also has the option to purchase in situ fixed or movable plant and equipment (cl 35(3)).

1006 ***Issues***: The claimants' argument against the validity of K843924 and K843925 (the "Yandi Rail Leases") identify the issues and may be stated as follows:

(1) The material does not reveal the existence of an approved proposal within cl 7(1)(l) of the Marillana State Agreement. As such, it cannot be concluded that the condition precedent to the grant of the leases in cll 7, 8 and 22 of the Marillana State Agreement was satisfied.

(2) As a result, the grant of the leases were neither a past act covered by s 228(3)(b) NTA or a pre-existing right-based act (being a future act) within s 24IB NTA.

(3) If the grant of lease was a past act, each lease is a mining lease within the definition of category C past act, and outside of categories A and B.

(4) If the grant of each lease was a future act covered by s 24IB, it cannot be concluded that the leases confer rights of exclusive possession that engage the extinguishment provisions of s 24ID(1)(b) NTA.

(5) If Subdiv M applies, each grant would have to satisfy the freehold test in s 24MB NTA. If each grant does pass the freehold test, the grants were still invalid due to the State's failure to comply with the procedural requirements in s 24MD(6A) and (6B), as per the claimants' submissions in relation to miscellaneous licence L45/147 discussed above.

(6) If Subdiv M does not apply, each grant is invalid to the extent it affects native title (s 24OA).

1007 In response, the State submits that:

(1) The grant was valid as the Marillana State Agreement requirements were satisfied. It can readily be inferred from the "1991 Proposal" (as defined in State's submissions) that the company required appropriate tenure for the rail spur line and repeater station, and that the tenure required was a special lease (as specifically referred to in the 1991 Proposal).

(2) Each grant was a past act, as the Marillana State Agreement created either:

(a) a legally enforceable right; or

(b) a commitment, arrangement or undertaking,

for the purposes of s 228(3)(b) NTA, the grant wholly extinguishing native title in accordance with *Daniel 2004.*

(3) If the grants were past acts, they were category A past acts as they were commercial leases, and their effect was to wholly extinguish native title.

(4) Alternatively, they were category B past acts as they were leases (other than mining leases) conferring a right of exclusive possession which wholly extinguished native title.

(5) If the grants were not past acts, they were pre-existing right-based acts within the meaning of s 24IB NTA that conferred a right of exclusive possession which wholly extinguished native title.

1008 The BHP Billiton respondents' submissions may be summarised as follows:

(1) The claimants' principal submission, namely that the material does not reveal the existence of an approved proposal within cl 7(1)(l) of the Marillana State Agreement for the grant of the leases, misconceives the nature of "Approved Proposals" under the Marillana State Agreement and the relationship between cll 7, 8 and 22 of that Agreement.

(2) The proper interpretation of the requirements for matters such as environmental approvals is that they are merely contractual preconditions to the operation of the legally enforceable right of the BHP Billiton respondents to the grant of the rail leases. Those environmental approvals (which as the State points out had all been obtained prior to the making of the Marillana State Agreement) do not change the character of the company's rights under the Marillana State Agreement or their characterisation as a legally enforceable right within the meaning of s 228(3)(b)(i) NTA.

(3) Even if the rail leases are not commercial leases, they are plainly general leases that wholly extinguish native title and are therefore category B past acts.

(4) In that regard, the rail leases are clearly not "mining leases" within category C past acts.

1009 ***Whether an approved proposal is revealed***: The claimants contend the material does not reveal the existence of an approved proposal within cl 7(1)(l) of the Marillana State Agreement relating to the grant of the rail leases of a kind mentioned in recital A of the leases and so it cannot be concluded that the condition precedent to the grant of the leases in clauses 7, 8 and 22 of the Marillana State Agreement was satisfied.

1010 Attention is drawn to annexures MJF3 and MJF4 of an affidavit of Michael John Fitzpatrick, land tenure and approvals manager at BHP Billiton Iron Ore Pty Ltd, which are said to identify proposals submitted in March 1991 and approved 5 June 1991 for items covered by paras (a), (g), (h), (i), (j), (l) and (m) of cl 7(1) of the Marillana State Agreement. They include a project description for transportation of iron ore by rail. A November 1995 proposal submitted and approved on 5 February 1996 includes a project description for the rail spur line.

1011 The claimants submit, however, they do not deal with the requirements of cl 7(1)(l) in stipulating as contemplated by cl 11(2)(b)(i) that the lease was required from the State for the rail spur and there is no evidence of a later proposal. The claimants submit that in circumstances where the leases came into existence some 18 years ago and what is said to be the process that pre-conditioned their grant and the processes used and relied upon by the State and BHP Billiton make no mention of the grant of the leases, the Court ought not be satisfied that the conditions stipulated have been met.

1012 In the result, the claimants say it could not be said that the grant of the rail leases involves a past act covered by s 228(3)(b) NTA, or a pre-existing right-based future act within s 24IB. Absent a submission of a proposal for their grant and approval, the processes by which the interests in issue might come into existence cannot be engaged. It cannot be said there is an exercise giving effect to some earlier right or arrangement (or at least no evidence of those things).

1013 Additionally, the claimants say cl 8 provides a further obstacle in denying the existence or arrangement because of the presence of veto from the Minister responsible for the *Environmental Protection Act 1986* (WA) (***Environmental Protection Act***) to decide

whether or not a proposal might proceed, having regard to its environmental effects. That means a proposal may be refused with the result that the scheme is outside that considered in *Daniel 2004* at [48].

1014 The State submit that nothing in cl 7 required a proposal to be submitted in respect of any leases, licences or other tenures required from the State. Rather, it was optional for the company to submit a proposal of this nature, as indicated by the use of the word "or" before the specific enumerated proposals in cl 7.

1015 The State says the failure to include a proposal in accordance with cl 7(1)(l) did not disentitle the company to appropriate tenure in accordance with its proposals. The scheme of the agreement was that, once proposals were approved, "reasonable" tenure would be granted on request "having regard to the requirements of the Company", as provided for by cl 22(1). This indicates an intention that the precise nature of the tenure required was to be decided at the time of request by the company, not necessarily at the time of submission of the proposals.

1016 The State thus submit that it can be readily inferred from the 1991 Proposal that the company required appropriate tenure for the rail spur line and repeater station, and that the tenure required was a special lease.

1017 In any event, the State submits that the 1991 Proposal did in fact specifically refer to the need for a special lease for the rail spur. Accordingly, the grant of the leases was in accordance with the approved proposals.

1018 The BHP Billiton respondents similarly submit that there is no warrant for a construction of the Marillana State Agreement, having regard to the text and context of the Agreement itself, that requires that the approval proposals themselves specifically refer to and seek the specific tenure required by the company at that point, failing which the exercise of those rights may subsequently be declared to be "invalid".

1019 They submit that it will often be the case that certain activities proposed in a detailed proposal (such as the construction and operation of a railway over a particular route) will necessarily require the company to have granted to it security of land tenure. Clause 22 is

intended therefore to be the mechanism by which the company has the right to the grant of tenure it requires in order to implement the approved proposals.

1020 These respondents accept that the contents of the approved proposals will naturally determine what is "reasonable tenure" but submit it is cl 22 and not the content of the approved proposals themselves that ultimately give the right to reasonable tenure.

1021 I generally accept these submissions made on behalf of the relevant respondents. In particular I accept the submission made on behalf of the BHP Billiton respondents that, were the claimants' construction of the Marillana State Agreement correct, such that it was necessary for the "Approved Proposals" to be for the grant of tenure per se, rather than the carrying out of activities, there would be no reason for cl 22 to refer to "reasonable" tenure or the "requirements of the company". Those words would, in such a circumstance, be wholly unnecessary because the approved proposals would, by definition, be required to specify the tenure to be granted.

1022 I am inclined, therefore, to accept the submission made on behalf of the BHP Billiton respondents that it is not necessary to infer that the tenure has been identified but rather that cl 22 of the Marillana State Agreement facilitates the specification of what tenure is appropriate at a later point.

1023 I reject therefore the first submission made on behalf of the claimants that the material does not reveal the existence of an approved proposal because it did not specify the tenure required. In those circumstances the claimants' submission that the grant of the rail leases was therefore not a past act covered by s 228(3)(b) or a pre-existing right-based future act within s 24IB is rejected.

1024 ***Whether the grant of a lease was a past act covered by s 228(3)(b) NTA or a pre-existing rights-based act (being a future act within s 24IB NTA)***: The claimants submit that if it is concluded that the grant of the rail leases was a past act within s 228(3), each rail lease is a mining lease within category C and outside categories A and B: see s 229 (category A), s 230 (category B), s 246 (commercial lease) NTA.

1025 The claimants submit that each lease permits the lessee to use the land or waters "solely or primarily for mining", an expression, as noted above, in relation to the exploration licence L45/147, that depending upon context that may possibly encompass infrastructure.

1026 Thus, the claimants submit the context of the NTA confirms the ordinary understanding that mining includes activities that relate to ancillary elements in the conduct of mining operations, such as the provision of infrastructure for transportation. In this regard, *Dampier Salt (Operations) Pty Ltd v Collector of Customs* (1995) 133 ALR 502 is relied on at 509-511. The claimants submit there can be no question the rail is connected with the mining operations and refer to decisions already referred to above, namely *BHP Billiton v MIB Claimants* and *BHP Billiton v National Competition Council*. Thus, in this instance, the rail leases are said to fall within the definition of a mining lease set out at s 245 NTA in that it is a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining. It follows, it is submitted, that it cannot be a category A or category B past act as defined and it must be a category C past act as defined.

1027 The State, however, submits that each act of grant of a rail lease in this case cannot be a past act unless it is shown that native title existed at the time of the relevant act and the act would be invalid due to the operation of the RDA, particular s 10(1).

1028 The State submits that given the absence of prior tenure that would have completely extinguished native title it is possible that native title existed over the area of the leases at the time of their grant. I interpolate to say that in light of my findings above concerning native title rights and interest that submission is properly made. Further, as the leases conferred a right of exclusive possession they will extinguish any subsisting native title. As the leases could not be granted over freehold, their effect on native title would be rendered invalid by s 10(1) RDA and so the requirements of s 228(3)(a) NTA are met.

1029 On the face of it, the State's submission concerning satisfaction of the definition of past act to be found in s 228(3)(a) should be accepted, assuming for the moment that each of the rail leases conferred exclusive possession and should in that regard not be treated as if it were a mining lease which, on the authority of *Ward HC*, does not necessarily extinguish all native title.

1030 That being so, for present purposes, the first question is whether the further plank of the definition in s 228(3)(b) is satisfied, in that the act takes place on or after 1 January 1994, as it does in these cases, and takes place either in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; or in giving effect to or otherwise because of an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the relevant time. In this instance, the State contend that the Marillana State Agreement is the source of a legally enforceable right that has given rise to the grant of the rail leases on 3 February 2009 and accordingly the grants are past acts; and past acts that totally extinguish native title in the area of the leases. On both counts, the State relies on *Daniel 2004* as supporting the analysis and the conclusion.

1031 The claimants submit, however, that if the Marillana State Agreement itself is said to be the legally enforceable right, then *Daniel 2004* is to be distinguished and a contrary conclusion must be reached because any obligations under this State Agreement are subject to the *Environmental Protection Act* and so did not confer a legally enforceable right. The claimants submit that the State seeks to overcome that very obstacle by implicitly defining the legally enforceable right as encompassing the Marillana State Agreement as it operates by reference to external facts, namely the approvals actually given under the *Environmental Protection Act*. They submit, however, there is no legitimate reason to have regard to those facts and not the other facts that are preconditions to any legally enforceable right actually arising. They say the other precondition is the making of a proposal for the grant of the special leases.

1032 In broad terms the claimants submit that the Marillana State Agreement does not operate to confer upon the company a legally enforceable right to the grant of the special leases unless and until both a detailed proposal is made for the grant of the special leases *and* any environmental approvals have been obtained, and there is no evidence of those things having occurred before 1 January 1994 (in the case of s 228(3)(b)(i)) or 23 December 1996 in the case of s 24IB(a)).

1033 The State contend, however, that in *Daniel 2004* Nicholson J held that the provisions of the State Agreement gave rise to a legally enforceable right because cl 19 (the equivalent to cl 22 of the Marillana State Agreement) and cl 8 were expressed in mandatory terms such

that it was not the case that the Minister could refuse a proposal or only grant it on very different terms and conditions. The State contend cl 22 in this case is not materially different from that considered in *Daniel 2004*. It is expressed in mandatory terms. It does not refer to the *Environmental Protection Act*. The State points out that cl 8 of the Marillana State Agreement is also in the same terms as the cl 8 considered by his Honour in *Daniel 2004*, though the Minister's duties were subject to the *Environmental Protection Act*.

1034 The State points to the evidence that shows that at the time the Marillana State Agreement had been entered into on 20 December 1990, all the requirements of the *Environmental Protection Act* had been satisfied in respect of all aspects of the proposals at that point, including the rail route and no further approvals were required. Accordingly, it is submitted cl 8 imposed mandatory requirements on the Minister administering the *Marillana Agreement Act* in the same way as that found by Nicholson J in relation to the *North-West Gas Development (Woodside) Agreement Act 1979* (WA).

1035 In my view, the fact that environmental approvals may be required before the leases can be granted does not mean that the reasoning employed by Nicholson J in *Daniel 2004* at [48] and [49] should not be applied here. Indeed, the relevant provisions identified by the State are analogous to those considered by his Honour in *Daniel 2004*. Subject to the proponent of the rail lease proposals obtaining environmental clearance under the *Environmental Protection Act*, it seems to me that the proponent is entitled under the Marillana State Agreement to receive reasonable tenure to carry out the proposed railway development and the Marillana State Agreement provides the legally enforceable right to a grant of the relevant rail leases. In those circumstances, I find that the grants of the rail leases were past acts.

1036 I therefore do not need to consider the application of s 24IB NTA.

1037 ***If the grants of the rail leases were past acts, as found above, whether each is a "mining lease" within the definition of category C past act and outside of categories A and B***: The State contends that the grants of the rail leases, as past acts, were category A past acts because each constituted a commercial lease for the purposes of s 229(3)(a) NTA and accordingly extinguished native title under s 6 TVA.

1038 A commercial lease is defined in s 246(1) NTA as follows:

> A ***commercial lease*** is a lease (other than a mining lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes. The defining of ***agricultural lease***, ***pastoral lease*** and ***residential lease*** in sections 247, 248 and 249 is not intended to limit the coverage of ***commercial lease***.

1039 Two examples of a commercial lease are given in s 246(2):

> (a) construction on land of a building to be used for business or commercial purposes, or of a hotel, motel or tourist resort, is an example of use of the land for business or commercial purposes; and
> (b) use of a building on land for business or commercial purposes, or operation of a hotel, motel or tourist resort on land, is an example of use of the land for business or commercial purposes.

1040 In this case, the "permitted uses" of the leases are as follows:

(1) Lease K843924: "Construction, provision, extension, use, operation and maintenance on the Land of a railway spur line and access roads and for ancillary and incidental purposes thereto in accordance with the Approved Proposals".

(2) Lease K843925: "Construction, provision, extension, use, operation and maintenance on the Land of a communication repeater station and for ancillary and incidental purposes thereto in accordance with the Approved Proposals".

1041 The State notes that in *Daniel 2003(1)* (at [1000]), Nicholson J found that special leases held by Dampier Salt under the *Dampier Solar Salt Agreement Act 1967* (WA) were each commercial leases. One was for a private roadway for conveying salt between the production site and the jetty and the other was for a power transmission line and ancillary works.

1042 His Honour also found that 11 special leases held by Robe River Mining Co Pty Ltd under the *Iron Ore (Robe River) Agreement Act 1964* (WA) were commercial leases under s 23B(2)(c)(iii) NTA (see [1019], [1014] and [1015]). They special leases included leases for construction of radio repeater stations and a railway between Cape Lambert and the mineral lease.

1043 By contrast, his Honour held that Woodside's accommodation lease was not a commercial lease because the provision of accommodation for an expanded construction

workforce, whilst "incidental to achievement of a wider commercial purpose", did not amount to use of the land for "business or commercial purposes" (see *Daniel 2004* at [60]).

1044 The State submits that the accommodation lease in that case may be distinguished from the other leases found to be commercial leases and that in the present case the leases are for infrastructure directly involved in commercial mining operations and are for the same purposes as the leases found in *Daniel 2003(1)* to be commercial leases.

1045 The State further submits that if the leases are not category A past acts, then they are category B past acts, each being a lease that is not a mining lease as provided for by s 230 NTA. In each case the lease conferred a right of exclusive possession wholly inconsistent with native title and extinguished native title. This extinguishment is confirmed by s 8 TVA. The State notes that this would appear to be the basis upon which Nicholson J found that the accommodation lease in *Daniel 2004* extinguished native title, as his Honour found at [68].

1046 The BHP Billiton respondents submit the rail leases are "plainly general leases" that wholly extinguish native title and are therefore category B past acts. In that regard, they refer to *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 (***Goldsworthy***), where the High Court considered a lease granted under s 116 *Land Act 1933* and found that it conferred a right of exclusive possession in relation to the lease that provided for dredging the Port Hedland harbour. They submit the finding in that case applies to the rail leases.

1047 The finding in *Daniel 2003(1)* that certain infrastructure leases including a rail lease should be characterised as a commercial lease is persuasive. In the result, however, it is not something that I need to determine because, even if the rail leases are not category A past acts, they are definitely category B past acts, on the basis submitted by the State and the BHP Billiton respondents – save for the question of whether or not they each constitute a "mining lease" as defined by the NTA, an issue dealt with immediately below.

1048 The question then is in substance whether each of the rail leases is properly characterised as a "mining lease" as defined in the NTA. If it is then, as the submissions of the claimants recognise, it will not be a "commercial lease" or a category A past act, nor will

it be a category B past act. A category C past act is expressly defined by s 231 to be a past act consisting of the grant of a mining lease.

1049 Each of the relevant parties have made submissions concerning the ordinary meaning of the noun or verb "mine" and thus the meaning of the expression "mining" and the proper meaning that should be given to the expression "a mining lease" in the NTA. It is accepted all around that depending on the context a particular word or expression may have a different meaning from one statutory enactment to another.

1050 On the face of it, the expression "a mining lease" has a very particular meaning and role to play under the NTA. Section 245 defines a mining lease as:

> (1) A ***mining lease*** is a lease (other than an agricultural lease, a pastoral lease or a residential lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for mining.

1051 The State and the BHP Billiton respondents say that while the mining leases may have some connection with those tenures under which mining is carried out, the purpose for which the rail leases have been granted and the uses which are permitted cannot be characterised as permits to the lessee to use the land "solely or primarily for mining".

1052 In the event, I accept the submissions made by these respondents.

1053 I accept, therefore, that the expression "mining lease" is limited in the context of the NTA and should reflect the meaning given to the verb "mine" in s 253 NTA. That definition is not comprehensive but simply provides that mine "includes" certain exploration, prospecting, extraction and quarrying activities. That may mean that other activities can be drawn in, but in the circumstances I do not consider that a lease granted in respect of the railway should be included within the concept in this case. The focus of the definition of mine is the physical, primary acts and not associated with activities that facilitate the conduct of a broader "mining operation".

1054 The only respect in which the NTA suggests the meaning of "mine" which goes beyond the physical, primary act, is in the use of the compendious phrase, "the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure

facility … associated with mining" found in s 24MD(6B)(b) and discussed above in relation to L45/147.

1055 While this particular provision – which as noted above is a difficult one to grapple with – might suggest that where an infrastructure facility is associated with mining, then the creation of a right in respect of such construction should be seen as the creation (or variation) of a "right to mine" where that is the sole purpose of the infrastructure, I am rather inclined to treat a provision such as s 24MD(6B)(b) as standing alone and to be interpreted in the particular circumstances of the subdivision of the NTA in which it appears. It is not a provision, in my view, which, in the overall context of the NTA, suggests that every time an infrastructure facility can be shown to be solely or primarily associated with mining that the tenure pursuant to which it is constructed should also be treated as a "right to mine" or indeed "mining" itself and so involve the grant of a "mining lease".

1056 As the BHP Billiton respondents also point out the phrase used in s 24MD(6B)(b) draws a distinction between "mining" simpliciter and activities "associated with mining", which tends to confirm the plain and ordinary meaning of the word "mining".

1057 In these circumstances, I find that the relevant rail leases do not fall within the term "mining lease" used in the s 230 definition of a category B past act.

1058 Accordingly, I find that each of the rail leases is a category B past act.

1059 I also find that each of the rail leases granted exclusive possession on the following basis:

- They are not mining leases as defined.
- Each was granted under s 79 *Land Administration Act 1997* and should be treated as common law leases to be construed on their terms.
- Each lease is of land suggesting a right of exclusive possession.
- Each conveys a right of quiet enjoyment, consistent with exclusive possession; as discussed in *Goldsworthy* at 214 (Mason J).

- None of the reservations of the lease suggest that the exclusive possession was for purposes limited in a way that are not necessarily intended to extinguish native title.

1060 In these circumstances I find that native title is wholly extinguished in the area of each of those leases.

BHP's Yandi mining lease AM70/270

1061 ***Issues***: The issues may be identified by the following propositions advanced by the claimants:

(1) That the grant of BHP's Yandi mining lease AM70/270 was valid because it did not extinguish any native title to any greater extent than the pre-existing pastoral leases that affected the subject land as it did not confer any rights or interests that were inconsistent with the surviving native title rights.

(2) Alternatively, if the mining lease would (apart from the RDA) have extinguished some incidents of native title then its grant was a category C past act to which the non-extinguishment principle applies.

(3) The content of the rights granted under the mining lease must be understood by reference to the tonnage to be produced in the areas to be mined as identified in the original approved proposal. Thus, when the State approves additional proposals that permit mining on new areas they separately affect native title in the sense referred to in s 227 NTA.

(4) As a result, approved proposals were:

(i) If approved prior to 1 January 1994, validated as category C past acts to which the non-extinguishment principle applies;

(ii) If approved between 1 January 1994 and 23 December 1996, category C intermediate period acts; and

(iii) If approved after 23 December 1996, invalid future acts.

(5) That as to the content of the proposed determination of native title and any declaratory relief in relation to the validity of post-23 December 1996 approved proposals and mining operations, this is an issue that should be the subject of further submissions in relation to any determination made.

1062 The claimants do not contend that the mining lease is invalid.

1063 The State and the BHP Billiton respondents make submissions to the following effect:

(1) That the mining lease is valid but has brought about further extinguishment than that effected by the underlying prior pastoral leases, a submission to be approached on common law principles.

(2) If the arguments of the State and the BHP Billiton respondents are not accepted in that regard, the effect of a validated act is that the non-extinguishment principle applies.

(3) The mining lease was granted pursuant to the Marillana State Agreement which contains contractual requirements that the BHP Billiton respondents obtain permissions and approvals to conduct certain activities pursuant to the mining lease. The approved proposals only regulate activities done pursuant to the mining lease as between the State and the relevant joint venturers and do not expand the rights granted pursuant to the mining lease.

(4) In that sense, the requirement for the approval of proposals is properly understood as being a condition on the exercise of the joint venturers' contractual rights granted under the mining lease, as adverted to by s 44H NTA. They do not affect native title and the future act and past act regimes do not fall to be considered.

1064 ***Whether the grant of the mining lease was valid because it did not effect any further extinguishment***: The claimants' primary submission is that the grant of the mining lease is valid because it did not confer any rights that were inconsistent with those native title rights that survived the grant of earlier tenure, such as pre-existing pastoral leases, and so effected no further extinguishment.

1065 The State and the BHP Billiton respondents contend that the mining lease is valid but has brought about further extinguishment, having regard to common law principles.

1066 The claimants, relying on *Ward HC* (at [321]) contend that the mining lease here in question is indistinguishable in substance from the standard mining lease granted under the *Mining Act 1978* that was held not to effect any relevant extinguishment of native title, apart from the right to control access to traditional territory. Thus, the claimants contend, in circumstances where prior pastoral leases had already extinguished the native title right to

control access, consistent with the other findings in *Ward HC* in relation to the extinguishing effect of a pastoral lease, the grant of the mining lease effected no additional extinguishment.

1067 The claimants' submission in this regard directly conflicts with the State's competing submission that further extinguishment was effected, additional to that effected by the pastoral leases, by the grants here in question.

1068 What is not entirely clear from the State's submissions is whether the State contends that there has been complete extinguishment effected by the mining lease, but that appears to be the tenor of its submissions.

1069 The State first draws attention to *Ward HC*. The State takes the view that whilst the Court ruled on the extinguishing effect of a number of grants of interests including mining leases granted under the *Mining Act 1978*, it was unable finally to rule on the extent of extinguishment because the Courts below had not enumerated the rights and interests that comprised the bundle of native title rights found to exist. Nonetheless the State acknowledge that the majority concluded that on the available facts it could not be said that the grant of the Argyle mining lease under the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA) and *Mining Act 1978*, were necessarily inconsistent with the continued existence of all native title rights and interests (*Ward HC* at [296], [308], [333]). What was clearly accepted was that the native title right to control access to the relevant land was extinguished.

1070 The State then draws attention to *Daniel 2003(1)* which addressed in a preliminary way the extinguishing effect of the grant of mineral leases under the *Mining Act 1904* and various State Agreement Acts including the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) and *Dampier Solar Salt Industry Agreement Act 1967* (WA). Nicholson J (at [789]) considered that the mineral leases under the *Mining Act 1904* were not distinguishable from the mining leases in *Ward HC*. However, his Honour considered that not only was the right to control access extinguished but that access in terms of remaining on the land, ritual and ceremony, camping in terms of living on the land and cooking and lighting fires were also extinguished, and that the extinguishment was in relation of the whole of the leased area, not just those parts where development had occurred or infrastructure installed. His Honour also made similar findings in relation to mineral lease ML4SA, granted pursuant to the

Mining Act 1904 and the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA). Nonetheless, the State, for reasons concerning the strength of evidence before his Honour, consider the findings made in respect of ML4SA not to be of "compelling significance". Accordingly, I will not further regard those latter findings.

1071 The State also draws attention to the decision in *Brown v Western Australia (No 2)* [2010] FCA 498; (2010) 268 ALR 149 (***Brown (No 2)***). It notes Bennett J, in respect of the grant of mineral leases under the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA), held that despite the extensive rights given to the joint venturers, there was no necessary inconsistency between those rights and existing native title rights and interests. However, having regard to the approach taken to development acts under pastoral leases in *De Rose (No 2)* her Honour considered that where development had occurred or infrastructure installed pursuant to those rights, complete extinguishment had occurred at that point. The State respectfully submits that this Court should not follow *Brown (No 2)* in this latter regard and should also not follow the reasoning in *De Rose (No 2)*.

1072 The State submits that when one reads the terms of the relevant grant in this case and looks at the actual usage effected, the conclusion should be that there has been a total extinguishment of native title and, in this sense, the finding made in *Daniel 2003(1)* in respect of mineral lease 253SA granted under the *Mining Act 1904* and the *Dampier Solar Salt Industry Agreement Act 1967* (WA) to this effect, should be adopted and applied here.

1073 In my view, the factual circumstances that govern the Marillana State Agreement and the mining lease here in question are entirely different from the factual circumstances that apparently led Nicholson J in *Daniel 2003(1)* to consider that mineral lease 253SA at the time of grant effected total extinguishment. As the submissions of the State indicate, his Honour conducted a site inspection and apparently came to the view that, as at the time of grant, questions of extinguishment should be informed by evidence of usage. That decision stands alone in large part from all the other authorities, and especially from *Ward HC*.

1074 There is nothing in the terms of the Marillana State Agreement and the mining lease here in question to distinguish it from the findings made in *Ward HC* in respect of the Argyle State Agreement, nor from those primarily made by Bennett J in *Brown (No 2)* concerning

the Goldsworthy State Agreement and the mining leases granted thereunder respectively. They do not create rights that are necessarily inconsistent with all native title.

1075 Additionally, having regard to the decision in *Brown FC* (which, as explained above, I consider should be applied here), there is no reason to consider that the actual usage subsequently effected in the present case should inform the question of extinguishment. The most that can be said is that, while the rights given to the joint venturers under the Marillana State Agreement and the mining lease subsist and are exercised, the rights of the joint venturers prevail over those of the native title holders. I would therefore not find, as Nicholson J did in *Daniel 2003(1)* that any particular native title rights were extinguished.

1076 It may also be noted, as the claimants point out, that while in *Daniel 2003(1)* (at [741] and [789]) Nicholson J considered the extent of extinguishment of non-exclusive rights by the grant of mineral leases, his Honour reconsidered the position in *Daniel 2003(2)* and held that there was no inconsistency between mineral leases and other mining tenements and the native title rights to remain and live, engage in ceremony and ritual, and cook on land. The result was no extinguishment of native title by mining tenements other than a right to control access.

1077 In my view, the primary submission of the claimants should be upheld. On the grant of the mining lease here in question there is no necessary inconsistency with native title rights subsisting at the time of its grant. Native title rights of the type here claimed of a non-exclusive nature as found above, including the rights to hunt, gather, conduct ceremonies, were not necessarily extinguished. As a result, on the grant of AM70/270 there was no extinguishment effected additional to that effected by prior pastoral leases.

1078 In that event, the grant of AM70/270 would appear to be a validated act to which the non-extinguishment principle applies. I will hear from the parties as to the appropriate terms of the determination in light of this finding.

1079 ***Alternatively, whether the mining lease would (apart from the RDA) have extinguished some native title so making its grant a category C past act to which the non-extinguishment principle applies***: I should also deal with the contentions made in the event I had found AM70/270 effected additional extinguishment as the relevant respondents

contended. The claimants say alternatively, that if the Yandi mining lease would, apart from the RDA, have extinguished some incidents of native title, then its grant and its subsequent approval pre-1 January 1994 was a category C past act to which the non-extinguishment principle applies.

1080 Section 228(2)(a)(ii) and (b) NTA apply to the mining lease. This is because the grant of the mining lease was at a time before 1 January 1994 and because, as found above, native title rights existed in relation to the land the subject of the mining lease when the grant took place.

1081 The question arises under para (b) then as to whether, apart from the NTA, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist. In this regard the parties agree that the question is whether the RDA would have applied to the grant to make it invalid on the basis that native title rights and interests were affected.

1082 In this regard, the parties particularly focus on authorities construing the effect s 10 RDA, including *Gerhardy*, *Ward HC* and *James FC*.

1083 The State contends that reading *Ward HC* and *James FC* together the position with respect to a mining lease is as follows:

(1) When considering the extinguishment of a native title right to control access to land, inequality in the enjoyment of the right to own and inherit property operates to invalidate the mining lease, as explained in *James FC* at [42]-[55]. This is because only the native title right to control is extinguished while any non-native title right to control access is merely suspended.

(2) When considering the extinguishment of non-exclusive native title rights (for example, rights to access) by a mining lease there is no inequality in the enjoyment of the right to own and inherit property other than the absence of compensation, as to which see *James FC* at [33], [34] and [51]. That is, some non-exclusive native title rights to use and enjoy are extinguished subject to payment of compensation, while any non-native title rights to use are suspended for the duration of the lease.

1084 The claimants say the State misreads *James FC*. In *James FC* (at [52]-[53]) the Court explained that *Ward HC* addressed only the situation where there was no finding of any native title right having been extinguished (or which would, but for the RDA, be extinguished) as a result of a grant of a mining lease. The majority in the High Court therefore dealt with the mining lease in that case on the basis that it was *Gerhardy* category 1 situation. That conclusion is correct because otherwise the decision in *Ward HC* in relation to the RDA and mining leases would be inconsistent with other parts of the same judgment, including the *Native Title Act Case*. *James FC* cannot be limited to extinguishment of a right to control access by the grant of a mining lease. It is the fact of extinguishment of any native title right in circumstances where there is no extinguishment of non-native title rights that invokes a *Gerhardy* category 2 situation and outcome.

1085 In my view, *James FC* stands for the proposition that *Ward HC*, insofar as it dealt with mining leases, dealt with a particular factual scenario, including assumptions as to what, if any, native title was extinguished by the grant of the mining leases in question, as a *Gerhardy* category 1 case. As the Full Court in *James FC* said (at [52]), "That appears to have been the way the case was argued". As the Full Court in that paragraph pointed out, the no-compensation discrimination in *Ward FC* was remedied by s 10 RDA. But as the Full Court further explained (at [52]), the appellants put their claim on the basis that the effect of the *Mining Act 1978* was that the native title holders do not enjoy their rights to own and inherit property equally with other landholders. The *Mining Act 1978* and the leases granted pursuant to its provisions extinguished the Martu peoples' right to control access to the land and did not extinguish to any extent the title of other landholders. Their Honours noted that that was a *Gerhardy* category 2 situation and was not remedied by the provision of compensation. Even if compensation provided by the *Mining Act 1978* extended to cover the extinguishing effect of the grant of a mining lease, the availability of that compensation would not avoid the consequence that the extinguishing effect itself is a discriminatory burden placed only on native title holders. The Full Court also explained (at [69]-[76]) why the compensation provided by the *Mining Act 1978* did not so extend.

1086 In all of these circumstances, it is, in my view, an impermissibly narrow reading of what the Full Court decided in *James FC* to say that it merely stands for the proposition that only where the right to control access, that is to say, a native title right of exclusive possession, has been extinguished that the holding in *James FC* applies. There is no reason

in principle why the extinguishment of any native title right or interest, whether properly characterised as an exclusive or a non-exclusive right, whether the right deals with access or is of an economic or usufructuary nature, such as the right to hunt or gather, does not similarly attract protection under the RDA because it involves discriminatory treatment of the right to own and inherit property (including the right to be immune from the arbitrary deprivation of property) – as to which see *James FC* at [41]. These rights in relation to land constitute "property" in the conceptual sense discussed in *Yanner v Eaton* [2003] HCA 53, 69; (2003) 201 CLR 351 (***Yanner v Eaton***).

1087 If, therefore, a non-exclusive native title right or interest of this nature were to be found to be extinguished by the grant of the Yandi mining lease in this case (contrary to my primary finding above), in my view, on the authority of *James FC*, that would constitute a *Gerhardy* category 2 case. As a result, the act of the grant of a mining lease would be invalid by reason of the operation of the RDA and, in terms of s 228(2)(b) "would have been valid to that extent if the native title did not exist". In such circumstances the act would be a past act as defined. Section 113 *Mining Act 1978* would have no application to, in effect, restore the native title rights extinguished, as explained in *Ward HC* and *James FC*.

1088 Because s 231 defines a category C past act as a past act consisting of the grant of a mining lease, then the grant of the Yandi mining lease would be a category C past act in such circumstances; as the claimants, in the alternative, claim.

1089 ***The approvals of additional proposals permitting mining on new areas***: The claimants say the content of the additional approvals of proposals granted under the Marillana State Agreement were defined by reference to, amongst other things, the tonnage to be produced and the part of the lease area to be mined, in accordance with the original approved proposal. The physical impacts permitted under the subsequent expansion approvals might be seen, therefore, as *affecting the enjoyment of native title* to the then undeveloped areas within s 227 NTA.

1090 The claimants submit that an "act" includes the making, amendment or repeal of legislation, the grant, issue or variation of a licence, permit, authority or instrument and the creation or variation of any interest in land, as provided for by s 226(2)(a) and (b). Thus, where an approval permits further mining operations to take place on the lease, the enjoyment

or exercise of native title may be impaired, as opposed to extinguished. The claimants note that an act is a "future act" if, apart from the NTA, it would affect native title in the manner set out in s 227 and is not a past act, as provided by s 233(1) and discussed in *Lardil FC* at [61], [70] and [114]. Thus, the claimants say that while native title rights might be impaired concerning their enjoyment or exercise (but not their existence), an approval for the expansion does not constitute a past act, including in respect of an act that takes place after 1 January 1994 under s 228(3).

1091 The claimants then submit that, aside from the possible engagement in the post-8 July 1994 period respecting expenditure of aggregate project costs, cl 11 of the Marillana State Agreement imposes no obligation to approve a proposal. The claimants say this feature of the Marillana State Agreement distinguishes it from the State Agreement considered in *Daniel 2004*, where the finding that the Minister had no ability to refuse a proposal was critical to the determination there made.

1092 The claimants say if there were specific evidence of the post-8 July 1994 proviso being engaged with respect to any particular proposal and approval, further questions might arise as to whether the First Variation Agreement and its implementing legislation involved a future act, but there is no such evidence and so the question does not arise.

1093 Thus, the claimants say that, in respect of any act on or after 1 January 1994, for the purposes of s 228(3)(b)(ii), the act cannot be shown to be one *giving effect to or otherwise because of an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made*. Similarly, the claimants say that a post-8 July 1994 act of this nature cannot be a *pre-existing right-based act* under s 24IB NTA because it is not giving effect to or otherwise because of any such offer, commitment, arrangement or undertaking.

1094 The State rejects the claimants' submission in this regard, contending that s 228(3)(b) NTA is not satisfied in respect of the subsequent approvals of proposals.

1095 Having regard to the s 227 definition of when an act affects native title, the State submits that native title cannot be affected if it does not exist and it will not exist if it has

already been extinguished. The State thus refers to its submissions that the Marillana lease itself extinguished all native title within the whole of the lease area at the time of its grant. That submission is rejected.

1096 The State then submits, in the alternative, that if some native title rights survive the grant of the Marillana lease, as I have found they did, it then becomes necessary to identify precisely which rights survived and where they exist. Even if some rights survived it does not necessarily follow that they were affected by the approval of any of the post-1 January 1994 proposals. The State submits the claimants have not attempted to specify how its rights were affected by any of the approvals of proposals.

1097 The State submits that, for the purposes of s 227, the approvals of proposals will only be inconsistent with the "existence" of native title if there is an inconsistency of rights as a matter of law. It is submitted an act cannot be inconsistent with the continued enjoyment or exercise of a right if the right is not in fact enjoyed or exercised. Hence, the Court can only conclude that an act affects native title if it first finds that one or more native title rights were being enjoyed or exercised. Such a finding requires evidence of the enjoyment or exercise at the time of the relevant act. In the absence of such evidence there is no basis for a finding of inconsistency with the enjoyment or exercise of native title rights.

1098 I do not accept the State's submissions concerning the manner in which any subsisting native title rights or interests (such as the right to hunt, gather or conduct ceremonies which I have found to exist) might be affected. In particular, I do not accept that it is necessary for the purposes of that definition that a claimant lead evidence that a particular activity was impaired at the time an act occurred – that is to say, at the time a mining lease or a particular proposal was approved. On the face of it approvals of proposals in this case affected the ability of the native title holders to exercise native title rights such as hunting, gathering and performing ceremonies in the areas of the expanded mining operation or infrastructure and so affected native title in the relevant sense. This does not focus on instant conflict, but rather on continued ability to exist, be enjoyed or be exercised after the fact of the act in question in relation to a native title right of which the holder is possessed.

1099 The State and the BHP Billiton parties in essence contend that so far as the subsequent approvals of proposals are concerned, they were granted pursuant to the Marillana

State Agreement which contained contractual requirements that the BHP Billiton respondents obtain permissions and approvals to conduct certain activities pursuant to the mining lease. They say in substance that the approved proposals merely regulate activities done pursuant to the mining lease, as between the State and the relevant joint venturers, and do not expand the rights granted pursuant to the mining lease. The State says that an argument to this effect was rightly accepted by Bennett J in *Brown (No 2)* (at [182]) where her Honour likened the position to that of a home owner with a fee simple interest who cannot carry out alterations to a residence without State or local council approval. Her Honour observed that the approval requirement did not derogate from the underlying rights in the property and was merely regulation.

1100 These respondents also say that if the claimants' primary argument, which I have accepted, that a mining lease works no further extinguishment than the underlying pastoral lease is correct, it is difficult to see how the approval of proposals directed at the exercise of those rights, and are not distinguishable from those granted under the mining lease, can be said to work any further extinguishment.

1101 These respondents then argue that the relevant approvals of proposals go to changing the rate of mining, the location of mining and the construction of additional infrastructure required for mining and the like. They deny the proposition that the State's approval of a proposal could "affect" native title, contending that once it is understood that an approval merely regulates the underlying rights held by the joint venturers under the Marillana State Agreement there is no such affectation.

1102 In summary, these respondents submit:

(1) It is the mining lease which confers the right to mine and associated rights to the land which intersects with native title.

(2) The Marillana State Agreement is a contract between two parties which regulates the rights of each party.

(3) The need for proposals to be approved operates as a contractual control on the rights of the joint venturers under the lease.

(4) Those contractual controls operate in much the same manner as general regulatory controls such as obligations to obtain Aboriginal heritage approval, environmental approvals and the like under State laws.

(5) Those controls do not alter the fact that it is the "right" under the mining lease which affects native title and which were created upon the creation of the lease.

1103 In short, these respondents contend they have all the rights that the mining lease creates, which may impair the enjoyment or exercise of subsisting native title rights from the moment of its grant. The exercise of those rights under the grant, as a matter of contract between the State and the joint venturers, is controlled by the need of the joint venturers to get relevant approvals mentioned in the Marillana State Agreement. Whether or not the joint venturers will be able to exploit the rights is controlled by contract. When the approvals are given, if they are given, they therefore do not expand the primary rights already possessed by the joint venturers.

1104 The BHP Billiton respondents also contend that the approval of proposals mechanism simply "conditions" the rights under the mining lease in the manner contemplated by s 44H NTA.

1105 Section 44H appears in Div 4 of Pt 2 NTA and is headed "Rights conferred by valid leases etc.". It provides as follows:

> **44H Rights conferred by valid leases etc.**
>
> To avoid doubt, if:
> (a) the grant, issue or creation of a lease, licence, permit or authority is valid (including because of any provision of this Act); and
> (b) the lease, licence, permit or authority requires or permits the doing of any activity (whether or not subject to any conditions); and
> (ba) an activity is done in accordance with the lease, licence, permit or authority and any such conditions;
> then:
> (c) the requirement or permission, and the doing of the activity, prevail over any native title rights and interests and any exercise of those rights and interests, but do not extinguish them; and
> (d) the existence and exercise of the native title rights and interests do not prevent the doing of the activity; and
> (e) native title holders are not entitled to compensation under this Act for the doing of the activity.
>
> Note 1: Any compensation to which the native title holders may be entitled under this Act for the grant of the lease, licence, permit or authority may take into account the doing of the activity.

Note 2: This section is not intended to imply that the person carrying on the activity is not subject to the laws of a State or Territory.

1106 The BHP Billiton respondents submit that s 44H should be construed as:

(1) applying to circumstances where:

(i) the interest granted does not fully extinguish native title rights and interests; but

(ii) activities undertaken pursuant to them may not be consistent with the exercise of such native title rights and interest;

because if the interest granted fully extinguished native title then s 44H has no purpose, because there would be no remaining native title rights and interests for activities to be inconsistent with; as to which see *De Rose (No 2)* at [159]-[160];

(2) applying to activities undertaken pursuant to the grant and not the actual rights granted themselves; as to which see the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) (at [6.21]-[6.28]);

(3) clarifying the effect of activities done pursuant to a lease, licence, permit or authority on native title rights and interests, rather than:

(i) creating obligations; or

(ii) affecting the status of rights flowing from that instrument, licence, permit or authority interact with native title rights and interests: as to which see *Risk v Northern Territory* [2006] FCA 404 (***Risk***) at [872].

1107 They contend this is the correct construction of s 44H given:

(1) Its position in the NTA where it sits in Div 4 of Pt 2 following provisions on validation of past acts, confirmation of past extinguishment and future acts.

(2) The use of the introductory words to the section "To avoid doubt", which suggests that s 44H serves merely a confirmatory role.

(3) The addition of Note 2 at the end of s 44H which states that "This section is not intended to imply that the person carrying on the activity is not subject to the laws of a State or Territory" and thereby does not have the effect of making otherwise unlawful activities lawful.

(4) The use of the term "activity" throughout the section rather than the right or interest which suggests s 44H does not affect rights or interests in land and therefore extinguishment of native title: as to which see *De Rose (No 2)* at [162]; and

(5) The purposes of the addition of s 44H NTA as in [6.21] of the Explanatory Memorandum which states that the purpose is to confirm the position of grants such as pastoral leases which do not fully extinguish native title rights, but where the activities that will be undertaken under the grant may be inconsistent with native title rights and interests.

1108 Reference is also made to the Explanatory Memorandum at [6.26] to [6.28], which provides examples of the operation of s 44H, being the performance of irrigation activities pursuant to an irrigation licence and undertaking activity to prospect for minerals pursuant to a prospecting licence.

1109 These respondents in particular submit that:

(1) approved proposals only regulate activities done pursuant to a valid lease, not the rights granted under the lease;

(2) consequently, approved proposals have no bearing on the rights granted and no effect on whether or not extinguishment occurs.

Thus, the effect of s 44H is to put beyond any doubt that native title rights and interests are not extinguished by the requirement or permission or the doing of the activity in giving effect to a requirement or permission contained in the lease.

1110 I accept the respondents' submissions that, in the circumstances, the approvals of proposals do not affect native title to any greater extent than the grant of the initial mining lease in respect of which the Marillana State Agreement controls or regulates the location and rate of mining thereafter.

1111 While each proposal, when approved, crystallises the mining to be undertaken, in my view the existence or enjoyment of native title is not relevantly affected because it has already been affected to the same extent contended for by the grant of the mining lease.

1112 In those circumstances there is not, in my view, any relevant "future act" and therefore there is no need to further consider whether or not the approvals in respect of proposals were pre-existing right-based acts.

1113 I also think there is force in the submission particularly of the BHP Billiton respondents that this is a case where s 44H applies. The grant of the mining lease when taken with the Marillana State Agreement permits mining that seeks to control it, especially through the contractual provisions.

1114 It would appear in this case, therefore, to be an "activity" – namely, mining pursuant to the approved proposal – which is done in accordance with the lease in this case and in particular the conditions on which it was issued under the ratified State Agreement.

1115 In the end I see no relevant reason why one would distinguish the activity that occurs under the approved proposals from the carrying out of an activity, for example, pursuant to a pastoral lease that permitted an activity on conditions.

1116 In those circumstances s 44H(c), (d) and (e) would apply such that:

- the permission and the doing of the activity prevail over any native title rights and interests and any exercise of those rights and interests, but do not extinguish them; and
- the existence and exercise of native title rights and interests do not prevent the doing of the activity; and
- native title rights holders are not entitled to compensation for the doing of the activity.

1117 Therefore under general principles, confirmed by s 44H, the approvals of proposals in my opinion do not relevantly affect native title, so there is no relevant future act, but nor do they extinguish native title rights and interests. However they prevail over them.

1118 In these circumstances, there is no need to consider the contentions made in respect of the application of the future act provisions of the NTA.

1119 In summary, the approvals of additional proposals are not relevantly future acts, do not attract the future act provisions of the NTA and, in my view, are affected by the operation of s 44H NTA.

1120 I will hear from the parties as to the appropriate determination to made in respect of the approvals of proposals in light of these findings.

Whether Extinguishment To Be Disregarded

Section 47A – Youngaleena and Yandeyarra

1121 Section 47A(1) and (2) NTA provides as follows:

> (1) This section applies if:
> (a) a claimant application is made in relation to an area; and
> (b) when the application is made:
> (i) a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
> (ii) the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
> (c) when the application is made, one or more members of the native title claim group occupy the area.
>
> (2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any of the following acts must be disregarded:
> (a) the grant or vesting mentioned in subparagraph (1)(b)(i) or the doing of the thing that resulted in the holding or reservation mentioned in subparagraph (1)(b)(ii);
> (b) the creation of any other prior interest in relation to the area, other than, in the case of an area held as mentioned in subparagraph (1)(b)(ii), the grant of a freehold estate for the provision of services (such as health and welfare services).

1122 The claimants submit that s 47A NTA applies to:

(1) lease GE I144640 (Youngaleena); and

(2) reserve 31428 (Yandeeyara).

1123 The claimants note the requirement in s 47A(1)(c) that one or more members of the claim group "occupy" the area when "the application is made". The claimants submit that

date, in this proceeding, refers to the date of filing of the underlying (pre-combination) claims, which it says, relevantly to Youngaleena, are WAD6278/98 filed on 29 September 1998, WAD319/2010 filed on 29 October 2010 and WAD371/2010 filed on 29 November 2010.

1124 The claimants say the State has admitted occupation of Youngaleena as at 29 October 2010 and 29 November 2010 (State's response to claimants' amended statement of issues, facts and contentions regarding extinguishment filed 2 December 2011 at [17]). No other respondent party has raised any issue in relation to the claimants' statement that the area was occupied at the relevant times. Accordingly the Court may proceed by consent to find that s 47A applies.

1125 In relation to Yandeeyara, the claimants say it satisfies s 47A(1)(b)(i) in that it is vested in the Aboriginal Lands Trust under the *Aboriginal Affairs Planning Authority Act 1972* (WA).

1126 In relation to occupation of that part of the Yandeyarra reserve within the claim area, the claimants refer to the evidence mentioned below which deals with that part of the reserve and surrounding unallocated Crown land (***UCL***).

1127 The State admits that s 47A applies to both of these areas (on the basis of s 47A(1)(b)(ii) applying to each of them), but disputes that the other requirements are satisfied. The section will only apply to an area of land under s 47A(1)(c) if, when the "application is made, one or more members of the native title claim group occupy the area". It is therefore necessary to identify both the time of making the relevant "claimant application" and relevant evidence of "occupation".

1128 The State notes these requirements also apply with respect to s 47B, as discussed below.

1129 Merkel J considered ss 47A and 47B in *Rubibi Community v Western Australia (No 4)* [2004] FCA 1019; (2004) 138 FCR 536 (***Rubibi (No 4)***). His Honour held (at [28] and [37]) that the expression "when the application is made" in each of these provisions means the date on which the application was filed in the Federal Court.

1130 The State contends that, for applications which were lodged at the National Native Title Tribunal prior to the 1998 amendments to the NTA, and which became matters of the Federal Court upon those amendments taking effect on 30 September 1998, the relevant date is the date of lodgement at the Tribunal, not 30 September 1998: see *Risk v National Native Title Tribunal* [2000] FCA 1589 at [5]; cll 5 and 6 of Pt 3 of Sch 5 of Endnote 3 NTA in respect of the *Native Title Amendment Act 1998* (Cth). The State says this was clearly also the view of Merkel J in *Rubibi (No 4)*, as the table in [2] of his decision identifies the "date filed" of each of the various claims as prior to 30 September 1998.

1131 There are four claims that are possibly relevant to ss 47A and 47B in the present proceeding. These claims, and the dates they were filed for the purposes of ss 47A and 47B are as follows:

(1) the IB claim WAD6096/1998, lodged at the Tribunal on 4 June 1996;

(2) the MIB claim WAD6278/1998, lodged at the Tribunal on 29 September 1998;

(3) the claim WAD319/2010, filed in the Federal Court on 29 October 2010; and

(4) the claim WAD371/2010, filed in the Federal Court on 29 November 2010.

1132 These four claims were combined by order of the Court in this proceeding on 3 June 2011. The relevant orders were as follows:

> 1. Pursuant to sections 64(2) and 66B of the *Native Title Act 1993* (Cth), application WAD 6096 of 1998 is amended such that it:
>   (a) is combined with native title determination applications WAD 6278 of 1998, WAD 319 of 2010 and WAD 371 of 2010; and
>   (b) takes the form of the minute of proposed Amended Native Title Determination Application (Form 1) filed on 1 June 2011.
> 2. The minute of proposed Amended Native Title Determination Application (Form 1) filed on 1 June 2011 stand as the amended Application and further filing thereof is dispensed with.

1133 The State contends the effect of this combination order is that the only claim which falls to be considered in this proceeding is the IB claim, and that the other claims all ended upon the combination order being made, and have no independent existence. The State says this is of relevance in applying *Rubibi (No 4)*, because in that case the claims Merkel J was considering were continuing claims, despite a combination order having been made. Merkel J was required to make a determination in respect of each of the earlier, pre-combination claims, which was the reason why his Honour implied that the relevant date was

the date of filing of each of the pre-combination claims, not the date of the combination order (*Rubibi (No 4)* at [36]).

1134 The principle, the State contends, is that extinguishment of native title can only be disregarded in respect of "an area" that is the subject of an application that is made under s 61 NTA (*Rubibi (No 4)* at [27]). The Court does not have jurisdiction to make an order disregarding extinguishment pursuant to ss 47A or 47B in respect of a claim that is no longer on foot. As the IB claim is the only claim that is on foot, and it is that claim which falls for determination, the Court can consider *only* that claim for the purposes of ss 47A and 47B. That means that the relevant date is 4 June 1996 (not 30 September 1998 as contended by the claimants). This also means that the relevant "area" is the area of the IB claim as originally filed. It is this area to which ss 47A(1)(b) and 47B(1)(b) refer. It is not the area of the claim as at the date of the determination, as this would mean that the relevant date is the date of the determination rather than the date of filing, which was the point of *Rubibi (No 4).*

1135 Accordingly, the State contends the whole northern area of the claim, being outside of the area of the IB claim as filed, is irrelevant to a consideration of ss 47A and 47B. As both Youngaleena and Yandeyarra are within this area, s 47A does not apply with respect to either.

1136 Further, even if the Court considers, contrary to these submissions, that the MIB claim is relevant to the sections, the State says the sections cannot apply with respect to either of the two later claims (WAD319/2010 and WAD371/2010). These later claims are in a separate category because they were brought by essentially the same people as the earlier claims, and covered the same areas: the WAD319/2010 claim covered exactly the same area as the MIB claim, and the WAD371/2010 claim covered the whole of the area of the IB claim and MIB claim together. For such claims to be brought and to have the effect of triggering ss 47A and 47B is contrary to the intent of the NTA and would amount to, in effect, an abuse of process. This is because, although ss 47A and 47B are said to be beneficial provisions, their intent cannot have been to allow claimant groups to bring repeated, unending, overlapping claims whenever (in the case of s 47B), a particular interest is cancelled and becomes UCL: *Rubibi (No 4)* at [31]. If this was permitted it would thwart the principle of permanence of extinguishment: s 237A NTA; and would create considerable uncertainty as to whether native title has ever been extinguished over a particular parcel of land. This would lead to

uncertainty with respect to future acts and public exposure to compensation: see *Alyawarr FC* at [186]-[187], cited in *Moses FC* at [166].

1137 The State says the proper principle is that overlapping claims brought by the same or some of the same claimants, whether or not they have been combined and whether or not they continue despite combination, are not relevant for the purposes of ss 47A and 47B. This principle is based on both the statutory construction and public policy considerations identified above.

1138 For the same reasons, if the MIB claim is considered to be relevant, it is only the part of the MIB claim that did not overlap the IB claim that is relevant.

1139 The BHP Billiton respondents adopt the State's submissions

1140 The claimants agree that the relevant date is the date of lodgement at the National Native Title Tribunal, not the date on which the claims are taken to have been filed in the Federal Court. But the claimants contend there is no relevant distinction between the combination order made in *Rubibi (No 4)* (see [3]) and the orders made in this proceeding on 3 June 2011. While a combination operates as an amendment of the one application by combination with others (see *Western Australia v Strickland* [2000] FCA 652; (2000) 99 FCR 33 at [6], [22] citing *Bropho v Western Australia* [2000] FCA 1; (2000) 96 FCR 453 at [25]) it cannot reasonably be suggested that the effect of the orders of 3 June 2011 is that each of the combined applications is not continuing. Accordingly, the "date when the application is made" for the purpose of ss 47A and 47B are the dates on which each of the underlying applications were filed in the Federal Court or lodged with the Tribunal: *Rubibi (No 4)* at [36].

1141 I accept the claimants' submissions. Thus, ss 47A and 47B NTA relevantly apply to each application. It is apparent that the WAD319/2010 and WAD371/2010 claims were filed for the purposes of invoking ss 47A and 47B and so should not be considered an abuse of process as contended for by the State. In any event, there was no suggestion in *Rubibi (No 4)* or *Kogolo v Western Australia* [2011] FCA 1481 (***Kogolo***) that filing claims in order to take advantage of those provisions was an abuse of process: see *Rubibi (No 4)* at [4]-[6] and *Kogolo*.

1142 Given the State's admissions concerning occupation and that s 47A applies to both Youngaleena and Yandeyarra subject to the other requirements of the section being satisfied, I find s 47A applies to each of these areas as claimed.

Section 47B – Areas of Potential Application

1143 ***Introduction***: The claimants say the second tenure DVD, for the purposes of s 47B, shows parts of the claim area which as at 12 January 2010 (the date of capture of the data) were UCL, ie not the subject of a freehold, a lease or a reserve under the *Land Administration Act 1997*. Those areas are described as UCL areas 1 to 173. The State has further sought to delineate the areas where s 47B may apply, in the affidavits of Jamie Hugh Strain affirmed 25 January 2012 and Paul Terence Godden affirmed 25 January 2012. The maps (which appear as annexures to Mr Strain's affidavit) were prepared however by subtracting areas the subject of mining and petroleum tenure from the land tenure: affidavit of Mr Godden at [14].

1144 The State refers to the table in Ex 63 annexure PTG2, p 22 which, it says, sets out the areas that could potentially be subject to s 47B, being areas identified by Landgate as meeting the criteria of s 47B(1)(b) within the area of the IB claim as filed as at 4 June 1996. There are seven parcels of land identified as UCL. These areas may be described as follows:

(1) Areas in the south/south-east of the claim to the east and north of the Great Northern Highway in the Hamersley Range, south and east of Juna Downs Station (UCL 24, which comprises four discrete areas, and UCL 32): Ex 64 annexure JHS2.

(2) Areas in the south of the claim, west of the Great Northern Highway and east of Mt Meharry, south of Juna Downs Station (UCL 165, which comprises six different areas; 3114/1191 (part of the current Juna Downs Station); and RTIO's lease L21122 granted under s 79 *Lands Administration Act 1997* and the *Iron Ore (Yandicoogina) Agreement Act 1996* (WA)): Ex 64 annexures JHS2 and JHS8.

1145 Maps depicting these areas are contained in Ex 64 annexures JHS2 and JHS 8, pp 10 and 22. These areas are now largely covered by BHP's Goldsworthy (Area C) lease, which was granted on 26 April 2002.

1146 The State says that if, contrary to its submissions, the MIB claim is considered relevant to s 47B (as I have found it is above), there are additional areas to which s 47B may

apply. These areas are set out in Ex 63 annexure PTG2, pp 19-21 (except with respect to roads and the former Wittenoom townsite, as to which see below). These areas are mapped in Ex 64 annexures JHS2 to JHS8, inclusive, and may be categorised geographically as follows:

(1) Areas in the Hamersley Range north and north-west of BHP's Yandi mine, and east of Karijini National Park (UCL 2 and 26-29; part of BHP's railway lease K843924; lease K843925 (for BHP's repeater station)): Ex 64 annexures JHS2, JHS6 and JHS7.

(2) Areas adjoining Great Northern Highway and Karijini National Park (UCL 2, 3, 12-17, and 19): Ex 64 annexure JHS6.

(3) Areas around Wittenoom (UCL 34-41 and 43; and pastoral lease 3114/1047 (part of Mulga Downs)). UCL 40 and the area around it is the part of the Hamersley Range including Wittenoom Gorge and the former Wittenoom Gorge Mine to the south of Wittenoom that is not included within Karijini National Park: Ex 64 annexures JHS2 and JHS3.

(4) Areas adjoining the eastern part of the Nanutarra-Munjina Road (UCL 7, 9 and 42): Ex 64 annexure JHS5.

(5) The area of historical reserve 1328 (for "water and stopping place"), within Mulga Downs Station, north-east of Wittenoom (UCL 33: Ex 64 annexure JHS2.

(6) Areas in the north of the claim in the Chichester Range, north of Mulga Downs and on either side of the Great Northern Highway (UCL 1 and 21): Ex 64 annexure JHS2.

(7) UCL 5, in the eastern part of the claim area, about 100 metres to the west of BHP's special lease 3116/6300 (I123596) for the purposes of a quarry, close to the Mt Newman-Port Hedland railway line: Ex 64 annexure JHS2 (Inset B).

(8) UCL 24, in the extreme south of the claim, in the part which extends beyond the boundary of the IB claim. This area is north of the Great Northern Highway in the Hamersley Range: Ex 64 annexure JHS2.

1147 The State notes there are numerous additional areas within the former Wittenoom townsite to which s 47B could potentially apply (mainly former freehold residential lots), if the provision was capable of applying to Wittenoom: UCL 45-55, 57-64, 68, 69, 73, 82-85, 98-100, 102, 106, 107, 109-111, 116-120, 123, 124, 126-128 and 155; closed road 1 (part of

historical road 6); current reserves 46723 (for "Water Supply Depot") and 46724 (for "Water Supply"). See Ex 64 annexure JHS4. However, the State says, the Wittenoom townsite does not attract the operation of s 47B because it was covered by a "proclamation" as at the date the MIB claim was made (s 47B(1)(b)(ii)).

1148 On 5 May 1950, Wittenoom was legally established as a town pursuant to two notices published in the Gazette:

(1) a proclamation by the Governor of resumption of part of pastoral lease 394/1034 under s 109 *Land Act 1933*; and

(2) notification of the area as "Town and Suburban", to be known as Wittenoom, pursuant to s 10 *Land Act 1933*.

1149 Although the town acquired legal status in May 1950, construction of the town apparently began earlier, probably in late 1946.

1150 Wittenoom's status as a town was abolished by order of the Minister made on 15 March 2007 under s 26(2) *Land Administration Act 1997*.

1151 The terms of the proclamation are set out above. This proclamation of resumption for the purpose of "Townsite" was in the State's submission for a "particular" purpose, and a "public" purpose. The State submits a proclamation of this nature is distinguishable from the proclamations of townsites considered by the Full Court in *Alyawarr FC*, *Sebastian FC* and *Griffiths FC*, because in this case "Townsite" is the stated purpose of the proclamation. Although published at the same time, it is one step removed from the notice constituting and defining the boundaries of a townsite under s 10 *Land Act 1933*. It was this latter type of notice that has been considered previously by the Full Court, and found to be for a "broadly expressed purpose which encompasses a variety of potential but unascertained uses": *Alyawarr FC* at [187].

1152 Roads 24-26, 30 and 33 within the non-overlapping part of the MIB claim area, and road 32 within the IB claim area are identified in Ex 63 annexure PTG2 as areas where s 47B could potentially apply. Roads 24-26, 20 and 32 are all part of the Great Northern Highway. This road was recorded as UCL by Landgate because, as at the relevant dates the road had not yet been dedicated under the *Land Administration Act 1997* (though it had been constructed

in 1987: Ex 70 at [5]). Road 33 is part of the eastern section of the Nanutarra-Munjina Road (the bituminised section between Wittenoom and Munjina).

1153 The State notes the claimants concede that native title has been extinguished over the whole of the Nanutarra-Wittenoom Road, and that this road is excluded from the claim area. Accordingly, in the State's submission, s 47B does not apply to these roads. This includes those parts of the road that are not depicted in the maps in Ex 64, namely historical road 9 (the western part of the Nanutarra-Wittenoom Road) and historical road 10 (the first part of the eastern section of the Nanutarra-Wittenoom road within the former Wittenoom town boundaries (see Ex 64 annexures JHS2, JHS3 and JHS4). These roads are not depicted because they were classified by Landgate as "historical roads", ie roads no longer having any tenure.

1154 The State denies that s 47B is capable of applying to other "historical" roads not shown in Ex 64, such as parts of the Roebourne-Wittenoom Road and the Bolitho Road. These roads were public works so are not subject to s 47B: *Erubam Le (Darnley Islanders) v Queensland* [2003] FCAFC 227; (2003) 134 FCR 155 (***Erubam Le FC***) at [90]. Further or alternatively, these roads were dedicated at common law as set out above. "Dedication" in s 47B(1)(b)(ii) includes common law dedication.

1155 The State submits that if, contrary to its submissions as to the relevance of the WAD319/2010 and WAD371/2010 claims, the relevant parcels of land for those claims are those identified in Ex 63 annexure PTG1, pp 10-17. Those areas have not been mapped in Ex 64, though they can be identified on the second tenure DVD. In light of my finding above concerning the application dates, this may require attention.

1156 As to the particular submissions concerning reserves, Wittenoom roads and the like, they are dealt with below. I will, however, now deal with a submission concerning exploration licences and prospecting licences.

1157 ***Exploration licences and prospecting licences***: The State notes that whether s 47B is held to apply to areas covered at the relevant dates by exploration licences and prospecting licences granted under the *Mining Act 1978* will have a large effect upon the areas to which

the section applies, because there have been numerous such tenements which have either been granted since 1996/1998, or have ceased since those dates.

1158 In this regard, the claimants submit that s 47B will (subject to satisfying s 47B(1)(c)) apply in areas the subject of an exploration licence or a prospecting licence under the *Mining Act 1978*. The claimants accept that for s 47B(2)(b) such licences are a "permission or authority, made or conferred by the Crown in any capacity". However the claimants submit that they are not permissions or authorities "under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose".

1159 The claimants note this issue has not been the subject of explicit consideration in previous cases of which they are aware, although *Daniel 2003(1)* implicitly precludes the application of s 47B in areas the subject of exploration and prospecting licences. However, the issue was not argued nor the subject of reasons in that case. See also, on appeal, *Moses FC* at [197], [199]. In *Kogolo* at [28], similarly, the parties and the Court proceeded on the assumption that a petroleum exploration permit disapplied s 47B, without argument or reasons. These authorities are therefore, the claimants submit, not binding in this case.

1160 The claimants observe the phrase "under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose" has been considered by the Full Court on four occasions: *Alyawarr FC*, *Moses FC*, *Griffiths FC* and *Sebastian FC*. The Court has held in those cases that:

(1) The limitation in s 47B(1)(b)(ii) should be construed narrowly: *Alyawarr FC* at [187]; *Griffiths FC* at [156], [162]-[163]; *Moses FC* at [170]; *Sebastian FC* at [221], [226].

(2) A public purpose encompasses purposes of a public nature such as the creation of reserves for public works or recreation or environmental protection. The policy of that section is to ensure that, in the public interest, prior extinguishment which might obviate public exposure to compensation claims or a future act process should be continued in force. A proclamation of a townsite, which might comprise largely private property, is not a "public purpose": *Alyawarr FC* at [187]; *Sebastian FC* at [221], [223], [226].

(3) A proclamation for a broadly expressed purpose which encompasses a variety of potential but unascertained uses is not a proclamation for a particular purpose: *Alyawarr FC* at [187]; *Sebastian FC* at [221], [226].

(4) Any intention to use the land for requisite purpose or purposes was to be gleaned from the terms of the proclamation and its constating legislation as an intention to be fixed for the duration of the proclamation, and not as a matter of fact at the time of the application for a native title determination: *Alyawarr FC* at [188]; *Sebastian FC* at [222], [223], [226].

1161 The claimants say that the Full Court in *Moses FC* found that land the subject of certain temporary reserves under the *Mining Act 1904* were not reserved for a public purpose or a particular purpose. The Full Court (at [166]-[167]) considered that the question of whether the temporary reserves were for public purposes or a particular purpose was to be answered solely by reference to the provisions of the *Mining Act 1904* and the terms of the instruments in question. The Full Court rejected the submission that the temporary reserves required land to be used for, or for purposes associated with, a public purpose or a particular purpose, namely mining; albeit on the basis that the temporary reserves did not even require that the land be used for any particular purpose (see [168], [172], [175]).

1162 Even if the particular purpose was "orderly development" of the area, the Full Court considered ([179]) that the concept of a particular purpose in s 47B(1)(b)(ii) contemplates a purpose with much greater specificity than for "orderly development" of an area.

1163 In considering the meaning of a "particular purpose", s 228(9)(c) NTA the claimants contend, is illustrative as it uses very similar language to s 47B(1)(b)(ii). The example given in s 228(9)(c) of a reservation for a particular purpose is a reservation for forestry purposes. Section 24JA(1) NTA also refers to a particular purpose in similar terms to s 47B(1)(b)(ii), and gives examples of a reservation for a national park or a hospital as being a reservation for a "particular purpose". See *Erubam Le FC* at [56]-[57], [77].

1164 Exploration or prospecting under an exploration licence or prospecting licence, the claimants submit, is clearly not a public purpose. It is undertaken by members of the private sector for their own profit. The question is therefore whether land the subject of such licences "is to be used ... for a particular purpose". The claimants submit that it is not.

Rather, under the terms of the *Mining Act 1978*, the holder of an exploration or prospecting licence may exercise broadly expressed purposes which encompass a variety of potential but unascertained uses: see *Mining Act 1978* ss 48 (eg to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of prospecting for minerals in, on or under the land) and 66. These are similar to the purposes of "mining" and "orderly development" referred to (and rejected) in *Moses FC*; or "townsite" rejected in *Alyawarr FC*, *Sebastian FC* and *Griffiths FC*, and "benefit of Islander inhabitants" in *Erubam Le FC*. The rights conferred by such licences are broad, and are aimed at discovering whether there are any minerals on or under the land which may subsequently be the subject of a mining operation under a mining lease and other tenements. Compare, for example, a general purpose lease, which under s 87 *Mining Act 1978* must be for a specified purpose (s 87(2)) which falls within the parameters in s 87(1) (which are purposes directly connected with mining operations). See too ss 91(3)(b) and 91(6) regarding the requirements for a miscellaneous licence.

1165 Furthermore, an exploration or prospecting licence does not require the land be *used* in any particular way, eg exploration could take place by way of desktop studies, aerial surveys, or very infrequent visitation, using a hand held metal detector.

1166 The nature of such a licence is different to the example of a reserve for forestry purposes or a national park referred to above. Under those examples, there is a real limitation on use of the land for that purpose. With an exploration or prospecting licence, however, as submitted above there is no limitation on the use of the land by others (except for mineral exploration). This is not Parliament's intention. Were it to be the case that something like an exploration or prospecting licence is caught by s 47A(1)(b)(ii) then applying the same reasoning, a seed collection permit or bee keeping licence, for example, covering the entire Pilbara region could disapply s 47B across a vast area.

1167 The claimants say then that it follows that the evidence as to areas to which s 47B may apply, in the affidavits of Messrs Strain and Godden, is irrelevant and inadmissible because it is based on an incorrect instruction. Of course, another way of putting that submission would be to say that, in the event of the claimants' submissions are accepted, the affidavits should not be accepted as conclusive as to the areas in relation to which s 47B may possibly apply.

1168 The State says *Alyawarr FC* is the primary case to consider because it came first and established the principles which were essentially followed in the other cases. In *Alyawarr FC*, the State submits, the Full Court was primarily concerned with whether the proclamation of a townsite in the Northern Territory under s 111 *Crown Lands Ordinance 1931-1952* (Cth) was a proclamation for a "public" or "particular" purpose within the meaning of s 47B(1)(b)(ii): *Alyawarr FC* at [169]-[190]. The Court said (at [186]-[187]) that:

> [186] The definition of a townsite and the setting aside of land within the townsite as 'town lands' under the *Crown Lands Ordinance* embraced a variety of potential subsequent uses none of which was defined at the point of proclamation. The proclamation enlivened powers to grant leases for a variety of purposes.
>
> [187] The purpose of s 47B is beneficial. The qualification on its application in s 47B(1)(b)(ii) is no doubt intended to minimise the impact of native title determination applications on areas set aside by proclamation or otherwise under statutory authority for public or particular purposes That limitation should not be construed more widely than is necessary to achieve its purpose. A proclamation for a broadly expressed purpose which encompasses a variety of potential but unascertained uses is not a proclamation for a particular purpose. The term 'public purposes' may arguably encompass a land use planning purpose which is met by establishing a framework or condition for the allocation of private rights such as the grant of residential or commercial leases in a township. Alternatively, it may be construed as referring to purposes of a public nature such as the creation of reserves for public works or recreation or environmental protection. A narrower construction accords with a comprehensible policy that, in the public interest, prior extinguishment which might obviate public exposure to compensation claims or a future act process should be continued in force. It is not necessary in aid of the narrower construction to define its outer limits here. It is sufficient to say that the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does not define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii).

1169 The State then observes that the Full Court in *Griffiths FC* was concerned with the establishment of a different townsite in the Northern Territory, proclaimed under a similar provision as the town considered in *Alyawarr FC*: *Griffiths FC* at [147]-[170]. The reasoning of the Court in *Alyawarr FC* was adopted and followed: *Griffiths FC* at [161]-[163]; [169].

1170 The Full Court in *Moses FC* was concerned with temporary reserves created under s 276 *Mining Act 1904*, and in particular the "second constructional question" identified by the Court in *Alyawarr FC*, namely, whether (in the case of *Moses FC*) the temporary reserves were reservations "under which" the land or waters were "to be used for public purposes or

for a particular purpose": *Moses FC* at [167]-[169]; *Alyawarr FC* at [188]. In this context, the Full Court agreed with the Court's construction of s 47B in *Alyawarr FC* at [187], leading to the conclusion that "[t]he relevant use, whether for public purposes or for a particular purpose, must emerge from the reservation itself": *Moses FC* at [170]. The Court in *Alyawarr FC* had preferred a construction of s 47B(1)(b)(ii) which required the intention to use the land to be gleaned from, in that case, the proclamation of the townsite itself "and its constating legislation": *Alyawarr FC* at [188].

1171 Accordingly, the State contends the Full Court in *Moses FC* held that the relevant use of the temporary reserves must emerge from the reservations themselves: *Moses FC* at [170]. The Court drew a distinction between public uses such as an airport site or salt mine which may be ultimate uses of such reservations, with the purposes actually prescribed by the reservations. Such "ultimate" uses were not uses "under" the reservation: see *Moses FC* at [185] for an example of the application of this principle.

1172 The Court went on to consider the nature of the purposes for which the area of the particular temporary reservations were to be used. Construing s 276 *Mining Act 1904*, the effect of a temporary reservation was said to prevent occupation of the reserved area, and so restrict activities which might otherwise be carried out on the land: *Moses FC* at [172] and [174]. A reservation under s 276 did not require the Minister to have any purpose specifically in mind, and the purpose may have been no more that to preserve for a different Minister the opportunity at some time in the future to manage the future development of the area: *Moses FC* at [174]. The Court concluded that "a reservation under s 276 may lawfully be made without the area of the reservation being required for public purposes for a particular purpose, and there is no requirement in s 276 of the Mining Act that under a reservation the area is to be used for public purposes or for a particular purpose": *Moses FC* at [175].

1173 The State then turn to *Sebastian FC* where the Full Court construed the meaning of s 47B(1)(b)(ii) in the context of the proclamation of the Broome townsite under the *Land Regulations 1882* and subsequently under the *Land Act 1898*: *Sebastian FC* at [209]-[227]. The Court held that the reasoning of the Court in *Alyawarr FC* applied to such proclamations, even if a town had been established: *Sebastian FC* at [220] and [223]. It concluded that "the construction of s 47B adopted in [*Alyawarr FC*] should now be accepted as correct unless and until a judgment of the High Court establishes that that construction is erroneous".

1174 The State thus contends that, following *Alyawarr FC*, the purposes of prospecting licences and exploration licences granted under the *Mining Act 1978* are to be discerned from the instruments themselves and from the legislation. The exploration and prospecting licences that affect the application of s 47B in this case are identified in Ex 63 annexure PTG1 in respect of each relevant parcel of land. For each of these tenements a mining tenement register extract is available on the second tenure DVD. As the tenements involved are numerous, it is more convenient to consider the relevant terms of the *Mining Act 1978*.

1175 The legislative scheme relating to prospecting licences is set out in Div 1 of Pt IV *Mining Act 1978*, and Div 1 of Pt IV *Mining Regulations 1981* (WA) (***Mining Regulations 1981***). The purpose of a prospecting licence is to be discerned from these provisions read together.

1176 Section 40(1) *Mining Act 1978* states that "the mining registrar or the warden ... may, on the application of any person grant to that person a licence known as a prospecting licence which shall be subject to such conditions as are prescribed or are imposed…". The holder of a prospecting licence is entitled to an instrument of licence in the form of Form 4 in the *Mining Regulations 1981*: s 116 *Mining Act 1978*; reg 13 *Mining Regulations 1981*. The form states that the holder of the licence "is/are subject to the provisions of the *Mining Act 1978* and to the conditions stated in the Schedule hereunder, authorised in accordance with section 48 of the Act to prospect the land the subject of this licence situated at [description of the locality, mineral field, and size of the area covered by the licence]".

1177 Section 48 *Mining Act 1978* sets out the rights which are conferred by a prospecting licence. It states:

> A prospecting licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject —
>
> (a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of prospecting for minerals in, on or under the land;
>
> (b) to prospect, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;
>
> (c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for

> which the licence remains in force, as does not exceed the prescribed limit, or in such greater amount as the Minister may, in any case, approve in writing;
>
> (d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act, water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with prospecting for minerals on the land.

1178 Accordingly, the State says, a prospecting licence is for a very clear, defined and specific purpose. That purpose may be described as prospecting for minerals, as particularised in s 48 *Mining Act 1978*. The particularisation may to some extent expand the meaning of "prospecting" beyond its ordinary meaning, but does not "broaden" the rights conferred in the manner contended by the claimants. A prospecting licence is accordingly of very different character to either a proclamation of a town, or a temporary reservation under s 276 *Mining Act 1904*.

1179 The State submits a temporary reservation is a closer example, because it relates to mining. The difference is very clear: while a temporary reservation merely restricts the use of the land, and preserves land for future uses which may not be ascertainable at the time of the reservation, a prospecting licence is a licence which allows the holder to immediately put the relevant land to the specific purposes set out in s 48 *Mining Act 1978*. In the language of *Alyawarr FC*, a prospecting licence does not "[encompass] a variety of potential but unascertained uses"; rather, it encompasses the particular, ascertained purpose of prospecting, which is further particularised in s 48 *Mining Act 1978*.

1180 The State contends that the purposes of a prospecting licence are both "particular" and "public" purposes. Although prospecting licences are granted to private entities, prospecting for minerals is a public as well as a private purpose because there is a clear public interest in the identification and better delineation of the State's mineral resources. That this is also a purpose of prospecting licences is demonstrated, for example, by ss 51 and 51A *Mining Act 1978*, which require the holder of a prospecting licence to submit reports and geological samples. Further, the holder must spend $40 per ha on a prospecting licence, or at least $2000 per year: reg 15(1) *Mining Regulations 1981*.

1181 The legislative scheme relating to exploration licences is set out in Div 2 of Pt IV *Mining Act 1978*, and Div 2 of Pt IV *Mining Regulations 1981*. Under s 57(1), the Minister may, subject to the *Mining Act 1978* "on the application of any person … grant to that person a licence to be known as an exploration licence on such terms and conditions as the Minister may determine". The holder of an exploration licence is entitled to an instrument of licence in the form of Form 6 in the *Mining Regulations 1981*: s 116 *Mining Act* 1978; reg 19 *Mining Regulations 1981*. The form states that the holder of the licence "is/are authorised in accordance with section 66 of the Act to explore the land the subject of this licence situated at [description of the locality, mineral field, and number of blocks]".

1182 Section 66 *Mining Act 1978* sets out the rights which are conferred by an exploration licence. It states:

> An exploration licence, while it remains in force, authorises the holder thereof, subject to this Act, and in accordance with any conditions to which the licence may be subject —
> (a) to enter and re-enter the land the subject of the licence with such agents, employees, vehicles, machinery and equipment as may be necessary or expedient for the purpose of exploring for minerals in, on or under the land;
> (b) to explore, subject to any conditions imposed under section 24, 24A or 25, for minerals, and to carry on such operations and carry out such works as are necessary for that purpose on such land including digging pits, trenches and holes, and sinking bores and tunnels to the extent necessary for the purpose in, on or under the land;
> (c) to excavate, extract or remove, subject to any conditions imposed under section 24, 24A or 25, from such land, earth, soil, rock, stone, fluid or mineral bearing substances in such amount, in total during the period for which the licence remains in force, as does not exceed the prescribed limit, or in such greater amount as the Minister may, in any case, approve in writing;
> (d) to take and divert, subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with exploring for minerals on the land.

1183 Accordingly, the State says, an exploration licence is for the purpose of exploring for minerals, as particularised in s 66 *Mining Act 1978*. For the same reasons as stated above, this is a "particular purpose", "under which" the land in the area of an exploration licence "is to be used."

1184 Minerals exploration, the State says, is also a "public" purpose "under which" the land is to be used. This is a public purpose for the same reason as for prospecting licences – namely, that exploration licences facilitate the identification and better delineation of the State's mineral resources, which in turn facilitates mining. Mining is of benefit to the local, State and national economies due to the revenue and employment which is generated. The State observes the National Native Title Tribunal has repeatedly held that mining and exploration activities are in the "public interest" for the purpose of s 39(1)(e) NTA. See, for example, *Evans v Western Australia* (1997) 77 FCR 193 at 215; *Australian Manganese Pty Ltd v Western Australia* [2008] NNTTA 38; (2008) 218 FLR 387 at [59].

1185 The State submits that the claimants' reference to "seed collection permits" and "bee keeping licences" as a comparison to prospecting licences and exploration licences is misconceived. Whatever rights are conferred by those types of licences, prospecting licences and exploration licences can be granted over relatively small, discrete areas of land only: 200 ha in the case of prospecting licences (s 40(2) *Mining Act 1978*), and generally about 25,300 ha (253 square km) for exploration licences (for a 70 block licence): s 57(2) *Mining Ac*t read with s 56C. This is an approximate figure only. Many of the exploration licences in the claim area are substantially smaller than this and not the "entire Pilbara region." There is no policy reason for not finding that these types of licences are for a "particular purpose".

1186 In my view, the critical question raised here is whether a prospecting licence or an exploration licence issued at relevant times under statutes of Western Australia are permissions or authorities "under which" the whole or part of the land in the area "is to be used for public purposes or for a particular purpose". The expression "is to be used" should be given particular consideration. It rather suggests that the permission or authority provides for the future use of the relevant land in the area for a public purpose or a particular purpose. If that be correct, then if the permission or authority merely facilitates a future use for such a purpose, where its relevant future use is not by any means definite it will not be a permission or authority of the type described by this provision.

1187 Indeed, in *Alyawarr FC* (at [188]) the Full Court said of the proclamation in that case, in respect of a townsite in the Northern Territory, that it must be one under which the land or waters which it covers "is to be used" for specified purposes. The Court added:

> The words 'is to be used' import the need to identify some intention to use the

> subject land for the requisite purpose or purposes. The question that arises is whether that intention is to be gleaned by reference to the terms of the proclamation and its constating legislation as an intention fixed for the duration of the proclamation or whether it is to be ascertained as a matter of fact at the time of the application for a native title determination.

1188 The Full Court (at [188]) went on to observe that the evidence in that case suggested that there was little or no prospect of the townsite ever becoming a town. Their Honours observed that the proclamation was in effect a dead letter even though it was said by the Northern Territory to have the effect of defeating the beneficial operation of s 47B in that case.

1189 Nonetheless, the Full Court considered that, although the first potential interpretation can yield artificial results, it provided an objective basis for determining the question of the imputed intention associated with the proclamation. The Court considered the alternative approach would require factual inquiry into whether there has been, at the time of the application, an effective abandonment, attributable to the Crown, of any intention to implement the proposed purposes of the proclamation. Thus, the latter construction was not to be preferred.

1190 So far as the townsite proclamation was concerned in that case, the Court (at [189]) noted that there was evidence of a public plan prepared for a townsite in 1977, which showed provision for a recreation area, government offices etc. The Court noted there was no suggestion that the plan had any statutory significance or legal effect. The Northern Territory, the Court noted, could not point to evidence about its provenance. Thus, the Court considered it did not impact upon the characterisation of the proclamation for the purposes of s 47B.

1191 The Full Court said (at [187]) that a proclamation for a broadly expressed purpose which encompasses a variety of potential but unascertained uses is not a proclamation for a particular purpose. It said that the term “public purposes” may arguably encompass a land use planning purpose which is met by establishing a framework or condition for the allocation of private rights, such as the grant of residential or commercial leases in a township. Alternatively, it may be construed as referring to purposes of a public nature, such as the creation of reserves for public works or recreation or environmental protection. A narrower construction, the Full Court considered, accords with a “comprehensible policy”

that, in the public interest, prior extinguishment which might obviate public exposure to compensation claims or a future act process should be continued in force. But their Honours considered that a mere proclamation of a townsite which might comprise largely private property holdings by lease or otherwise, did not define public purposes or a particular purpose within the meaning of s 47B.

1192 In *Griffiths FC*, a Full Court further considered the proclamation of a townsite in the Northern Territory. It declined (at [163]) to distinguish *Alyawarr FC* from the case then before it and refused an appeal in respect of the primary judge's holding that the claimants were entitled to the benefit of s 47B.

1193 In *Moses FC*, a Full Court adopted the construction of s 47B adopted in *Alyawarr FC* at [187]. The Full Court (at [170]) considered that the wording of s 47B(1)(b)(ii) "supports the conclusion there reached", and said:

> The relevant use, whether for public purposes or for a particular purpose, must emerge from the reservation itself. It is 'under' the reservation that the area is to be used for public purposes or for a particular purpose, as the word 'which' is the relative pronoun for the reservation or other instrument made or conferred by the Crown. If the use of the word 'under' was not intended to convey that the public purposes or the particular purpose could emerge in respect of the reserved area independently of the reservation itself, the words 'under which' would not have been used and instead a simple conjunctive 'and' would have been used. Consequently, although particular land may ultimately be used for a public purpose such as an airport site or a salt mine, such use cannot be regarded as occurring 'under' a reservation … unless that section or the reservation made pursuant to that section and in its legislative context provide the necessary purposive character to the reservation.

1194 The Full Court then went on to consider whether a temporary reservation for mining purposes satisfied the words. The Court accepted (at [174]) that the words of s 276 *Mining Act 1904* showed that the reservation itself "prevents occupation of the reserved area". Their Honours said, therefore, "That which may or may not be done on reserved areas has been addressed". The Court considered the Minister's reasons for making a reservation may well involve long term public planning, using the expression "public" in the wider sense discussed in *Alyawarr FC* at [187]. But their Honours considered a reservation under s 276 did not require that the Minister have any purpose specifically in mind and the purpose may be no more than to preserve for a different Minister the opportunity at some time in the future to manage the future development of the area. The Court further noted there that:

> The Minister's power may be exercised if the plan for the future use of the area is

> inchoate or even entirely unformed. The capacity of the Minister to cancel the reservation at any time is consistent with that position.

1195 The Court (at [175]) concluded that there was "no requirement" in s 276 that under a reservation the area "is to be used for public purposes or for a particular purpose". Their Honours added that such a reservation may, but need not even, contemplate a "variety of potential but unascertained uses" of the land.

1196 *Sebastian FC* again concerned a townsite, this time Broome, Western Australia. The Full Court (at [221]) and following adopted what was said in *Alyawarr FC* at [187]. Their Honours rejected a proposition that *Alyawarr FC* should be accepted as correct unless and until a judgment of the High Court establishes that that construction is erroneous.

1197 From all these cases it is clear that one should go to the relevant permission or authority – in this case, the prospecting licences and exploration licences – read in context with the legislation that attaches rights to them, to determine whether under those instruments each of the subject areas "is to be used for public purposes or for a particular purpose".

1198 For the reasons given in *Alyawarr FC* at [187], I do not consider that the public policy considerations that might be considered to underlie the requirements of relevant mining legislation, to the effect that the holders of relevant authorities or permissions should actively carry out activities on land the subject of the permission or authority for the ultimate advantage of the State or the people of the State, turns the activity in question into a "public purpose".

1199 One can see, in the instances discussed in *Alyawarr FC*, that the provision of land so that housing may be provided to citizens, may possibly be characterised as a "public purpose". But the provision of an entitlement to a private citizen or corporation to undertake mining exploration, which may over time result in the trickling down of financial benefits to the community and its members, is in an entirely different category.

1200 The real question then is whether under the permission or authorities in question each of the areas "is to be used … for a particular purpose".

1201 There can be little doubt that land may be used for more than one purpose. There is a considerable number of authorities that bear on the question of "use" in relation to land under town planning and environmental planning legislation, in the various Australian jurisdictions: see, for example, *University of Western Australia v City of Subiaco* (1980) 52 LGRA 360.

1202 However, it is well understood that in construing a term in a statute not only must attention be given to the actual words used, but also the context in which they have been used and the general purposes and objects of the legislation: *Project Blue Sky*. In this case, one would think that the expression, "is to be used" should be given a construction that reflects a future use that is currently proposed as indeed *Alyawarr FC* indicates. As *Moses FC* indicates, a restriction on land use might also relevantly provide how land "is to be used".

1203 At a general level, if the holder of a permission or authority such as a prospecting licence or an exploration licence were to enter land, pursuant to the rights given by the mining legislation at relevant times and to do the things authorised – to dig and take away materials etc – then it might reasonably be said that the holder of that permission or authority is thereby "using" the land and using it for the particular purpose of mineral prospecting or exploration. But that is not the relevant question raised by s 47B(1)(b)(ii). The question is whether the relevant prospecting licence or exploration licence, when read with the relevant statutory provisions, is one "under which" the relevant area "is to be used" for a particular purpose.

1204 In my opinion, the grant of a prospecting licence or an exploration licence neither limits the use to which the subject land may be put, and so prevents any other use, nor positively requires the use of the area to which it relates for the particular purpose of mineral prospecting or exploration. It merely facilitates that activity, if the holder wishes to pursue it. A relevant authority may, in certain circumstances, be forfeited if the terms and conditions upon which it is granted, both pursuant to its own terms as well as the statute, but that does not mean that the area in question "is to be used" for a particular purpose under the permission or authority.

1205 In this case, the circumstances are quite different from those contemplated in *Alyawarr FC* and *Moses FC*. There may be a reservation, as noted, where land is set aside for forestry and cannot be used for any other purpose and so "is to be used" for forestry. That

would be the clear consequence of such a reservation. Similarly, there may be circumstances (although *Alyawarr FC* and the other cases were not those on the facts) where the reservation of an area for a townsite may indicate that the area in question "is to be used" for the townsite; not possibly, but actually.

1206 In my view, there is nothing in the grant of prospecting licences and exploration licences in question, when read with the relevant statutory provisions, that leads to the conclusion that the relevant area in question "is to be used" in either a restrictive or positive sense, for prospecting or exploration purposes. If the provision used the expression "may be used", then the position would be different.

1207 In this case, the grants of prospecting licences and exploration licences facilitate an activity on land for the stated purposes, but they do not in the relevant sense specify how that land "is to be used".

1208 In those circumstances, I find that the land covered by the prospecting licences and exploration licences in question is not thereby made exempt from the application of s 47B NTA.

1209 As to the effect of this finding, I will hear further from the relevant parties.

Section 47B(1)(c) – Occupation

1210 ***Introduction***: In assessing occupation for the purposes of s 47B(1)(c) the claimants contend the Court should have regard to the evidence as to the "patterns of Aboriginal occupation" of the claim area, referring to what was said in *Moses FC* at [207] and [208] and the cases there cited. Relevantly, in this case, the claimants say the evidence included:

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

1211 In *Hayes* Olney J observed (at [162]) that occupancy of land for the purposes of s 47B "should be understood in the sense that the indigenous people have traditionally occupied land". His Honour there expressed the view that the use of particular land by members of a claimant group which is not random or coincidental, but in accordance with the traditional way of life, habits, customs and usages of the community, is sufficient to indicate occupation of the land. Those views have been approved in a number of cases including *Griffiths FC* at [662] and [703]; *Risk* at [888]; *Rubibi (No 7)* at [81].

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

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

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

- To "occupy" an area involves the exercise of some physical activity or activities in relation to the area.
- To occupy an area does not require the performance of an activity or activities on every part of the land.
- To occupy an area does not necessarily involve consistently or repeatedly performing the activity or activities over part of the area.

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

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

1216 ***General occupation evidence:*** The claimants led specific evidence as to occupation of UCL from Maitland Parker. His evidence was given by reference to the large areas of UCL identified by yellow on the map annexed to his statement as Attachment C (Attachment C is a version of the site map prepared by Dr Palmer at Attachment C to Ex 48). There was also a vast amount of more generalised evidence from the lay witnesses as to activities they carry out as of right within the claim area. The claimants contend that it would be reasonable for the Court to infer that a large number of these activities also took place in areas of UCL. For example, witnesses such as Timothy Parker gave evidence that he went hunting all over Banjima country; and Archie Tucker lived in the bush in Mulga Downs, working as a dogger throughout the 1990s before taking up residence at Wirilimura community within the claim area where he goes hunting almost every day. See also witness statement of Mr G Tucker.

1217 The claimants further say it is not necessary for them to adduce evidence as to occupation of UCL by reference to the parcel identifiers used by the State and in many cases evidence of occupation of a general area will be sufficient to establish occupation of a particular area within the general area: *Moses FC* at [215] citing *Risk* at [890].

1218 The claimants refer to Maitland Parker's evidence as to occupation and submit it should be assessed in the context of his evidence as a whole and that of other lay witnesses. At the relevant times he was living in the Karijini National Park, within the claim area. During this time, whilst earning a living as a ranger, he was entrusted to look after the country by his old people such as Wobby Parker (deceased) and H Parker (deceased) from Youngaleena. He identifies the various sections of UCL as areas where he would go on trips. These trips were to carry out traditional activities including hunting, fishing camping and looking after country. They were often made with his family and those of his cousin brother J Parker (deceased) (brother of Dawn Hicks, son of Wobby Parker (deceased)) and their fathers and uncles and the reference to "we" in his statement is to be interpreted accordingly. Many of these areas contain sites of significance and the claimants submit it can be inferred from his evidence that Maitland's trips with family were part of a process of looking after country in accordance with the traditional laws and customs of the Banjima people. These trips took place throughout the 1990s and right up to the present. They were part of a continuous process of looking after country established by the lay evidence taken as a whole.

1219 The State notes the claimants rely primarily upon the evidence of Maitland Parker for its evidence of occupation for the purpose of s 47B(1)(c) (though it also refers to the evidence of certain other claimants). The State contends none of the evidence of Mr Parker or any other member of the former MIB claim group is relevant because none of those persons was a member of the IB claim group. Only occupation by members of the IB claim group is relevant, because it is only the IB claim that is relevant. For the reasons given above, I reject this particular submission.

1220 The State further say that evidence can be relevant only in relation to the portion of the MIB claim as at 29 September 1998 that did not overlap the IB claim. It is not relevant to the IB, WAD319/2010 or WAD371/2010 claims for the reasons given above. Again, I reject that submission for the reasons given above.

1221 In addition to evidence as to specific areas, referred to primarily in the evidence of Maitland Parker, the State responds to the examples given of Timothy Parker hunting "all over" Banjima country, and Archie Tucker living in the bush in Mulga Downs, working as a dogger, throughout the 1990s before taking up residence at Wirilimura community. The State says the precise oral evidence given by Timothy Parker that is relied upon is as follows:

> MR McINTYRE: Do you do any hunting around this country?
>
> TIMOTHY PARKER: Yes, I do a lot of hunting around here. I do – I do a lot of hunting around all areas.

1222 This evidence, the State observes, was given at Youngaleena, so "here" should be taken to mean the community at Youngaleena.

1223 Paragraph 65 of Timothy Parker's witness statement (Ex 11) states:

> Today I go all over Banjima country hunting. In the next couple of days I will go to Nyiyarparli country for kangaroo because all the kangaroos have moved that way because there is no feed in my country at the moment.

1224 Such generalised evidence as this, the State submits, cannot establish "occupation" of any particular area. As the maps in Ex 64 show, the areas to which s 47B may apply are numerous, separated widely geographically, of varying size, with different topography, different nearby tenure, and different tenure histories. It cannot be assumed that Mr Parker

hunts within the vicinity of any of these areas, let alone within them, except perhaps the areas closest to Youngaleena.

1225 The State also submits his evidence does not address the temporal requirement. Mr Parker is clearly talking about the present day, not when the MIB claim was filed (on 29 September 1998). Mr Parker did not begin living at Youngaleena until 1999 or 2001. Evidence relating to a time period after a claim is filed cannot satisfy the requirements of "occupation" for the purposes of ss 47A or 47B.

1226 The evidence of Archie Tucker also is too general, the State contends. Mr Tucker attested that:

> [18] From Ashburton I went to work with Hamersley Iron in Dampier and Karratha for 15 years Then I went dogging by myself. That was in 1992. I worked as dogger then on Hamersley, Brockman, Mulga Downs, Coolawanyah, Hooley, Mt Florence stations I was living and working in the bush basically living on the land.
>
> [19] I used to go to Youngaleena and talk to HP and get tips for dogging. I didn't need to ask about the country. I knew all that country from growing up. I lived in the bush all around there and never got lost. One time I walked 20 km at night. I feel safe and free in my Banjima country.
>
> ….
>
> [39] Hunting is something I do almost every day when I am living at Weelimarra.

1227 The State says the only areas to which s 47B may apply that might be described as being within Mulga Downs are the portion of the pastoral lease north of Wittenoom, the area of historical reserve 1328 (for "Water and Stopping Place"), and UCL 5 to the west of BHP's special lease 3116/6300 (I123596) for the purposes of a quarry, close to the Mt Newman-Port Hedland railway line. The latter two areas are very small, and UCL 5 is only 100 m to the west of BHP's quarry lease, which was granted in 1978. The State contends it can reasonably be inferred that Mr Tucker did not go close enough to this area such that he can be said to have been exercising "possessory rights" over the area. This area is around 28 km from the Weelimarra block as the crow flies. There is also no evidence that Mr Tucker went near to either of the other areas. It cannot be inferred from such generalised evidence as this that Mr Tucker "occupied" the whole of Mulga Downs, which spans some 90-100 km west to east.

1228 The State also refers to the witness statement of Mr G Tucker (Ex 3) at [208]. That paragraph states: "I go hunting every weekend when I go to my block. When I get one or two animals that is it. I am still doing that to this day". The State says the "block" is not close to any area where s 47B may potentially apply. It can be inferred that Mr Tucker went hunting close to the block, rather than areas distant. There is no evidence that better hunting areas are to found more distant from the block.

1229 I generally accept the State's submissions. To find that the general "occupation" evidence relied on by the claimants is sufficient to show one or more claimants did occupy the relevantly large area concerned at the time the application was filed, would be tantamount to finding that because relevant connection has been established, occupation is made out. In the event, while there are a number of activities pointed to, which I accept occurred, the question is always a matter of "fact and degree". I do not consider the evidence supports the conclusion that at the time of the applications one or more members of the claim group occupied the relevant area in the sense described in *Moses FC*. Undoubtedly they used it from time to time, but, in my view, they did not relevantly "occupy" it. As it was put in *Moses FC* at [218], what is required is a presence or activity in the area concerned so that as a matter of practicality that presence or activity involves the assertion of being established over the area itself. I will now consider claims of occupation in respect of particular areas.

Mt King Area (UCL 25)

1230 The claimants say UCL 25 covers part of the claim area between Hamersley and Bee Gorges. Both gorges (Galharramunha and Banbanmunha) contain significant sites under Banjima law and custom. The Mt King area was referred to extensively in the evidence as a boundary marker for Banjima and Yindjibarndi People. This area forms part of the Hamersley Range and water flows through the gorges in this area into the Fortescue Valley. The evidence of Maitland Parker was that he used to go hunting in the valley to the west of Mt King. He (and his extended family) also used to follow the south branch of the Fortescue right up "as far as I could go".

1231 The State says UCL 25 is described by the claimants as covering part of the claim area between Hamersley and Bee Gorge. UCL 25 is, in fact, historical road 9 (part of the western section of the Nanutarra-Wittenoom Road), and a corridor of about 100 m either side of the road. As the claimants have elsewhere accepted that the road is excluded from the

area, it is assumed the submissions in relation to this area are in error. Also, as the road corridor is part of the public work comprising the road, the whole of this area is excluded from being an area where s 47B could apply. Landgate has not recorded this area as an area to which s 47B could apply because of the presence of mining tenure over the area as at the date of the application. The area does not include any gorges. Bee Gorge (site 26) is about 10 km to the south of the road, and Hamersley Gorge is outside the claim area, at least 5k m south-west of the road. The road does not pass through either of these gorges

1232 The State also submits the fact that Maitland Parker showed Dr Palmer sites in Hamersley Gorge and Bee Gorge does not establish that he occupied the area. In any event, he showed Dr Palmer the sites recently, long after the MIB claim was filed. Maitland Parker's evidence (at [110]) is:

> There is a valley to the west of Mt King where I used to go hunting. I also used to follow the south branch of the Fortescue right up as far as I could go in that country.

1233 Mt King is about 8 km south of the road, the State say, and so use of the valley for hunting cannot establish occupation of the road, especially given the road does not go to Mt King or to the valley. It is unknown when Mr Parker went hunting; it cannot be inferred that he did so contemporaneously with the filing of the MIB claim.

1234 The State also notes the southern branch of the Fortescue River is within the Yindjibarndi No 1 claim area, and depending on the tributary is at least 5 km west of the nearest point of the road. This evidence thus relies upon an exercise of possessory rights of the Yindjibarndi No 1 claim area. A finding of such rights should not be made in the absence of evidence from the Yindjibarndi people. Alternatively Mr Parker was using the area within the permission of the Yindjibarndi, which does not amount to "occupation."

1235 In the factual circumstances described in the submissions of the State, which I accept, I am not satisfied that there has been any relevant occupation by a member or members of the claim group of UCL 25. Such evidence of use or occupation as there is, is that given by Maitland Parker. It is not entirely clear that it is evidence that relates to UCL 25 as such and it is not clear that the evidence is capable of showing occupation at any relevant time when an application was lodged. I am also not satisfied the presence shown by the evidence involves the assertion of being established over the area in the relevant sense.

1236 In these circumstances, I find that s 47B does not apply to UCL 25.

Bee Gorge/Wittenoom (UCL 34-41, 45-164 and 166-173)

1237 The claimants say this area of the Hamersley Range to the east of Mt King covers Bee Gorge (Banbanmunha) and Wittenoom Gorge (Nambigunha) (site 33). The UCL also includes areas in and around the Wittenoom townsite at the base of the Hamersley Range opposite Wittenoom Gorge. Maitland Parker gave evidence that "we" used to go hunting in and out of these areas. He, together with members of his extended family, would drive from the Ranger's headquarters around Joffre across Hancock Creek and out to Wittenoom through Banbanmunha Gorge. He would get bush tucker like kangaroo, kurramandu (goanna), bush turkey and fish in the pools. There was extensive evidence from various witnesses about living and camping at Wittenoom. For example Marie-Anne Tucker explained that, "We used to go fishing down Wittenoom gorge and we still catch a fish there now. ... We catch kulumba (freshwater fish like a perch) there and use bugs in the muddy banks for bait sometimes". See also witness statement of Alec Tucker (Ex 2) at [161].

1238 The claimants also note it is a matter of common knowledge that the Wittenoom townsite has been largely deserted since the 1990s due to asbestos concerns. It is submitted that the threshold for evidence of occupation of UCL in and around the townsite is closer to that which exists for open country than that applied in *Moses FC* in relation to the Karratha townsite lots: see *Moses FC* at [231].

1239 The State says many of these areas (such as UCL 129-154; 156-164; 166-173) are not areas where s 47B can apply because of the presence of mining tenure at the relevant dates. As noted above, that submission is rejected.

1240 As to Maitland Parker's evidence (at [111]) the State says at most it amounts to hunting in Bee Gorge and Wittenoom Gorge at some time in the 1990s. In the absence of any details, it cannot be inferred that this hunting was contemporaneous with the filing of the MIB claim in 1998. Also, Bee Gorge and Wittenoom Gorge comprise a very small part of the UCL in this area. Mr Parker does not attest that he hunted on top of the plateau surrounding the gorges, nor should it be inferred. Given the stark differences in topography and large areas involved any occupation of the gorges cannot amount to occupation of the

whole of the plateau areas surrounding the gorges. The same can be said of the evidence of Marie-Anne Tucker.

1241 Also, it is submitted, large parts of the UCL in this area are not within the gorges or Hamersley Range. UCL 35-39, and much of UCL 34, are in the Fortescue River valley around Wittenoom. Maitland Parker's evidence does not relate to these areas, and the presence of Wittenoom must be taken into account. Activities of a traditional nature are less likely to have taken place close to Wittenoom because of the occupation and visitation of that area by others. The State submit Maitland Parker's evidence on this point is vague and should not be accepted. He does not attest that he was actually shooting kangaroos close to Wittenoom at the relevant time (only that it was "possible" to shoot kangaroos).

1242 The State notes the remaining areas of UCL are within Wittenoom itself. As submitted above, s 47B does not apply to the area of the former Wittenoom townsite because it was covered by a proclamation within the meaning of s 47B(1)(b)(ii) at the relevant time. Alternatively, the State says the Court should not accept that Wittenoom was "occupied" within the meaning of s 47B(1)(c). Unlike the town considered by Mansfield J in *Alyawarr* at [311]-[314] and on appeal in *Alyawarr FC*, Wittenoom in 1998 was a live town with a population, buildings, and roads: affidavit of Keith Arthur Pearson, senior project advisor, Shire of Ashburton, at [25]-[26]; *Alyawarr* at [38]; *Alyawarr FC* at [169]. Accordingly it should be considered as a distinct area, separate and different from the surrounding areas. It therefore cannot be inferred from any evidence of use of the surrounding land that land within the town itself was occupied. Maitland Parker's evidence on this point is implausible and should not be accepted.

1243 The State says the reasoning in *Moses FC* (at [231]) applies, though the situation here is reversed (the claimants here do not claim to have lived in the town at the relevant time). Any other evidence of hunting or other activities in the vicinity of Wittenoom is scant and lacking details and is insufficient to establish occupation of any area within Wittenoom.

1244 Further, at least some of the areas to which s 47B could potentially apply within Wittenoom were very likely to have been used for other purposes at the time the MIB claim was filed. For example, reserve 46723 was, until 31 October 1995, reserve 39515, set apart as a reserve for the purpose of "Depot Site (Water Authority of Western Australia)" by notice

published in the Gazette on 25 July 1986 and vested in the Water Authority of Western Australia for that purpose. An aerial photograph taken on 1 June 1979 shows buildings within this area, and it may be inferred that these buildings (or replacement buildings) still exist, given a new reserve was created for the purpose of "Water Supply" over the same area on 15 August 2002. This area could not have been "occupied" by Maitland Parker in September 1998.

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

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

1247 In these circumstances, I find that s 47B does not apply to UCL 34-41, 45, 164 or 166-173.

Top of Tableland White Springs (UCL 1 and 21)

1248 The claimants say there was evidence that the Banjima boundary extended north of the claim area boundary towards White Spring homestead. This section of UCL and the adjacent section of the Yandeyarra reserve includes the headwaters of Bea Bea Creek as it flows south of the Chichester Range towards Weelimarra community: noting the witness statement of Archie Tucker (Ex 28) at [29] refers to "Babba (sic) Creek". Maitland Parker

gave evidence that "we" used to go into this area on the old Hedland road through the station country towards White Spring hunting for bush animals.

1249 The State says the only evidence of "occupation" in relation to this area is Maitland Parker's statement that "We used to go into this area on the old Hedland road through the station country towards White Spring hunting for bush animals": Ex 8 at [112]. The other submissions do not relate to any physical activities or presence in the area. Footnote 147 of the claimants' submissions identifies the "old Hedland Road" as a dotted line on "Attachment C" (Appendix C to Ex 48). This road appears to join the Great Northern Highway about 10 km south of the northern boundary of the claim area which is south of the relevant areas of UCL. There is no other road which traverses this area. Accordingly, travel along the "old Hedland Road" did not bring Mr Parker into the areas of UCL. Also, it is self-evident that these areas of UCL in the Chichester Range are not "station country". It cannot be inferred that Mr Parker ever hunted in these areas of UCL.

1250 The State submits that given the vagueness of the evidence, it cannot be inferred that Mr Parker through his hunting occupied a wider area that included these areas of UCL. It also cannot be inferred that Mr Parker carried out any hunting at the relevant time. Saying we "used" to go hunting says nothing about the time period – it may have been decades ago, or after the claim was filed. In any event, the Court cannot infer from this evidence that the areas were occupied at the relevant time.

1251 I accept the submissions made by the State and encapsulated in the preceding paragraph. The evidence taken as a whole is insufficient to establish relevant occupation in accordance with the principles identified in *Moses FC* in respect of the areas identified.

1252 In these circumstances, I find that s 47B does not apply to UCL 1 and 21.

Dignam's Gorge/Wadugara (UCL 2, 12 and 165)

1253 The claimants say this section of the Hamersley Range includes a number of gorges including Dignam's Gorge (Thurdurunha) and Munjina Gorge (Bilirrbinha). According to Maitland Parker "We used to go hunting in Dignam's Gorge Thurdurunha and that bush tucker like jandaru, gajawarri (there is a lot of wild orange gajawarri going into there), kangaroo, kurramandu (goanna), bush turkey and fish are found in the pools". He also gave

evidence of camping further to the east on the north of the Hamersley escarpment along the Roy Hill Road and hunting back south into the gorges including Munjina Gorge Bilirrbinha.

1254 The claimants also note the section west of the Great Northern Highway is adjacent to the 5 Mile community (Windell Block) and that the Court sat at Windell Block and heard evidence from Dawn Hicks, Ronnelle Hicks and from men in a restricted session about the occupation and use of the areas around Windell through to Munjina claypan on the east of the Great Northern Highway: witness statement of Dawn Hicks (Ex 40) at [46], [51]; witness statement Ronnelle Hicks (Ex 35) at [19]. While there are no permanent structures at the 5 Mile community, occupation does not require constant performance of activities; they can be spasmodic: *Moses FC* at [215] (eg the holding law ceremonies at 5 Mile). There was evidence of an increase site within this section of UCL: witness statement Brian Tucker (Ex 12) at [127]; Dr Palmer's first report at [643]-[645]. There was also extensive evidence about Wadugara (Mt Lockyer) (site 77) at trial. For example Mervyn Smith explained his mother (Gladys Tucker) was born at Wardugara (Mt Lockyer) and this was one of the dangerous places where marban men kept their gear when they were travelling through country: see also witness statement Maitland Parker (Ex 8) at [113]. According to Dawn Hicks this area is replete with spirituality, her family have a responsibility to look after this area and travel and camp and look after this country: witness statement Dawn Hicks (Ex 40) at [34]-[36].

1255 The State says UCL 165 comprises six different areas in the south of the claim area, west of the Great Northern Highway and east of Mt Meharry. It is a great distance from all the areas referred to in the claimants' submissions, and so the evidence cited by the claimants does not establish occupation of UCL 165.

1256 UCL 2 comprises multiple areas. The largest sections of UCL 2 are in the Hamersley Range, to the east of Karijini National Park. They are a considerable distance to the east of the places referred to in the claimants' submissions, and so the claimants' evidence cannot establish occupation of these areas. Other parts of UCL 2 are linear areas of land on the eastern boundary of Karijini National Park, and other linear and irregularly-shaped sections to the east of Karijini. One section only of UCL is adjacent to the Great Northern Highway.

1257 UCL 12 is a small area of land adjoining the west side of the Great Northern Highway at the corner of Karijini National Park, opposite the area of UCL 2 adjoining the highway.

1258 The State submits none of the areas referred to by the claimants is within any of these three areas of UCL. The closest site referred to is Bilirrbinha (site 58), which is about 3 km north of the areas of UCL adjoining the highway. The claimants have not cited any evidence as to contemporaneous physical activities or presence at Bilirrbinha. Dignam's Gorge is marked as a place about 15 km to the west of site 58. Dignam's Gorge is too distant to establish occupation of places adjacent to, and east of, the highway. Again, it is not possible to infer from Mr Parker's evidence that his activities were contemporaneous with the filing of the MIB claim.

1259 The State says no part of UCL 2 or 12 is "adjacent" to 5 Mile/Windell Block (site 51). The nearest part of UCL 2 is about 10 km north of the community. UCL 12 is about 20 km away. In any event, there was in fact no oral or affidavit evidence of any habitation of that community. Whilst it appeared from the Court sitting that the community had been inhabited recently, there is insufficient evidence to conclude that the community was occupied prior to the filing of either of the claims. Further, there is no evidence of any physical activities or presence at Buthanmara (site 56). The evidence in fact indicates that this site is not used as Dr Palmer in his notes for this site recorded "site not located, position indicative". None of the evidence cited by the claimants in respect of Mt Lockyer (site 77) is of contemporaneous physical activities or presence. The evidence of Dawn Hicks cited relates to when she was a girl living with her father in Wittenoom and not to the date of the filing of the MIB claim. In any event, as Dawn Hicks was a member of the IB claim group and not the MIB claim group, her evidence cannot establish occupation of the area around Mt Lockyer, which is within the former MIB claim area, not the IB claim area.

1260 I generally accept the State's submissions concerning the sufficiency of the occupation evidence in respect of these areas. While there is evidence in relation to the Windell Block that might, especially when taken with other evidence, show a certain level of occupation over a number of years and, by inference, the relevant date of the application and underlying applications, I am left quite uncertain as to the relationship of that land at Windell with the relevant areas of UCL.

1261 For those reasons I am not satisfied on the balance of probabilities that there was any relevant occupation of the areas in question.

1262 In these circumstances, I find that s 47B does not apply to UCL 2, 12 and 165.

Road areas through Karijini National Park (UCL 3 and 13-19)

1263 The claimants say it is apparent from the recent affidavit material filed by the State that there are some small sections of UCL adjacent to the highway as it passes through the Karijini National Park south of Auski. This particular area is within the general area identified as Dignam's Gorge/Wadugara described above and the evidence referred to above in relation to this area especially that of Dawn Hicks appears to include and in part relate directly to this particular area. It is also very close to a site at which preservation evidence was given in relation to a feature referred to as the Stone Man. Evidence was also given in restricted session during the preservation evidence regarding this formation. Such supervisory and protective activities by Law men can constitute occupation for the purpose of s 47B: *Moses FC* at [208] citing *Rubibi*.

1264 The State says UCL 18 is not an area where s 47B may apply. The submissions above are repeated. As to the Stone Man (presumed to be at or close to site 58), the claimants have not cited evidence of any "supervisory and protective activities" in respect of this feature. The singing of songs and knowledge of stories regarding a feature do not constitute physical activities or presence amounting to occupation for the purposes of s 47B(1)(c) NTA. Any evidence in relation to the Stone Man cannot establish occupation of all the areas of UCL adjoining Great Northern Highway because these areas are mostly remote from the Stone Man.

1265 While there was some evidence concerning the Stone Man, as pointed out by the claimants, I am not satisfied on the whole of the evidence that such evidence as there was, from a mythological point of view, is sufficient in the circumstances of this case, as a matter of fact and agree, to indicate possession of the areas claimed. I do not reject the submission that supervisory and protective activities under traditional law can, in appropriate circumstances, support a finding of occupation, just that in circumstances of this case, having regard to the relevant evidence I am not satisfied that occupation as a matter of fact in degree has been made out.

1266 In these circumstances, I find that s 47B does not apply to UCL 3, 13-19.

Rockhole Bore/Gunadayanah (UCL 2, 4, 6, 8 and 26-31)

1267 The claimants say this area includes the gorge known as Kalayangayilba (witness statement Maitland Parker (Ex 8) at [95]) and the site Gunadayanah (Rock Hole Bore). Maitland Parker gave evidence of hunting there. The area is to the immediate north of the site known as Barimuna.

1268 The State says UCL 4, 6, 8, 30 and 31 are not areas where s 47B can apply. As described above, UCL 28 and the relevant part of UCL 2 are extensive areas of UCL on the top of the Hamersley Plateau. UCL 26 and 27 are located between the parcels of land comprising BHP's railway lease. UCL 28 is a linear area of land in the Fortescue Valley perpendicular to the railway line. The other areas that were UCL on 29 September 1998 are now the subject of BHP's leases, which had rail and other infrastructure constructed on them in 1998: Ex 81 at [25]-[29]. The only evidence as to occupation of these areas is Maitland Parker's evidence as to hunting in the area of Rock Hole Bore (site 100). In oral evidence, Mr Parker said simply "good country for hunting, camping, yes" in relation to this area.

1269 The State notes Rock Hole Bore is about 20 km north-east of the Yandi mine and about 4 km to the closest part of the Yandi rail spur. It is on the edge of the escarpment of the Hamersley Range. Accordingly, it is to be inferred that Mr Parker's reference to hunting in the area is to hunting in the Fortescue Valley to the north of the Bore. There is no evidence of any contemporary use of the high areas of the Hamersley plateau. In any event, Mr Parker's evidence is vague and lacking in detail, especially as to the time period when the hunting took place, how frequently it took place, and the duration of the hunting. These details are necessary to found a conclusion that the hunting constituted an exercise of "possessory rights".

1270 The State further submits that, if this evidence is held to establish occupation, it is still insufficient to establish occupation over the whole of each of these areas of UCL. Rock Hold Bore is on the fringe of these areas, and it cannot be inferred from evidence of this one location that Mr Parker occupied the whole of the area (especially, as stated, much of the area is on the Hamersley plateau, and the Bore is on the edge of the plain). Because of the

presence of major infrastructure on the BHP leases in 1998 (and at all subsequent times) these areas cannot have been occupied.

1271 I accept the State's submissions that there is insufficient evidence of occupation in relation to these areas at material times.

1272 The position is the occupation area in this case (as indeed many of the other instances) relies on the evidence of Maitland Parker, as one of the members of the claim group. That is quite appropriate in terms of seeking to meet the requirements for the application of s 47B NTA. However, Mr Parker's evidence generally relates to various parts of the claim area, which over time, he has visited. Again, there is nothing wrong with that aspect of his evidence, as a Banjima man with his extended family he has conducted activities on Banjima country. The difficulty is that it cannot easily be drawn from the evidence exactly where and when those visitations or activities took place and the extent to which those activities display a possessory nature. In my view, in the particular circumstances of this claim, the sorts of passing trips, visits and activities, while no doubt meaningful to Mr Parker and his extended family at material times, is insufficient, on the balance of probabilities, to establish occupation having regard to the principles laid down by the Full Court in *Moses FC*. The presence of activities relied on do not, in my judgment, involve the assertion of being established over that place, as was put in *Moses FC*.

1273 In these circumstances, I find that s 47B does not apply to UCL 2, 4, 6, 8, 26-31.

Road/Easement Yandi – Barimuna (UCL 32)

1274 The claimants say it is apparent from the recent affidavit material filed by the State that a road or easement running from the junction of Weeli Wolli and Yandicoogina Creek in a westerly direction to the immediate south of Barimuna is UCL. The Court heard extensive evidence about looking after country in and around this site (witness statement Margaret Parker: Ex 36) at [52]. Timothy Parker gave evidence about going hunting in and around the area (witness statement of Timothy Parker (Ex 11) at [45] where he says he "[goes] hunting all through that country in Mulga Downs and down the Weeli Wolli through to Hope Downs and back across"), as did Maitland Parker: affidavit of Maitland Parker sworn 27 February 2012.

1275 The State says UCL 32 is a short, linear strip of land in close proximity to RTIO's Yandicoogina mine. It appears to cross a road or track. It is not itself a road or easement. The whole of the road/easement traversed by UCL 32, including UCL 32, is presently covered by mining lease 70/274, granted to Hamersley Iron-Yandi Pty Ltd on 13 October 1997. Between 8 June 1982 and 25 September 1997 (when they were surrendered), the whole of this road (except for, apparently, UCL 32) was covered by exploration licences E47/6, E47/7 and E47/8, each of which was held by CSR Ltd and Hamersley Iron-Yandi Pty Ltd. It is not clear why this particular area of land has been identified as UCL as at 4 June 1996, the date when the IB claim was lodged over the area. Accordingly the claimants' evidence as to Barimuna does not establish occupation of this area.

1276 The State says, even if it was held that the exploration licences are not for a "particular" or "public" purpose, such that s 47B could apply to the whole road as I have held above, the evidence does not establish occupation. This is because:

(1) There was not "extensive evidence" of looking after Barimuna, as described above. The evidence of Margaret Parker cited is of building a fence around Barimuna in 2007. Apart from not meeting the temporal requirement, this is not evidence of exercise of possessory rights, because it can be inferred that this action took place in the context of dealings with BHP in association with the mine, and not as of right.

(2) Barimuna, in any event, is a discrete location to the north of the road. Any occupation of this discrete site cannot amount to occupation of the whole of the road.

(3) Given the presence of minerals exploration and mining in the area, it is likely that this road was being heavily used by mining companies in 1996 (and also in 1998) pursuant to licence. The claimants cannot have been exercising possessory rights over the road. Maitland Parker's evidence of hunting and fishing along this road in the "late 1990s" is vague, imprecise, and implausible and should not be accepted.

(4) Timothy Parker, Maitland Parker, and Marie-Anne Tucker are all members of the former MIB claim group. UCL 32 is in the area of the former IB claim, so any evidence of occupation must be provided by one or more members of the IB claim group, and relate to the period when that claim was filed.

1277 The claim for occupation in relation to this area relies very much on connection with Barimuna and general evidence of hunting in Mulga Downs and down to Weeli Wolli Creek area. I accept, as the State points out, that UCL 32 appears to cross a road or track and it is not clear why the particular area has been identified as UCL as at 4 June 1996. The latter point does not really matter. What does matter is its identification as UCL.

1278 Nonetheless, while I do not doubt the substance of the evidence relied upon by the claimants in support of occupation, I find it difficult to relate that evidence to the particular area in question.

1279 Accordingly, I am not satisfied on the balance of probabilities that there is sufficient evidence to establish occupation of the relevant area.

1280 In these circumstances, I find that s 47B does not apply to UCL 32.

Mulga Downs Homestead (UCL 33)

1281 The claimants say the Court heard considerable evidence from lay witnesses in relation to places in and around the Mulga Downs homestead. This parcel of UCL is in close proximity. The claimants rely upon the evidence of Maitland Parker: sworn 27 February 2012 (Ex 90) and the witness statement of Marie-Anne Tucker (Ex 14) at [101]-[102]).

1282 The State says UCL 33 is an area of former reserve for "Water and Stopping Place" that was cancelled on 2 November 1993. It is in the vicinity of Gnalka Gnooma Pool, on the edge of the Fortescue River, about 4 km south or south-east of the Mulga Downs homestead. The evidence of the claimants in relation to places in and around the Mulga Downs homestead relates to the early and middle parts of the twentieth century. By the 1950s the Banjima people had left Mulga Downs, with the communities at Youngaleena and Wirilimura being established in the 1990s and later. This earlier evidence of a presence of Mulga Downs does not establish occupation for the purpose of s 47B(1)(c). The evidence of contemporary physical presence and activities on Mulga Downs is, the State says, scant, vague, and lacking detail. The evidence of Maitland Parker cited (Ex 90 at [6]) is as follows:

> During 2009 and 2010 I spent a lot of time in and around the Hancock Prospecting Pty Ltd exploration licences to the immediate south east of the Mulga Downs homestead participating in heritage surveys as well as gathering bush foods.

1283 The State contends participation in heritage surveys does not amount to "occupation" because such participation is at the invitation of the relevant company and so does not involve an exercise of "possessory rights". It appears from this evidence of "gathering bush foods" was incidental to the surveys, and so also does not establish occupation. There is no detail as to the nature or frequency of the gathering of bush foods. Also, this evidence relates to a period after 1998 and so does not amount to occupation at the time when the MIB claim was made. If 29 October 2010 and/or 29 November 2010 are accepted as the relevant dates, UCL 33 was completely covered by granted exploration licence E47/1244 as at each of these dates.

1284 As to the last submission by the State that the grant of an exploration licence at material times makes this area of UCL unavailable for claim, I have above rejected the broad submission that the grounds of such licences had that effect.

1285 I also reject the submission that just because activities relied upon by claimants involve the activities of a member of the claim group in heritage surveys at the "invitation" of another person or company, makes evidence of that activity irrelevant to the occupation issue that arises under s 47B.

1286 What might be said, however, is that the fact that evidence relied upon arose in those circumstances should be taken into account. Thus, if there were other evidence amounting to occupation, then evidence to that effect would add to the understanding that occupation was made out in accordance with the principles explained in *Moses FC*.

1287 However, in the circumstances, I generally accept the occupation submissions made by the State that the early period of occupation is to be explained by presence of Banjima people on Mulga Downs and that it is necessary in the circumstances of the current occupation claim to regard what evidence there is more contemporaneous with the application dates (as found above). In that regard, the Court is not satisfied on the balance of probabilities, taking into account all of the relevant evidence that occupation is established in accordance with the principles explained in *Moses FC*.

1288 In these circumstances, I find that s 47B does not apply to UCL 33.

Cowra (UCL 5 and 10)

1289 The claimants say there are two very small parcels of UCL in the general area of Cowra, an outstation of Mulga Downs to the north east of the claim area. The Court heard extensive evidence about Cowra, including for example the use of the bush that grows there for smoking in law ceremonies (witness statement Timothy Parker (Ex 11) at [64]). This evidence together with the evidence about activities on Mulga Downs station generally and Wirilimura community (which is close by) is sufficient to establish occupation of these parcels

1290 The State says UCL 10 is not an area to which s 47B can apply (it does not appear in Ex 63 annexure PTG2). As at all possible relevant dates, 29 September 1998, 29 October 2010 and 29 November 2010, it was covered by E45/1073. However, for the reasons I have given above, this fact does not make the land unavailable for claim.

1291 Further, the State says UCL 5 is about 100 m to the west of BHP's special lease 3116/6300 (I123596) for the purposes of a quarry, close to the Mt Newman-Port Hedland railway line. The relevant location is 2-3 km south of the Mulga Downs outcamp. The cited evidence of Timothy Parker in relation to this area (Ex 11 at [64]) is as follows:

> The leaves of the bush *guwara* are used when rituals of initiation are staged. The leaves are still used today. It grows near Cowra (same name) and near our Law ground at Youngaleena. This is used to smoke the boys.

1292 There was no evidence that the bushes near Cowra were used for smoking purposes in ceremonies. Given that Mr Parker lives at Youngaleena and the bushes grow there, it is implausible that Mr Parker would go Cowra, which is some 60 km distance by road, to collect the bushes. The Court should not accept that there was "extensive evidence" of use of this area. Any such evidence is historical rather than contemporaneous

1293 Additionally, the State says Wirilimura is not "close by"; it is comparatively far, being 25 km to the east of Great Northern Highway along the track. Occupation of the Wirilimura community cannot establish occupation of this distant parcel of land, especially given its proximity to the quarry and railway. In any event, the Wirilimura community was established only in 2000, after all of the relevant possible dates. The land was not occupied before then.

1294 I generally accept the State's submissions concerning the insufficiency of the occupation evidence.

1295 I do not doubt that it can reasonably inferred that Timothy Parker may have collected leaves off the guwara bush (or that others have) for use at initiation rituals. It is not clear, however, on the evidence whether that is something done contemporaneously with the relevant application dates. But even so, the evidence overall, as a matter of fact and degree, does not enable the Court to be satisfied on the balance of probabilities that the occupation principles laid down in *Moses FC* have been met in this case.

1296 In these circumstances, I find that s 47B does not apply to UCL 5 and 10.

Thulanygara (hills) Djadjaling (UCL 24)

1297 The claimants say there was extensive evidence in relation to this area of country given during the Hope Downs preservation evidence. It is associated with the jandaru or bush honey. The jilbalba or increase site for the Jandaru is towards the western extremity of the parcel (or just outside) and there was another related site at Hope Downs (which was destroyed by RTIO after the 2008 preservation evidence). The entirety of that preservation evidence including the restricted evidence is relevant to the occupation of the area: supervisory and protective activities by law men can constitute occupation as found in *Moses FC* at [208] citing *Rubibi*. The evidence of Maitland Parker relating to this area is consistent with its continued use for jandaru and other bush foods:

> 116 We used to travel along the old Juna Downs station road, before Area C started, going down to Weeli Wolli to camp. We would hunt and get bush foods like *jandaru* and kangaroo along this area up into the hills to the north of the road. There is a lot of jandaru there along the hills and creek lines.

1298 Further, Maitland Parker was named Jarjaling because it is the country he belongs to, which he got from his dad. During the restricted video session the Court was shown a video of the Wardirba being performed at Thulanygara (site 49). Mr Parker explained "there's a song you sing in Thulanygara".

1299 The State says UCL 24 comprises five discrete areas in the south/south-east of the claim to the east and north of the Great Northern Highway in the Hamersley Range, south and east of Juna Downs Station. One of these areas relates to the MIB claim filed on

29 September 1998; the rest relate to the IB claim filed on 4 June 1996. The areas are extensive. The claimants have not identified precisely the location of the jandaru site said to be near one of these areas. Accordingly, the Court should not accept the relevance of any evidence associated with this site. It cannot establish occupation of the whole of all five of the large areas comprising UCL 24. As to the evidence associated with the jandaru site, the claimants have not identified any with any particularity. It is not accepted that there is any evidence of contemporaneous physical activities or presence associated with this site that would amount to occupation. The claimants have not identified any evidence of "supervisory and protective activities".

1300 As to Maitland Parker's evidence of hunting and gathering bush foods, the State submit it is unclear where and when this took place. It is too imprecise to establish occupation of the whole, or any, of the areas comprising UCL 24. His oral evidence that he "belongs to" the range of hills called "Thulanygara" is not evidence of physical activities or presence amounting to occupation. The video relating to Thulanygara (site 49) is not in evidence. The location, content, and date of this video cannot be verified, and so it cannot establish "occupation".

1301 In this case, I accept there is evidence about use of some areas. The difficulty is, as the State contends, it is not easy to be sure in relation to what places the activities relate. As the State says it is not clear the increase site is in the relevant area at all.

1302 The evidence that Mr Parker's Aboriginal name was given to him because that was the country of his father and of the Wardirba being performed at Thulanygara, and there is a song sung for that place, is relevant but on its own does not involve the relevant physical activity that can lead to occupation being established over an area.

1303 The evidence overall lacks the quality that implies occupation of the area in question.

1304 I find therefore that s 47B does not apply generally in relation to UCL 24

Youngaleena (UCL 42, 7 and 9) and Auski (UCL 11, 20, 22 and 23)

1305 The claimants say there are a series of parcels of UCL adjacent to the Roy Hill Road between Youngaleena and Wittenoom and Youngaleena and Auski. Given the size of the

Youngaleena community and the evidence of hunting all around "here", the Court could readily infer that these parcels were occupied for the purpose of s 47B. The same applies to small parcels of land in and around the Auski roadhouse. May Byrne gave evidence of a meeting at Auski at which other Aboriginal people were welcomed to country by Bottom End Banjima people. The claimants say occupation does not have to involve traditional activities: *Moses FC* at [215] citing *Rubibi (No 7)* at [84].] The claimants further rely on the affidavit of Maitland Parker (Ex 90) at [7].

1306 The State says none of areas UCL 11, 20, 22 and 23 is an area to which s 47B could apply: they do not appear in Ex 63 annexure PTG2. At all of the possible relevant dates, each of these parcels of land was covered by granted exploration licence E47/525. In any event, May Byrne's evidence as to attending a meeting at the Auski roadhouse is not evidence of the exercise of possessory rights. That is the relevance of her activities not being traditional.

1307 UCL 7, 9 and 42 are depicted on Ex 64 annexure JHS5. They are located adjacent to Youngaleena and the eastern section of the Nanutarra-Munjina Road (UCL 7 and 9), or just off the road (UCL 42). The State accepts that Timothy Parker's evidence as to living at Youngaleena and hunting around the community would be sufficient to establish occupation of UCL 7, 9, and 42, subject to the temporal requirement. As stated above, Mr Parker did not begin living at Youngaleena until 1999 or 2001, after the MIB claim was filed. He did not occupy the area at the time the claim was filed.

1308 For the reasons given above, the fact that there was an exploration licence at material dates over UCL 11, 20, 22 and 23 does not make those areas unavailable for claimants under s 47B.

1309 However, I accept the submissions made on behalf of the State that the evidence is insufficient to show relevant occupation of these "Auski" parcels at relevant times.

1310 The Court notes, and the State accepts, that Timothy Parker's evidence as to living at Youngaleena and hunting around the community would be sufficient to establish occupation of UCL 7, 9 and 42, subject to the temporal requirement.

1311 As found above, I am satisfied that the temporal requirement is met.

1312 In these circumstances I find that:

(1) s 47B does not apply to UCL 11, 20, 22 and 23;

(2) s 47B applies to UCL 7, 9 and 42.

Gundawana - Top End Banjima Country (Mt Robinson; The Governor) (UCL 165)

1313 The claimants say this parcel of UCL covers most of what was referred to in the evidence as Top End Banjima country, being south of Bathangarrana Gap and west of the Great Northern Highway. This is an area referred to in the evidence generally as Gundawana Claypan. There was evidence as to the significance of this area to Banjima people. This area contains important sites and boundary markers such as Mt Robinson (site 48) and Yilarlnguna (The Governor) (site 98). The location known as Packsaddle is adjacent to this area. Marnmu Smyth gave evidence of camping near Packsaddle recently (it can be inferred from the statement that this was in or about 2010 or 2009) and of the carrying out of traditional activities, such as hunting as well as men's ceremonies (witness statement Marnmu Smyth (Ex 13) at [56]). Maitland Parker gave evidence as to hunting and camping in this area.

1314 The State says UCL 165 comprises six different areas in the south of the claim, west of the Great Northern Highway and Mt Robinson, and east of Mt Meharry (south of Juna Downs Station). The evidence cited as to Gundawana Claypan, which would appear to be close to the south-east corner of the largest parcel comprising UCL 165, is not evidence as to physical activities or presence at the claypan. This evidence cannot establish occupation of any area. Similarly for the evidence concerning boundary markers. As to Marnmu Smyth's evidence, it does not meet the temporal requirement because, if the claimants are correct, it relates to 2009 or 2010, which is after when the IB claim was filed on 4 June 1996. It is accepted that Ms Smyth was a member of the IB claim group. If however, contrary to these submissions, the date for the WAD319/2010 claim is considered the relevant one (29 October 2010), the exploration licences covering the area at that date must be taken into account. In any event, Ms Smyth's evidence as to activities on a single location on a single date cannot be sufficient for establishing occupation of the whole of the disparate areas comprising UCL 165.

1315 So too the Court rejects the State's submission that the only relevant date for showing possession is 4 June 1996 when the IB claim was filed.

1316 Nonetheless, as at the end of October 2010, the evidence of occupation, in accordance with the principles established in *Moses FC,* is, as a matter of fact and degree, lacking.

1317 While there is a range of evidence that supports the finding that relevant connection under the NTA has been made out (as found above), general knowledge of country, boundary markers, evidence of recent camping near Packsaddle, and the conduct of men's ceremonies, is not sufficient, in my view, to establish that there has been occupation of UCL 165 as a general tract of land. The Court is also left in doubt as to precisely where a number of these activities occurred and so is not satisfied that there is relevant occupation of particular areas at the appropriate dates by a member or members of the claim group of UCL 165.

1318 In these circumstances, I find that s 47B does not apply to UCL 165.

Disputed Extinguishing Acts

Freehold

1319 Details of freehold estates granted in the claim area are set out in Ex 61 annexure LRM2 and consist of the following:

(1) historical freehold titles, of which there are 208 (all within the former Wittenoom townsite): Ex 61 annexure LRM2 Document 2, pp 26-30, items 30-238 inclusive in the table; and

(2) current freehold titles, of which there are 20 (19 of which are in the former Wittenoom townsite, the remaining one being for the Auski roadhouse (Munjina)): Ex 61 annexure LRM2 Document 8, p 52, items 21-40 inclusive in the table.

1320 In addition to the titles identified in Ex 61, grants in fee simple were made over the following reserves, in each case pursuant to s 33(4)(a) *Land Act 1933*:

(1) reserve 27998 for the purpose of "Fire Station Site" on 25 February 1966; and

(2) reserve 28375 for the purpose of "Fire Station Site" on 16 December 1966.

1321 The State says each of the grants of freehold titles, including the grants of fee simple in respect of reserves, is valid. As the grants are valid, they are, by reason of s 23B(2)(c)(ii) NTA previous exclusive possession acts. They are also relevant acts within the meaning of s 12I TVA. Each grant completely extinguishes native title to the land concerned: ss 23A(2) and 23C(1) NTA and s 12I TVA. Moreover, freehold grants extinguish native title under the common law: *Fejo*.

1322 The claimants agree that subject to the potential application of s 47B in relation to certain of the freehold titles, all of the freehold titles identified in Ex 61 (and referred to above) extinguished native title.

1323 The parties are invited to make final submissions in light of relevant findings concerning the application of s 47B although in light of the s 47B findings above, it is understood native title will have been extinguished in most, if not all cases.

Leases 3116/6300 (I123596) and 3116/6329 (I123720) and other leases

1324 The State refers to leases granted within the claim area that are identified primarily in Ex 61, consisting of the following:

(1) Leases over reserves, granted under s 33 *Land Act 1933*. These leases (for the purpose of the aerodrome or aerial landing ground north of Wittenoom) were discussed above.

(2) Special leases granted under s 116 *Land Act 1933*. A number of these were discussed above.

(3) Special leases granted under s 117 *Land Act 1933*. A number of these were discussed above.

(4) Special leases granted under a State Agreement Act for non-mining purposes

(5) Leases granted under s 79 *Land Administration Act 1997*, in some cases pursuant to a State Agreement.

1325 In addition, Ex 62 identifies a lease over reserve 31428 granted under the *Aboriginal Affairs Planning Authority Act 1972* (WA).

1326 Further, correspondence in relation to (historical) reserve 25156 (for the purpose of "Church Site – Church of England") on the second tenure DVD indicates that a lease was granted over that area.

1327 Subject to the operation of the RDA, the State submits leases which confer a right of exclusive possession extinguish native title at common law: *Wilson v Anderson* at [36]. In *Ward HC*, the High Court held (at [351]-[357]) that the grant of a special lease under s 116 *Land Act 1933* granted the lessee a right of exclusive possession of the leased land. Similarly, the Court held (at [358]-[375]) that the grant of a lease over a reserve under s 32 *Land Act 1933* gave a right of exclusive possession and so extinguished native title. Further, the NTA confirms that, with some exceptions, leases which are (inter alia) scheduled interests, commercial leases, or leases other than mining leases which confer a right of exclusive possession are previous exclusive possession acts. The TVA confirms that such leases extinguish native title if they were in force on 23 December 1996 (and so are relevant acts): s 12I TVA.

1328 The State notes the claimants accept that, subject to its contentions as to invalidity (with respect to some leases) and s 47B, a number of the leases identified in Ex 61 are previous exclusive possession acts, or have otherwise wholly extinguished native title by reason that they confer on the lessee a right of exclusive possession.

1329 As to leases 3116/6300 (I123596) and 3116/6329 (I123720), each was granted under s 116 *Land Act 1933* and the Newman State Agreement.

1330 Special lease 3116/6300 (I123596) is dated 24 November 1978 and was registered on 17 January 1979. It was granted to BHP Billiton respondents for the purpose of:

> …a quarry for the production of railway ballast and a stockpile area for the storage of the said railway ballast for the requirements of the Lessees in the operation and maintenance of the railway constructed pursuant to the Agreement.

1331 Special lease 3116/6329 (I123720) is dated 4 September 1979 and was registered on the same day. It was granted to BHP Billiton respondents for the purpose of:

> …the laying out development construction provision and provision of and use of a water supply and ancillary installations and facilities for drawing conserving reticulating and supplying water to the maintenance camp established by the Lessees on the land the subject of Special Lease 3116/6300 for the purposes of the operation

and maintenance of the railway constructed pursuant to the Agreement.

1332 The claimants withdraw a concession that the leases are "mining leases" within the meaning of s 245(1) NTA and rely on the definition of "mine" in s 253, which includes a quarry in para (c) of the definition; and *Hayes* at [112(iv)]. They say they are therefore category C past acts: s 231 NTA; and not previous exclusive possession acts: see s 23B(2)(c)(viii) NTA.

1333 The State accepts that each of the leases is a past act. It also notes "mining lease" is defined in s 245(1) NTA and "mine" is defined in s 253.

1334 The claimants however rely on the inclusion of "quarry" in paragraph (c) of the provision to say that the leases (or at least 3116/6300) is a "mining lease".

1335 The State notes the term "quarry" in the definition of "mine" expressly excludes quarrying for purposes other than "extracting, producing or refining minerals from the sand, gravel rocks or soil". The State submits this reinforces the point that a mining lease is a lease that permits the land or waters to be used solely or primarily for the extraction of minerals (as well as exploration and prospecting), as stated in the s 245 definition of "mining lease" but not all purposes ancillary to mining.

1336 The State says one of the purposes of special lease 3116/6300 is a "quarry *for the production of railway ballast*" (emphasis added). Thus, the purpose of the quarrying is not for "extracting, producing or refining minerals from the sand, gravel rocks or soil". Accordingly it falls within the exclusion to the definition of mine, whether or not that definition also includes other purposes incidental to mining.

1337 The State says the lease considered in *Hayes* (which Olney J considered a mining lease) was for "quarrying purposes only": *Hayes* at [112]. Whilst this conclusion may be open when the purpose of the quarrying is unknown, it is not when the purpose is known, and that purpose falls within the exclusion in the definition of mine.

1338 This purpose is in any event only one of the two purposes of the lease. The other purpose is "a stockpile area for the storage of the railway ballast for the requirements of the Lessees in the operation and maintenance of the railway constructed pursuant to the

Agreement". It cannot be said that the lease was "solely" or "primarily" for the purpose of a quarry. Thus the lease is not a mining lease.

1339 Not being a mining lease, special lease 3116/6300 will be a previous exclusive possession act pursuant to s 23B(2)(c)(viii) (and a relevant act which extinguishes native title, being in force on 23 December 1996 (s 12I TVA) if it conferred a right of exclusive possession over particular land or waters

1340 The lease was granted under s 116 *Land Act 1933* as modified by the Newman State Agreement. In *Ward HC*, the High Court held (at [357]) that the grant of a special lease under s 116 *Land Act 1933* granted the lessee a right of exclusive possession of the leased land. Special lease 3116/6300 does not contain any features which suggest that anything other than a right of exclusive possession was conferred. Accordingly, the lease is a previous exclusive possession act within s 23B(2)(c)(viii).

1341 Moreover, the lease is a scheduled interest pursuant to s 23B(2)(c)(i) because it is solely or primarily for "railway and ancillary installations, works and facilities": Sch 1, cl 36 NTA. Each of the purposes of "quarry" and "stockpile" clearly relates to "installations, works and facilities" that are ancillary to a railway. It extinguishes native title on this basis: s 12I TVA.

1342 Further, the lease is a commercial lease pursuant to s 23B(2)(c)(iii). It extinguished native title on this basis also. "Commercial lease" is defined in s 246(1). In *Daniel 2003(1)*, Nicholson J held that a number of special leases granted under State Agreement Acts were commercial leases, including a lease for the purpose "a railway between Cape Lambert & the mineral lease & all necessary switch & other gear installations works, facilities & services ancillary thereto": *Daniel 2003(1)* at [1014].

1343 As to special lease 3116/6329, the State observes it is not for the purpose of a quarry, or for any other purpose included within the definition of mining. It is not for the purpose of "mining" within the ordinary meaning of that term (ie extraction of minerals). It is not a mining lease.

1344 The lease was granted under s 116 *Land Act 1933* as modified by the Newman State Agreement. It conferred a right of exclusive possession. Accordingly, it is a previous exclusive possession act pursuant to s 23B(2)(c)(viii) which, being a relevant act, extinguished native title pursuant to s 12I TVA.

1345 Further, the lease is a commercial lease, and so also extinguishes native title on that basis: s 23B(2)(c)(iii) NTA; s 12I TVA.

1346 The BHP Billiton respondents' submissions reflects the State's analysis. Alternatively, they say if 3116/6329 and 3116/6300 were not validly granted, then they are:

(1) category A past acts under s 229 NTA on the basis they are commercial leases; or

(2) category B past acts under s 230 NTA.

1347 Consequently, they say:

(1) the grants are validated by s 5 TVA and s 19 NTA; and

(2) in the case of a category A past act, native title is wholly extinguished pursuant to s 6 TVA and ss 15(1)(a) and 19 NTA; or

(3) in the case of a category B past act, native title is wholly extinguished on the basis that the right of exclusive possession granted under the lease is wholly inconsistent with any native title rights, pursuant to s 8 TVA and ss 15(1)(c) and 19 NTA.

1348 The claimants maintain that both leases are mining leases and therefore category C past acts. They note the definition of "mine" in s 253 NTA expressly includes a quarry. The State's submissions proceed on the assumption that the words beginning on the line underneath the para (c) reference to "quarry" in that definition refer to quarrying. However, it is unlikely that is what Parliament intended. Were that so, the obvious way of expressing that would have been in para (c) to refer to a "quarry, but not including a quarry for a purpose other than...". Instead of doing that, Parliament carefully chose the words "*extract, obtain or remove* sand, gravel, rocks or soil *from the natural surface* of land, or of the bed beneath waters .." (emphasis added). This appears directed to "yandying" activities (a dictionary definition of which is "separate (grass seed or a mineral) from the surrounding refuse by shaking it in a special shallow dish"), and rock and soil sampling or collecting activities. Yandying will in most case then be reincluded by para (d), but other forms of rock or soil

sampling or collecting will not. Thus "mine" includes to quarry: a dictionary definition of which (as a noun – the verb has a corresponding meaning) is "a place, typically a large, deep pit, from which stone or other materials are or have been extracted", but does not include such low impact activities as collecting rocks or soil samples or specimens.

1349 The claimants say, however, they do not rely only on the purpose of quarrying.

1350 I accept the submissions made on behalf of the State and BHP Billiton respondents.

1351 I do not accept the construction placed on the definition of "mine" in s 253 NTA and its relationship to "quarry" in para (c) as advanced on behalf of the claimants. I consider that in the definition of "mine", the word "quarry" is used as a verb, just as the words "explore" and "prospect" in (a) and the word "extract" in para (b) are so used. So it follows the exception following (c) applies and demands an analysis of the purpose of the quarrying and, in particular in this case, whether it was for a purpose other than extracting, producing or refining minerals from the sand, gravel, rocks or soil or processing the sand, gravel, rocks or soil by non-mechanical means.

1352 In this case, it is accepted, and I find, that the purpose was for providing ballast, being a purpose other than those described in (d) and (e); and so the quarrying is not within the definition of "mine". In those circumstances, the primary submissions of the State should be accepted.

1353 I find, therefore, that leases 3116/6300 (I123596) and 3116/639 (I123720) are each previous exclusive possession acts pursuant to s 23B(2)(c)(viii) and a relevant act which extinguishes native title, being in force on 23 December 1996 (s 12I TVA) on the basis that it each conferred a right of exclusive possession over particular land or waters.

Special leases 3116/7030, 3116/6202, 3116/6408 and 3116/8091

1354 Each of these four special leases was granted after the commencement of the RDA and was not in existence as at 1 January 1994.

1355 The claimants contend each is a category D past act to which the non-extinguishment principle applies.

1356 The State agrees, but for the fact that it says that each of the leases was granted over an area of land that had been the subject of a lease pre-RDA.

1357 It appears the claimants concede that 3116/7030 was over the same area as special lease 3116/5414. In that regard, the claimants concede that if 3116/5414 was a valid lease, then it will have extinguished native title and the area in question will not be excluded from the application if it is also found that s 47B NTA applies to the area.

1358 In light of my findings above that 3116/5414 was not valid, but that s 47B does not apply in that area, then it would not be open to find that 3116/7030 was a category D past act to which the non-extinguishment principle applies.

1359 As to 3116/6202, the State submits it was granted over the same area as special lease 3116/4817. I accept that is so.

1360 As to special lease 3116/6408, the State say it was granted over the same area as special lease 3116/5141. I accept that is so.

1361 As to special lease 3116/8091, the State say it was granted over the same area as special lease 3116/5141 (and also 3116/6408). I accept that is so.

1362 I note the claimants accept that both special leases 3116/4817 and 3116/5141 extinguished native title, subject to their contentions as to s 47B. In light of my finding that s 47B does not apply in respect of either of those special leases, then it would follow that there has been extinguishment of native title over all these areas and the subject areas of the primary leases considered will therefore be treated as excluded from the claim area.

Special leases L21122L, L21123L, L1124L

1363 The claimants accept that the leases are valid.

1364 The claimants submit, however, that the non-extinguishment principle applies to the grant of the leases, as the historical taking orders relating to the underlying land contained certain exclusions from their application (ie roads and existing mining tenements) with the result that s 24MD(3) NTA applies in respect of the taking orders and the grant of the leases.

In this regard, the claimants rely on *Western Australia v Gordon* [2010] NNTTA 152; (2010) 258 FLR 168 (***Gordon***) at [36]-[41].

1365 The RTIO respondents admit that if the Court determines to follow *Gordon*, the consequence is that the non-extinguishment principle applies to the grant of the leases.

1366 In my view, the result is that s 24MD(3) NTA applies in respect of the taking orders and the subsequent grant of the leases, such that the non-extinguishment principle applies as determined in *Gordon* at [36]-[41].

1367 I will hear from the relevant parties as to the appropriate determination to be made in light of this finding.

Special lease 3116/6851

1368 This lease was granted under s 117 *Land Act 1933* over Wittenoom lots 292, 293 and 300 for the purpose of "Office and Storage" on 22 May 1978. It expired on 31 March 1983.

1369 This area had previously been subject to two earlier leases: special leases 3116/3859 and 3116/5790, granted on 28 June 1968, and 19 December 1974, respectively. The claimants concede that each of these earlier leases extinguished native title, subject to their contentions as to validity.

1370 As I have found above that the two earlier special leases were not validly granted, I will hear from the parties as to the appropriate determination.

Lease over reserve 31428 (Yandeyarra)

1371 Reserve 31428 (Yandeyarra) was set apart as a reserve for the purpose of "Aborigines Pastoral Station and Preservation of Aboriginal Cultural Material" in accordance with a notice published in the Gazette on 30 June 1972. By proclamation published in the same Gazette, the reserve was declared to be a "reserve for natives" pursuant to s 18 *Native Welfare Act 1963* (WA). Also, by Order in Council published in the same Gazette the reserve was vested in the Minister for Community Welfare in trust for the purpose of the reserve pursuant to s 33 *Land Act 1933*.

1372 By Proclamation published in the Gazette on 23 March 1973 the reserve was placed under the control and management of the Aboriginal Lands Trust (***ALT***). The reserve was subsequently (on 29 June 1973) vested in the ALT pursuant to s 33 *Land Act 1933* for the purpose of "Use and Benefit of Aborigines" (the earlier vesting order being revoked).

1373 On 1 March 1988 the ALT granted a lease of the reserve to Mugarinya Community Association Inc (***Yandeyarra lease***). The lease is expressed to be pursuant to the ALT's powers under ss 20(3)(c) and 30(c) *Aboriginal Affairs Planning Authority Act 1972* (WA) (***AAPA Act***). The lease recites, inter alia, that "[t]he Minister and The Aboriginal Affairs Planning Authority has approved of the granting of this lease as appears by the approval endorsed on this lease". The area of the reserve was leased for a term of 99 years, commencing 1 September 1988.

1374 The lease conferred a right of exclusive possession. However, it is not a previous exclusive possession act because it falls within the exception in s 23B(9) NTA.

1375 The State does not rely upon the Yandeyarra lease as having extinguished native title. The State accepts the lease should be recorded, however, as an "other interest" which prevails over native title to the extent of inconsistency for the purposes of s 225(c) and (d) NTA. The claimants agree.

1376 In these circumstances, the Yandeyarra lease should be recorded as an "other interest" in the determination.

Lease over reserve 25156 (Church site)

1377 Reserve 25156 was set aside as a reserve pursuant to s 29 *Land Act 1933* for the purpose of "Church site – Church of England" in accordance with a notice published in the Gazette on 21 November 1958. The reserve was not vested under s 33 *Land Act 1933*. The reserve was cancelled by notice published in the Gazette on 31 October 1995.

1378 Correspondence contained in Ex 65 in respect of this reserve (annexures AFG74 and AFG75) indicates that a lease was granted in respect of the reserve:

(1) A letter from the Executive Director of the Department of Land to the Diocesan Registrar of the Diocese of North West Australia dated 16 January 1987 sets out the terms of a proposed "lease back" of the premises to the Church. The letter concludes "would you please advise (after consideration of the above terms and conditions) whether the Diocese of North West Australia wishes to proceed with a lease of the premises at lot 16 Second Avenue, Wittenoom".

(2) A letter from the Diocesan Registrar to the Director, Land Acquisitions Branch, Department of Land Administration dated 20 May 1987 states:

> Thank you for your letter of April 16th. It was disappointing to hear that the amendment proposed in my last letter was not acceptable to you. We would nevertheless like to proceed with the settlement on the conditions set down in your letter of January 16th.

1379 Although there is no other evidence of this lease, the State submit it should be inferred from this exchange of correspondence that a lease was in fact granted to the Church in respect of the reserve.

1380 The claimants, however, contend the State has not discharged its evidentiary burden of demonstrating that a lease was granted. All that exists is a statement in correspondence of a desire to proceed with a lease, with no evidence as to whether that desire was acted upon, if so, when, and on what terms and conditions.

1381 I accept the claimants' submission. On such sparse evidence the Court is not prepared to find that a lease was in fact granted and so the asserted Church lease does not extinguish native title of the area concerned. I find below, however, that the use made of the reserve supports a finding of use allowed by the State thus disclosing an assertion of the State's use rights over the reserve which extinguished native title.

Lease 3116/11923 (GE144640) (Youngaleena)

1382 Lease 3116/11923 was granted under s 116 *Land Act 1933* on 8 January 1998. It was registered on the same day.

1383 The lease was granted to the "Youngaleena Bujjma Aboriginal Corporation" for the special purposes of "Use and Benefit of Aboriginal Inhabitants".

1384 The State does not contend that this lease extinguished native title. It submits it should, however, be recorded as an "other interest" which prevails over native title to the extent of any inconsistency for the purposes of s 225(c) and (d) NTA.

1385 The parties agree that lease 3116/11923 is an "other interest".

1386 The determination should reflect this "other interest".

Reserves

1387 That part of Karijini National Park which was the subject of a vesting under the *Land Act 1933* (reserve 30082) is excluded from the claim. The affidavit of Mr Strain at annexure JHS1 shows the extent of the area that was vested in 1969. The vesting was cancelled in December 1973 and the reserve was never re-vested. Accordingly, the claimants say those areas identified on annexure JHS1 as areas "A" are included in the claim. The areas within the north eastern boundary of the reserve which are shown in annexure JHS1 as UCL are also included in the claim by the claimants on the basis they are subject to s 47B.

1388 The claimants accept, however, that the following reserves have been vested under s 33 *Land Act 1933* and, in accordance with the decision *Ward HC*, wholly extinguished native title. Accordingly those areas are excluded from the claim area, except to the extent they are shown as being UCL on the second tenure DVD (being the following entries marked with an asterix); 23710*, 23776, 23864*, 23866*, 24438 (*part), 24858*, 25793*, 26028, 26031, 26369*, 26764*, 27373*, 27588*, 34773*, 34774, 34775, 37591*, 37592*, 39305*, 39515 and 42078.

1389 The claimants also agree that native title has, apart from the operation of s 47B, been wholly extinguished by the use of the following reserves:

(1) reserve 24824 for police purposes; and

(2) reserve 26780 for a school site.

1390 In addition to those two reserves, there is evidence of the following two reserves being used for their purpose:

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

(2) reserve 25156, for the purpose of "Church Site – Church of England" (discussed above).

1391 In relation to reserve 24849 the evidence comprises:

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

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

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

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

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

1392 In relation to reserve 25156 the evidence comprises:

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

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

(3) a letter from State Development Western Australia to the Chief Executive Officer of the Building Management Authority dated 20 March 1991 including an attachment referring to building number 6, "church", at the corner of Second Avenue and Lockyer Street (reserve number 25156), as a building proposed to be demolished.

1393 The State submits the construction of an ambulance depot and church, respectively, within these reserves indicates that the scope of the rights conferred included the right to

construct an ambulance depot and a church, respectively. Such rights were inconsistent with the existence of native title and extinguished native title.

1394 The State says it does not matter that the State did not assert any rights in relation to the reserves. Citing *Ward HC* (at [214]-[216]) and *Sebastian FC* (at [260]-[261]) it says whether or not the Crown has asserted rights in respect of a reserve, an inquiry as to the use which has been made of a reserve can inform the nature of the rights conferred. The construction of the buildings on the reserves in this case indicates the existence of a right to construct the buildings. In the case of these two reserves there was more than simply an exercise by the Crown of a power to decide how the land could be used.

1395 As to the State's submission that the construction of buildings indicates a right to do so, the claimants contend construction does not "indicate" that those particular reserves conferred any additional or different rights to other reserves created under the *Land Act 1933*. The nature of the rights created by the act of reservation is to be construed from the legislation and the Gazette notices. Those rights would be the same whether or not a building was actually built on the land any time after the creation of the reserves.

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

1397 In these circumstances, I find that the uses made of reserves 24849 and 25156 extinguished native title.

Roads and Other Public Works

1398 ***Introduction***: Roads are excluded from the claim area (on the basis that the construction of a road is a public work which is a previous exclusive possession act, or the dedication of the road otherwise extinguished native title at common law), except to the extent referred to below.

1399 Other features associated with roads referred to in the evidence are:

(1) Tourist information bay adjacent to Karijini Drive.

(2) Water bores:

(a) Adjacent to Karijini Drive.

(b) Adjacent to Great Northern Highway.

(c) Adjacent to Nanutarra to Munjina Road.

(3) Gravel pits:

(a) Adjacent to Karijini Drive.

(b) Adjacent to Great Northern Highway.

(c) Adjacent to Nanutarra to Munjina Road.

1400 Whether native title is extinguished in the whole area of a "road corridor" or areas adjacent to roads, such as borrow pits and water bores, is a question of fact in every case. The onus is on the respondents to identify what and where those areas are and how they are reasonably incidental or necessary to the roads: *King v Northern Territory* [2007] FCA 944; (2007) 162 FCR 89 at [214]-[219].

1401 The State's tenure evidence identifies 33 roads within the claim area (though many "roads" are actually parts of roads). These roads comprise the following:

(1) the Great Northern Highway;

(2) Karijini Drive;

(3) the Nanutarra-Munjina Road;

(4) the Munjina-Roy Hill Road;

(5) the Roebourne-Wittenoom Road;

(6) Bolitho Road (from Wittenoom to Wittenoom Gorge); and

(7) roads within the town of Wittenoom.

1402 These roads (other than the roads within Wittenoom townsite) are depicted on the topographic map contained in Ex 60 annexure LRM1 Document 7, p 36. The Nanutarra-Wittenoom Road is shown as two roads on the map: the Nanutarra-Wittenoom Road, and the Munjina-Wittenoom Road. Other roads and tracks are shown on the topographic map as well.

1403 Roads and works associated with roads are generally public works under the NTA. Section 253 NTA defines "public work" as:

> (a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
> (i) *a building, or other structure (including a memorial), that is a fixture*; or
> (ii) a road, railway or bridge; or
> (iia) where the expression is used in or for the purposes of Division 2 or 2A of Part 2—a stock route; or
> (iii) *a well, or bore, for obtaining water*; or
> (iv) *any major earthworks*; or
> (b) a building that is constructed with the authority of the Crown, other than on a lease.
>
> Note: In addition, section 251D deals with land or waters relating to public works
> (Emphasis added)

1404 The meaning of "public work" is extended by s 251D NTA which provides:

> In this Act, a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

1405 Public works when commenced to be constructed or established on or before 23 December 1996 are previous exclusive possession acts: s 23B(7) NTA. Such acts extinguish native title if they are attributable to the State: s 12J TVA.

1406 Whether or not extinguishment is confirmed by the TVA, the conferral of rights in the public upon establishment of a road in accordance with statutory procedures is inconsistent with native title in the land upon which the road is established: *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151.

1407 The area on which a road is or was situated extends to and includes adjacent land and waters necessary for or incidental to the construction, establishment or operation of the road in question. Accordingly the extended definition of public work in s 251D NTA applies to road corridors, and to features associated with roads such as gravel pits and water bores used in the construction and maintenance of roads. These features are also public works in their own right.

1408 Some roads are, on those principles, the subject of extinguishment controversy.

1409 ***Wittenoom roads***: The claimants identify roads within Wittenoom, shown in the second tenure DVD as roads 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; and historical roads 1, 2, 3 and 6 (now UCL). They refer to aerial photographs in the affidavit of Mr Morgan sworn 20 May 2011 (Ex 61) annexure LRM3 which they say show that in many cases there is no evidence of even an unsealed road having been constructed or used within those areas. Thus, the evidence does not establish the extent to which, and by whom, roads were actually established within the townsite. In particular, it cannot be concluded on the balance of probabilities that roads were constructed by or on behalf of the Crown or a statutory authority; they may well have been constructed by a mining company: see the affidavit of Keith Arthur Pearson sworn 10 February 2012 (Ex 78), in particular at [18]-[22].

1410 The State identifies current roads 1-3, 7-13, and 15-16 (not road 14) and historical roads 1-3 and 6 as within the former town of Wittenoom. The claimants do not accept that these roads are previous exclusive possession acts, or that they extinguished native title at all.

1411 Roads 7, 8, 10 and 11: Of these roads, current roads 7, 8, 10, and 11 are widenings or short extensions of existing roads and do not appear from a certified aerial photograph taken on 1 June 1979 to have been built. Nor do these particular roads appear to have been dedicated under statute.

1412 Accordingly, the State does not contend that these particular roads have extinguished native title and the Court so finds.

1413 Remaining Wittenoom roads: Of the remaining Wittenoom roads, the evidence indicates that they were most likely established from the late 1940s when the town of Wittenoom was established: Ex 78 at [19] and [22]. Except in the case of current road 16 (as to which see below), the cancelled public plans or diagrams on which these roads appear were all drawn before 31 October 1975, and so it may be inferred that all the roads were constructed or established before the commencement of the RDA.

1414 I accept the State's submissions that it should be inferred that all the Wittenoom roads were originally constructed by the Tableland Road Board (the present Shire of Ashburton): Ex 78 at [23]. The named roads within the town all correspond with roads under the control and management of the Shire of Ashburton: Ex 78 at [25].

1415 Accordingly, each of these roads is a public work which is attributable to the State for the purposes of s 12J(1) TVA, for which there is statutory confirmation of extinguishment and I so find.

1416 Current roads 1-3 and historical roads 1-3: Current roads 1-3, and historical roads 1-3 were additionally dedicated under the *Road Districts Act 1919* (WA) (***Road Districts Act 1919***) by virtue of being marked as a "road" on a plan publicly exhibited in the public office of the Department of Lands and Surveys, or on a plan deposited in the Office of Titles pursuant to s 2(c) *Road Districts Act Amendment Act 1932* (WA). Accordingly, they were vested in the Road Board: s 158 *Road Districts Act 1919*. Current roads 15 and 16 were dedicated under the *Local Government Act 1960* (WA).

1417 The State say dedication by these means amounted to "establishment" of the road by or on behalf of the Crown or a local government authority, providing an alternative basis for each of these roads being a public work attributable to the Crown. Such a construction of the definition of public work in s 253 NTA was accepted by Nicholson J in *Daniel 2003(1)* (at [642]-[643]) and Sundberg J in *Neowarra* (at [621]) and I accept it too.

1418 As a result it is unnecessary to consider the State's alternative submission, dedication of these roads under statute created rights in the public inconsistent with native title and so extinguished native title.

1419 I find currents roads 1-3 and historical roads 1-3 extinguished native title.

1420 ***Bolitho Road***: Historical roads 4 and 8 are referred to in the second tenure DVD as Bolitho Road heading south out of Wittenoom, and are now UCL.

1421 The claimants submit the evidence does not establish this is a public work or has otherwise extinguished native title.

1422 The State says this road runs south from Wittenoom to Wittenoom Gorge, where the Wittenoom mine was.

1423 I accept the State's submissions that it should be inferred from the evidence that this road was constructed in around the late 1940s, and that it was constructed by the Tablelands Road Board: Ex 78 at [19] and [22]-[23].

1424 This road is formally under the control and maintenance of the Shire of Ashburton, and previously has been maintained by the Shire: Ex 78 at [25] and [31]. It should be inferred that this road is the same as the "Mine Road", at least part of which appears to have been bituminised by the Shire in around April 1959: Ex 78 annexure KAP4, p 23. Accordingly, this road is a public work which is attributable to the State for the purposes of s 12J(1) TVA, for which there is statutory confirmation of extinguishment and I so find.

1425 The main part of Bolitho Road, from the edge of the town to Wittenoom Gorge (historical road 4), was dedicated under the *Road Districts Act 1919*. Accordingly, it was "established" by or on behalf of the Crown or a local government authority and so is a public work which is attributable to the State for the purposes of s 12J(1) TVA.

1426 I find Bolitho Road extinguished native title.

1427 ***Roebourne-Wittenoom Road***: The claimants submit the evidence does not establish this is a public work or has otherwise extinguished native title.

1428 The Wittenoom-Roebourne Road is a gravel road connecting the town of Roebourne with the former town of Wittenoom: Ex 78 at [31].

1429 It is unclear exactly when the road was built, though it appears on public plans as early as 1952. The road may have been built earlier than that, given that the establishment of Wittenoom commenced in late 1946: Ex 78 at [21].

1430 The Shire has ongoing control and maintenance of this road: Ex 78 annexure KAP2 within annexure KAP3, p 21.

1431 I accept the State's submissions that, because it connects two towns, it is to be inferred that this road was constructed by or on behalf of the Crown or a local government body or other statutory authority of the Crown such that it is a public work that is attributable

to the State: s 253 NTA; s 12J(1) TVA. Accordingly, there is statutory confirmation of extinguishment by this road and I so find.

1432 I find the Roebourne-Wittenoom Road extinguished native title.

1433 ***Karijini Drive***: The claimants admit that the actual construction of the road is valid and the area is, to the relevant extent, excluded from the claim area. I so find.

1434 ***Nanutarra to Munjina Road***: The Nanutarra to Munjina Road (also referred to in some documents as the Nanutarra to Wittenoom Road and the Munjina to Wittenoom Road) is in two parts, being that to the west of Wittenoom and that to the east.

1435 The part to the east (which connects Wittenoom to the Great Northern Highway) is shown in the second tenure DVD as comprising roads 4 and 33, and historical road 10 (which is now UCL).

1436 That part to the west is shown as historical road 9, part of which is now pastoral lease and part is now UCL.

1437 The claimants admit that the actual construction of the road is valid and the area is, to the relevant extent, excluded from the claim area. I so find.

1438 ***Munjina to Roy Hill Road***: The claimants admit that the actual construction of the road is valid and the area is, to the relevant extent, excluded from the claim area. I so find.

1439 ***Road 17***: Road 17, to the south of Wittenoom within Karijini National Park, was declared a public street under s 288 *Local Government Act 1960* (WA) in 1978.

1440 The claimants concede this area is excluded from the claim area and I so find.

1441 ***Road 18***: Road 18 is a small road next to Auski roadhouse (at the junction of Great Northern Highway and the Nanutarra to Munjima Road). This area was resumed under s 17 *Public Works Act 1902* (WA) for a road in 1990.

1442 The claimants concede that the area is excluded from the claim area and I so find.

1443 ***Great Northern Highway***: This highway appears in the second tenure DVD as roads 19-32 (inclusive) (being broken up into different sections).

1444 The claimants admit that the actual construction of the road is valid and the area is, to the relevant extent excluded from the claim area and I so find.

1445 ***Extent of construction and features associated with roads***: There is evidence of road corridors and features associated with roads in the claim area: Ex 67, 68 and 69. In relation to these, the claimants say that the onus is on the respondents to identify what and where those areas road corridors and areas adjacent to roads are, and how they are reasonably incidental or necessary to the roads.

1446 Water bores: There is evidence of 14 waters bores within the claim area: seven on or near the Great Northern Highway; four on or near the Nanutarra-Munjina Road; and three on or near Karijini Drive: Ex 67 at [7(c)]. Coordinates for the water bores are contained in Ex 67 annexure BA2, and these locations are shown in the map contained in Ex 67 annexure BA3: Ex 67 at [9].

1447 The water bores were all constructed or established by Main Roads Western Australia (***MRWA***): Ex 67 at [10]. The Commissioner of Main Roads was established under s 9 *Main Roads Act 1930* (WA) and so is a statutory authority as defined in s 253 NTA. Accordingly, all the water bores were public works in their own right: para (a)(iii) of the definition of public work in s 253 NTA.

1448 The water bores were established as "pre-construction features" for the provision of water for the construction and maintenance of MRWA roads within the claim area: Ex 67 at [10]; Ex 68 at [12]. The water bores typically occupy about 1 square metre of ground, though about 1 ha, plus access to the nearest road or track, is required to access and pump water from water bores: Ex 67 at [10]; Ex 68 at [10]. All of this land, including the access route between the water bore and the nearest road, comprises land and waters which are necessary for or incidental to the construction and maintenance of the MRWA roads within the claim area: s 251D NTA. It can be seen from Ex 67 annexure BAN3 that all the water bores are located in close proximity to the MRWA roads they serve: see also Ex 67 at [11].

1449 The claimants say the evidence does not establish why an area of 1 ha is necessary for or incidental to the water bores, which themselves only cover an area of 1 square metre. The mere assertion in Ex 68 at [10] that the "area required ... is about 1ha, plus access from the nearest point" is not a sufficient evidentiary basis to make a finding as to the extent of any extinguishment, apart from an area of 1 square metre at each of the points identified in Ex 67 annexure BAN3.

1450 I find, that, as all the water bores were constructed or established before 23 December 1996, (Ex 68 at [10], [14] and [20]) they were previous exclusive possession acts that were attributable to the State, for which there is statutory confirmation of extinguishment: ss 23B(7) and 23C(2) NTA; s 12J(1) TVA.

1451 The construction or establishment of each water bore extinguished native title over an area required for their access and use.

1452 The matter in dispute between the parties is the identification of adjacent land, the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the water bores. The question will always need to be resolved as one of fact and degree. I note that in *Neowarra* (at [622]) Sundberg J considered that if particular borrow pits and water bores in issue in that case were not within the definition of "public work" then they would be covered by s 251D. His Honour said:

> They are adjacent to the Road and their use is or was necessary for, or incidental to, the construction, establishment or operation of the Road. Any access tracks to the bores and pits are within s 251D.

1453 In Mr Armstrong's affidavit sworn 19 May 2011 (Ex 68) he says (at [10]) in respect of the three water bores near Karijini Drive, that they were "located adjacent to this portion of Karijini Drive". He then states that:

> The area required for each of these and all other water bores within the Banjima Trial Area is about 1ha, plus access from the nearest point.

1454 The circumstance thus described does not appear to need to reflect the sort of evidence that was before Sundberg J in *Neowarra*. I am left in some doubt as to whether the three water bores "located adjacent" to Karijini Drive are in fact within the area that might be identified as the road reserve, or are some distance away accessible only by some access

road. Similarly, I am uncertain as to the location of other water bores in relation to made roads.

1455 Additionally, I am uncertain why it is that an area of "about 1ha" is required as stated by Mr Armstrong.

1456 In the circumstances I would not find extinguishment in respect of water bores in respect of an area as great as 1 ha (which in old imperial measure is about 2.46 acres), when a water bore itself covers an area of only 1 square metre. In that regard I note that Mr Armstrong does not specify 1 ha without qualification, but says that an area of "about 1ha" is required.

1457 In all the circumstances, I consider that some allowance is required and that 0.10 ha (or about one-quarter of an acre) is more appropriate. I am also left unsure on the evidence regarding the exact location of water bores area "adjacent" to Karijini Drive.

1458 I will hear from the parties as to the formulation of the determination in this regard.

1459 Gravel pits: There are more than 10 gravel pits within the claim area: nine on or near the Nanutarra-Munjina Road (Ex 67 at [7(b)]), more than one along Karijini Drive (Ex 68 at [11]), and one on the Munjina-Roy Hill Road. The coordinates of the gravel pits along Nanutarra-Munjina Road are provided in Ex 67 annexure BA2, p 12 and the locations of these gravel pits are shown in Ex 67 annexures BA4 and BA5, pp 14 and 15. All the gravel pits are very close to the road, though it is unclear whether they fall within the road corridor.

1460 Although sometimes referred to by Mr Armstrong in his affidavits as "reserves", these gravel pits are not usually set aside as reserves under the *Land Act 1933*. Instead they were constructed pursuant to the Commissioner's powers under the *Main Roads Act 1930* (WA): ss 16, 19, 22, 26 and 27A(3).

1461 An exception is the gravel pit on the Munjina-Roy Hill Road which was set aside as a reserve for "gravel purposes" under the *Land Act 1933* (reserve 42078) and vested in the Commissioner for Main Roads under s 33 of that Act.

1462 Gravel (or "borrow") pits, are areas where MRWA extracts gravel for road construction and maintenance: Ex 67 at [13]. Gravel pits, like water bores, are "pre-construction" features which are typically constructed before a road is constructed to provide the necessary materials for construction: Ex 68 at [12]. They vary in size from between 1 ha and 5 ha (Ex 68 at [11] and [21]) and were dug by means of bulldozer. The method is explained in Ex 68 at [13]: first, the topsoil (overburden) and any vegetation are cleared to the extent of the pit; second, the cleared area is excavated to a depth of usually 150 mm, and the material stockpiled; third, the pit is excavated to a typical depth of 1 m and the material stockpiled within the pit; fourth, the material is excavated from the pit by front-end loaders and deposited into trucks when required; fifth, the pits are progressively rehabilitated when they are no longer required.

1463 MRWA continues to use some of the pits as required: Ex 68 at [21], for example, MRWA continues to maintain the whole length of the largely-unsealed Nanutarra-Munjina Road: Ex 70 at [9] and [16].

1464 The claimants say the gravel pits are not "major earthworks" and therefore not public works which have extinguished native title. The term "major earthworks" is defined in s 253 NTA as, relevantly, "earthworks ... whose construction causes major disturbance to the land...". The claimants submit that the digging of a small number of pits, widely spaced, to no more than 1 m in depth, which pits are progressively rehabilitated, does not cause major disturbance to the land. They say the finding in *Neowarra* (at [622]) that the borrow pits in that case were public works was based on the evidence referred to in that case at [618].

1465 I am not satisfied from the evidence above that these gravel pits are of sufficient scale to involve major disturbance to the land and so are not "major earthworks". There is something a little circular about the definition of "major earthworks", in that it refers to earthworks whose construction causes "major disturbance to the land…". Thus, a further judgment has to be made as to whether there is "major disturbance to the land". No further statutory definition of that expression is required. The word "major" is best defined in this particular context as something prominent or significant in size, amount or degree.

1466 The Macquarie Dictionary defines major as follows:

> 11. very important or significant:

The New Shorter Oxford English Dictionary defines major as follows:

> Also, unusually important, serious or significant;

1467 Whether an earthwork is major would also depend, I consider, on the terrestrial context of the earthworks, for example a pit of this size in somewhere like Kings Park, Perth, in a nature reserve, would I think be considered a major earthwork, but in a vast area of remote country near a gravel road, probably not so.

1468 While, obviously a gravel pit of the type described in Ex 68 by Mr Armstrong no doubt involves disturbance to the land, I do not consider it constitutes a "major" disturbance of the land.

1469 In these circumstances, I find that the pits are not public works in their own right because they are not major earthworks which have been constructed or established by MRWA pursuant to statutory authority.

1470 Tourist information bay: A Tourist information bay is located at the junction of the Great Northern Highway and Karijini Drive. The area of this bay is approximately 1 ha: Ex 8 at [9].

1471 Although there is limited evidence about this bay, the State submits it is to be inferred that this a "rest area" used by the public, similar to the "rest areas" considered by Sundberg J in *Neowarra* at [618] and [622]. Accordingly, this area is "adjacent land … which is … necessary for, or incidental to, the … operation of" the Great Northern Highway and Karijini Drive within the meaning of s 251D NTA: *Neowarra* at [622].

1472 The claimants say the evidence does not enable any finding to be made as to whether the tourist information bay is a major earthwork or a fixture or is otherwise a public work.

1473 I accept the State's submissions. It may reasonably be inferred the area is adjacent to the roads and serves motorists and so is included in the operation of the roads.

1474 I find the tourist information bay falls within s 251D NTA.

1475 Road corridors: There are public plans for Karijini Drive, (Ex 68 annexures BNA1-BNA3) the Great Northern Highway and part of the Nanutarra-Munjina Road (current road 33) (Ex 70 annexure RJS5, p 22) in the State's tenure evidence which show the dimensions of the road corridor for the relevant road. For Karijini Drive, the corridor is about 30 m wide within Karijini National Park (see also Ex 69 at [5]) and about 200 m wide outside the park. The corridor for the different sections of the Great Northern Highway varies but is generally 200 m or more in width. The corridor for current road 33 is 217.5 m in width.

1476 A corridor width of about 200 m for these roads is in accordance with MRWA policy for selecting road corridor widths in areas designated "pastoral/arid": Ex 69 at [7]. Mr Armstrong confirmed that the corridor for the whole of the Nanutarra-Munjina Road (not just current road 33) is 100 m each side of the centreline outside of town boundaries (ie 200 metres wide), and 100 m wide (50 m each side of the centreline) within town boundaries: Ex 68 at [19].

1477 Road corridors are the "area required" for the given road: Ex 68 at [19]. Among other purposes, a road corridor of approximately 200 m width in "pastoral/arid" areas (apart from within national parks) is required for, inter alia: to prevent soil movement onto the road surface; to provide turning circles; to provide space for drainage channels and offshoot drains; to prevent stock straying onto the road; and to provide lines of sight: Ex 69 at [7]. The preservation of native vegetation in road corridors helps prevent soil movement and thereby reduces maintenance costs. Road corridors also contain, partly contain, and/or provide access to water bores and gravel pits located close to roads (see above).

1478 Accordingly, the whole of the road corridors as shown on plans for the MRWA roads in the claim area, and a corridor of 200 m (outside towns) or 100 m (within towns) for the Nanutarra-Munjina Road is adjacent land, the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work (the road) within the meaning of s 251D NTA.

1479 I find, therefore, the whole of the road corridors, being constructed or established before 23 December 1996, are previous exclusive possession acts that are attributable to the State, for which there is statutory confirmation of extinguishment: ss 23B(7) and 23C(2) NTA; s 12J(1) TVA.

Public Works

1480 In addition to the roads and features associated with roads, the State notes there are also the following public works within the claim area:

(1) a police station, constructed within reserve 24824 for the purpose of "Police";

(2) a school, constructed within reserve 26780 for the purpose of "School Site"; and

(3) an aerodrome or aerial landing ground, constructed within the area of reserves 23278 and 24898, each for the purpose of "Aerial Landing Ground".

1481 The claimants submit the respondents bear the onus of establishing, with particularity, any acts which are said to be public works which have extinguished native title over the land and waters concerned.

1482 The State draws attention to the following evidence in relation to the police station:

(1) a certified aerial photograph taken on 1 June 1979 shows three buildings occupying much of the area of the reserve;

(2) a letter from the Undersecretary for Work, Department of Public Work to the Under Secretary for Lands dated 24 April 1957 states that "this Department has erected a police station and quarters" on Wittenoom lots 111 and 112. This is the area of reserve 24824;

(3) a letter from the Commissioner of Police dated 24 November 1989 to the Executive Director, Department of Land Administration refers to an "Officer in Charge quarters", a "lock-up area" and a "Police Station Courthouse" at the Wittenoom Police Station. A plan attached to this letter shows the three buildings, which correspond with the three main buildings shown in the aerial photograph.

1483 There is also the following evidence in relation to the school:

(1) a certified aerial photograph taken on 1 June 1979 shows two buildings and an oval within the area of the reserve;

(2) a handwritten note to the Registration and Deeds Branch of the Department dated 27 November 1962 states that "the school is already established on this lot [Wittenoom Gorge lot 356] which will be reserved for that purpose";

(3) a letter from the Executive Director of the Building Management Authority of Western Australia to the Superintendent of Education (Buildings), Education Department of WA dated 16 September 1986 refers to the proposed demolition and removal of school buildings at Wittenoom.

1484 In relation to the aerial landing ground or aerodrome the State notes there is evidence of an "original plan" dated 5 June 1974 which shows an "aerodrome" with multiple radiating runways. There is also evidence that an aerodrome was in existence on the land since October 1949 at the latest. Further, it is to be inferred from the evidence of leases and a replacement lease over the area of these reserves that an aerial landing ground or aerodrome was constructed over the area of these reserves. An aerial landing ground or aerodrome is a "building, or other structure … that is a fixture": s 253 NTA definition of public work.

1485 The State submits the whole of the area of each of the reserves was "adjacent land … the use of which … was necessary for, or incidental to, the construction, establishment or operation of the work" for the purposes of s 251D NTA.

1486 Each of these public works was constructed or established before 23 December 1996. Accordingly, the State submits, each is a previous exclusive possession act: s 23B(7) NTA.

1487 Further, the State submits, the police station and the school were attributable to the State, the aerial landing ground or aerodrome was attributable to the Commonwealth. Accordingly, the TVA and the NTA, respectively, confirm extinguishment of native title by these public works (if native title was not otherwise extinguished by the use of the reserves, or by the leases over the reserves in the case of the aerial landing ground): s 12J TVA; s 23C(2) NTA.

1488 I find the State's "public works" contention is also made out in each of reserves 24824 and 26780.

1489 The claimants note, as to the aerodrome, the evidence in the second tenure DVD are surveyor's diagrams and there is no indication whether the diagrams are surveys of an aerodrome then in existence, or whether they are surveys of a proposed aerodrome. Further, the evidence at Ex 65 annexure AFG42 is that an aerodrome (the size and nature of which is not revealed) was already in existence on a pastoral lease before the Commonwealth assumed

control of it. Hence the aerodrome (whatever form it took) is not a "public work" as defined in s 253 NTA because:

(1) it was not constructed or established by or on behalf of the Crown (as required by the chapeau to para (a) of the definition); and

(2) there is no evidence it was constructed with the authority of the Crown, and in any event was on a lease (contrary to para (b) of the definition).

1490 I am left in real doubt, for the reasons advanced by the claimants in the preceding paragraph, that the aerodrome is a "public work" and so find reserves 23278 and 24898 are not the subject of public works.

Pastoral Improvements

1491 The Pastoral respondents, in their statement of issues facts and contentions dated 10 June 2011, contend that native title has been fully extinguished in relation to specific areas of each pastoral lease on which valid improvements have been constructed, together with adjacent pastoral land the use of which is reasonably necessary for or incidental to the operation or enjoyment of such improvements. This is said to include:

(1) Homesteads, sheds and outbuildings;

(2) Trap yards;

(3) Stock yards;

(4) Constructed station roads and tracks;

(5) Constructed dams, bores, turkey nests, squatters' tanks and stock watering points;

(6) Airstrips; and

(7) Dwelling houses and storage sheds.

1492 That contention is evidently based on the decision of the Full Court in *De Rose (No 2)* which has been followed in a number of decisions. However, the majority in *Brown FC* have either not applied it (Greenwood J) or expressly not followed it (Barker J). In my view, as a result of *Brown FC*, I do not consider the pastoral improvements referred to extinguish native title, but the use rights so conveyed to the lessee prevail over subsisting native title rights but did not extinguish them.

1493 Nonetheless, for the record the following evidence is noted.

1494 Of the following current pastoral stations within the claim area:

(1) Mt Florance (pastoral lease 3114/0465, registered on 18 November 1965);

(2) Marillana (pastoral lease 3114/0984, registered on 5 February 1973);

(3) Mulga Downs (pastoral leases 3114/1047 and 398/763, registered on 17 December 1990 and 8 December 1987, respectively;

(4) Hooley (pastoral lease 3114/1173, registered on 15 October 1982); and

(5) Juna Downs (pastoral lease 3114/1191, registered on 4 April 1984);

the State submits there is evidence of pastoral improvements in respect of each. The evidence consists of lists, descriptions, coordinates, maps, and, in some cases, aerial photographs, of improvements. The improvements identified are said to include the following:

(1) Mt Florance: stock watering points: Ex 75 at [7]; annexure TRR2;

(2) Marillana: water bores, fences and yards: Ex 82 at [12]; annexure MJF3;

(3) Mulga Downs: homesteads and camps (including associated infrastructure), wells and bores (including windmills, tanks troughs and airstrips), fences, tracks, and dams: Ex 74 at [7]; annexures CLE3 and CLE4; Ex 94 at [7]; annexures BGR1 and BGR2;

(4) Hooley: wells, windmills, tanks, troughs, holding yards for cattle, holding pens and holding paddocks, and solar pumps: Ex 76 at [7]; annexure PGC2; and

(5) Juna Downs: a homestead (including a power supply, water supply and fuel facilities); a building containing staff quarters; a head stockman's cottage; an airstrip, hangar, various station sheds and workshop; 29 water bores; and six sets of stockyards: Ex 88 at [10]; annexures JAW3, JAW4 and JAW5.

1495 The BHP Billiton respondents adopt the State's submissions, insofar as they relate to pastoral lease 3114/0984, being Marillana Station.

1496 The BHP Billiton respondents submit that the types of improvements required for pastoral purposes include:

(1) homesteads, sheds and outbuildings (including dwelling houses and storage sheds);

(2) trap yards;

(3) stock yards (including stock mustering yards);

(4) constructed station roads and tracks;

(5) constructed dams, bores, windmills, turkey nests, squatters' tanks and stock watering points; and

(6) airstrips

1497 The improvements currently located on the pastoral lease include:

(1) a pastoral homestead (located outside of the claim area); and

(2) various water bores (as shown on the map which is annexure MJF3 to Ex 82); and

(3) fences and yards.

1498 The RTIO respondents say the improvements currently located on 3114/1191 include:

(1) the pastoral homestead, plus power supply, water supply and fuel facilities;

(2) a building containing the staff quarters;

(3) the head stockman's cottage;

(4) an airstrip, hanger, various station sheds and workshop;

(5) boundary and paddock fencing;

(6) approximately 29 stock water bores; and

(7) six sets of stock yards,

Resumptions

1499 The whole of the area of the Wittenoom townsite was subject to a resumption under s 109 *Land Act 1933* by proclamation published in the Gazette on 5 May 1950. The proclamation stated:

> WHEREAS by section 109 of the *Land Act*, 1933-1948, the Governor may resume for any purpose as in the public interest he may think fit, any portion of land held as a Pastoral Lease; and whereas it is deemed expedient that the portion of Pastoral Lease 394/1034, as described in the Schedule hereunder, should be resumed for the purpose of a 'Townsite': Now, therefore I, Sir James Mitchell, Governor as aforesaid, with

the advice and consent of the Executive Council, do by this my Proclamation resume portion of Pastoral Lease 394/1034 for the purpose aforesaid.

1500 Section 109 *Land Act 1933* provided as follows:

> Subject as hereinafter provided, the Governor may resume, enter upon, and dispose of the whole or any part of the land comprised in any pastoral lease, for agricultural or horticultural settlement, or for mining or any other purpose as in the public interest he may think fit.

1501 Section 109A prescribed the preliminary procedural steps with respect to pastoral lessees.

1502 Also on 5 May 1950 a notice was published in the Gazette proclaiming Wittenoom as a town under s 10 *Land Act 1933*:

> LAND ACT, 1933-1848.
> New Townsite – Wittenoom
> Department of Lands and Surveys,
> Perth, 2nd May, 1950.
>
> Corr. 3602/48.
>
> IT is hereby notified that His Excellency the Governor in Executive Council has been pleased to approve, under section 10 of the above Act, of the land described in the Schedule hereto being classified as 'Town and Suburban', and of such town site being hereafter known and distinguished as 'Wittenoom'.
>
> Schedule
>
> [description of area]

1503 Section 10 *Land Act 1933* stated:

> The Governor may, by notice in the *Gazette* –
> (1) Constitute and define the boundaries of any new districts and townsites, and distinguish each townsite by name as a town.
> (2) Declare that any district or townsite shall cease to exist as such.
> (3) Extend or diminish the area of any district or townsite.
> (4) Alter the boundaries or name of any district or townsite.
> (5) Define or alter the name of any street, square, terrace, road, lane, or way.
> (6) Divide any district into two or more districts, and give each a distinguishing name.
> (7) Set apart any Crown lands, or any lands within a townsite, as suburban lands.

1504 The powers under s 10(1) and 10(7) were exercised.

1505 In *Ward HC* (at [206]-[208]) the Court held that the resumptions there in question did not extinguish native title because the resumption "did not give the Crown any larger title to the land than the radical title acquired at sovereignty". The Court indicated, however, that the situation may be different if there was dedication of the land:

> If there was no dedication of the land, and was only a resumption, both before and after that resumption the land was Crown land.

1506 In this case, the State contends the resumption of the land coupled with a simultaneous constitution of the land as a townsite amounted to a dedication of land for the purpose of "townsite" and extinguished any native title within the whole of the area of the townsite, including the area of reserve 46724.

1507 The claimants submit that the constitution of Wittenoom as a townsite under s 10 *Land Act 1933* did not constitute a "dedication" of land and refer to *Ward HC* at [217]-[218] and *Sebastian FC* at [220], and say it did not otherwise effect any extinguishment of native title.

1508 I find, relying on the discussion in *Ward HC* (at [217]-[220]) that the act of notification in the Gazette of the townsite, under s 10 *Land Act 1933* is not to be equated with common law dedication and, even with the act of resumption, did not necessarily extinguish all native title rights, although it did extinguish the native title right to control access.

Mining Tenements under *Mining Act 1904*

1509 Introduction: The State has granted the following types of interests over the claim area under the *Mining Act 1904* and *Mining Regulations 1925* (WA) (***Mining Regulations 1925***) which the State says have extinguished native title:

(1) Business areas. There are 22 historical tenements, all within Wittenoom.

(2) Residential areas. There are four historical tenements (RA 70/5 to 70/8), each within Wittenoom.

(3) Market garden areas. There are four historical tenements (GA 70/3 to 70/6).

(4) Mineral claims. There are 227 historical tenements

(5) Mineral leases. There are two historical tenements (ML47/509 and ML47/510), not including mineral leases granted under State Agreement Acts

(6) Miner's homestead leases. There are five historical tenements (MHL46/4 to 46/6; MHL47/3 and MHL47/4).

(7) Residence leases. There are 10 historical leases (RL70/16 to RL70/24; RL70/29).

(8) Tailings leases. There are three historical leases (TL47/1 to 47/3).

(9) Prospecting areas. There are three historical tenements (PA47/262, PA45/2878 and PA45/2879). PA47/262 is only partly within the claim area.

1510 The claimants do not challenge the validity of any of these tenements.

1511 Business areas: The business areas were all registered between 1947 and 1950, were each within the town of Wittenoom, and were each of approximately 1 acre or less.

1512 To understand business areas it is first necessary to refer to the general scheme of the *Mining Act 1904* and *Mining Regulations 1925* and the rights to carry out mining and related activities which flowed from possession of a "miner's right".

1513 Section 26 *Mining Act 1904* as passed set out these rights as follows:

> The holder of a miner's right shall subject to this Act and the regulations, be entitled (except as against His Majesty) –
> (1) To *take possession of*, *mine*, and *occupy* Crown land for mining purposes;
> (2) To *take possession of* and *occupy* Crown land as an *authorised holding*;
> (3) To cut, construct, and use races, dams, drains, wells, reservoirs, roads, and tramways which may be required for mining purposes through and upon any Crown land ;
> (4) To take or divert water from any natural spring, lake, pool, or stream situate in or flowing through any Crown land, and to use, sell, and dispose of such water for any purpose in connection with mining;
> (5) To bore, or by other means sink for, collect, and store water on any Crown land, and to use, sell, and dispose of such water for any purpose connected with mining;
> (6) To use by way of an casement any unoccupied Crown land;
> (7) To erect and remove any building or structure on any Crown land lawfully occupied;
> (8) To cut and remove any live or dead timber for mining purposes from any Crown land, for his personal use, subject to the provisions of any Act relating to Crown lands and the regulations thereunder for the preservation of timber in force for the time being;
> (9) To remove any stone, clay, or gravel for his personal use in connection with mining from any Crown land not exempted from mining operations;

> (10) To *take possession of and occupy*, with the approval of the Warden as to locality, the surface of any Crown land, not exceeding one acre, for the purpose of *residence* or *business*; but no locality within three miles from the nearest municipality or townsite shall be approved by the Warden without the consent in writing of the Minister;
> (11) To take possession of and occupy, for residence or business, such portion of the surface of any Crown land as may be reserved or specially set apart for such purpose, and open to selection.
> (Emphasis added)

1514 In 1968 a subs (12) was added, pursuant to s 2 *Mining Act Amendment Act 1968* (WA):

> (12) to enter a mineral claim and prospect on it by any mode with a view to grounding an application pursuant to section twenty-eight A of this Act in respect of that claim but so that he does not interfere with or cause damage to the actual workings of the claim holder.

1515 In 1969 subs (9) was substituted for the following, pursuant to s 2 *Mining Act Amendment Act 1969* (WA):

> (9) to remove any stone, sand, clay, or gravel from any Crown land not exempted from mining operations.

1516 Otherwise s 26 was not amended until the repeal of the Act.

1517 Any person taking up and occupying Crown land by virtue of a miner's right was, subject to the provisions of the *Mining Act 1904* and the *Mining Regulations 1925*, deemed in law to be possessed of such land so taken up and occupied, except as against the Crown: s 3(1) *Mining Act 1904*.

1518 "Mining" or "to mine" was defined as "[a]ll modes of prospecting and mining for and obtaining gold or minerals": s 3 *Mining Act 1904*.

1519 "Authorised holding" was defined as "[a]ny mining tenement other than a lease, an application for a lease, or a claim": s 3 *Mining Act 1904*.

1520 "Mining tenement" was defined in s 3 as:

> Any land applied for, held, occupied, used, or enjoyed under a lease or application therefore, or as a claim, or *any area*, water race, drain, dam, or reservoir; any stack or accumulation of earth containing gold or any other mineral; or any easement taken up, held, occupied, used, or enjoyed under or by virtue of a miner's right.

(Emphasis added)

1521 "Claim" was defined at all relevant times as:

> The portion of land which any miner shall lawfully have taken possession of and be entitled to occupy for mining purposes, or any number of such portions lawfully amalgamated; but no land comprised in any mining lease, or in any application therefore, shall be deemed to be a claim.

1522 Mining tenements other than leases were governed by Pt III *Mining Regulations 1925*. Division 1 of Pt III governed "prospecting and reward areas", Div 2 governed "claims", Div 3 governed "water rights", and Div 4 governed "all other authorised holdings". Leases were governed by Pt IV.

1523 Regulation 84 (in Pt III) stated:

> A miner may at any time *take possession of*, mark off, and apply for registration of such area, as is hereinafter set forth, of the surface only of any Crown land within a proclaimed goldfield, mineral field, or district as an *authorised holding*, for any of the following purposes: –
>
> (a) A *Residence* or *Business Area*, not exceeding one acre, for the purpose of residence or business under the provisions of section 26, subsection 10: Provided that when the area is for residence only it shall not exceed one-quarter of an acre;
>
> (b) A Residence or Business Area on Crown land specially set apart for the purpose under the provisions of section 26, subsection 11;
>
> (c) A Machinery Area, not exceeding five acres, for erecting machinery for the extraction of gold or minerals;
>
> (d) A Tailings Area, not exceeding five acres, for stacking tailings or any• earth containing gold or minerals, and for treating the same thereon;
>
> (e) A Washing Area, not exceeding five acres, for washing any earth containing gold or minerals;
>
> (f) A *Market Garden Area*, not exceeding five acres, for poultry farming or growing fruit, vegetables, fodder, or garden produce of any kind.
>
> (g) A Quarrying Area not exceeding 24 acres, for the purpose of obtaining stone or gravel for building or other purposes.
>
> (Emphasis added)

1524 A "miner" was any person being the holder of a miner's right.

1525 Accordingly, the State submits, the holder of a miner's right who took possession of Crown land pursuant to reg 84 for the purposes of, inter alia, a business area, had the right to occupy the land for that purpose and was deemed in law to possess the land. Such rights of occupation and possession for any purpose are inconsistent with and extinguish native title.

1526 Nicholson J considered the rights conferred by business areas in *Daniel 2003(1)* at [752]-[758]. His Honour held that the registration of a business area pursuant to reg 84 *Mining Regulations 1925* conferred upon the holder thereof a right akin to a right of exclusive possession by necessary implication from the provisions of the *Mining Act 1904* and regulations which:

(1) required the holder to take "possession" and continually "occupy" the area;

(2) allowed for the area to be "sublet";

(3) required the area to be used for business purposes; and

(4) restricted the size of the area to 1 acre.

1527 Accordingly, his Honour held (at [758]) that the registration of each business area within the claim area was wholly inconsistent with the continued existence of any native title in the land the subject of the business area and those rights and interests were thereby extinguished.

1528 The State relies on *Daniel 2003(1)* in this regard in submitting the registration of each of the business areas extinguished native title, if native title had not already been extinguished over the relevant area.

1529 The claimants, however, submit that the State's submission does not accord with what was said in *Ward HC* at [296], [305] and [336]-[342] and invite the Court not to follow *Daniel 2003(1)* in this respect. In my view the claimants' submission should be accepted.

1530 It is correct to submit, as the State does, that in *Daniel 2003(1)*, Nicholson J held that the registration of each business area was wholly inconsistent with native title and native title was thereby extinguished. His Honour came to this conclusion by finding (at [757]) that the registration of a business area conferred upon the holder a "right akin to a right of exclusive possession of the land concerned". He drew this "necessary implication" from the Act and regulations which provided for the holder to take possession and continually occupy the area and to be able to sublet it. His Honour also thought that because the area was restricted to 1 acre, that was a case where "the usage, including the size, informs the nature of the rights".

1531 The difficulty, in my view, with this analysis, with respect, is that it fails to recognise that the rights conferred in respect of a business area are entirely for the purposes of the relevant Act and regulations at material times. They are tied to the holder being a "miner". In my view, the rights conferred in respect of the business area cannot relevantly be distinguished from the grant of the general purpose lease considered by the majority in *Ward HC*. The plurality (at [340]) considered the grant of a general purpose lease was not necessarily inconsistent with all native title rights and interests in respect of the subject land. The majority did not accept the reasoning in the Full Court that the express grant of exclusive possession (albeit for specified purposes) together with the strict imposition of a regime of control combined to create rights and obligations totally inconsistent with native title. Nor did it matter, as noted by the plurality at [337], that a general purpose lease was for an area of 4.5 ha. Their Honours (at [341]) considered it apparent that the right to control access to the land was inconsistent with a native title right to control access, but otherwise there was no necessary inconsistency and it was thereby important to identify the full bundle of native title rights and interests before determining what other particular native title rights and interests may have been extinguished.

1532 The plurality, in so finding, referred to their earlier reasons. These may be taken to include their finding that a mining lease under the relevant legislation was not necessarily inconsistent with the continuation of native title rights and interests and that the grant of a pastoral lease was not necessarily inconsistent with the continuation of native title rights and interests.

1533 In my view, and I find, the registration of the business areas under the relevant Act and regulations at material times was not necessarily inconsistent with native title rights and interests.

1534 I should add that there is nothing to indicate that the business areas so registered had any life beyond the valid life of the miner's right granted under the Act at material times.

1535 The claimants also draw attention to the High Court's recent holding that all mining tenements under the *Mining Act 1904* are chattel interests, not interests in land: see s 273 *Mining Act 1904* and *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)*

[2010] HCA 49; (2010) 241 CLR 576 (***TEC Desert***) at [28]-[33]; and simply provided "security adequate for the furtherance of the mining activity".

1536 The claimants submit the occupation and possession upon which the State so heavily relies is "directed at preventing others from carrying out mining and related activities on the relevant land" and did not confer exclusive possession for other purposes: *TEC Desert* at [34], citing *Ward HC* at [308]. See also *Ward HC* at [327], [331], [333] regarding the Argyle diamond mining lease; the definition of "claim" in the *Mining Act 1904*; and in the case of leases under the *Mining Act 1904*, ss 48 and 80(1)(b). I accept that submission.

1537 The claimants submit that the decision of Nicholson J in *Daniel 2003(1)* concerning business areas and residential areas under the *Mining Act 1904* is clearly wrong and should not be followed. His Honour's decision in relation to market garden areas is not relevantly distinguishable, yet his Honour considered those tenements did not extinguish native title. The result is not, as the State submits, that his Honour's decision in relation to market garden areas was wrong; the proper result is that his Honour's decision in relation to business areas and residential areas was wrong. In all other respects, Nicholson J's decision in relation to the extinguishing effect of mining tenements under the *Mining Act 1904*, and the decision of Sundberg J in *Neowarra* at [601]-[603], are correct and should be followed. I accept those submissions.

1538 Further, the claimants say many of the historical mining tenements (including all the business areas and residential areas) were located on land which is currently UCL. Any extinguishment in those areas is to be disregarded under s 47B NTA in any event. The question of the application of s 47B has already been dealt with above.

1539 Finally the claimants observe, correctly, that if, as the State submits, mining tenements granted after 31 October 1975 and before 1 January 1994 would have (at common law) wholly extinguished native title, or extinguished some of the then existing native title rights, those grants will be category C past acts to which the non-extinguishment principle applies: *James FC* especially at [41]-[53].

1540 I should finally state that, applying *Brown FC*, I consider that during the life of a business area the rights conferred prevailed over, but did not extinguish, subsisting native title rights.

1541 As noted above, I find the registration of business areas did not extinguish all native title.

1542 Residential areas: Four residential areas were granted in 1947 over quarter acre lots within Wittenoom.

1543 Regulations 84 and 87(1) *Mining Regulations 1925* applied to residential areas as well as to business areas. Nicholson J in *Daniel 2003(1)* held (at [805]) that residential areas had the same effect on native title as business areas.

1544 The State contends each of the residential areas extinguished native title if native title was not already extinguished over these areas.

1545 For the same reasons that I consider the registered business areas did not necessarily extinguish all native title rights and interests, I find that the grants of the four residential areas did not necessarily extinguish all native title rights and interests. However, the rights granted, during the life of the residential areas, prevailed over, but did not extinguish, subsisting native title rights.

1546 Market garden areas: Four market garden areas were each registered in 1949 over areas south of Wittenoom ranging from 3 to about 5 acres.

1547 In *Daniel 2003(1)*, Nicholson J considered the rights conferred by market garden areas at [776]-[782]. His Honour held that the registration of a market area pursuant to reg 84 conferred upon the holder thereof a right of exclusive possession by necessary implication from the provisions of the *Mining Act 1904* and *Mining Regulations 1925* which:

(1) required the holder to take “possession” and “occupy” the area;

(2) allowed for the area to be “sublet”;

(3) limited the area to 5 acres;

(4) required the area to be used for market gardening purposes; and

(5) required the area to be securely fenced.

1548 Nonetheless, as noted above, his Honour held (at [782]) that the market garden areas considered did not wholly extinguish native title, but instead had the same extinguishing and non-extinguishing effect as did gold mining leases under the *Goldfields Acts 1886* and *1895* (WA) (as to which see *Daniel 2003(1)* at [741]).

1549 The State contends that having found that market garden areas conferred a right of exclusive possession, Nicholson J erred in not finding that the market garden area extinguished native title. Market garden areas confer the same type of rights as business areas and residential areas, including a right of occupation, so there is no basis for not finding that market garden areas wholly extinguish native title. Therefore, the registration of each of the market garden areas extinguished native title.

1550 For the reasons given above as to why, in my view, the registration of business areas under the relevant Act and regulations did not extinguish all native title rights and interests in the subject land, I find that the registration of each market garden area did not extinguish subsisting native title rights, but prevailed over them.

1551 Consistent with the finding made by Nicholson J, it plainly is the case that the right to control access has been extinguished as a native title right (if it existed at the time of the grant), but that no subsisting native title rights such as the right to hunt, gather bush foods and conduct ceremonies would be extinguished, although, in the event of any inconsistency between the market gardeners' rights and the exercise of such native title rights, those of the market gardener would prevail.

1552 Mineral claims: Most of the mineral claims were granted pre-RDA, though some were granted post-RDA. The State submits post-RDA mineral claims were all valid for the same reasons as the other post-RDA tenements discussed above.

1553 The definition of "claim" is stated above. They were areas which were taken possession of and occupied by holders of miner's rights for mining purposes

1554 Claims were governed by Div 2 of Pt III *Mining Regulations 1925*. Pursuant to reg 50:

> Every claim shall be worked continuously and efficiently on every working day unless exemption or partial exemption from working the same has been granted by the Warden. Every claim not so worked shall be liable to forfeiture at the discretion of the Warden on the application of any miner in the manner prescribed by these regulations; but it shall not be necessary to work on any claim claiming any general exemption, or on a public holiday, or during any general cessation of work caused by flood, rain, or drought.

1555 "Mineral claims" were claims for the particular minerals identified in reg 55(1). Such mineral claims were for a maximum area of 300 acres: reg 55(2) *Mining Regulations 1925*.

1556 It was not necessary to register an "ordinary alluvial claim", but such a claim needed to be taken possession of and marked off in such manner as provided in the regulations. All claims other than "ordinary alluvial claims" needed to be registered: reg 40 *Mining Regulations 1925*.

1557 Nicholson J considered the grant of mineral claims in *Daniel 2003(1)* (at [783]-[786]), and concluded that each registered mineral claim was inconsistent with the maintenance of any exclusive native title rights to possession or occupation of the area, and any exclusive rights to use the resources of the area, and accordingly extinguished native title to that extent if it had existed in that respect. They had the same extinguishing and non-extinguishing effect as gold mining leases under the *Goldfields Acts 1886* and *1895* (WA).

1558 The State respectfully submits that Nicholson J erred in relation to mineral claims and should not be followed. Mineral claims extinguished native title because they comprised a right of occupation and possession. Alternatively, the mineral claims extinguished the rights said by Nicholson J to have been extinguished.

1559 I reject the State's first submission that the primary reasoning of Nicholson J in *Daniel 2003(1)* should not be followed. In my view, his Honour was, with respect, entirely correct to find that the proper analysis of the relevant mineral claims was governed by what was said in *Ward HC* in respect of mining leases there considered.

1560 As to the alternative submission of the State, I find, consistent with *Ward HC*, that the right of exclusive possession, that is, to control access, as a native title right was removed, if it still subsisted. However, I do not accept the reasoning, with respect to Nicholson J in *Daniel 2003(1)* that native title rights of access in terms of remaining, ritual and ceremony, camping in terms of living on the land, and cooking and lighting were necessarily extinguished. Having regard to the decision in *Brown FC*, the rights conferred on the holder of a relevant mineral claim would prevail over, but not extinguish such rights.

1561 Mineral leases: Mineral leases ML47/509 and ML47/510 were each granted on or around 1 January 1974.

1562 Mineral leases could be granted under s 48 *Mining Act 1904*, which provided as follows as at January 1974:

> The Governor may, subject to this Act and the regulations, grant to any person a lease of any Crown land, not exempted by the next following section, for *any or all* of the undermentioned purposes, that is to say-
> (1) for mining, and for all purposes necessary to effectually carry on mining operations therein or thereon for any mineral other than gold;
> (2) for cutting and constructing thereon water races, drains, dams, reservoirs, tramways and roads to be used in connection with such mining;
> (3) for erecting thereon any buildings and machinery to be used in connection with such mining;
> (4) for boring or sinking for, pumping, or raising water;
> (5) for residence thereon in connection with any or all such purposes
> (Emphasis added)

1563 The maximum area of a mineral lease for minerals other than coal or gold was generally 300 acres: s 50(1)(b) *Mining Act 1904*; reg 98(f) *Mining Regulations 1925*.

1564 Section 51 stated:

> Every mineral lease shall be granted for the working of some mineral or combination of minerals to be specified therein, and every such lease shall, subject as hereinafter provided, contain a reservation of all gold found in the land.

1565 General provisions as to leases were contained in the ss 66-116 *Mining Act 1904*. Among these provisions was s 80(1)(b), which stated:

> Every lease shall contain and be subject to the prescribed covenants by the lessee and conditions, and particularly–
> …
> (b) a covenant to use the land continuously and *bona fide* exclusively for purposes

for which it is demised, and in accordance with the regulations;

1566 Unless exempt from labour conditions, every lease other than a gold mining lease was required to be worked every working day by at least two men: reg 111 *Mining Regulations 1925*. Failure to do so rendered the lease liable to forfeiture: reg 114 *Mining Regulations 1925*.

1567 Nicholson J considered the nature of the rights conferred by mineral leases granted under the *Mining Act 1904* in *Daniel 2003(1)* (at [787]-[789]) and held that "[t]here is nothing to distinguish these leases from the mining leases considered in *Ward* HC at 90-94, at [282]-[296]; 96-98, [306]-[309]; 105, [341]; and 133, [468]. Any native title right to be asked permission to use or have access to the lease area would have been extinguished if it had existed". The mineral leases had the same effect of extinguishing and non-extinguishing on non-exclusive native title rights as gold mining leases under the *Goldfields Acts 1886* and *1895* (WA).

1568 The State submits Nicholson J should not be followed in relation to mineral leases for the following reasons. First, mineral leases granted under the *Mining Act 1904* are different from mining leases granted under the *Mining Act 1978* in the following ways:

(1) They could be granted for purposes broader than mining leases. For example, a mineral lease could include a right to construct a residence: s 48(5) *Mining Act 1904*.

(2) Mineral leases were only about one tenth of the size of a mining lease. While the maximum size of an ordinary mineral lease was 300 acres (or about 121 ha or 1.2 square km), a mining lease until 10 February 2006 (upon commencement of s 28 *Mining Amendment Act 2004* (WA)) could cover 10 square km (s 37 *Mining Act 1978*) or 1000 ha or 2471 acres. There is now no statutory limit on the size of a mining lease, though the area granted may be less than the area applied for: s 73(1) *Mining Act 1978*.

(3) Mineral leases were required to be worked every working day by at least two men. Mining leases, by contrast, are subject only to expenditure conditions: s 82(1)(c) *Mining Act 1978*.

1569 The High Court in *Ward HC* did not consider the grant of mineral leases under the *Mining Act 1904*.

1570 Secondly, the State submits, the High Court in *Ward HC* did not explain in any detail at all the precise nature of the inconsistency between the grant of a mining lease under the *Mining Act 1978* and native title rights and interests. The Court only said that the grant of a mining lease was inconsistent with at least a native title right to control access. Accordingly:

(1) There is no authority, in *Ward HC* or elsewhere, for the proposition that, at common law, other than the right to control access, all of the rights granted to mining lessees can co-exist with, and do not extinguish, native title rights.

(2) There is no authority in *Ward HC* for the proposition that the grant of a mining lease necessarily does not wholly extinguish native title. In effect, the *Ward HC* majority concluded that "a mining lease might not wholly extinguish native title (but, on the facts, we can't say)".

(3) The position in *Ward HC* in relation to general mining leases should be considered the "minimum" amount of extinguishment, not the total amount possible.

(4) Conclusions reached by other single judges of the Federal Court can only be persuasive where it can be demonstrated that they concern a grant of the same type of tenure and that they were reached following a consideration of evidence of the rights granted and submissions about their effect (that is, that the "inconsistency of incidents" test was meaningfully applied).

1571 Each of the mineral leases was granted over an area of 50 ha, or half a square km. This area was required to be worked continuously for mining, which included "all purposes necessary to effectually carry on mining operations": s 48(1) *Mining Act 1904*. "Mining operations" was not defined in the *Mining Act 1904*, but is defined in the *Mining Act 1978* (at s 8(1)) to include, effectively, the removal and processing of minerals.

1572 The holder of the mineral leases was required to carry out these purposes over the area of leases. Such purposes are inconsistent with any native title rights. Accordingly, native title was extinguished over the whole of the area of the leases.

1573 Alternatively, the State submits the mineral leases extinguished those non-exclusive native title rights found by Nicholson J (at [741] and [789]) to have been extinguished by gold mining leases; in other words, any native title rights consisting of or comprising:

(1) access in terms of remaining;

(2) ritual and ceremony;

(3) camping in terms of living on the land; and

(4) cooking and lighting.

1574 In my view, Nicholson J was right, with respect, to find as he did that such mineral leases did not necessarily extinguish native title, save for the right to control access, and I find to the same effect. There is no basis to distinguish the findings in *Ward HC*, as suggested by the State.

1575 Further, on the approach of *Brown FC*, I reject the State's submission that any particular usufructuary or ceremonial rights were extinguished. The rights granted by the mineral leases prevailed over, but did not extinguish, such rights.

1576 Miners' homestead leases: Five miners' homestead leases were granted between 1939 and 1941 over an area of 10 acres or less within the current area of reserve 30082 (Karijini National Park). Some of the homestead leases were over areas covered by earlier ones.

1577 Nicholson J considered the rights conferred by miners' homestead leases in *Daniel 2003(1)* (at [790]-[795]). His Honour held that such leases had the same effect as pastoral leases, and that the extinguishing and non-extinguishing effect was as for gold mining leases.

1578 At the relevant dates miners' homestead leases were governed by Pt IX *Mining Act 1904*. Pursuant to s 196:

> Any miner resident on a goldfield or a mineral field, being not less than eighteen years of age, or any incorporated company, may, subject to the regulations, apply for a lease, to be called a 'Miner's Homestead Lease', of any Crown land within the limits of the goldfield or mineral field.

1579 Pursuant to s 205:

> Upon the report of the warden, the Minister may, with the approval of the Governor, grant to the applicant a miner's homestead lease, which, subject to the prescribed conditions, shall be in force so long as the lessee pays the rent as prescribed by this Act, and observes and performs the covenants of the lease.

1580 Pursuant to s 208, the lessee was required within three years from the date of survey of the land to:

> fence the whole of the land with a substantial fence not being a brush fence, proved to the satisfaction of the Minister to be sufficient to resist the trespass of great stock, and within five years of said date shall expend upon the land, in prescribed improvements, an amount equal to ten shillings per acre.

1581 Permissible improvements were "wells of fresh water, reservoirs, tanks or dams, of permanent character and available for the use of stock; or … dwelling-houses or buildings for industrial purposes; or … sheds and buildings erected for farm or shearing or station purposes; or … cultivation, subdivision fences, clearing, grubbing, draining, ringbarking … or any other improvement for maintaining or improving the agricultural or pastoral capabilities of the land": s 210 *Mining Act 1904*.

1582 The State submits that, whilst a miner's homestead lease was precarious (s 207 *Mining Act 1904*), it is clear from the purposes of these leases that the right they comprised was a right of exclusive possession. Alternatively, the rights conferred were inconsistent with native title rights and extinguished any native title. In any event, each of the miners' homestead leases was included within the area that was subsequently vested as reserve 30082 in 1969, such that any native title surviving the grant of the leases was extinguished at that point.

1583 I reject the State's submission that the holding of Nicholson J in *Daniel 2003(1)* in respect of miners' homestead leases should not be followed.

1584 Essentially for the same reasons that I rejected the State's submission that the mineral leases did not necessarily extinguish all native title rights and interests, I find that the homestead leases similarly did not have that effect.

1585 Again, I find that, to the extent the rights conferred on a miner by a homestead lease in their exercise conflicted with the exercise of any non-exclusive native title rights and

interests, then the lessee's rights prevailed over, but did not extinguish, those native title rights.

1586 As to the extinguishing effect of reserve 30082 vested in 1969, that has been dealt with elsewhere.

1587 Residence leases: Ten residence leases were granted between 1943 and 1947. They were all located south of Wittenoom adjoining or close to the road to the mine now known as Bolitho Road, except for residential lease 70/029 which was granted for a "single men's accommodation area" in Wittenoom itself. They ranged from between 1 acre and 65 acres in size.

1588 These leases were granted under s 48(5) *Mining Act 1904*, being leases for "residence thereon in connection with any or all such purposes " The "purposes" referred to were the other purposes for which leases could be granted under s 48.

1589 Section 80(1)(b) *Mining Act 1904* applied to such leases, requiring them to be used "continuously and *bona fide* exclusively" for the purposes for which they were demised.

1590 The State contends that, being for the purpose of "residence", these leases were for a purpose for which it would be expected that the user would wish to control access to the land: *Ward HC* at [356]. Accordingly they were inconsistent with, and extinguished, native title.

1591 The States notes it does not appear that there is any earlier authority on residence leases.

1592 Alternatively, the State submits that if these leases did not wholly extinguish native title, then they extinguished the same rights as Nicholson J found were extinguished by mineral leases above.

1593 Consistent with my findings above, I reject the State's submission that the residence leases granted under the relevant Act totally extinguished native title. I accept, however, that they will have extinguished any exclusive native title right to control access to the land (if it still existed) but not otherwise.

1594 There is absolutely nothing in *Ward HC* on which one can mount an argument that, because a native title right to control access to land has been extinguished, there has been total extinguishment of native title rights in a relevant area. Indeed, *Ward HC* stands for the contrary proposition, namely, that other native title rights and interests may well subsist in circumstances where the right to control access has been extinguished.

1595 There is nothing in the grant of residence leases to distinguish them from the various forms of tenure, such as pastoral leases, mining leases and the like, that were considered by the majority in *Ward HC* to not necessarily extinguish all native title rights and interests.

1596 As to the State's alternative submission, I again find, on the basis of *Brown FC*, that, to the extent that the exercise of the rights granted under the residence leases was inconsistent with the exercise of subsisting native title rights and interests found above, those rights prevailed over the subsisting native title rights and interests but did not extinguish them.

1597 Tailings leases: Three tailings leases were granted in 1960 (TL47/0001), 1968 (TL47/0002) and 1970 (TL47/0003). They each covered between 15 and 48 acres.

1598 Tailing leases were covered by s 65 *Mining Act 1904*. They were essentially minerals leases for the purpose of mining tailings. They were distinct from tailings areas, which were for stacking tailings: reg 84 *Mining Regulations 1925*.

1599 The general provisions relating to leases applied to tailings leases.

1600 The State submits the tailings leases in question being over small areas, and requiring continuous work, comprised rights inconsistent with native title and extinguished native title.

1601 I reject the State's submission that the tailings leases, because they were over small areas requiring continuous work, necessarily extinguished native title.

1602 The tailings leases that were authorised under the relevant Act, as noted, were essentially mineral leases for the purpose of mining tailings. Just because an intensive use of the land was proposed is no reason to conclude that it was thereby necessarily intended that all native title rights and interests should be considered extinguished.

1603 In my view, consistent with the holding in *Brown FC*, to the extent that the use of the subject land was inconsistent with the enjoyment of native title rights and interests those rights prevailed over any subsisting native title rights and interests but did not extinguish them.

1604 Prospecting Areas: Three prospecting areas were granted in 1960 (PA47/262) and 1968 (PA45/2878 and PA/2879). They each covered between 5 and 48 acres.

1605 Pursuant to reg 5 *Mining Regulations 1925* (as at 1960):

> A miner who desires to prospect for gold or minerals, other than coal, on Crown land may mark off, apply for, and hold land for such purpose under Section 26, but the maximum area shall be as follows:–
> (a) Outside the limits of a goldfield or mineral field, or more than fifty miles from the nearest mine as defined in Regulation 16, forty-eight acres;
> (b) Within the limits of any such field, twenty-four acres.
> Every such area shall be called a Prospecting Area.

1606 Regulation 10 required, inter alia, that "[b]ona fide work in prospecting must be carried on, on every Prospecting Area for gold or minerals other than coal, on every working day after ten clear days from the date of registration".

1607 Nicholson J considered the rights conferred by prospecting areas in *Daniel 2003(1)* (at [796]-[797]). His Honour held that "[t]he rights under a prospecting area would be inconsistent with any right to control access; that is, to exclusive possession. Otherwise the grant of such an area did not confer rights which could not coexist with all other aspects of the native title rights and interests".

1608 The State respectfully submits that the three prospecting areas in this case extinguished any native title right, primarily because their grant was of possession and occupation, terms wholly inconsistent with rights in another person. Alternatively it says these extinguished any native title rights to control access, occupy, reside, make decisions or control use.

1609 The State previously contended that Quarrying Area 47/125 extinguished native title. That contention is now withdrawn.

1610 The State's submissions are rejected. Effectively the State again invites the Court not to follow the holding of Nicholson J in *Daniel 2003(1)* that the prospecting areas did not extinguish all native title rights and interests. In my view, with respect, the holding of Nicholson J to this effect accords entirely with *Ward HC*. There is no necessary extinguishment of native title rights and interests; merely the native title right to control access to the subject areas.

1611 So far as other non-exclusive native title rights and interests are concerned, such as the right to hunt, gather, camp on and conduct ceremonies on the land, as found above, to the extent that the rights granted under the Act in respect of the three prospecting areas in their exercise were inconsistent with the exercise of subsisting native title rights and interests then, consistent with *Brown FC*, those rights prevailed over, but did not extinguish those native title rights.

Mining leases and general purpose leases under *Mining Act 1978*

1612 Introduction: The State has granted the following types of interests over the claim area under the *Mining Act 1978*, which it says have extinguished native title:

(a) Mining leases – there are 25 current, and six historical, tenements recorded in the State's tenure evidence, not including mining leases granted under State Agreement Acts.

(b) General purpose leases – there are nine current (G47/12 to G47/20), and three historical tenements recorded in the State's tenure evidence.

1613 Mining leases: The claimants have not challenged the validity of any of the mining leases.

1614 All of the mining leases were granted, after the commencement of the RDA, over the area covered by earlier Oil Prospecting Area 20H (OPA20H) (granted under s 6 *Mining Act Amendment Act 1920*).

1615 The State contends the grant of this earlier tenement extinguished any exclusive native title rights. The State says it follows none of the mining leases is a past act and

extinguishment by each falls to be considered by reference to the inconsistency of incidents test.

1616 Section 71 *Mining Act 1978* states that:

> Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden in accordance with section 75, grant to the person a lease to be known as a mining lease on such terms and conditions as the Minister considers reasonable.

1617 Section 85 *Mining Act 1978* states:

> (1) Subject to this Act and to any conditions to which the mining lease is subject, a mining lease authorises the lessee thereof and his agents and employees on his behalf to —
>
> (a) work and mine the land in respect of which the lease was granted for any minerals; and
>
> (b) take and remove from the land any minerals and dispose of them; and
>
> (c) take and divert subject to the *Rights in Water and Irrigation Act 1914*, or any Act amending or replacing the relevant provisions of that Act, water from any natural spring, lake, pool or stream situate in or flowing through such land or from any excavation previously made and used for mining purposes, and subject to that Act to sink a well or bore on such land and take water therefrom and to use the water so taken for his domestic purposes and for any purpose in connection with mining for minerals on the land; and
>
> (d) do all acts and things that are necessary to effectually carry out mining operations in, on or under the land.
>
> (2) Subject to this Act and to any conditions to which the mining lease is subject, the lessee of a mining lease —
>
> (a) is entitled to use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes; and
>
> (b) owns all minerals lawfully mined from the land under the mining lease.
>
> (3) The rights conferred by this section are exclusive rights for mining purposes in relation to the land in respect of which the mining lease was granted.

1618 The State contends that, as submitted above, *Ward HC* did not comprehensively determine which native title rights were extinguished by such mining leases. This falls to be determined by a comparison between the native title rights determined to exist within the relevant area, and the rights conferred by the mining lease.

1619 It says the rights comprised in a mining lease included rights to "do all acts and things that are necessary to effectually carry out mining operations in, on or under the land". "Mining operations" is defined broadly in the *Mining Act 1978* to involve, essentially, mining and processing minerals including by mechanical means, and includes "the doing of all

lawful acts incident or conducive to any such operation or purposes": s 8(1) *Mining Act 1978*. The majority in *Ward HC* said that it was a "very large expression": *Ward HC* at [308].

1620 Further, the holder of a mining lease was entitled to "use, occupy, and enjoy the land in respect of which the mining lease was granted for mining purposes".

1621 The State contends a right of "occupation" for any purpose is inconsistent with native title. Even if, as is the case with mining leases, that purpose is for mining, mining and "mining operations" are of such an intensive nature that the rights comprised are inconsistent with native title. It does not matter that mining may not be carried out throughout the whole of a mining lease. The right to mine being conferred, and occupation granted, it extinguishes native title throughout the whole of the mining lease.

1622 Alternatively, the State submits that, following *Daniel 2003(1)* (at [822]) the mining leases extinguished the same native title rights as the Court found were extinguished by the mineral leases over the whole of the area of each of the leases. Further, native title is wholly extinguished at least in those areas where mining operations have actually been carried out, pursuant to the principle in *De Rose (No 2)* and *Brown (No 2)*. Accordingly native title is extinguished in this case in those parts of mining leases where there is evidence of mining having been carried out.

1623 The BHP Billiton respondents hold 11 of the mining leases within the claim area granted under the *Mining Act 1978*. Ten mining leases were granted prior to the commencement of the NTA on 1 January 1994. One mining lease was granted after the commencement of the NTA: M45/629, granted 23 November 1994.

1624 The BHP Billiton respondents adopt the State's submissions in relation to their mining leases, and make the following further submissions. In summary, they submit that:

(1) at common law, the grant of the pre-NTA mining leases had the effect of extinguishing any exclusive native title rights to possess, occupy, use and enjoy the subject land, including any right to control access: *Ward HC* [309]; *Daniel 2003(1)* [822];

(2) other native title rights may also be inconsistent with the rights conferred by the pre-NTA mining leases in accordance with the principles set out in, among other authorities, *Ward HC*, *Daniel 2003(1)*, *De Rose (No 2)* and *Brown (No 2)*; and

(3) native title has been extinguished in accordance with *Brown (No 2)*, in any areas within the pre-NTA mining leases on which infrastructure has been constructed. Also, any future development will extinguish native title rights and interests to the relevant area to the extent of the inconsistency, as per *Brown (No 2)*.

1625 Alternatively, the grant of the pre-NTA mining leases are category C past acts under s 231 NTA. Consequently, the non-extinguishment principle applies.

1626 In relation to the post-NTA mining lease, the BHP Billiton respondents submit that its grant is a category C intermediate period act under s 232D NTA. Consequently, the non-extinguishment principle applies.

1627 The submission that at common law the grant of a pre-NTA mining lease had the effect of extinguishing any exclusive native title rights to possess and control access to the subject land is well established by *Ward HC* (at [309]).

1628 While it may be open to argue that, having regard to the rights conferred by a particular lease granted under and in relation to mining legislation (including State agreements and ratifying Acts) that other particular native title rights and interests have been extinguished, I do not accept the very broad submission of these parties that the mining leases to which it draws attention (including those of the BHP Billiton parties) have the effect of extinguishing all native title. The relevant leases are in substance indistinguishable from those mining leases and other mining interests considered in *Ward HC* by the plurality not necessarily to extinguish all native title rights and interests.

1629 Further, I reject the submissions of these respondents that the carrying out of development or provision of infrastructure, pursuant to the leases, had the effect of extinguishing native title. In that regard I would apply *Brown FC* to the effect that, while activities of this nature carried out pursuant to a mining lease may mean that the rights of the mining lease holder are inconsistent with the exercise of any subsisting native title rights and interests, they prevail over but do not extinguish subsisting native title rights and interests.

1630 General purpose leases: Twelve general purpose leases were all granted post-RDA and pre-NTA.

1631 The claimants have not challenged the validity of any of the general purpose leases.

1632 Because they were all granted over the area covered by earlier OPA20H, the State contends none of the general purposes is a past act and extinguishment falls to be considered pursuant to the inconsistency of incidents test.

1633 Section 86(1) *Mining Act 1978* states:

> Subject to this Act, the Minister may, on the application of any person, after receiving a recommendation of the mining registrar or the warden, grant to such person a lease to be known as a general purpose lease for use by him in respect to mining operations on such terms and conditions as the Minister considers reasonable.

1634 The area of a general purpose lease may not exceed 10 ha, unless the Minister is satisfied that a larger area of land is required for the purposes of the lease: s 86(3) *Mining Act 1978*.

1635 Section 87 *Mining Act 1978* states:

> (1) A general purpose lease entitles the lessee thereof and his agents and employees to the exclusive occupation of the land in respect of which the general purpose lease was granted for one or more of the following purposes —
>
> (a) for erecting, placing and operating machinery thereon in connection with the mining operations carried on by the lessee in relation to which the general purpose lease was granted;
> (b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;
> (c) for using the land for any other specified purpose directly connected with mining operations
>
> (2) The purpose or purposes for which a general purpose lease is granted shall be specified in the lease.

1636 A general purpose lease must be used only for the purposes specified in the lease: reg 36(b) *Mining Regulations 1981*.

1637 A general purpose lease is generally for 21 years: s 88 *Mining Act 1978*.

1638 The State notes that a general purpose lease was considered in *Ward HC* at [336]-[342] and was found not necessarily inconsistent with all native title rights and interests (at [340]).

1639 The State also notes in *Daniel 2003(1)* (at [826]), Nicholson J held that general purpose leases had the same extinguishing effect as mining leases.

1640 The general purposes leases are for the following purposes, and have the following areas:

(1) G47/4: "Sample processing and storage"; 3 ha.

(2) G47/5: "Powerhouse and fuel storage"; 3 ha.

(3) G47/6: "Workshops, equipment storage yard and fuel storage"; 4.1 ha.

(4) G47/12: "Accommodation village and supporting infrastructure"; 8.751 ha.

(5) G47/13: "Accommodation village and infrastructure"; 8.751 ha.

(6) G47/14: "Accommodation village and supporting infrastructure"; 8.751 ha.

(7) G47/15: "Accommodation village and infrastructure"; 8.751 ha.

(8) G47/16: "Accommodation and supporting infrastructure"; 8.7525 ha.

(9) G47/17: "Accommodation village and supporting infrastructure"; 8.7525 ha.

(10) G47/18: "Accommodation village and infrastructure"; 8.753 ha.

(11) G47/19: "Accommodation village and infrastructure"; 8.752 ha.

(12) G47/20: "Lease consists of stockpiled aggregate materials from a quarry operation and will be used for this purpose. GPL 47/20 replaces Bell Newman Tailings Lease 3"; 6.76 ha.

1641 The State says the purpose of these leases is such that it can be inferred that the user wished to control access to the land: *Ward HC* at [356]. Each of these purposes, with their corresponding rights to construct, for example, an accommodation village, are inconsistent with native title. That this is so is supported by the fact that each of the leases is over an area less than 10 ha. Unlike a pastoral lease, there is no potential for native title rights to be exercised over the same area as a general purpose lease. This is supported by the conferral

under s 87 *Mining Act 1978* of "exclusive occupation". Accordingly, native title was extinguished over the whole of each of the general purpose leases.

1642 Alternatively, following *Daniel 2003(1)*, the general purpose leases extinguished any native title right of occupation, and otherwise extinguished the same rights as those set above in respect of mineral leases over the whole of the area of each of the leases.

1643 Further, native title is wholly extinguished at least in those areas where rights have been exercised, pursuant to the principle in *De Rose (No 2)* and *Brown (No 2)*. For example, native title has been wholly extinguished in those parts of BHP's general purpose leases where it has constructed an accommodation village.

1644 The BHP Billiton respondents hold eight general purpose leases within the claim area granted under Div 4 of Pt IV *Mining Act 1978* on 8 May 1991: G47/12, G47/13, G47/14, G47/15, G47/16, G47/17, G47/18 and G47/19.

1645 The BHP Billiton respondents adopt the State's submissions in relation to their general purpose leases.

1646 As to the specific uses to which the general purpose leases are put, the BHP Billiton respondents further submit that native title has been wholly extinguished in any areas within the general purpose leases on which infrastructure has been constructed. The general purpose leases are utilised for the following uses:

(1) accommodation;

(2) messing;

(3) water treatment;

(4) power; and

(5) other associated activities for the camp.

1647 They note access to the infrastructure on the general purpose leases is limited to approved BHP Billiton personnel, contractors and invitees. They must pass through the mine access security gate.

1648 The BHP Billiton respondents submit that, in accordance with *Brown (No 2)*, native title has been wholly extinguished over any controlled areas within general purpose leases, being areas on which infrastructure is located.

1649 Further, certain native title rights have been extinguished where those rights are inconsistent with the rights under the general purpose leases.

1650 Alternatively, in the event the grants of the general purpose leases were past acts, the BHP Billiton respondents submit that they were category C past acts to which the non-extinguishment principle applies.

1651 For the reasons given in the preceding section dealing with mining leases, I find these general purpose leases do not necessarily extinguish native title (save for the right to control access, if it still existed) and, in the event of inconsistency of rights upon exercise, those of the lessee prevail, as explained in *Brown FC*.

1652 It would appear then that the result is that the general purpose leases are category C past acts to which the non-extinguishment principle applies, but I will hear from the parties in that regard.

Mineral leases ratified by the Yandicoogina State Agreement

1653 The RTIO respondents:

- hold mineral lease AM70/274, granted under the *Mining Act 1978* and pursuant to the Yandicoogina State Agreement on 13 October 1997; and
- hold mineral lease AM70/282, granted under the *Mining Act 1978* and pursuant to the Hope Downs State Agreement on 31 March 2006.

1654 The claimants agree both are valid.

1655 The claimants submit that the non-extinguishment principle applies to AM70/282.

1656 The RTIO respondents make no submissions in relation to the extinguishing effect of either mineral lease and therefore I assume the relevant parties consider the

non-extinguishment principle applies to each mineral lease but will hear further from them as to the appropriate determination.

BHP's Mt Goldsworthy (Area C) Lease AML70/281

1657 Mineral lease AML70/281SA (***Goldsworthy lease***) was granted on 26 April 2002 under the agreement scheduled to and ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (***Goldsworthy State Agreement***; ***Goldsworthy Agreement Act***). The lease is for BHP's "Mining Area C" project, and includes the "Area C" mine.

1658 The claimants do not challenge the validity of the Goldsworthy lease, or the proposals approved under it. However, the claimants contend that the lease had no effect on native title.

1659 As the lease was granted after 1 January 1994 it will be a future act if it affected native title and was not a past act: s 233 NTA.

1660 The lease comprises a single, though irregularly-shaped area in the southern part of the claim area. The whole of this area was the subject of the following prior petroleum and mining tenure:

(1) OPA20H;

(2) Temporary reserve 70/1807, rights of occupancy of which were granted on 29 March 1960 pursuant to s 276 *Mining Act 1904*; and

(3) Temporary reserve 70/3156, rights of occupancy of which appear to have been granted on 29 December 1964 pursuant to s 276 *Mining Act 1904*.

1661 Further:

(1) A large part of the area was covered by Permit to Explore 37H (PE37H).

(2) Some of the area was covered by Juna Downs Station (pastoral lease 3114/1191, granted and registered on 4 April 1984) at the time of grant. The whole of this area, and some small, additional areas, were covered by earlier, historical, pastoral leases: pastoral leases: 3338/96, granted or registered on 22 February 1922; 3400/96,

registered on 2 May 1924; 394/1418, registered on 13 February 1964; 3114/1083, registered on 14 January 1975; and 398/0712, registered on 18 April 1983.

1662 It is generally accepted these earlier tenures had extinguished at least any native title right to control access over the whole of the area of the lease prior to the grant of the lease. The claimants, however, contend that a "qualified" right to control access survived. As discussed elsewhere in these reasons, I do not accept such a native title right exists. The State says other non-exclusive native title rights were also extinguished by the grant of the current and historical pastoral leases; however, nothing turns on that for present purposes.

1663 The State observes that because the Goldsworthy lease did not extinguish any native title right to control access, it was not invalidated by s 10(1) RDA and was not a past act.

1664 The State says, however, that the lease will nonetheless have affected native title because it conferred a right of exclusive possession or was otherwise wholly inconsistent with native title, a proposition I reject below. However, consistent with earlier analysis, it may be said the grant would otherwise affect the enjoyment of native title, and so may be considered a future act.

1665 On this argument, the State says if the grant of the lease was a future act, then the future act provisions fall to be considered. In this regard, the State argues the lease is a pre-existing right-based act within the meaning of s 24IB NTA because it was granted in accordance with an approved proposal submitted on 11 May 1999 pursuant to the Goldsworthy State Agreement.

1666 The proposal was entitled "Proposal for Land Requirements for Mining Lease", and was expressed to be submitted pursuant to cl 12(3c)(j) of the Goldsworthy State Agreement. The proposal is accordingly for "any leases licences or other tenures of land required from the State". The other proposal or proposals required under cl 12(3c) were separately submitted on 28 March 2002.

1667 The proposal states that "[i]t is proposed that the maximum area of Temporary Reserve 3156H allowable under the terms of the State Agreement be converted to a Mining Lease".

1668 The proposal for the grant of a lease was approved by the Minister for State Development under cl 12(3f)(a) of the Goldsworthy State Agreement.

1669 Clause 12(4) provided, inter alia, that:

> If and when the Minister has approved or is deemed to have approved the Joint Venturers' proposals pursuant to this clause the Joint Venturers may apply for a mineral lease of mining area 'C' or any part or parts thereof … and the Minister … shall cause to be granted to the Joint Venturers as tenants in common in equal shares a mineral lease … of the land so applied for … for iron ore in the form of the lease in the Schedule hereto…

1670 Accordingly, the State contends, the grant of the mineral lease was mandatory, and the lease falls into paras (a) or (b) of s 24IB.

1671 Subdivision I of Div 3 of Pt 2 NTA applying, the State submits the lease is valid, subject to Subdiv P: s 24ID(1)(a). Since there is no suggestion that Subdiv P was not complied with the lease is valid.

1672 If the lease conferred a right of exclusive possession it extinguished native title: s 24ID(1)(b). Otherwise, the non-extinguishment principle applies: s 24ID(1)(c).

1673 The State submits an analysis of the rights conferred by the Goldsworthy lease, and the analysis of the leases in respect of Goldsworthy Areas "A" and "B" provided in *Brown (No 2)* indicates that the Goldsworthy lease conferred a right of exclusive possession.

1674 The Goldsworthy lease instrument provides, inter alia:

> **NOW WE** in consideration of the rents and royalties reserved by and of the provisions of the said Agreement and in pursuance of the said Act ***DO BY THESE PRESENTS GRANT AND DEMISE*** unto the Lessees as tenants in common in the following respective undivided shares –
>
> BHP Billiton Minerals Pty Ltd 85%
> Cl Minerals Australia Ply Ltd 8%
> Mitsui Iron Ore Corporation Ply Ltd 7%
>
> subject to the said provisions ALL THOSE pieces and parcels of land situated in the West Pilbara Mineral Field containing by admeasurement 56,324.0833 hectares (139, 179.3 acres) be the same more or less and particularly described and delineated on the plan in the Schedule hereto and *all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land* (hereinafter called 'the said mine') together with all rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining to a lessee of a mining lease under the Mining Act 1978 (but

> restricted to iron ore) including all amendments thereof for the time being in force and all regulations made thereunder for the time being in force (which Act and regulations are hereinafter referred to as 'the Mining Act') or to which the Lessees are entitled under the said Agreement **TO HOLD** the said land and mine and all and singular the premises hereby demised from and including the day hereof to the 4th day of August 2007 with the right to renew the same from time to time for further periods each of twenty one years *as provided in but subject to the said Agreement for the purposes but upon and subject to the terms covenants and conditions set out in the said Agreement and to the Mining Act (as modified by the said Agreement)* **YIELDING** and paying therefor the rent and royalties as set out in the said Agreement. **AND WE** do hereby declare that this lease is subject to the observance and performance by the Lessees of the following covenants and conditions that is to say:
>
> 1. *The Lessees shall and will use the land bona fide exclusively for the purposes of the said Agreement*.
> (Emphasis added)

1675 The terms of mineral leases granted under the Goldsworthy State Agreement in respect of Areas "A" and "B" were considered in *Brown (No 2)* and *Brown FC*. The Goldsworthy lease (for Area "C") contains all of these same features, except that the relevant mining legislation is the *Mining Act 1978*, not the *Mining Act 1904*. In particular:

(1) the lease was granted under the Goldsworthy State Agreement, not under the *Mining Act 1978*; and

(2) the lessees were required to use the land bona fide exclusively for the purpose of the Goldsworthy State Agreement.

1676 The rights conferred under the Area "A" and "B" leases were described in *Brown (No 2)* at [183]-[184]. Bennett J concluded that these rights were inconsistent with the continued existence of all of the determined native title rights and were "analogous to rights of exclusive possession", stating that it was "inconceivable" how the rights granted to the lessees pursuant to the Goldsworthy State Agreement could co-exist with, or were consistent with, the determined native title rights: *Brown (No 2)* at [202]-[203]. The State submits, as it did in *Brown FC*, that the lease conferred exclusive possession, rather than rights "analogous" thereto.

1677 The Goldsworthy lease was granted under cl 12 of the Goldsworthy State Agreement: Ex 83 at [50]. Clause 12 as at the date of grant (26 April 2002) had been amended by the First Variation Agreement (approved on 15 December 1971: s 4A *Goldsworthy Agreement Act*; date of commencement of the *Iron Ore (Mount Goldsworthy) Agreement Act Amendment*

Act 1971 (WA)), the Second Variation Agreement (ratified on 8 July 1994: s 4B *Goldsworthy Agreement Act*; date of commencement of Pt 2 *Acts Amendment (Mount Goldsworthy, McCamey's Monster and Marillana Creek Iron Ore Agreements) Act 1994* (WA)), and the Third Variation Agreement (ratified on 7 December 2000: s 4C *Goldsworthy Agreement Act*; date of commencement of Pt 5 *Acts Amendment (Iron Ore Agreements) Act 2000* (WA)).

1678 The State contends the rights conferred by the lease can also be inferred from use which has been made of the lease. Mr Fitzpatrick has attested to extensive infrastructure having been constructed on the area of the lease including: an open cut mine; a beneficiation plant; a power station and distribution including transmission lines; an airport, and an accommodation village: Ex 83 at [48]. Some of this infrastructure is depicted in annexures MJF7-9 of Ex 83.

1679 Access to the mine during its operation is controlled by automatically operated boom gates located at the mine entry. The gates are guarded 24 hours a day: Ex 83 at [53].

1680 The State says that it emerges from the lease instrument, the terms of the Goldsworthy State Agreement, and the infrastructure constructed on the Goldsworthy lease that the rights conferred by the lease were very extensive, and were of the same nature as those conferred by the Area "A" and "B" leases considered in *Brown (No 2)* and *Brown FC*, except that it does not appear there was conferred in respect of Area "C" a right to construct a town.

1681 The State notes the terms of the lease are in the same form as a general lease. The lease was not in the form of a lease granted under the *Mining Act 1978*, and was different from such leases. The nature of the rights conferred are such that it can readily be inferred that the lessee would wish to control access to the land. The lessee does in fact control access to the area mined.

1682 Accordingly, the State submits the Goldsworthy lease conferred a right of exclusive possession and extinguished native title. The State submits *Brown (No 2)* and *Brown FC* should therefore not be followed.

1683 The BHP Billiton respondents adopt the State's submissions in relation to the Goldsworthy lease, and make the following further submissions. These respondents note

that, while the claimants do not admit that the grant of the lease was a pre-existing right-based act, they admit the validity of AML70/281. As a result, the validity of the lease is not in issue in this proceeding. Alternatively, these respondents submit that the non-extinguishment principle applies to the lease because its grant is either:

(1) a pre-existing right-based act which does not confer exclusive possession: s 24ID(1)(c) NTA; or

(2) a future act which passes the freehold test under s 24MB NTA: s 24MD(3) NTA; or

(3) a category C past act under ss 228(3) and 231 NTA: s 15(1)(d) NTA.

1684 The BHP Billiton respondents submit that the grant of the Goldsworthy lease is a pre-existing right-based act under s 24IB NTA and extinguishes native title on the basis it confers exclusive possession (for the same reasons advanced below in relation to AML70/244).

1685 These respondents says the lease:

(1) was granted in accordance with Div 3 of Pt 2 NTA;

(2) is a valid grant to which Subdiv I of Div 3 of Pt 2 NTA (s 24IB) applied, as the grant was a pre-existing right-based act, granted in accordance with cl 8(2) of the Goldsworthy State Agreement; and

(3) is, in addition to the above, valid on its face with respect to the presumption of regularity.

1686 Clause 8(2) of the Goldsworthy State Agreement provides:

> As soon as conveniently may be after the commencement date the State shall–
> **Mineral Lease after commencement date**
> (a) after application is made by the Joint Venturers for a mineral lease of any part or parts (not exceeding in total area three hundred (300) square miles and in the shape of a parallelogram or parallelograms) of mining area 'A' in conformity with the Joint Venturers' detailed proposals under clause 5(2)(a)(A) hereof as finally approved or determined cause any necessary survey to be made of the land so applied for (the cost of which survey to the State will be recouped or repaid to the State by the Joint Ventures on demand after completion of the survey) and shall cause to be granted to the Joint Venturers as tenants in common in equal shares a mineral lease thereof for iron ore in the form of the Schedule hereto for a term which subject to the payment of rents and royalties hereinafter mentioned and to the performance and observance by the Joint Venturers of their obligations under the mineral lease and otherwise under this

> Agreement shall be for a period of twenty one (21) years commencing from the commencement date with rights to successive renewals of twenty one (21) years upon the same terms and conditions but subject to earlier determination upon the cessation or determination of this Agreement…

1687 Alternatively, in the event the grant of AML70/281 did not confer rights of exclusive possession, the non-extinguishment principle will apply to its grant: s 24ID(1)(c) NTA.

1688 The claimants accept that the grant of the lease, and all the mining operations conducted under the lease, are valid.

1689 In short, the claimants note the terms of the lease state that it confers upon the grantee "all rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining to a lessee of a mining lease under the Mining Act 1978 (but restricted to iron ore) including all amendments thereof for the time being in force and all regulations made thereunder for the time being in force ... or to which the Lessees are entitled under the said Agreement". The extinguishing effect of the lease is therefore no different to an ordinary mining lease under the *Mining Act 1978* and so *Ward FC* applies to the effect that the lease does not necessarily extinguish native title rights.

1690 I accept the submission made on behalf of the claimants. Consistent with the analysis made by the majority judges in *Brown FC*, while the terms of the Goldsworthy State Agreement and AML70/281 conferred extensive rights on the holder of the lease, those rights were for the purpose of mining and are not to be equated with general law leases pursuant to which exclusive possession is given to a grantee in respect of land. As sophisticated and extensive as the tenure is by which the grantee received its interest in this case, the tenure was for the purpose of facilitating mining and associated developments (although in this case, unlike in *Brown FC*, not including the construction of a town).

1691 Also, consistent with the finding of both Greenwood J and Barker J in *Brown FC*, the carrying out of developments or installation of infrastructure at material times did not extinguish native title. Rather, the exercise of the rights given to the grantee prevailed over the inconsistent exercise of any subsisting native title rights and interests. In this case, however, there is no evidence that there was any attempted exercise of native title rights at material times, so that the question of the primacy of the rights granted under the lease has

never arisen for adjudication. In a practical sense, therefore, at all material times, the lease has been the paramount interest in relation to the subject area.

1692 In short, AML70/281 did not, in my view, extinguish any native title rights and interests additional to those which had already been extinguished by prior tenure.

1693 In those circumstances, the result would appear to be that the non-extinguishment principle applies to AML70/281 because it is either a pre-existing right-based act, or a future act which passes the freehold test, or is a category C past act.

BHP's Mt Newman Mineral Lease AML70/244

1694 Mineral lease AML70/244SA (***Newman lease***) was granted under the Newman State Agreement on 7 April 1967. The Newman State Agreement was discussed above in relation to BHP's Chichester Regrade miscellaneous licence.

1695 The Newman lease is divided into 21 sections, of which only section 1 and part of section 2 are within the claim area. Whilst there are operating mines on some of the sections of the lease, none of these mines is within the sections that are within the claim area.

1696 Having been granted pre-RDA, the Newman lease is valid, and extinguishment falls to be considered by reference to the inconsistency of incidents test. The claimants submit that the lease had no effect on native title.

1697 The Newman lease instrument states, inter alia,

> NOW WE in consideration of the rents and royalties reserved by and of the provisions of the said Agreement and in pursuance of the said Act *DO BY THESE PRESENTS GRANT AND DEMISE* unto the Assignees subject to the said provisions ALL THOSE pieces and parcels of land situated in the Pilbara, West Pilbara and Peak Hill Goldfields containing by admeasurement three hundred square miles be the same more or less and particularly described and delineated on the plan in the Schedule *hereto and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land* (hereinafter called 'the said mine') together with all rights, liberties, easements, advantages, and appurtenances thereto belonging or appertaining to a lessee of a mineral lease under the Mining Act, 1904 including all amendments thereof for the time being in force and all regulations made thereunder for the time being in force (which Act and regulations are hereinafter referred to as 'the Mining Act') or to which the Company is entitled under the said Agreement TO HOLD the said land and mine and all and singular the premises hereby demised for the full term of twenty-one years from the seventh day of April, 1967 with the right to renew the

> same from time to time for further periods each of twenty-one years *as provided in but subject to the said Agreement for the purposes but upon and subject to the terms covenants and conditions set out in the said Agreement and to the Mining Act* (as modified by the said Agreement) YIELDING and paying therefor the rent and royalties as set out in the said Agreement. AND WE do hereby declare that this Lease is subject to the observance and performance by the Assignees of the following covenants and conditions, that is to say:–
>
> 1. *The Assignees shall and will use the land bona fide exclusively for the purposes of the said Agreement.*
>
> (Emphasis added)

1698 These terms are not materially different from those of the Goldsworthy lease, except that the relevant statute is the *Mining Act 1904*.

1699 The submissions of the State in respect of the Goldsworthy lease apply to the Newman lease. In particular, the State says, the purpose of the Newman lease was to facilitate a major mining project, including transportation of ore by rail, and development of a harbour and town: Sch 1, cl 5(2) *Newman Agreement Act*.

1700 The State contends the rights conferred by the lease can be inferred by the nature of the mining activities that have actually been carried out on the lease. On another section of the lease close to Newman (outside the claim area) BHP has constructed the Mt Whaleback mine. This is a major open cut mine with associated infrastructure such as roads and railway. BHP has the right to construct the same such mine within the sections of the lease within the Banjima claim area.

1701 The State says that, following Bennett J's reasoning in *Brown (No 2),* it is inconceivable that the rights granted to BHP pursuant to the Newman lease could be consistent with any native title rights: *Brown (No 2)* at [202]-[203]. Accordingly, native title was extinguished over the whole of the area of the lease, including those sections where mining has not yet taken place. Alternatively, following *Daniel 2003(1)*, the Newman lease extinguished the same native title rights as were held to be extinguished by the mineral leases in that case over the whole of the area of the lease.

1702 The BHP Billiton respondents hold the Newman lease. The BHP Billiton respondents adopt the State's submissions in relation to the lease, and make the following further submissions:

(1) the form and content of the rights conferred by mineral lease AML70/244 conferred a right of exclusive possession on the BHP Billiton respondents, the effect of which is to extinguish at common law all native title rights and interests over the entirety of the area of the mineral lease (cf *Brown (No 2)* at [185]);

(2) even if the grant of the mineral lease did not confer a right of exclusive possession, an objective inquiry into the inconsistency between the rights comprising the mineral lease and any native title rights that may be recognised will be required (*Ward HC* at [78]) and:

(a) due to the comprehensiveness of the rights conferred by the lease, will result in the extinguishment of each of those rights; or

(b) alternatively, will at least result in extinguishment of any exclusive native title rights to possess, occupy, use and enjoy the subject land, including any right to control access (*Ward HC* at [309]); and

(3) extinguishment may also be effected in accordance with the principles identified in *De Rose (No 2)* and *Brown (No 2)* at [210] in relation to future development.

1703 These respondents submit that, if native title was extinguished at common law prior to the enactment of the NTA, then, subject to ss 47, 47A and 47B NTA, it cannot be recognised in a determination of native title under the NTA.

1704 As to the judgment in *Brown (No 2)* as it relates to State Agreement mineral leases conferring exclusive possession (or not), the BHP Billiton respondents make the following additional submissions.

1705 The meaning of the term "exclusive possession" was discussed by Gummow J in *Wik* at 194-195 (footnotes omitted):

> … at common law the term 'exclusive possession' is used as a touchstone for the differentiation between the interest of a lessee and that of a licensee, who has no interest in the premises. 'Exclusive possession' serves to identify the nature of the interest conferred upon the lessee as one authorising the exclusion from the demised premises (by ejectment and, after entry by the lessee, by trespass) not only of strangers but also, subject to the reservation of any limited right of entry, of the landlord. As Windeyer J put it, a tenant cannot be deprived of the rights of a tenant by being called a licensee.

1706 Exclusive possession is a right to exclude all others from the leased area.

1707 Similarly, in *Wik*, at 108, Toohey J, in ascertaining whether or not a lease confers a right of exclusive possession, stated:

> The first step is to consider whether the relevant grants did in truth confer possession of the land on the grantees to the exclusion of all others including the holders of native title rights. That question is not answered by reference only to general concepts of what is involved in a grant of leasehold. The language of the statute authorising the grant and the terms of the grant are all-important.

1708 The matters to which Bennett J had regard in considering whether the mineral leases in *Brown (No 2)* conferred on their holders a right of exclusive possession are set out at *Brown (No 2)* at [176]-[186].

1709 Clause 8(1)(a) of the Newman State Agreement provides for the State to grant a mineral lease for iron ore in the form set out in the Schedule to the Newman State Agreement. The demise in the form set out in the schedule is expressed in the following terms:

> … NOW WE in consideration of the rents and royalties reserved by and of the provisions of the said Agreement and in pursuance of the said Act DO BY THESE PRESENTS GRANT AND DEMISE unto the Company subject to the said provisions ALL THOSE pieces and parcels of land situated in the Goldfield(s) containing by admeasurement be the same more or less and particularly described and delineated on the plan in the Schedule hereto and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land (hereinafter called 'the said mine') together with all rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining to a lessee of a mineral lease under the *Mining Act 1904* including all amendments thereof for the time being in force and all regulations made thereunder for the time being in force (which Act and regulations are hereinafter referred to as 'the Mining Act') or to which the Company is entitled under the said Agreement TO HOLD the said land and mine and all and singular the premises hereby demised…

1710 Pursuant to the BHP Billiton respondents' rights under AML70/244, it has established and carries on its mines on land comprised in AML70/244.

1711 The BHP Billiton respondents submit the magnitude of the operations to be undertaken pursuant to the lease is readily apparent from the significant construction and production obligations imposed upon BHP Billiton by the Newman State Agreement. The character and intensity of the use of the land the subject of AML70/244 is very different to that of the pastoral leases considered in *Wik*, which Kirby J regarded as being of "limited intensity" (at 249-250). The subject matter and purpose of AML70/244 and the magnitude of

the development and improvement conditions imposed upon BHP Billiton indicate a scale and intensity of operations that clearly point to a grant of exclusive possession.

1712 The lease was granted for a term of twenty one years "with a right to renew the same from time to time for further periods each of twenty one years". Further, cl 23 of the Newman State Agreement enables the Minister, at BHP Billiton's request, to extend any period or date referred to in the Newman State Agreement for such period or to such later date as the Minister thinks fit. The BHP Billiton respondents submit these provisions mean that, in effect, AML70/244 can be renewed indefinitely. This indicates a "substantial element of permanence": *Ward FC* at [559] (Beaumont and von Doussa JJ). This element of permanence was missing from the exploration licences considered by Carr J in *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 at 485, which were only granted for terms of five years with annual renewals thereafter. The BHP Billiton respondents submit this feature of AML70/244 makes it more akin to the nature of freehold than a lease and is more consistent with a grant of exclusive possession than a lesser interest.

1713 Furthermore, AML70/244 contains a covenant that BHP Billiton "shall and will use the land bona fide exclusively for the purposes of [the Newman State Agreement]". The BHP Billiton respondents submit this indicates a complete and sustained dedication of the land to the purposes for which a mineral lease was granted, which is inconsistent with the use or the occupation of the land by any other person. The fact that the grantee is granted exclusive possession for a nominated purpose does not mean that possession can be granted to another person for another purpose: *Ward FC* at [558] (Beaumont and von Doussa JJ).

1714 These respondents contend a grant that expressly provides for a grantee to "take possession" indicates an intention to confer exclusive possession. They refer to passages from the following cases:

(1) "References in the deed to the licensee 'giving up possession of the said building occupied by her' and to 'that part of the premises occupied by her', are consistent with a tenancy, and in their setting are not really consistent with the supposed licence": *Radaich v Smith* (1959) 101 CLR 209 at 224 (Windeyer J).

(2) "Clause 9 of the lessee's covenants bound the 'lessee … at the end or other sooner determination of the lease' to 'deliver peaceable possession thereof' to the

Government or to the Minister or to some officer 'authorised … to receive possession thereof.' Similarly, cl 15 prohibited the 'lessee', during the term granted by the lease from disposing of or parting 'with the possession' of the land. These provisions are consistent with a grant of a legal right to exclusive possession": *ICI Alkali (Aust) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* [1977] VR 400 at 337 (McInerney J);

(3) "There is another indication that a pastoral lease granted under the 1910 Act did not confer a right of exclusive possession. In contradistinction to the express provision contained in s 76(1) of the 1910 Act with respect to persons whose applications for agricultural holdings had been approved, there was no provision in the Act authorising a pastoral lessee to take possession of the land the subject of a lease": *Wik* at 154 (Gaudron J).

1715 There are many references in the *Mining Act 1904* (at relevant times) to the grantee of a mineral lease taking, having or parting with possession:

- an applicant for a mineral lease may "take possession of and hold the land applied for pending the application" (s 68);
- a mineral lease shall contain and be subject to a covenant not to "part with possession of the land" without the Minister's written consent (s 80(1)(d));
- the owner or occupier of private land is entitled to compensation from the applicant for a mineral lease "for being deprived of the possession of the surface or of any part of the surface of private land" (s 168); and
- if mining operations have not commenced during the twelve months following the registration of a mining lease in relation to private land, the Governor may authorise the owner of the land "to re-enter and take possession of the land" (s 174).

1716 The BHP Billiton respondents contend the Newman State Agreement imposes significant fetters on the capacity of the Crown to resume or make other grants in relation to land the subject of, among other things, AML70/244. Under cl 8(4)(a) of the Newman State Agreement, the State covenants that it shall not during the currency of the Agreement "register any claim or grant any lease or other mining tenement under the Mining Act or otherwise by which any person other than the Company or an associated company will obtain under the laws relating to mining or otherwise any rights to mine or take the natural

substances (other than petroleum…) within the mineral lease unless the Minister reasonably determines that it is not likely to unduly prejudice or to interfere with the operations of the Company hereunder…". Similarly, under cl 10(g) of the Agreement the parties covenant that AML70/244 shall be zoned and protected so that "the operations of the Company hereunder may be undertaken and carried out thereon without any interference or interruption by the State…". Such restrictions on the State are only consistent with a grant of exclusive possession.

1717 Section 69 *Mining Act 1904* makes it a trespass for certain persons, after an application for a mineral lease has been lodged, to enter, occupy or interfere with the land the subject of the application, and the applicant may seek damages from the trespasser in the Warden's court. The BHP Billiton respondents contend that while this provision may not have been directed at native title holders, it supports the view that the grant of a mineral lease confers a right of exclusive possession.

1718 Lease-type terminology is used throughout the *Mining Act 1904* in relation to mineral leases. The use of the words "lease", "lessee", "possession", "rent", "covenant", "term", "demised" and "forfeiture" is consistent with an intention on the part of the Parliament that mineral leases are leases. Similarly, the AML70/244 lease instrument uses language consistent with a lease: for example, "lease" and its derivatives, "do by these presents grant and demise unto the Assignees", "to hold the said land", "for the full term of twenty-one years", "yielding and paying therefor the rent and royalties…" and "covenants". In the presence of other indicia, the BHP Billiton respondents contend this supports a finding that AML70/244 confers a right of exclusive possession.

1719 Even if the grant of AML70/244 did not confer a right of exclusive possession, an objective inquiry into the inconsistency between the rights comprising the mineral lease and any native title rights that may be recognised will be required (*Ward HC* at [78]) and:

(1) due to the comprehensiveness of the rights conferred by AML70/244, will result in the extinguishment of each of those rights; or

(2) alternatively, will result in extinguishment of:

    (a) any exclusive native title rights to possess, occupy, use and enjoy the subject land, including any right to control access (*Ward HC* at [308][309]); and

(b) rights that are inconsistent with the rights under the lease.

1720 In *Daniel 2003(1)* Nicholson J considered the rights conferred by, and conditions attached to, certain mineral leases granted under the *Mining Act 1904* and held that certain non-exclusive native title rights and interests (in addition to the right to control access) would have been extinguished due to inconsistency.

1721 Consistent with *Daniel 2003(1)*, *Daniel 2003(2)*, and *Rubibi (No 7)*, the BHP Billiton respondents submit that the following rights and interests claimed by the claimants are inconsistent with the rights conferred by the lease, the right to:

(1) make decisions about the use of the area by person who are not members of the Aboriginal society to which the native title claim group belong (claimed right 15);

(2) invite and permit others to have access and participate in or carry out activities (claimed right 16);

(3) access (unless limited to entering and travelling) (claimed right 17);

(4) erect shelters (unless limited to temporary shelters) (claimed right 19);

(5) camp (unless limited to temporary camping) (claimed right 20);

(6) take soil (claimed right 26);

(7) take sand (claimed right 27);

(8) take stone and/or flint (claimed right 28);

(9) take clay (claimed right 29);

(10) take gravel (claimed right 30);

(11) control the taking, use and enjoyment by others of the resources in the area etc (claimed right 33);

(12) manufacture traditional items from resources (claimed right 34);

(13) trade in resources (claimed right 35); and

(14) prevent any activity that is occurring that is either unauthorised or inappropriate (in accordance with traditional law and customs) in relation to significant places and objects by all reasonable lawful means etc (claimed right 38).

1722 Alternatively, the BHP Billiton respondents submit that native title has been extinguished in areas where mining operations have been conducted on mining leases*: Rubibi (No 7)* at [66], and *Brown (No 2)* at [230].

1723 As noted above, only two sections of AML70/244 intersect with the Banjima claim area.

1724 The affidavit of Mr Fitzpatrick (Ex 83) evidences in detail the type and scope of activities and operations that have been conducted on those areas of AML70/244 outside of the claim area (but still, pursuant to the Newman State Agreement).

1725 The BHP Billiton respondents submit that, in accordance with *Brown (No 2)*, extinguishment on those parts of AML70/244 within the claim area may occur in the future in the event future mining operations and infrastructure construction occurs there. Indeed, having reviewed the iron ore potential for sections 1 and 2 of AML70/244, BHP Billiton has identified four deposits that are generally high grade (possibly containing between 60 and 2000 million tonnes of potential mineralisation, with the mid case at approximately 570 million tonnes).

1726 Evidence from John James Kirk Enfield (Ex 84 at [16]) is that future mining operations on sections 1 and 2 of AML70/244 would likely entail (inter alia):

(1) open pit mining several pits down to potentially 300 m depth;

(2) construction of a crushing and conveying circuit to crush the material;

(3) conveying of material to processing plants, or the construction of new processing facilities;

(4) construction of very large storage areas for overburden;

(5) construction of a rail spur of approximately 10 km in length;

(6) construction of a maintenance workshop and facilities for fuel and water storage;

(7) construction of administration offices;

(8) a camp to house mine workers; and

(9) construction of a secure, fenced, remote explosive magazine area.

1727 The BHP Billiton respondents submit that, in accordance with *Brown (No 2)*, future development of AML70/244 will extinguish native title rights and interests in their entirety, in the area of the mining operations and constructed improvements

1728 As in the case of the Goldsworthy lease, AML70/281, the claimants submit the lease has no greater extinguishing effect than an ordinary mineral lease under the *Mining Act 1904*. That was the conclusion reached by Nicholson J in *Daniel 2003(1)* at [848] in relation to a similar State Agreement mineral lease.

1729 As to the BHP Billiton respondents' submissions in respect of possible future operations, the claimants say they demonstrate that the concept of extinguishment by use of a mineral lease is unworkable and erroneous. Section 225 requires the Court to make a determination as to the existence of native title as at the date of the determination: *King* at [170]. As at the present date, there is no extinguishment through mining operations. The evidence before the Court does not enable it to make a determination of the rights of the parties based on a predictive judgment as to the likely nature and extent of mining operations on AML70/244 in the future. For any number of reasons mining may not ever occur. Nor should the Court seek to make such a predictive assessment. As the High Court stated in *Ward HC* at [82], the rights granted are either inconsistent with native title or they are not. The claimants submit that they are not.

1730 For the same reasons given above in relation to the Goldsworthy lease, I find the Newman lease does not extinguish native title (save if relevant in respect of a prior exclusive right to control access to subject land).

1731 In those circumstances the result would appear to be that AML70/244 is subject to the non-extinguishment principle for the same reasons that AML70/281 is so subject, but I will hear from the parties in this regard.

RTIO's Mt Bruce Mineral Lease AML70/252

1732 It does not appear to be in dispute that mineral lease AML70/252SA (***Mt Bruce lease***) was granted under the agreement scheduled to and ratified by the *Iron Ore (Mount Bruce) Agreement Act 1972* (WA) (***Mt Bruce State Agreement***; ***Bruce Agreement Act***) on

31 October 1975 (albeit that the mining lease itself appears to have been granted on 7 June 1974).

1733 The Mt Bruce lease comprises 19 discrete sections all of which are within the claim area. The lease covers an area along or close to the northern escarpment of the Hamersley Range on both sides of the Great Northern Highway.

1734 Having been granted after the commencement of the RDA but before 1 January 1994, (as I have understood the parties to agree) the lease will be a past act if:

(1) at the time of grant native title existed in relation to the land or waters; and

(2) apart from the NTA, "the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist": s 228(2) NTA.

1735 The claimants do not contend that the lease is invalid.

1736 The Mt Bruce lease was granted over an area that had been wholly subject to historical petroleum tenures (OPA20H and PE37H), and to temporary reserve 70/1807, rights of occupancy which were approved by the Governor in Council on 17 May 1960. The whole of the area had also been subject to other temporary reserves for which rights of occupancy had been granted. Part of the area had been subject to historical pastoral leases.

1737 Accordingly, it is accepted any native title right to control access to the subject areas had been extinguished over the area of the lease prior to its grant.

1738 The claimants submit that the lease does not extinguish native title.

1739 The Mt Bruce lease instrument states, inter alia,

> NOW WE in consideration of the rents and royalties reserved by and of the provisions of the said Agreement and in pursuance of the said Act *DO BY THESE PRESENTS GRANT AND DEMISE* unto the Company subject to the said provisions ALL THOSE pieces or parcels or land situated in the WEST PILBARA GOLDFIELD containing approximately 546.25 square kilometres and … being the land shaded pink on the plans in the Schedule hereto *and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land* (hereinafter called 'the said mine') together with all rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining to a lessee of a mineral lease under the MINING ACT 1904 including all amendments thereof for the time being in force

> and all regulations made thereunder for the time being in force (which Act and regulations are hereinafter referred to as 'the Mining Act') or to which the Company is entitled under the said Agreement TO HOLD the said land and mine and all and singular the premises hereby demised for the full term of twenty-one years from the 7th day of June 1974 with the right to renew the same from time to time for further periods, each of twenty-one years *as provided in but subject to the said Agreement for the purposes but upon and subject to the terms covenants and conditions set out in the said Agreement and to the Mining Act (as modified by the said Agreement)* YIELDING AND PAYING therefor the rent and royalties as set out in the said Agreement AND WE DO hereby declare that this lease is subject to the observance and performance by the Company of the following covenants and conditions, that is to say:
>
> (1) *The Company shall and will use the land bona fide exclusively for the purposes of the said Agreement.*
>
> (Emphasis added)

1740 These terms are not materially different from those of the Newman lease. Nor are they materially different from the terms of the Goldsworthy lease, except that the relevant statute is the *Mining Act 1904*.

1741 The submissions of the State in respect of the Goldsworthy lease apply to the Mt Bruce lease. In particular, the State says, the purpose of the Mt Bruce lease was to facilitate a major mining project, including transportation of ore by rail, and development of a harbour and town: Sch 1, cl 5(3) *Mt Bruce Agreement Act*.

1742 Following Bennett J's reasoning in *Brown (No 2)*, the State says it is inconceivable that the rights granted to RTIO pursuant to the Mt Bruce lease could be consistent with any native title rights: *Brown (No 2)* at [202]-[203]. Accordingly, native title was extinguished over the whole of the area of the lease.

1743 Alternatively, following *Daniel 2003(1)* the Mt Bruce lease extinguished the same native title rights as those held to be extinguished by the mineral leases in that case over the whole of the area of the lease.

1744 The RTIO respondents additionally submit that, in accordance with *Brown (No 2)*, extinguishment on AML70/252 may occur in the future in the event future mining operations and infrastructure construction occurs there. Any such future development will extinguish native title rights and interests in the relevant area to the extent of the inconsistency.

1745 Further, in *Daniel 2003(1)* Nicholson J considered the rights conferred by, and conditions attached to, certain mineral leases granted under the *Mining Act 1904*. Nicholson J considered that certain non-exclusive native title rights and interests (in addition to the right to control access) would have been extinguished due to inconsistency.

1746 Consistent with *Daniel 2003(1)*, *Daniel 2003(2)* and *Rubibi (No 7)*, the RTIO respondents submit that the same rights and interests claimed by the claimants and identified by the BHP Billiton respondents relative to the Newman lease are inconsistent with the rights conferred by AM70/252.

1747 The claimants submit this mineral lease is indistinguishable from the Newman lease discussed above and for the reasons advanced above does not extinguish native title to any greater extent than prior tenures.

1748 For the same reasons given in relation to the Newman lease, I find the Mt Bruce lease does not extinguish any additional native title rights and so it would appear that the result is that the non-extinguishment principle applies to it in the same way that it does to AML70/281 and AML70/244, but I will hear from the parties in this regard.

Minerals Petroleum and Geothermal Energy

Minerals and Petroleum

1749 Schedule Q to the claimants' form 1 application confirms that the claimants do not claim any right, title or interest in any minerals, petroleum or gas wholly owned by the Crown.

1750 The claimants submit however that such ownership is not inconsistent with a native title right to take ochre for ceremonial purposes (*Daniel 2003(1)* at [729]-[732]), or with a right to control access or use the land for any purpose, including the extraction of minerals or petroleum, except to the extent that a valid right of access for that purpose has been granted pursuant to statute in which case the statutory right will prevail over the native title right.

1751 The State respond by saying whether by virtue of the vesting provisions in s 3 *Western Australia Constitution Act 1890* (UK) (which provision states "[t]he entire management and control of the waste lands of the Crown in the colony of Western Australia,

and of the proceeds of the sale, letting, and disposal thereof, including all royalties, mines, and minerals, shall be vested in the legislature of that colony"), or s 117 *Mining Act 1904* and s 9 *Petroleum Act 1936*, full beneficial ownership of all minerals specified and petroleum is vested in the Crown. Any native title in minerals or petroleum accordingly was extinguished, as found in *Ward HC* at [383]. See also *Ward FC* at [541]; *Daniel 2003(1)* at [728]-[730]; *Neowarra* at [599]-[600].

1752 Additionally, the State notes that, pursuant to a proclamation made under s 115 *Mining Act 1904* and published in the Gazette on 12 May 1920, the State has full beneficial ownership of ochres for use in the manufacture of porcelain, fine pottery or pigments (which proclamation brought "ochres ... for use in the manufacture of porcelain, fine pottery or pigments" into the definition of "minerals" in the *Mining Act 1904*: see *Daniel 2003(1)* at [729] and *Neowarra* at [599]). The State accepts, however, that this vesting is not inconsistent with a native title right to take ochre for ceremonial purposes (should such a right be established).

1753 The BHP Billiton respondents also note that if any native title rights to minerals existed in Western Australia, those rights have been extinguished by the Crown's acquisition of full beneficial ownership of the minerals referred to in s 117 *Mining Act 1904*.

1754 "Minerals" for the purposes of s 117 *Mining Act 1904* was defined in s 115 and expressly included "iron". The *Mining Act Amendment Act 1961* (WA) removed the definition formerly contained in s 115, with the effect that thereafter, until the commencement of the *Mining Act 1978*, the general definition of "minerals" in s 3(1) applied for the purposes of s 117. Section 3(1) defined "minerals" to mean "all minerals other than gold, and all precious stones".

1755 The decision of the Full Court in *Ward FC* to this effect, submit these respondents, is consistent with the reasoning of Drummond J in *Wik Peoples v Queensland* (1996) 63 FCR 450 at 500-502, Olney J in *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 601, and Olney J in *Wandarang People v Northern Territory* [2000] FCA 923; (2000) 104 FCR 380 at [124], to the effect that the corresponding provisions in Queensland and Northern Territory mining legislation extinguished any native title rights that might otherwise have existed in relation to minerals.

1756 Further, they submit the declaration of Crown property in minerals continues – provision to the same effect as s 117 *Mining Act 1904* appears in s 9 *Mining Act 1978*. Further, the existing ownership of all natural resources owned by the Crown has been confirmed: s 13(1) TVA and s 212(1)(a) NTA.

1757 I accept the respondents' submissions. These authorities, in my view, prevent any re-shaping of an argument that native title rights may relate to minerals and petroleum – save in respect of the taking of ochre for ceremonial purposes. That is to say, a native title right to take ochre for ceremonial purposes may exist.

Geothermal energy and geothermal energy resources

1758 Section 9 *Petroleum and Geothermal Energy Resources Act 1967* was amended by the *Petroleum Amendment Act 2007* (WA) on 19 January 2008 to extend the State's ownership of petroleum to "geothermal energy resources" and "geothermal energy" and provides:

> Notwithstanding anything to the contrary contained in any Act, or in any grant, lease, or other instrument of title, whether made or issued before or after the commencement of this Act, all petroleum, geothermal energy resources and geothermal energy on or below the surface of all land within this State, whether alienated in fee simple or not so alienated from the Crown, are and shall be deemed always to have been the property of the Crown.

1759 "Geothermal energy" is defined in s 5 of the Act as "thermal energy that results from natural geological processes and is contained in geothermal energy resources". "Geothermal energy resources" are defined as "subsurface rock or other subterranean substances that contain geothermal energy and, where the context so requires, includes the geothermal energy contained in those resources".

1760 The State submits s 9 as amended confirms the State's *ownership* of geothermal energy and geothermal energy resources and has no effect on native title because there are no native title rights in geothermal energy or geothermal energy resources. It notes the claimants have not claimed such rights and there is no evidence of such rights. Accordingly, it is submitted the State's ownership of geothermal energy and geothermal energy resources should be recorded as an "other interest" which prevails over native title for the purposes of

s 225(c) and (d) in the event that a determination is made that native title exists in the claim area.

1761 The BHP Billiton respondents and the RTIO respondents adopt the State's submissions.

1762 The claimants say they have claimed the right to take *all* the resources of the claim area other than those lawfully *owned* by others. Insofar as the assertion of State *ownership* of geothermal energy resources by the amendment to the relevant Act in January 2008 applies as against the claimants in the claim area, the claimants submit it affects their native title right to exploit such resources, thereby *affects* their native title rights, and so is a future act as defined. Subdivision M of Div 3 of Pt 2 NTA therefore applies to the enactment of the *Petroleum Amendment Act 2007* (WA) by reason of s 24MA. The consequence is that the non-extinguishment principle applies under s 24MD(3). It is on that basis that the State's ownership of geothermal energy and geothermal energy resources is an "other interest".

1763 This issue is not the subject of any extensive submissions by the parties. In the result, I do not accept that either of the competing analyses are necessarily correct.

1764 I do not accept that the issue is to be resolved by asking whether or not the claimants have established that they have native title rights in geothermal energy or geothermal energy resources, as defined by the *Petroleum and Geothermal Energy Resources Act 1967* (as amended in 2008).

1765 It is evident that the exploitation of geothermal energy or geothermal energy resources as defined by the Act may, if carried out in the claim area, have the potential to affect native title rights and interests of the type I have found to subsist, such as the right to hunt or to gather bush resources, to camp, or to conduct ceremonies.

1766 It is possible, therefore, to see that any attempt to exploit geothermal energy or geothermal energy resources as defined by the Act, might, depending on the facts, "affect" native title in the manner suggested by s 227 NTA, and discussed generally above.

1767 The claimants' submission, however, goes further by suggesting that the provision by s 9 that such resources "are and shall be deemed always to have been the property of the Crown" is itself a legislative act that affects native title and so is a future act as defined.

1768 If one takes the view, as I do, that the effect of s 9 by so providing is simply to assert regulatory control over geothermal energy resources and geothermal energy, much in the same way as the relevant conservation legislation considered in *Yanner v Eaton* was held to assert control over fauna, including birds, in the State of Queensland, but not to have any extinguishing effect on native title rights in respect of fauna, then s 9 will not have effected any extinguishment.

1769 If a provision such as s 9 does not effect any relevant extinguishment of a native title right but is to be taken merely as an assertion by the State of regulatory authority in respect of the energy and resources concerned, then it is difficult also to see how the assertion of control, of itself, can be said to affect the exercise or enjoyment of native title rights in the claim area.

1770 In such circumstances, while any rights that might later be granted pursuant to the *Petroleum and Geothermal Energy Resources Act 1967* may be considered a future act as defined in the NTA, I do not consider that the assertion of control creates any property rights as such and thus there is no need, contrary to the submission of the State, to record the assertion of control as an "other interest" in the determination.

1771 This is not a case where, as in the case of other natural resources, the beneficial interest in a resource has been vested in the State and thereby has an extinguishing effect.

1772 Similarly, I do not accept the submission of the claimants that the assertion of State *ownership* actually constitutes a future act.

1773 I thereby reject both sets of submissions in relation to geothermal energy and geothermal energy resources and would not make any provision for such things in the determination.

Rights of access to tenements

1774 The State observes that the claimants generally submit that the State's ownership of minerals and petroleum is not inconsistent with a native title right to control access or use of the land for any purpose, including the extraction of minerals or petroleum, except to the extent that a valid right of access for that purpose which prevails over native title has been granted pursuant to statute.

1775 As to a valid right of access for that purpose, the State submits holders of mining and petroleum tenements have a right to access their tenements by reason of an easement of necessity, if they do not otherwise have a right of access.

1776 As to the easement of necessity, the State contends that, as a matter of general land law, where a landowner disposes of part of his or her land and retains another part so that the alienated part is land locked by the grantor's land (with or without others' land) an "easement of necessity" arises under which the grantee may obtain access: see *Barry v Hasseldine* [1952] Ch 835.

1777 The State says the general law requires that there must be an absolute necessity for the access sought before an easement of necessity will arise, but that will be the case in respect of any mining or petroleum tenement which is "landlocked", in other words one which is not connected with a road or track over which there is a lawful right of access.

1778 The State further notes that under the general law an easement will also arise under what is usually referred to as the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 (***Wheeldon v Burrows***) but only where there is a pre-existing road or track by which the tenement land has been accessed previously.

1779 Thus, the State concludes:

> Where applicable, an easement of necessity arises notwithstanding native title, primarily because at common law a tenement can be granted despite native title, and access to it is imperative.
>
> Accordingly a determination that native title exists in the claim area should record as an '*other interest*' a right of holders of mining tenements to access their tenements pursuant to an easement of necessity where applicable.

1780 The BHP Billiton respondents and the RTIO respondents adopt the State's submissions.

1781 The claimants note the principles of general law referred to in the State submissions are an application of the general principles concerning the implication of terms in a contract: *Moncrief v Jamieson* [2007] UKHL 42; *North Sydney Printing Pty Ltd v Sabemo Investment Co Pty Ltd* [1971] 2 NSWLR 150 at 160. Those principles cannot be used to support an alleged right of access to granted mining tenements exercisable as against native title holders because:

(1) There is no contractual relationship between the Crown and the grantee of a mining tenement. The grant of a mining tenement is purely governed by statute: *TEC Desert* at [28]-[29], and at [36] citing *Ward HC* at [291].

(2) The native title holders are not parties to the grant as between the Crown and the mining tenement holder, and an easement of necessity cannot arise over the land of a third party: *Fibrework Industries Pty Ltd v Furnari* [2005] VSC 489; [2006] ANZ ConvR 137 at [22]; *Riddiford v Foreman* (1910) 29 NZLR 781 at 786.

(3) The notion of an "easement of necessity" which may apply where an owner grants land to another is not apposite to the relationship between native title and Crown interests. Native title is not granted by the Crown out of the Crown's estate. It is an allodial property interest which burdens the Crown's sovereign radical title: *Ward HC* at [331]. Conversely, the statutory acquisition of minerals by the State in 1904 by s 117 *Mining Act 1904* did not comprise a grant of existing property interests by the native title holders to the Crown.

1782 Further, the claimants observe the rule in *Wheeldon v Burrows* is an application of the general rule against derogation from grant. It operates only as against the grantor of land under the common law in circumstances where the grantor grants part of his or her land to a grantee, and therefore also cannot operate in circumstances of the grant of a mining tenement under statute nor as against native title holders who are not party to the grant: see by analogy *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144 especially at 168-9, 175, 183 where the House of Lords held that the principle could not apply in the case of a compulsory acquisition of land.

1783 The rule also only applies in respect of uses of that part of the land retained by the grantor for the benefit of the part of the land granted to the grantee up to and at the time of the grant: see *In re St Clement's* [1988] 1 WLR 720. There is no evidence in this case of the Crown regularly accessing the areas of particular tenements prior to their grant.

1784 I reject the submissions of the State and generally adopt those of the claimants.

1785 The State's raising of the question of rights of access to tenements appears to have occurred by way of one strand of its responses to a broader claim made by the claimants that a native title right to control access may subsist notwithstanding State legislation concerning ownership of minerals and petroleum and regardless of the grant of tenements.

1786 The issue appears to have been raised as a general proposition and not in relation to any particular factual context that might test out the practical circumstances, such as would be the case where a traditional claim to an easement of necessity is made under the general law.

1787 In any event, the observation is properly made on behalf of the claimants that any attempt to imply some form of easement of necessity over the native title rights of native title holders based on the general law misses the point emphasised in *Yorta Yorta HC* that the origin of the native title rights is the indigenous law that applied prior to the time sovereignty was asserted by the British in Australia and the statutory rights in respect of minerals and petroleum and the like are those created under the regime of the new British sovereign and its successors, the Territories, States and Commonwealth of Australia, and the two, in relevant legal sense, do not meet.

1788 Just how, therefore, it could be argued successfully, on the basis of the existing general law, that the grant of some mining permission or authority can somehow burden native title with an easement of necessity is very difficult conceptually to imagine. There is no basis upon which it can be said that there is any express or implied consensual grant of an easement. It is simply not open to imply that there is such an easement because it is practical from a mineral development point of view. If there is to be any such easement implied or imposed as a matter of law, then it seems to me the law will need to be developed, either by a judicial determination to that effect binding on this Court or by statutory means.

1789 In the meantime, the submissions made on behalf of the State in relation to the contended easement of necessity in the terms described above are not only novel but unsupported by authority or statute and are rejected.

1790 It is not clear to me whether the State presses their submission based on the rule in *Wheeldon v Burrows*. In any event, for similar reasons to my finding on the contended easement of necessity, I would reject this submission. Apart from anything else, there is no evidence of continuous or apparent easements that might be the subject of any continuing or apparent easements for the purposes of an implied grant under the rule in *Wheeldon v Burrows.*

1791 I find therefore there are no easements of necessity (or similar) that burden the native title rights found above.

Disputed Partially Extinguishing Acts

Pastoral leases

1792 The claimants submit that the pastoral leases do not extinguish any native title rights, apart from the "unqualified" right to control access.

1793 The claimants submit that a limited right to control access to traditional territory survives the grant of pastoral leases and other forms of tenure which coexist with native title, such as mining leases, exploration licences, temporary reserves and the like, on the basis that such native title rights:

(1) are not absolute rights of control, but qualified rights of control;

(2) have existed as qualified rights of control since prior to the assertion of British sovereignty; and

(3) are and have always been exercisable subject to co-existing rights of others arising from the lex loci (that is, the law of the place) applicable from time to time, both prior to and since the assertion of British sovereignty.

1794 The claimants submit that the rights, understood in that way, are capable of being recognised consistently with the exposition of the law relating to the extinguishment of the native title right to exclude or control access arising from the grant of pastoral leases and

similar tenures, and public rights, as set out by the High Court in *Ward HC* at [49], [53], [194] and [388] and *Yarmirr HC* and the Full Court in *Alyawarr FC*.

1795 In *Ward HC* the High Court made the following finding in respect of the relationship between native title and pastoral leases:

> [192] These were acts involving the grant of rights and interests inconsistent with so much of the native title rights and interests as stipulated for control of access to the land the subject of the grants The pastoral leases were acts attributable to the State which denied to the native title holders the continuation of a traditional right to say who could or who could not come onto the land in question. That consequence flowed apart from the provisions of the State Validation Act. It followed that to that extent the grants of pastoral leases extinguished native title rights and interests within the meaning of par (b)(i) of s 12M(1).
>
> …
>
> [194] The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected.

1796 In *Alyawarr*, at first instance, Mansfield J was called upon to address what native title right to control access, if any, might survive the extinguishing affect of a pastoral lease upon native title. The native title rights claimed (and determined at para [3] of the determination) in that case included:

(1) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

(2) the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

(3) the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters;

(4) the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;

(5) the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with

them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters;…

1797 Mansfield J (at [70]) noted that:

> It is the applicants' case that, as a matter of customary law, their claimed native title rights are exclusive. However, they acknowledge that the NT Act as explained in *Ward* effectively means that the grant of a valid pastoral lease destroys the exclusive character of native title rights and interests existing prior to the grant to the extent of the rights granted under that lease.

1798 After considering *Ward HC*, his Honour (at [270] and [271]; in a passage later quoted in *Alyawarr FC* at [143]) said:

> It is obvious that rights under pastoral leases and statutory rights of entry for explicit purposes meant that native title holders would not have been able to prevent persons from entering the land in the exercise of those rights. On the other hand, the rights granted to the pastoral lessees were not rights granted to all persons, and pastoral lessees were obliged to exercise their rights for the purpose of the lease. The preserved rights are those to a pastoral lessee permitting access by the lessee or persons to whom the lessee permitted to enter, and reserved or statutory rights for reserved purposes such as stock routes. I do not consider that it is inconsistent with such rights that the native title right to control access to the land should survive to exclude persons who might wish to enter the land to do things unrelated to the pastoral lease or without some other reserved or statutory rights.
> …
> ... the inconsistency arises because the pastoral lease authorised the entry of a definable group of persons under it. It did not authorise the entry of all or any persons under it. The lessee could exclude uninvited persons, subject to the reservation in favour of Aboriginal persons. That right would run in tandem with the right in the native title holders to control access: s 44H of the NT Act. Once the lease came to an end, the Aboriginal native title holders would have whatever rights survived to control access to the claim area. Their right would have been extinguished to the extent that it was exclusive for the reason already given, and to the extent that it might otherwise have been exercisable in relation to the previous pastoral lessee and the lessee's authorised entrants. But it does not follow, in my view, that the right of a definable group of persons under the lease to access the claim area is inconsistent with (and so extinguishes) the *non-exclusive native title right to control access* to the claim area in respect of persons outside that definable group of persons.
> (Emphasis added)

1799 The claimants submit Mansfield J there seems to be using the phrase "non-exclusive native title right to control access" on the basis that an exclusive native title right only exists when there is an absolute right in the native title holder to exclude *all* others However, there may be rights to exclude or otherwise control the access of others which are "non-exclusive", in the sense that they do not apply to everybody in all circumstances, but may be qualified as to the circumstances of their application.

1800 Mansfield J indeed suggested examples of persons who were seeking to enter the land to film a sacred site or to set up a fishing camp at a water hole where camping or taking fish was prohibited or regulated by the traditional laws and customs of the native title holders: as noted in *Alyawarr FC* at [144]. Mansfield J (at [272]; as noted in *Alyawarr FC* at [144]), held that it was consistent with the reservation in the historical leases that the native title holders, in accordance with their traditional practices, could continue to control entry to their country by other Aboriginal people to the extent that that right was not in conflict with rights under the pastoral leases, and his Honour (at [274]; as noted by *Alyawarr FC* at [144]) said:

> I have reached the view that the native title rights to control access to the claim area and to make decisions about its use are not so inconsistent with rights under the pastoral leases as to lead to their total extinguishment.

1801 In *Alyawarr FC* (at [146]) the Full Court identified the issue raised by Mansfield J's conclusion in this way:

> The grant of historical pastoral leases had a partially extinguishing effect upon native title rights and interests in the determination area insofar as they comprised rights to exclude other persons from entering upon the land. The question is whether that partial extinguishment left in place a qualified right to exclude persons other than the relevant pastoral lessees and their invitees or other statutory entrants. The Northern Territory contended that the native title rights and interests set out in the determination must be native title rights and interests that existed at sovereignty. It was not open to determine, post-extinguishment, a qualified residual right which did not exist at sovereignty.

1802 The Full Court (at [147]) noted that:

> In *Neowarra* the claimants sought the right to make decisions about use and enjoyment of the claim area expressed as a qualified right to make access decisions in relation to persons other than persons holding a pastoral lease or exercising a statutory right in relation to the use of the land and waters. Sundberg J said at [475]:
>
> > The amendment does not avoid the difficulties. It confuses the separate processes required by the legislation. First there must be a determination of each native title right and interest. Then there must be a comparison between that right and interest and other interests that exist in the claim area. Each right or interest now propounded by the claimants for comparative purposes must be a native title right or interest. No native title right approximating to the reformulation is established by the evidence ... It is not surprising that the evidence does not establish the amended right. The subject matter of the qualification (a pastoral leaseholder and a person exercising a statutory right) did not then exist.

1803 The Full Court (at [147]) noted Sundberg J's reliance on the decision of the High Court in *Yarmirr HC* (at [98]) and further noted that:

> In that case the claimants sought to express wide-ranging native title rights in the sea

> as subject to public rights to navigate and fish and the right of innocent passage. Gleeson CJ, Gaudron, Gummow and Hayne JJ in their joint judgment said the two sets of rights were fundamentally inconsistent and could not stand together. It was not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests was to be subject to the other public and international rights. Sundberg J in *Neowarra* said at [475]:
>
> > That applies to the attempt to reconcile the fundamentally inconsistent native title right to make decisions about the use and enjoyment of the land and waters and the rights granted by a pastoral lease.

1804 On that basis the Full Court (at [148]) in *Alyawarr FC* concluded that:

> … the right to control access cannot be sustained where there is no right to exclusive occupation against the whole world. The underlying rationale for that conclusion is that particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty. The rights set out in para 3(e) and (f) of the determination do not resemble the holistic right of exclusion which went with exclusive possession and occupation at the time of sovereignty.

1805 The Full Court (at [149]) also considered a proposed alternative to paras 3(e) and 3(f), a para 3(fa) in the following terms:

> As an incident of their rights in relation to the use and enjoyment of the land and waters, a right to take appropriate steps according to law to prevent or mitigate any activity or presence of persons on the land which –
> (a) is without or in excess of lawful authority; and
> (b) interferes with or impairs the use and enjoyment of the land in accordance with rights and interests identified above.

1806 The Full Court (at [150]) also rejected that proposal saying:

> The difficulty with that alternative is that it imports a right of exclusion which is inconsistent with the reasoning upon which subparas (e) and (f) are wanting. Moreover it is very difficult to interpret and apply subpara (fa) to support a right to exclude a person from the land in the circumstances defined in that paragraph.

1807 The Full Court (at [151]) considered the further possibility that paras 3(e) and (f) could be replaced by a native title right defined in terms of para 5(e) of the determination of the Full Court in *A-G (NT) v Ward*, that provided for:

> 5(e) The right to make decisions about the use and enjoyment of the NT determination area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders.

1808 The Full Court did not support a determination in those terms.

1809 The claimants submit that the real issue which emerges from the reasoning in *Alyawarr FC*, based as it is on the High Court's conclusion in *Yarmirr HC*, is one of the correct formulation of a description of the native title right. It must be a right which existed in the native title holding group at the time of the acquisition of British sovereignty and, so, ipso facto, cannot be described in a form which includes a qualification which can only have come into existence after the acquisition of British sovereignty: see similarly *Neowarra* at [475], [477], [479]-[480]. A right in the nature of a right to protect sites of importance will not be inconsistent with the grant of a pastoral lease whereas a more broadly formulated right based on the laws and customs at sovereignty to exclude others and to protect the use of enjoyment of the land will be wholly inconsistent with such a grant.

1810 The claimants suggest the reasoning in *Alyawarr FC* and the High Court in *Yarmirr HC* proceeds on the basis that the native title right at the time of acquisition of sovereignty was an absolute right to exclude. In *Yarmirr HC* the rights claimed at [85] were:

(1) Right of members of the yuwurrumu to be recognised as the traditional owners of the estate (which includes the sea bed, the water and all life within it), to transmit all the inherited rights, interests and duties to subsequent generations and to exclude or restrict others from entering any area of the estate.

(2) Right of senior yuwurrumu members to speak for and make decisions about all aspects of the estate.

(3) Right of all members of the yuwurrumu to free access to the estate and its everyday resources in normal circumstances.

(4) Right of the senior members of the yuwurrumu to control the use of and access to the subsistence and other resources, including the ritual resources, of the estate by all people including younger members of the yuwurrumu and to engage in the trade and exchange of estate resources.

(5) Right of senior members of the yuwurrumu to receive a portion of major catches (eg turtle, dugong, crocodile or big hauls of fish) if they are co-resident with the person making the catch.

(6) Right of the senior yuwurrumu member(s) to close off areas of the estate on the death of either yuwurrumu members or of individuals in important relationships with yuwurrumu members, and to decide when they shall be re-opened to use.

(7) Right of senior yuwurrumu members to allocate names associated with their estate to their relatives and/or to exchange them with others in order to express, create and consolidate "company" and other relationships.

(8) Right of the senior members of the yuwurrumu to speak for and make decisions about the significant places in the estate and to ensure unintended harm is not caused by them, or to them.

(9) Right to receive, possess and safeguard the cultural and religious knowledge associated with the estate and the right and duty to pass it on to the younger generation.

(10) Right to speak for and make decisions about the estate's resources, and the use of those resources, and the right and duty to safeguard them.

1811 At [86], Gleeson CJ, Gaudron, Gummow and Hayne JJ said of those rights:

> Although not expressed as a claim to a right of exclusive possession of the claimed area, the rights just mentioned would, if established, have amounted to such a claim when taken as a whole.

1812 The majority then noted (at [95]) that a qualification to those rights was expressed in the amended notice of appeal in the following terms:

> The rights and interests of native title holders referred to in paragraph 5 above are qualified so that such rights and interests may not be exercised so as to impair or impede:
> (a) the right of innocent passage in relation to the territorial sea of Australia, as recognised by Article 14 of the Convention on the Territorial Sea and the Contiguous Zone (1958);
> (b) the reasonable exercise by the public of the liberty to navigate within the territorial sea, for the purposes permitted by the laws of Australia, but without prejudice to the right of the common law holders to close areas to access by any persons or class of persons in accordance with their traditional laws and customs so long as the effect of such closures does not at any particular time substantially impair or impede the bona fide passage of vessels through the waters of the determination area;
> (c) the right of holders of fishing licences, validly granted and currently in force under relevant legislation of the Northern Territory of Australia or the Commonwealth of Australia to enter the waters of the determination area in accordance with and for the purposes of exercising their rights under such licences.

1813 It was in that context that, the claimants submit, the majority concluded (at [98]) that:

> …there is a fundamental inconsistency between the asserted native title rights and

> interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.

1814 The claimants' primary case is that unqualified rights to control access existed and exist in the claim area and, subject to extinguishment, may be recognised in a determination of native title. However, in the alternative, if there is no longer such an unqualified right to exclude under Banjima traditional law and custom as presently acknowledged and observed, then the claimants submit a limited or qualified rights to exclude still exists under the traditional laws and customs of the Banjima people as they have adapted since the assertion of British sovereignty. Such adapted laws and customs are rooted in traditional law and custom as it existed at sovereignty and therefore the rights can still be recognised as native title rights consistently with the requirements of the NTA as explained in *Yorta Yorta HC*.

1815 The claimants argue that, prior to the assertion of British sovereignty, the laws which applied to qualify a native title holder's right to exclude were the lex loci, the laws of the land arising from the normative system of the indigenous society only. Following the British assertion of sovereignty the laws qualifying that right remained those of the lex loci, however, their content was expanded to include, along with those which were part of the normative system of the colonised peoples, those laws emanating from the British Crown. So if a person is able to assert a right of entry based on a valid grant or statutory licence from the British Crown, then that operates as a qualification of the same character as the general qualification which has always applied to the native title right to exclude. The right to prevent activities occurring was a right to prevent activities by "lawful means". What comprised lawful means, or the source of determining what were lawful means, may have changed with the change in sovereignty, but the essential criterion of qualification of the right and so the essence of the right as a qualified right to control activity remained the same.

1816 The right to control use or activities, the claimants therefore submit, is a right qualified by the prerequisite that the use or activity is unauthorised or is not in accordance with law. Prior to the acquisition of British sovereignty the law or lex loci which authorised the use or activity or the law which the use or activity must be in accord with was traditional indigenous law. After the acquisition of sovereignty by the British sovereign that traditional

law was a law recognised by the common law and the law or lex loci also included the common law and statute law which became part of the lex loci.

1817 The claimants conclude then that the right to make decisions about the use and enjoyment of the claim area by persons who are not members of the Aboriginal society to which the native title claim group belong, consistently with the lex loci which has been identified in the description of rights above, ought to be qualified in the same manner as those rights. The right to make decisions about the area must always have been subject to its exercise being in accordance with the limits placed upon the authority to make decisions imposed by the law or lex loci.

1818 The claimants say the position of both anthropologists, Dr Palmer and Mr Robinson, is that, for a number of reasons, the Banjima people at sovereignty did not hold an unqualified right to exclude all other people from the claim area under their traditional laws and customs. Those reasons include the following:

- The language group was a social and non-corporate formation.
- A smaller entity known as a country group (not the language group) held territorial rights in different parts of the claim area.
- Given multiple pathways for asserting rights and interests, those asserting rights to country may carry multiple or changing language identities, with the result that at sovereignty (and today) persons asserting a non-Banjima language identity may have had rights and interests in the claim area.

1819 The claimants say the evidence of the claim group was that an underlying basis for the right to exercise territorial rights is knowledge, in particular knowledge of the spiritual dangers of the country. An individual possessing this knowledge is highly likely to be a member of the claim group, however other persons from other language groups who possess this knowledge are able to access the claim area.

1820 The evidence in this case, the claimants submit, demonstrates that some persons asserting an identity other than Banjima had rights and interests in the claim area in accordance with traditional (pre-sovereignty) Banjima laws and customs. Examples are the Long Brothers and Toby Dingoman who, though not Banjima, had a right to be present and

engage in ritual activity on the land. Similarly, a Nyiyabarli man, such as David Stock, who has been through the Wardirba law has a right to participate in Wardirba ceremonies conducted on Banjima country without any Banjima person having any authority to prevent him from doing so; although generally Banjima persons would have a right to prevent persons not fitting into that class from attending such ceremonies on Banjima land.

1821 The claimants say these are examples of a limitation of the authority of the native title holders to make decisions about the use of the land which existed as part of their lex loci prior to the accession to British sovereignty.

1822 While the Banjima people, in accordance with their traditional laws and customs, had a wide-ranging capacity to control the activities of others, the claimants contend Banjima law and custom recognised that some other (non-Banjima) persons were entitled to enter and use parts of the claim area as of right and the Banjima people's right to control access was subject to the rights and licences which those persons had in relation to the land.

1823 If the native title rights of the Banjima people to control access to the area and the activities of others are qualified by the rights of others existing under the lex loci, comprising common law, statute law and traditional laws and customs recognised by the common law, then it follows that the holders of pastoral leases, mining tenements and other forms of licence (including those of other Aboriginal people recognised by Banjima traditional laws and customs) lawfully granted or existing over the claim area will be entitled to exercise all the rights accorded to them by the relevant licence, and the native title remains qualified (as it was prior to the change of sovereignty) in that it does not admit of any capacity to prevent the exercise of those rights.

1824 However, the claimants contend, the Banjima native title holders do have a right to control the activities of persons who are not licensed to carry out those activities. That may include any person who enters the land with no form of licence, or any person licensed to engage in certain activities who is engaging in other activities which exceed those authorised (including those incidentally authorised) by the relevant licence (for example, the holder of a pastoral lease who engages in non-pastoral activities).

1825 Extinguishment only arises, it is understood, when there is an inconsistency of rights: *Ward HC* at [78], [82]. The nature of the qualified right of the Banjima people to control access under their traditional laws and customs is such that there is no necessary inconsistency between that right and the rights of a pastoralist or mining tenement holder. Those latter rights fit within an exception to the Banjima people's right to control access as it exists under Banjima traditional law and custom (although the claimants contend that is not to say that the grant of those rights may not be a future act, as there is still an inconsistency between the rights of the pastoralist or mining tenement holder and the enjoyment and exercise of the whole of the beneficial interest in the Banjima people's native title rights: see s 227 NTA).

1826 Thus the claimants argue *Alyawarr FC*, *Yarmirr HC* and *Neowarra* may be distinguished on their facts. The proposed "reformulation" of the right in those cases was held to be inconsistent with traditional law and custom. In this case it is not.

1827 The claimants submit that if the Court finds that such a limited or qualified right exists, it would be appropriate for a general qualification to apply to those rights, to be expressed in the determination in the following terms:

> The following rights are exercisable and subject to, and do not affect the exercise of co-existing rights to access the area, engage in activities in the area or take, use or enjoy any resources of the area pursuant to the common law, statute law or traditional laws and customs.

1828 The claimants accept this right could not be said to confer upon the Banjima people the right to possess, occupy, use and enjoy the claim area to the exclusion of all others.

1829 The claimants otherwise submit that under s 12M TVA, relevant pastoral leases do not extinguish any native title rights apart from the unqualified rights to control access. That is, all of the non-exclusive native title rights identified above, including a qualified right to control the access of others claimed above survived the grant of the pastoral leases.

1830 The State, in turn, notes that in addition to five current pastoral leases in the claim area, there have been 201 historical pastoral leases granted in the claim area under the following legislation:

(1) *Land Regulations 1878* (WA) (17 pastoral leases granted).

(2) *Land Regulations 1882* (15 pastoral leases granted).

(3) *Land Regulations 1887* (50 pastoral leases granted).

(4) *Land Act 1898* (77 pastoral leases granted).

(5) *Land Act 1933* (42 pastoral leases granted).

1831 The State notes the claimants accept the validity of all the current pastoral leases and do not contend that any of the historical pastoral leases is invalid.

1832 The State makes these submissions. Pastoral leases are for "pastoral purposes", and include rights to use and occupy the land for that purpose, subject only to the conditions, exceptions and reservations contained in the pastoral lease: *Ward FC* at [310]. The particular rights conferred by pastoral leases under all of the above legislation are set out in *Neowarra* at [465]-[470].

1833 The High Court in *Ward HC* considered the rights conferred by pastoral leases in Western Australia at [170]-[187]. The Court concluded that, inter alia, none of the leases examined gave the holder a right to exclusive possession of the land: *Ward HC* at [186]. Accordingly each lease was a non-exclusive pastoral lease within the meaning of s 248B NTA: *Ward HC* at [188]. Further:

- The grant of each lease was a previous non-exclusive possession act attributable to the State, and was governed by s 12M TVA: *Ward HC* at [190].
- The grant of each pastoral lease extinguished any native title right to control access to the land pursuant to s 12M(1)(b)(i) TVA: *Ward HC* at [192].
- To the extent that rights and interests granted by each pastoral lease were not inconsistent with native title rights and interests, the rights and interests under the lease prevailed over, but did not extinguish, native title rights pursuant to s 12M(1)(a) TVA: *Ward HC* at [193].

1834 The Court was unable to identify precisely the native title rights which had been extinguished by the relevant pastoral leases because the native title rights and interests had not been determined with sufficient particularity in the primary judgment: *Ward HC* at [195]. However, the Court (*Ward HC* at [194]) said that:

> The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected. For example, the native title right to hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder although, as stated in par (a) of s 12M(1), the rights of the pastoral leaseholder would 'prevail over' the native title rights and interests in question. On the other hand, for the native title holders to burn off the land probably would have been inconsistent with the rights granted to the pastoral leaseholder, so as to bring about extinguishment as identified in par (b)(i) of s 12M(1).

1835 No more suggestion was given as to the non-exclusive rights which might have been extinguished.

1836 The State observes also that the Full Court in *De Rose (No 2)* held that a right under a pastoral lease to construct improvements was inconsistent with and extinguished native title. Although the holding was that native title was extinguished only where the right had been exercised (ie where the improvement had been constructed plus an adjacent area), there was nonetheless a holding that, pursuant to the "inconsistency of incidents" test, the native title and non-native title rights were inconsistent to this extent.

1837 A different (or possibly different) result was reached in *Alyawarr FC* (and also in *Daniel 2003(2)*). In *Alyawarr FC*, the Court considered whether a native title right "to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters" was inconsistent with rights conferred under pastoral leases: at [122]-[133]. The Court said:

> 131 The pastoral leases which have affected the claim area in the present case are historical grants. The relevant extinguishment of native title rights and interests derives only from inconsistency with the rights historically conferred by those leases. No question of prospective activity under a subsisting pastoral lease arises. Consistently with what was said by Nicholson J in *Daniel (No 2)* and Sundberg J in *Neowarra*, the right to 'live' on the land can be interpreted as a right to live permanently on the land without any conflict with pastoral leaseholders' rights. *That right does not necessarily involve permanent settlement at a particular place.* The issue therefore reduces to the question whether a native title right of permanent settlement is inconsistent with a pastoral leaseholder's rights. There is no logical reason why it must be so. *Just as the right to live permanently on the land does not necessarily give rise to inconsistency with the pastoral leaseholder's rights, neither does the right to erect a permanent structure. The existence of such a structure does not preclude a pastoralist's right to require its removal in the event that it conflicts with a proposed exercise by the pastoralist of a right under the lease*. It is not inevitable that such a conflict will arise.
>
> 132 The inconsistency posited by the Northern Territory in respect of the grant of

> historical pastoral leases long expired, is based on a *theoretical conflict* which would not inevitably have occurred. *No inconsistency of rights giving rise to extinguishment of the native title right to live on the land and to erect permanent structures thereon is demonstrated*. The concept of 'permanency' referred to here is, in any event, a relative one.

(Emphasis added).

1838 The State submits these passages demonstrate the test upon which the Court reached its conclusion. That test was a test of "operational inconsistency" of the type that was rejected by the High Court in *Ward HC*. That this is so is indicated by the fact that the Court based its decision at least partly on the fact that the Northern Territory was unable to "demonstrate" that any inconsistency had actually arisen. However, no such "demonstration" is required with the inconsistency of incidents test – either two sets of rights are inconsistent in a legal sense or they are not. The only exception may be where knowledge of the exercise of rights is necessary to determine the content of the rights.

1839 This interpretation is supported, the State contends, by the fact that the Court placed emphasis upon whether a pastoralist's right could prevail over native title: *Alyawarr FC* at [131]. Whether rights can prevail, however, is not the test. The issue of rights prevailing only arises once it is first determined that the rights are not inconsistent with one another as a matter of law: s 12M(1)(a) TVA. I should note immediately that [131] of *Alyawarr FC* referred to does not use the expression "prevail".

1840 Another possible interpretation of *Alyawarr FC*, says the State, is that had the Northern Territory provided evidence of inconsistency, such as evidence of a homestead having been constructed pursuant to a pastoral lease, the Court would have, consistently with *De Rose (No 2)*, found that native title was extinguished over that particular area.

1841 If and to the extent that *Alyawarr FC* was decided on a different basis to *De Rose (No 2)*, it was, in the State's submission, decided wrongly and should not be followed. If the decision is consistent with *De Rose (No 2)*, then the State maintains its earlier submission that native title is extinguished where inconsistent pastoral rights are exercised.

1842 The State also refer to *Neowarra* where, it is said, Sundberg J carried out (at [471]-[522]) an extensive comparison between rights conferred under pastoral leases and native title rights. Sundberg J did not consider where and when rights under pastoral leases

were exercised, but merely compared the rights and activities themselves. The State submits this is the correct approach and should be followed. It follows that the following native title rights and interests claimed in this proceeding were extinguished (if such rights are otherwise determined to exist in the relevant areas):

- A right to possess, occupy, use and enjoy the claim area to the exclusion of all others, and any other right of an "exclusive" nature (one that may, expressly or impliedly, include a right to control access and make decision about the use of the land) (claimed rights (1) to (5) inclusive, (15), (16), and (36) to (38) inclusive).
- A right to otherwise possess, occupy, use, and enjoy the claim area (claimed rights (10), (11) and (12)): *Neowarra* at [473].
- A right to trade in resources of the claim area (claimed right (35)): *Neowarra* at [481].
- A right to take resources, other than for satisfying personal, domestic, or non-commercial needs (claimed rights (25) to (32) inclusive): *Neowarra* at [478].
- A right to live within the claim area, or erect shelters, to the extent that either of these rights encompass permanency (claimed rights (18) and (19)): *Neowarra* at [502]. The State says it appears that Nicholson J in *Daniel 2003(2)* at [15(2)] was of the same view – a right to "live" was not inconsistent with pastoral rights only in so far as it did not encompass permanent living.
- A right to uphold and enforce traditional laws and customs (claimed rights (37) and (38)). The State contends that this "right" cannot in any event be recognised as a native title right or interest.

1843 The State notes the claimants submit that the current pastoral leases did not extinguish any native title right apart from "the unqualified right to control access". They make no express contentions in relation to the historical pastoral leases, but presumably would make the same contention in relation to those.

1844 The reference to extinguishment of an "unqualified right to control access" is misleading, the State says, because the claimants expressly disavow the existence of any such right. In other words, the claimants concede that it does not in fact have a right to possess, occupy, use and enjoy the claim area to the exclusion of all others (claimed right (1)):

claimants' closing submissions on extinguishment at [306]-[310]; [316]. There is no "unqualified right to control access".

1845 However, the claimants submit that they have a qualified right to control the activities of all those who are not licensed to carry out those activities. The State assumes this right is encapsulated in the following claimed right:

> (4) A right to control access of others to the area except such person as may be exercising a right accorded by the common law, statute law of the Commonwealth or the State of Western Australia or a lawful grant by the British sovereign or its successor.

1846 The State notes this right is said by the claimants to have existed at sovereignty, and, because it is not inconsistent with pastoral leases or mining tenements, is not extinguished by those interests. *Alyawarr FC*, *Yarmirr HC* and *Neowarra* are said to be distinguishable because the proposed "reformulation" of the right in those cases was held to be inconsistent with traditional law and custom. This contention, the State submits, is misconceived for the following reasons.

1847 First, the High Court said in *Ward HC* at [52] that without a right as against the whole world to possession of land, "it may greatly be doubted that there is *any* right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead" (emphasis added).

1848 This principle was applied in relation to pastoral leases. Pastoral leases attributable to the State "denied to the native title holders the continuation of a traditional right to say who could or who could not come onto the land in question": *Ward HC* at [192]. Similarly, the setting aside of a reserve was "inconsistent with *any* continued exercise of power by native title holders to decide how the land could or could not be used": *Ward HC* at [219] (emphasis added).

1849 In *Yarmirr HC*, the High Court said there was a "fundamental inconsistency" between certain common law rights and otherwise exclusive native title rights said to be qualified by reference to the inconsistent common law rights: *Yarmirr HC* at [98].

1850 These holdings of the High Court in *Ward HC* and *Yarmirr HC* were followed by the Full Court in *Alyawarr FC* (at [148]), by Nicholson J in *Daniel 2003(1)* (at [586]) and by Sundberg J in *Neowarra* (at [475], [477], [479] and [480]).

1851 Accordingly, the State submits, no native title right to control access of any nature can survive the grant of a pastoral lease or mining tenement.

1852 Secondly, the State submits, contrary to the claimants' submissions, the cases said to be distinguishable were not decided on the basis that the claimed "qualified exclusive" rights did not exist at sovereignty. In each case the asserted right was posited as an alternative to a right of exclusive possession as against the whole world. It was implicitly asserted that the right existed at sovereignty; if it did not then it could never have been recognised as a native title right or interest pursuant to the *Yorta Yorta HC* test and s 223 NTA. That was not the basis upon which the right was rejected.

1853 In each case, the State says, it was clear that the right could not exist as a matter of law, apart from whether the right otherwise existed as a matter of fact. See, for example, *Neowarra* at [475], [477], [479] and [480].

1854 Thirdly, claimed right (4) is claimed only in "Area A", which comprises the following areas:

- areas of UCL (including islands) that have not been previously subject to any grant by the Crown;
- areas to which s 47 NTA applies;
- areas to which s 47A NTA applies;
- areas to which s 47B NTA applies;
- other areas to which the non-extinguishment principle, set out in s 238 NTA, applies and in relation to which there has not been any prior extinguishment of native title.

1855 The area where pastoral leases and mining tenements are is "Area C", not "Area A". Accordingly, this right is not claimed in respect of pastoral leases and mining tenements and it is not open to the claimants to claim such rights now by means of submission.

1856 The relevant right claimed in respect of Area C is "[a] right to make decisions about the use of the area by persons who are not members of the Aboriginal society to which the native title claim belong" (claimed right (15)). Such a right is different from the right set out above and claimed in the claimants' submissions because it is not qualified by reference to the legality of the person's actions. This claimed right should be taken to be abandoned. Furthermore, the Delegate of the Native Title Registrar in applying the registration test under s 190B(6) NTA agreed that here was no prima facie basis for this claimed right.

1857 In any event, the State submits, neither claimed right (4) nor claimed right (15) is a native title right or interest within the meaning of s 223 NTA because it is not a right "in relation to land or waters". These two claimed rights are both, in substance, rights to uphold the laws and customs of the Banjima people. Accordingly, they are rights in relation to people, not land and waters, and, so cannot be recognised as native title rights or interests: *Neowarra* at [488].

1858 Fourthly, the State submits that even if, contrary to its earlier submissions, either of these rights is held to have existed at sovereignty in some form, the current asserted manifestation of the right is not an acceptable adaptation of the right in the *Yorta Yorta HC* sense. The State says the claimants' argument seems to be that, at sovereignty, there were laws other than Banjima laws within the claim area, and the Banjima right to control access operated only insofar as a person did not have rights under those other laws. If this is so it raises questions as to whether the Banjima people can have native title at all, because the traditional laws and customs of the area are then more properly described as an amalgam of Banjima and other laws. The State says it does not know what those other laws are. However, in any event, the British legal system did not apply to the claim area immediately prior to sovereignty. The traditional laws and customs (ie the laws and customs which existed at sovereignty) cannot have been "Banjima laws and customs subject to other subsisting [and unidentified] indigenous legal systems, as well as any unascertained legal systems that may be imposed in the future." That, however, is what the claimants are asking the Court to accept. Such rights cannot and did not exist at sovereignty, as recognised by Sundberg J in *Neowarra* (at [475], [477] and [480]).

1859 The BHP Billiton respondents adopt the State's submissions with respect to pastoral leases generally, and make the following additional submissions.

1860 The BHP Billiton respondents hold Marillana Station, pastoral lease 3114/0984. The pastoral lease was granted on 5 February 1973 under the *Land Act 1933*. The pastoral lease was granted before the commencement of the RDA. These respondents submit that the pastoral lease is a previous non-exclusive possession act (being a non-exclusive pastoral lease within s 248B NTA) attributable to the State. The grant of the pastoral lease is an act attributable to the State because the pastoral lease was granted by the State under State legislation: s 239 NTA.

1861 The BHP Billiton respondents say the effect of the grant of the pastoral lease on native title rights and interests must be determined with reference to s 12M TVA. Section 12M provides that to the extent a previous non-exclusive possession act attributable to the State involves the grant of rights and interests that are inconsistent with native title rights and interests, those native title rights and interests will be extinguished if, apart from the NTA, the act extinguishes native title. These respondents submit that, apart from the NTA, the grant of a pastoral lease extinguishes certain native title in accordance with the principles set out in *Ward HC*.

1862 The rights granted by the pastoral lease include the right to use the land for pastoral purposes under and subject to the *Land Act 1933*.

1863 The BHP Billiton respondents submit that the right to use land for pastoral purposes includes the right to construct improvements because:

16. (1) the grant of a right carries with it those rights necessary for its meaningful exercise: *Ward HC* [308]; and

17. (2) the construction of improvements is reasonably necessary for or incidental to the operation or enjoyment of the land for pastoral purposes.

1864 As to the relevant native title rights and interests identified in the amended form 1 application, the BHP Billiton respondents contend there is a clear inconsistency between:

(1) the rights arising under the pastoral lease; and

(2) any exclusive native title rights to possess, occupy, use and enjoy the land, as per *Ward HC* [192], [308].

1865 The BHP Billiton respondents submit that:

(1) at common law, the grant of the pastoral lease had the effect of extinguishing any exclusive native title rights to possess, occupy, use and enjoy the subject land, including any right to control access: *Ward HC* [309]; *Daniel 2003(1)* [822]; and

(2) other native title rights may also be inconsistent with the rights conferred by the pastoral lease in accordance with the principles set out in, among other authorities, *Ward HC*, *Daniel 2003(1)*, *De Rose (No 2)* and *Brown (No 2)*. The extent of any inconsistency must be determined following the determination of any native title rights.

1866 If the Court felt free to work from first principle, unaided or affected by authority, the primary submission of the claimants, that it is open to find that they have a qualified non-exclusive native title right to control the access of certain people to their traditional country, would seem, on its face, arguable.

1867 I say this because, if native title, at least in cases where claimants claim native title on a communal or a group basis, constitutes, as *Ward HC* ruled it does, a bundle of rights which may be extinguished or impaired in a piecemeal fashion, such that one or other right identified by the evidence may be lost or be rendered incapable of exercise, then, conceptually, it may be contended that a right to exclude all comers (apart from their own members – leaving aside their internal rules as to which members may enter particular places within their traditional country) should not be capable of being partially diminished so that it can no longer be exercised to prevent certain persons from entering their traditional country.

1868 For the sake of argument, assume that in about 1860 Western Australia had validly introduced a law which stated: "The surveyor FT Gregory may enter the traditional country of the Banjima people to explore the resource potential of the country and to take therefrom such materials as he thinks appropriate, notwithstanding the refusal of the Banjima people to permit him to do so". Would such a law properly be construed as one that, on its proper construction, was intended to extinguish the traditional right of the Banjima people to exclude all non-Banjima people who might thereafter wish to enter Banjima country without Banjima approval? If the correct answer to this question, or at least a strongly arguable answer to this question, is that the law might properly be construed as taking away the Banjima's right to

refuse access to a particular person, but otherwise one that left undiminished the right of the Banjima to exclude all persons other than the Governor, then it would be open to conclude that the unqualified native title right of the Banjima to control access to their traditional country had either been extinguished or regulated by the State law in that respect. The recent decision in *Akiba HC*, which held that a general right to take resources was not extinguished by laws regulating the activity of commercial fishing, provides some support for the view the latter might be considered the more correct analysis.

1869 The decision in *Ward HC* as to the effect of the grant of a pastoral lease and other like grants was that was not necessarily inconsistent with all native title rights and interests but at least it removed any exclusive possession right – or to put that another way, it removed any unqualified right to control access of non-indigenous persons. On one view of the plurality decision in *Ward HC* the particular issue now under consideration may be said not to have been in issue. On this view, the plurality simply made the point that, whatever else a pastoral lease did, no longer could it be said that the right of a native title holder to control access by all comers any longer existed, because they could not resist the entry of the grantee of the pastoral lease on the land the subject of the pastoral lease. A fuller analysis of the holding, however, may be said to lie in an understanding that under the pastoral leases considered, the lessee could control access, even if the lessee's rights to use the land were limited. In the FT Gregory hypothetical example just offered, FT Gregory may be said not to be the recipient of any rights of control of access, merely of rights of entry and limited taking. On that understanding, *Ward HC* and *Yarmirr HC* appear to preclude the continuation of any right to control access in like circumstances. Thus, there is no room to contend for a qualified right to control the access of some persons, being those who cannot rely on rights under some valid grant. It should be remarked, that if there were competing access control rights in the hands of native title holders and other grantees, very practical difficulties would arise in the enjoyment of the competing rights; difficulties which suggest there is no room for a qualified native title right to control access.

1870 The alternative way in which the claimants put their argument here is to say that the traditional right to control access always admitted of entries by persons who were not Banjima people. For reasons discussed above in relation to my findings that native title exists and is held by the Banjima, I have emphasised, guided by the wisdom of the anthropologists, Dr Palmer and Mr Robinson, that one must be careful not to confuse language group

appellations given to particular people with the identification of traditional country and those who hold traditional rights in it. In this particular case, I have emphasised that just because a person such as David Stock identified in the evidence as a Nyiyabarli person (or at least a person who identifies himself that way) does not mean that the land that he is identified as having traditional interests in is thereby Nyiyabarli country. David Stock is a person who has Banjima ancestry, on my view of the evidence, as explained above. He is thus a member of a broader society of persons recognised by Banjima law as having rights and interests in particular portions of Banjima country. I do not think that it necessarily flows from that, as I would understand the claimants' submissions to suggest, that the Banjima had laws that allowed persons from outside their law, the lex loci, to enter without any need for their approval. I think the proper view is that the lex loci, the law of the Banjima, recognised certain people as having rights under Banjima law including rights of access.

1871 I would reject, therefore, that the evidence shows that there was at sovereignty a qualified or non-exclusive right to control access of the type contended for in the alternative by the claimants.

1872 In summary, as to the claimants' primary submission, I consider that the authorities cited on behalf of the State, including *Ward HC* and *Yarmirr HC*, as well as *Alyawarr FC*, all militate against that conclusion there can be a qualified native title right to control access upon the grant of a pastoral lease. In the circumstances, it seems to me that authority currently stands against that proposition.

1873 As to the alternative argument, I find the evidence does not support the existence of a qualified right to control access of the type contended for in any event.

1874 I also find, more generally, that none of the rights granted by relevant pastoral leases is necessarily inconsistent with the non-exclusive native title rights established on the evidence. To the extent that any pastoral lease rights might in their exercise be, or have been, inconsistent with native title rights, I find, on the basis of *Brown FC*, that the lessee's rights prevail, or prevailed, over but do or did not extinguish the subsisting native title rights.

Non-vested reserves

1875 The State by table 7 of its submissions on extinguishment identifies the reserves which have been set aside or created in the claim area but which have not been vested. There are reserves which have been set aside or created under reg 32 *Land Regulations 1887*, s 29 *Land Act 1933* and s 41 *Land Administration Act 1997*.

1876 The State notes the High Court held in *Ward HC* that reservation of land under the relevant Western Australian provisions (including the *Land Regulations 1887* and the *Land Act 1933*) inhibited the Crown's future action in relation to that land: *Ward HC* at [218]. The effect on native title was explained by the plurality in *Ward HC* (at [219]) as follows:

> [B]y designating land as a reserve for a public purpose, even a purpose as broadly described as 'public utility', the executive, acting pursuant to legislative authority, decided the use or uses to which the land could be put. The executive thus exercised the power that was asserted at settlement by saying how the land could be used. The exercise of that power was inconsistent with any continued exercise of power by native title holders to decide how the land could or could not be used. The executive had taken to itself and asserted (pursuant to the authority conferred in that regard by statute) the right to say how the land could be used. This step was not, however, necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to traditional laws and customs, been entitled to use it before its reservation.

1877 Further (at [220] and [221) the plurality said:

> Whether a right in native title holders to use the land continued unextinguished depends upon other considerations, particularly what, if any, rights in others were created by the reservation or later asserted by the executive.
>
> The designation of land as a reserve for certain purposes did not, without more, create any right in the public or any section of the public which, by reason of inconsistency and apart from the State Validation Act, extinguished native title rights and interests.

1878 The State submits reserves created before 31 October 1975 were valid and extinguished native title at common law (the extent of extinguishment depending upon the nature and extent of the rights created and asserted). It says reserves created after the commencement of the RDA will be invalid by virtue of the RDA if they would have, but for the operation of the RDA, extinguished any native title right to control access or use of the land: *Ward HC* at [222]. Such reserves are category D past acts to which the non-extinguishment principle applies. Accordingly, any native title right to decide how the land could be used, and any other right of an "exclusive" nature such as a right to control

access, was extinguished by the setting aside or creation of each of the reserves (whether or not the reserve was also subsequently vested), if and to the extent that right had not already been extinguished.

1879 The exceptions, the State concedes, are reserves created on or after 31 October 1975, or areas of land added to reserves after this date (such as in the case of part of the current reserve 30082 (Karijini National Park)). The setting aside of such areas as reserves it is submitted did not of itself extinguish native title, though prior or subsequent acts in respect of the land may have extinguished native title.

1880 Notwithstanding the reserve is unvested, the State submits native title has also been extinguished over each of the following reserves for the following reasons:

- Reserves 23278 and 24898, each for the purpose of "Aerial Landing Ground", by virtue of these reserves having been leased under s 33 *Land Act 1933*, and further or alternatively by the construction or establishment of an aerodrome or aerial landing ground on these reserves as a public work.
- Reserve 24236 for the purpose of "Disused Cemetery", by virtue of this area of land having been excised from the area of a lease (lease 333/571). The lease had previously extinguished native title in the State's submission.
- Reserves 24824 (for "Police"), 24849 (for "Depot Site – St John Ambulance"), 25156 (for "Church Site – Church of England") and 26780 (for "School Site") by virtue of the assertion of rights or nature of rights conferred in relation to these reserves, or, in respect of reserves 24824 and 26780, by the construction or establishment of a public work.
- Reserves 27998 and 28375, each for "Fire Station Site", by virtue of grants in fee simple being made in respect of each of these reserves pursuant to s 33(4)(a) *Land Act 1933*.

1881 Some of these have been the subject of earlier submissions and findings in which extinguishment has been found.

1882 Further, the State submits native title has been extinguished over all of the unvested reserves within the former Wittenoom townsite by virtue of the resumption and dedication of

that land for the purpose of "Townsite" on 5 May 1950. I have rejected that particular submission above.

1883 The creation of the three reserves under the *Land Administration Act 1997* after 1 January 1994 (reserves 46723, 46724, 50105), and the making of management orders in respect of these reserves was valid, the State submits, whether or not due to the operation of the future act regime. It is accepted these reserves did not extinguish native title, and so should be recorded as "other interests" which prevail over native title pursuant to s 225(c) and (d) NTA.

1884 The claimants submit that unvested reserves do not extinguish any native title rights apart from the "unqualified right to control access". That is, all of the non-exclusive native title rights asserted above, including a qualified right to control the access of others, survived the creation of reserves. For the reasons given above, I reject the existence of the claimed qualified right to control access but I accept the submission that unvested reserves do not extinguish any native title save for the right to control access. I have dealt with the claimants' submissions concerning reserves 24849 and 25156 above.

1885 I find, on the evidence, that the use should be taken to reflect the assertion of rights by the State to control and use the area, as I would infer the ambulance and Church uses were with government approval, and so find reserves 24849 and 25156 (by their use) extinguished native title.

1886 As to reserves 23278 and 24898, 24236, 24824, 24849, 25156, 26780, 27998 and 28375 I find they extinguished native title by reason of use showing assertion of the State's rights.

1887 I will hear further from the parties as to the appropriate determination in light of these various findings.

Particular interests under mining and petroleum tenements

1888 Introduction: The State has granted the following types of interests over the claim area under the *Mining Act 1904* and *Mining Regulations 1925* which they say have partially extinguished native title:

- Water rights – there are five historical tenements (WR70/3 to 70/7).
- Rights of occupancy over temporary reserves – of the four current temporary reserves (TR70/3156, TR70/5616, TR70/5621, and TR70/5622), and 209 historical reserves, rights of occupancy were granted in respect of all of the reserves except for TR70/1122, TR70/1643, and TR70/6447.

1889 These interests are listed in Ex 61 annexure LRM2 Documents 3 and 10, and documents evidencing these interests are contained in the second tenure DVD.

1890 The claimants do not challenge the validity of any of these interests.

1891 Water rights: The five water rights registered in the claim area were each registered in 1943, and covered an area of between about 1 and 5 acres.

1892 Water rights were authorised by s 26(4) *Mining Act 1904*, which stated that:

> The holder of a miner's right shall, subject to this Act and the regulations, be entitled (except as against His Majesty) –
> …
> (4) to take or divert water from any natural spring, lake, pool, or stream situate in or flowing through any Crown land, and to use, sell, and dispose of such water for any purpose in connection with mining;

1893 Water rights were governed by Div 3 of Pt III *Mining Regulations 1925*. They conferred a right to take and sell water: *Daniel 2003(1)* at [820].

1894 The State submits the grant of each water right would have extinguished any exclusive native title rights to water on the land the subject of the water right, if there had been any.

1895 I accept the State's submissions. In doing so I refer to the analysis above concerning other interests, such as business areas, arising under the *Mining Act 1904* whereby I have found only exclusivity was extinguished.

1896 Rights of occupancy over temporary reserves: Rights of occupancy over temporary reserves were granted both pre-RDA and post-RDA. The State submits the post-RDA rights

of occupancy are all valid because any exclusive native title had been extinguished by OPA20H, if not by other earlier tenements.

1897 Temporary reserves were created under s 276 *Mining Act 1904*. This section provided at all relevant times that:

> The Minister, and, pending a recommendation to the Minister, a warden, may temporarily reserve any Crown land from occupation, and the Minister may at any time cancel such reservation: Provided that if such reservation is not confirmed by the Governor within twelve months, the land shall cease to be reserved.
>
> The Minister may, with the approval of the Governor, authorise any person to temporarily occupy any such reserve on such terms as he may think fit.

1898 The State contends the effect of a temporary reservation was to temporarily reserve Crown land from occupation for the purposes of the *Mining Act 1904*: *Australian Anglo American Prospecting Ltd v CRA Exploration Pty Ltd* [1981] WAR 97 at 101; cited in *Moses FC* at [172]. A reservation prevented occupation of the reserved area (*Moses FC* at [174]) which may otherwise have been permissible pursuant to a miner's right.

1899 In 1937, s 297 (as s 276 then was – s 276 was renumbered s 297 in the 1926 reprint of the Act, and renumbered again as s 276 in the 1946 reprint) was made subject to s 297A, (pursuant to s 2 *Mining Act Amendment Act 1937* (WA)) which stated as follows:

> (1.) Any right of occupancy granted under the preceding section shall not exceed three hundred acres in area and may be granted for a fixed period not exceeding one year.
> (2.) A right of occupancy not exceeding three hundred acres in area may be granted for a fixed period in excess of one year, but in that event the Minister shall cause the terms and conditions relating thereto to be laid on the Table of each House of Parliament within fourteen days of the granting thereof.
> (3.) Any such right of occupancy granted for any fixed period may be renewed from time to time for any term not exceeding twelve months on each occasion of renewal, but if any such renewal is granted then the provisions of subsection (2) of this section shall apply, and the terms and conditions of renewal shall be tabled in each House of Parliament accordingly.
> (4.) The provisions of section thirty-six of the Interpretation Act, 1918, relating to the disallowance of regulations by either House shall apply to all intents and purposes as if the terms and conditions of the right of occupancy as tabled under this section were regulations tabled under that section.

1900 Section 297A was renumbered as s 277 in the 1946 reprint of the Act. Section 277 was repealed and replaced in 1957 (pursuant to s 6 *Mining Act Amendment Act 1957* (WA));

henceforth the 300 acre restriction for rights of occupancy applied only with respect to prospecting for gold, other than for "deep alluvial gold".

1901 This section remained the same until the repeal of the *Mining Act 1904*, except for the substitution of the word "renewed" for "reviewed" in subs 4 in 1964 (pursuant to s 3 *Mining Act Amendment Act (No. 2) 1964* (WA)).

1902 Sundberg J considered the effect of a temporary reserve in *Neowarra* at [606]-[607]. The reserve in question included a right of occupancy for the purpose of searching and prospecting for bauxite. His Honour concluded (at [607]) that, had the area of the temporary reserve not previously been the subject of a pastoral lease, the reserve would have extinguished native title rights and interests of control over, access to, or use of the land and waters of the area.

1903 The State submits the Court should conclude that the grant of rights of occupancy of a temporary reserve extinguished at least any exclusive native title rights. I accept that submission.

1904 Further, the State contends the grant of a right of occupancy is inconsistent with any native title rights to occupy, reside or dwell, and accordingly extinguished any such rights. I reject that submission. The two rights may co-exist. In the event of inconsistency upon exercise, the statutory right will prevail over such native title rights.

1905 Prospecting and exploration licences: The State has also granted the following types of interests over the claim area under the *Mining Act 1978*:

- Prospecting licences – there are four current (P47/1252, P47/1253, P47/1467 and P47/1534) and 15 historical tenements.
- Exploration licences – there are 75 current, and 48 historical tenements.
- Miscellaneous licences – there are 33 current, and six historical tenements.

1906 The State notes the claimants have previously challenged the validity of 22 particular post-1994 prospecting and exploration licences, and one miscellaneous licence (L47/198) on the basis that there may not have been compliance with the future act provisions of the NTA.

It no longer challenges the validity of any particular mining tenement (though it makes general contentions as to post-23 December 1996 tenements).

1907 The State says the claimants' argument hinges on post-23 December 1996 tenements being future acts "on their face". The State says this is misconceived because, as explained above, an act will only be a future act if it affects native title. That depends upon the nature of any native title rights subsisting in the particular area of the tenement (which in turn depends on the prior tenure history), and the nature of the rights conferred. There is no certainty, or even probability, that any particular tenement is a future act. The onus is on the claimants to establish that any particular act is a future act, and it should not be assumed. Accordingly, in the absence of any evidence to the contrary, the State contends it should be assumed that each post-23 December 1996 did not affect native title. Hence the issue of compliance with the future act regime does not arise. If the issue of compliance with the future act regime does arise, it should not be assumed that the relevant procedures were not complied with. A presumption of regularity exists. The onus is on the claimants to demonstrate a failure to comply with procedures resulting in invalidity. Accordingly there is no basis for finding that any post-23 December 1996 mining tenement is invalid unless invalidity is demonstrated by the claimants on the balance of probabilities. However, in any event, proof of compliance with the relevant future act requirements (if and to the extent such provisions condition validity) for each of the exploration licences and prospecting licences previously challenged by the claimants (and miscellaneous licence L47/198) is contained in Ex 66 and 72. Each of these (and all other mining tenements) is valid.

1908 The State notes the rights conferred by prospecting and exploration licences. They comprised rights to prospect and explore for minerals, respectively, as particularised in ss 48 and 66 *Mining Act 1978*. In *Daniel 2003(1)* (at [831]-[844]), Nicholson J held that neither prospecting licences nor exploration licences extinguished any native title at all. The State respectfully submit that his Honour erred on these points, since by granting prospecting and exploration licences the executive decided how the land was to be used. Such an exercise of rights was inconsistent with any exclusive native title rights. However, given that any exclusive native title rights over the claim area had been extinguished by prior petroleum tenure (see below), none of the exploration or prospecting licences had any effect on native title.

1909 To the extent they are still current, the State submits the prospecting and exploration licences should all be recorded as valid "other interests" which prevail over native title for the purposes of s 225(c) and (d) NTA. I generally accept this submission so far as the final submission that none had any effect on native title is concerned in the circumstances.

1910 The BHP Billiton respondents hold 17 exploration licences within the claim area granted under the *Mining Act 1978*.

1911 Five exploration licences were granted prior to the commencement of the NTA: E47/13, granted 4 October 1982; E47/14, granted 4 October 1982; E47/628, granted 4 May 1993; E45/1073, granted 26 September 1991; and E45/1074, granted 26 September 1991.

1912 Twelve exploration licences were granted after the commencement of the NTA: E47/1222, granted 11 June 2003; E47/1429, granted 29 January 2007; E47/1431, granted 26 July 2006; E47/1432, granted 29 January 2007; E47/1767, granted 24 June 2009; E47/1870, granted 20 November 2009; E47/1871, granted 20 November 2009; E47/1872, granted 6 January 2011; E47/1873, granted 20 November 2009; E47/1874, granted 20 November 2009; E47/1875, granted 20 November 2009; and E47/1540, granted 21 April 2007.

1913 The Court notes that a number of these licences, while current at the time of the trial, may have since expired.

1914 The validity of the pre-NTA licences is not in contention.

1915 The claimants contend that those licences have no extinguishing effect on non-exclusive native title rights.

1916 There are no issues in dispute in relation to the validity and extinguishing effect of the following post-NTA licences: E47/1429, E47/1431, E47/1432, E47/1767, E47/1870, E47/1871, E47/1873, E47/1874 and E47/1875. The claimants admit the validity of those licences and agree that the non-extinguishment principle applies to their grant.

1917 The claimants dispute the validity and extinguishing effect, however, of E47/1222, E47/1872 and E47/1540.

1918 The BHP Billiton respondents submit that E47/1222, E47/1872 and E47/1540 were validly granted, having regard to:

(1) the relevant mining tenement register searches as shown on the second tenure DVD;

(2) para 129 and annexures MJF19 to MJF22 to the affidavit of Mr Fitzpatrick (Ex 83) in relation to E47/1222;

(3) para 130 and annexures MJF23 to MJF9 to the affidavit of Mr Fitzpatrick (Ex 83) in relation to E47/1872; and

(4) para 131 and annexures MJF30 to MJF36 to the affidavit of Mr Fitzpatrick (Ex 83) in relation to E47/1540.

1919 The BHP Billiton respondents submit that the post-NTA licences are acts to which Subdiv P of Div 3 of Pt 2 NTA and the expedited procedure applies (ss 29 and 32 NTA). This is the evidence of Mr Fitzpatrick referred to above. The non-extinguishment principle applies to such grants (s 238 NTA).

1920 Since the proceeding commenced, the BHP Billiton respondents have been granted one additional tenement, being prospecting licence P47/1421. The prospecting licence was granted under s 40 *Mining Act 1978* on 1 July 2011.

1921 The claimants have not made submissions in relation to that prospecting licence.

1922 The BHP Billiton respondents submit that the prospecting licence was validly granted and the non-extinguishment principle applies to its grant.

1923 The RTIO respondents hold 14 exploration licences in the claim area granted under the *Mining Act 1978.*

1924 The claimants do not contend the licences granted pre-NTA are invalid.

1925 The RTIO respondents make no submissions in relation to the extinguishing effect of the exploration licences granted pre-NTA (but refer to the State's submissions above).

1926 The claimants agree that all the RTIO respondents' post-NTA exploration licences are valid, and that the non-extinguishment principle applies to their grant.

1927 The RTIO respondents hold two prospecting licences in the claim area granted under s 40 *Mining Act 1978*: P47/1467 granted on 14 May 2010 and P47/1534 granted on 8 September 2010.

1928 The claimants agree that these prospecting licences are valid.

1929 The RTIO respondents and the claimants agree that the non-extinguishment principle applies to their grant.

1930 I accept the BHP Billiton and RTIO respondents' submissions and will hear from the parties generally as to the appropriate terms of the determination in light of doing so.

1931 Miscellaneous licences: Each of the miscellaneous licences would appear to have been granted post-NTA as the State submits (although I note that one, L47/18 was granted on 22 January 1992, but seems now to have expired). I proceed on the basis of the State's account, as it is not challenged by the claimants. Accordingly, the State says each is a future act to the extent it affected native title (unless it is a past act).

1932 It submits each of the miscellaneous licences is a valid, non-extinguishing act, whether or not by operation of the future act regime (unless the licence is a pre-existing right-based act which conferred a right of exclusive possession: s 24ID(1)(b) NTA). Each of the licences still current should be recorded as an "other interest" which prevails over native title for the purposes of s 225(c) and (d) NTA.

1933 The BHP Billiton respondents note there are no issues in dispute in relation to the validity and extinguishing effect of miscellaneous licences L47/92, L47/95 and L47/118.

1934 The claimants admit the validity of these miscellaneous licences.

1935 The BHP Billiton respondents contend that the non-extinguishment principle applies to the grant of these miscellaneous licences. This contention is admitted by the claimants.

1936 The RTIO respondents hold 26 miscellaneous licences in the claim area granted under the *Mining Act 1978*.

1937 The claimants agree that all of the RTIO respondents' miscellaneous licences are valid, and the non-extinguishment principle applies to their grant.

1938 I accept the respondents' submissions and will hear from the parties as to the appropriate terms of the determination in light of doing so.

1939 Petroleum Titles: The State has granted the following types of petroleum interests over the claim area, each of which is historical (non-current):

- Oil Prospecting Area 20H (OPA20H) granted under s 6 *Mining Act Amendment Act 1920*;
- Permit to Explore 37H (PE37H) granted under Div 1 of Pt IV *Petroleum Act 1936* on 10 February 1954; and
- Exploration permit 34 granted under the *Petroleum Act 1967* (WA) (***Petroleum Act 1967***) (as it was then known) on 4 December 1983.

1940 The claimants do not challenge the validity of any of these petroleum titles. The State says OPA20H and PE37H are valid in any event because they were granted pre-RDA and exploration permit 34 though granted post-RDA will not be a past act because of the prior extinguishing effect of the earlier petroleum titles.

1941 The register entry for OPA20H records that it was applied for on 6 April 1921, and was registered for the period 13 September 1921 to 12 September 1926. Rent was paid between 1922 and 1925 inclusive. The tenement was surrendered on 26 May 1926.

1942 Section 6 *Mining Act Amendment Act 1920* stated that:

> (1.) The Minister may, subject to this Act and the regulations, grant to any person who desires to prospect Crown land for mineral oil a license to occupy the land described therein for a period of not exceeding ten years.
> (2.) Every such license shall, subject to this Act and the regulations, confer on the licensee the exclusive right to bore and search for mineral oil on the land therein defined.
> (3.) The fee payable for such license shall be Five pounds per annum, payable yearly in advance.

> (4.) If any such Crown land is held under lease or permit for pastoral or timber purposes, the privileges conferred by a license shall be exercised by the licensee subject to the rights of the lessee or permit holder, and to such regulations as may be prescribed.

1943 Pursuant to s 7(1), "[t]he licensee *shall* within thirty days, or such further time as the Minister may in his discretion allow, after the grant of the license, commence and thereafter continue to search for mineral oil upon the land held under license" (emphasis added).

1944 Section 8(1) stated that:

> Any person who searches or attempts to search for mineral oil on land included in any license in contravention of the rights of the licensee, or who (without reasonable ground, proof whereof shall be upon him) hinders or interferes with any licensee in the exercise of his rights under the license, shall be guilty of an offence.
> Penalty: Fifty pounds.

1945 Nicholson J considered the rights conferred by oil prospecting areas in *Daniel 2003(1)* at [850] to [852]. Among the tenements considered was this particular oil prospecting area (OPA20H). His Honour concluded that "[t]he grant of each licence to prospect Crown lands for mineral oil within the claim area … would have extinguished any exclusivity of native title rights".

1946 The State submits the Court should follow Nicholson J. OPA20H extinguished any exclusive native title rights. Because OPA20H was over the whole claim area, it extinguished any exclusive native title rights over the whole claim area.

1947 The claimants agree that the petroleum titles extinguished any "unqualified" native title rights to control access.

1948 I accept the State's submission as to extinguishment of exclusivity. I reject the claimants' submission that there may be a "qualified" right of control, as discussed above.

1949 The register entry for PE37H states that it was applied for on 10 December 1953, and "approved" on 10 February 1954. It was registered for the period 10 February 1952 to 9 February 1956. A permit was issued on 18 February 1954. The holder was "Australasian Oil Exploration Limited". Reports are recorded as having been submitted in August and October or November 1954. The tenement was surrendered on 2 December 1954.

1950 The area of the tenement was 13,000 square miles. The map in the second tenure DVD shows that this tenement covered the whole of the claim area, except for the southern-most part.

1951 Permits to explore were governed by Div 1 of Pt IV *Petroleum Act 1936*. As at 1954 s 32(1) (within Pt IV) stated "[s]ubject to this Act, the Minister may – issue, or cause to be issued, permits to explore".

1952 The minimum area of a permit to explore was 1000 square miles: s 33 *Petroleum Act 1936*. The permits were for two years, with a right to apply for renewal: s 35(3) *Petroleum Act 1936.*

1953 The holder of a permit to explore was conferred "the exclusive right to explore for petroleum [within] the area of land specified in the permit": s 35(4) *Petroleum Act 1936.*

1954 The State submits the permit to explore extinguished any exclusive native title rights (though only if any such rights survived the earlier grant of petroleum and other tenure). I accept this submission.

1955 The instrument for exploration permit 34 states that it was granted under the *Petroleum Act 1967-1981* on 4 December 1983 for a period of five years. There are various conditions on the permit.

1956 The permit covers a large part of the northern part of the claim area (the part north of the northern escarpment of the Hamersley Range, mainly Mulga Downs).

1957 Exploration permits were governed by Div 2 of Pt III *Petroleum Act 1967*. It was an offence to explore for petroleum without a permit.

1958 Applications for permits could be made under s 30 following the publication by the Minister of invitation to apply in the Gazette: ss 30-31 *Petroleum Act 1967*. The Minister could inform an applicant that he was prepared to grant a permit by instrument in writing served on the applicant: s 32(1)(a)(i) *Petroleum Act 1967*. The Minister was then required to grant a permit if requested by the applicant, provided the applicant had lodged the required security: s 32(4) *Petroleum Act 1967*.

1959 Section 38 *Petroleum Act 1967* stated that:

> A permit, while it remains in force, authorizes the permittee, subject to this Act and the regulations and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area.

1960 These rights were exercisable "on any land within the permit area … whether Crown land or private land or partly Crown land and partly private": s 15(1) *Petroleum Act 1967*.

1961 Permits were five years, with a right to apply for renewal: ss 39-40 *Petroleum Act 1967*.

1962 Since it was granted post-RDA and pre-NTA the exploration permit would be a past act if it was invalid but for the operation of the NTA. However, given the earlier petroleum tenure and pastoral leases over the area of the permit, the State submits the permit had no further effect on native title. If the permit would have, but for the RDA, extinguished any exclusive native title, then it was a category C past act.

1963 I accept the State's submissions. I will hear from the parties as to the appropriate determination in light of doing so.

Watercourses

1964 The evidence establishes that various executive acts have taken place in respect of the claim area in relation to water, however the State acknowledges none of those things has effected any extinguishment of native title in the claim area.

1965 In particular, the claimants say:

(1) There are no proclaimed areas under the *Country Areas Water Supply Act 1947* (WA).

(2) There are no irrigation districts under the *Rights in Water and Irrigation Act 1914* (WA) (***RIWI Act***). Accordingly the vesting of water in the Crown which would otherwise extinguish any exclusive rights to water does not apply in the claim area. The vesting of water in the Crown by s 5A RIWI Act (enacted in 2000) is valid under s 24HA NTA, but the non-extinguishment principle applies. See also s 212 NTA which provides that confirmation of Crown ownership of water does not extinguish

any native title. Alternatively, s 9 RIWI Act preserves the riparian rights (which existed at common law) of an "owner or occupier of any land alienated from the Crown" to take water for, inter alia, "domestic and ordinary use" of a person "and his family".

(3) There is a surface water proclamation that Pt III RIWI Act applies, under s 27(5) RIWI Act (as it then was); and ground water proclamation under s 18 RIWI Act (as it then was). Note a proclamation under s 27(5) is now taken to be a proclamation under Div 1B: see s 7 RIWI Act. There is now no equivalent provision to a proclamation under s 18. These proclamations regulate but do not extinguish native title: *Daniel 2003(1)* at [869]-[870].

(4) The various water licences which have been issued have no effect on native title, alternatively they regulate but do not extinguish the exercise of native title rights in relation to water.

1966 The claim area is wholly contained within each of the water proclamation areas.

1967 In addition, the following licences and permits have been granted under the RIWI Act:

- licences to take groundwater under s 5C;
- licences to construct or alter wells under s 26D; and
- permits to obstruct or interfere with the bed, banks or waters of a watercourse under s 17.

1968 The State says the effect of a proclamation under s 27(5) was to cause the provisions of Pt III RIWI Act to apply to the relevant area: s 27(6) RIWI Act (as at August 1965). One of those provisions was s 4(1) which provided as follows:

> (1) The right to the use and flow and to the control of the water at any time in any watercourse, and in any lake, lagoon, swamp or marsh, and in any spring, and subterranean source of supply shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown.
> (2) This section shall not operate so as to prevent any person from draining any land, or making any dam or tank upon any land, of which he is the owner or occupier: Provided that the flow of water in any water-course, or into or out of any lake, lagoon, swamp or marsh is not thereby sensibly diminished.
> (3) Provided also that this Act shall not apply to the water flowing from any spring

> until it has passed beyond the boundaries of the land belonging to the owner or occupier of the land whereon such spring exists.

1969 The State notes the High Court in *Ward HC* considered this provision and the plurality (at [263]) said:

> Part III of the *Rights in Water and Irrigation Act* provides (in s 4(1)) that the 'right to the use and flow and to the control of the water' in natural waters 'shall, subject only to the restrictions hereinafter provided, and until appropriated under the sanction of this Act, or of some existing or future Act of Parliament, vest in the Crown'. It deals with riparian rights (s 14) and allows riparian owners to apply for special licences to divert and use water (s 15). The vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others.

1970 Accordingly, the State says the effect of the proclamation of the Pilbara Surface Water Proclamation on 13 August 1965 was to extinguish any exclusive native title rights to water as defined in s 4 RIWI Act: *Neowarra* at [637], [638], [641]. The State submits it was not necessary for there to be a proclamation of an irrigation district for s 4 RIWI Act to apply to the area. I accept this submission.

1971 The State contends that further, and to the extent that any exclusive native title rights to water may have survived s 4(1) RIWI Act, the common law cannot recognise any exclusive native title rights to water because at common law there is no property in water. This longstanding principle of the common law has recently been confirmed by the High Court in *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at [55] and [57]. Accordingly, any such rights are not native title rights and interests falling within s 223(1)(c) NTA. I reject this submission.

1972 It may be observed, without deciding, that just because, following Roman law, the common law considered there can be no property in flowing water itself, does not necessarily preclude the proof of a native title right in respect of flowing water, depending on the evidence relating to a particular indigenous system. The indigenous system recognised by the common law does not rely, for its internal rules, on the common law. In any event, the common law riparian rules in relation to flowing water recognise water use rights; and the common law rules relating to water not in watercourses indeed apprehends ownership of water: see DE Fisher *Water Law* (LBC Information Services 2000), Ch 4. These principles are reflected in s 4(1) RIWI Act set out above which seeks to enable governmental control of such use and ownership rights. In no sense therefore can it be said that recognition of a

native title right in relation to water use or ownership is repugnant to the common law, as the State's submission suggests.

1973 Be that as it may, it is submitted by the State the effect of the Pilbara Ground Water Proclamation was only to regulate native title: *Daniel 2003(1)* at [870]; and that the licences and permits granted under the RIWI Act did not extinguish native title, but prevail over native title to the extent of inconsistency. That may be accepted.

1974 Each of the proclamations should be recorded as an "other interest" which prevails over native title to the extent of inconsistency pursuant to s 225(c) and (d) NTA (in addition to the extinguishing effect of the Surface Water Proclamation). Similarly, licences and permits granted under the RIWI Act should be recognised as "other interests" which prevail over native title to the extent of inconsistency.

1975 I broadly accept the submissions made by the State in that regard and will hear from the parties as to the appropriate determination in light of doing so.

Wildlife Conservation Act 1950 (WA)

1976 By s 14(1) *Wildlife Conservation Act 1950* (WA) (originally entitled the *Fauna Conservation Act 1950* (WA)) "all fauna is wholly protected throughout the whole of the State at all times". By s 16, the taking of fauna is prohibited under criminal sanction.

1977 Section 22 vests property in all fauna, until lawfully taken, in the Crown. That section regulated but did not extinguish native title: *Ward FC* at [499]; *Yanner HC.*

1978 No determination would appear necessary.

Current Non-Native Title Rights and Interests

1979 A determination of native title in respect of the claim area must record "the nature and extent of any other interests in relation to the determination area", and the relationship between these "other interests" and the determined native title rights and interests: s 225(c) and (d) NTA.

1980 "Interest" is defined in s 253 NTA to mean:

(a) a legal or equitable estate or interest in the land or waters; or
(b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with:
    (i) the land or waters; or
    (ii) an estate or interest in the land or waters; or
(c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

1981 In *Ward HC* (at [387]) it was said that this definition is "very wide", and includes such things as the public right to fish.

1982 The State submit that should a determination that native title exists be made, the "other interests" recorded pursuant to s 225(c) should include the following, to the extent they are included within the determination area:

(1) each of the items of current land tenure identified in the tenure evidence, as updated prior to the determination, including the Yandeyarra lease;

(2) each of the items of current mining (and, if applicable, petroleum or geothermal) interests, as updated prior to the determination;

(3) rights of mining and petroleum tenement holders to access their tenements by easement of necessity where applicable;

(4) each of the roads (including road corridors and features associated with roads), including the rights of the Crown (including MRWA) with respect to roads, and of the public to use the roads, road corridors and associated features as applicable;

(5) the interests of persons in whom current reserves are vested, and of persons who have the care, control and management of reserves;

(6) the public right to fish;

(7) the interests of persons to whom valid and validated rights and interests have been granted by the Crown pursuant to statute or otherwise in the exercise of its executive power, including interests and permits granted under the RIWI Act and the *Land Administration Act 1997* (including those identified in Ex 73);

(8) the right to access land by an employee or agent or instrumentality of the State, Commonwealth or any local government or other statutory authority as required in the performance of his or her statutory or common law duties;

(9) public access to and enjoyment of the things confirmed pursuant to s 14 TVA;

(10) the Pilbara Surface Water Area and Pilbara Ground Water Area, and the interests of the Crown in respect of those areas;

(11) rights or interests held by reason of the force and operation of the laws of the State or the Commonwealth, including the State's ownership of minerals, petroleum, geothermal energy and geothermal energy resources;

(12) rights of the Crown, its agents and licensees in locating and extracting minerals, petroleum, geothermal energy and geothermal energy resources;

(13) each State Agreement applicable to the claim area, and the rights and interests comprised in, conferred under or in accordance with or pursuant to each of the State Agreements;

(14) the declarations as to Wittenoom and surrounding areas being "contaminated sites" as recorded in the Contaminated Sites Database of the Western Australian Department of Environment and Conservation.

1983 Subject to any finding to the contrary made above, these would all appear to be appropriate "other interests" to be recorded in the determination. I will, however, hear from the parties before so recording them.

Summary of Extinguishment Findings

1984 The following is intended merely as a brief summary of extinguishment findings made or findings made that are relevant to extinguishment issues. However, it is necessary to consider the precise findings made above so far as their full force and effect is concerned and their implications for the final formulation of the determination:

(1) The special leases referred to at [861] did not validly convey an interest and so did not have the effect of extinguishing native title: [896]-[898] above.

(2) Reserve 1470 was validly created: [909] above.

(3) Reserve 46724 did not involve any future act as the creation of the reserve and the management order in relation to it did not have any greater extinguishing effect than historic pastoral leases. It would also appear freehold grants extinguished native title rights over much of the area on the reserve in any event: [941]-[943] above.

(4) BHP Billiton's Chichester re-grade miscellaneous licence L45/147 was not a future act; alternatively, if it was a future act, it was an act within Subdiv I but not Subdiv P to which Subdiv M applies in any event. No question of invalidity arises by respect of non-compliance with Subdiv P (right to negotiate); or by reason of non-compliance with the Mining Warden's "condition" of its grant: [993] above.

(5) BHP's Yandi rail leases K843924 and K843925 are each category B past acts that granted exclusive possession and wholly extinguished native title: [1058]-[1060] above.

(6) BHP's Yandi mining lease AM70/270 did not confer any rights that were inconsistent with the native title rights that survived the grant of earlier tenure and so effected no further extinguishment and thus would appear to be a validated act to which the non-extinguishment principle applies: [1077]-[1078] above. Alternatively, if it extinguished some native title it would be a category C past act to which the non-extinguishment principle applies: [1087]-[1089] above. The approvals of additional proposals permitting mining on new areas did not relevantly affect native title and so were not future acts and, in any event, are activities to which s 44H NTA applies: [1119] above.

(7) Section 47A NTA applies to both Youngaleena and Yandeyarra: [1142] above.

(8) For the purposes of s 47B(2)(b) NTA, land which is or has been the subject of an exploration licence or a prospecting licence under the *Mining Act 1978* is not removed from the operation of s 47B: [1208] above.

(9) For the purposes of s 47B there is insufficient evidence of occupation of unallocated Crown land, save in respect of UCL 7, 9 and 42 (Youngaleena): [1216]-[1318] above.

(10) In the light of the s 47B findings freehold estates do extinguish native title in most, if not all cases: [1323] above.

(11) Leases 3116/6300 (I23596) and 3116/639 (I123720) are each previous exclusive possession acts pursuant to s 23B(2)(c)(viii) and a relevant act which extinguished native title, being in force on 23 December 1996 (s 12I TVA) on the basis that each conferred a right of exclusive possession over particular land or waters: [1353] above.

(12) Special lease 3116/7030 was over the same area as special lease 3116/5414. While special lease 3116/5414 has been found above to be invalid, it has also been found above that s 47B does not apply in that area. Thus, special lease 3116/7030 extinguished native title: [1357]-[1358] above.

(13) Special leases 3116/6202, 3116/6408 and 3116/8091 have extinguished native title: [1359]-[1362] above.

(14) The non-extinguishment principle applies to special leases L21122L, L21123L and L1124L: [1366] above.

(15) As to special lease 3116/6851, as I have found that two earlier leases, special leases 3116/3859 and 3116/5790 were not validly granted, I will hear from the parties as to the appropriate determination to be made: [1370] above.

(16) The lease over reserve 31428 (Yandeyarra) should be recorded as an "other interest" in the determination: [1376] above.

(17) As to the lease over reserve 25156 (Church site), the Court is not prepared to find that a lease was in fact granted and so extinguished native title. However, the Court subsequently finds that the use made of the reserve supports a finding of an assertion of the State's right to use the reserve which extinguished native title: [1381] above.

(18) Lease 3116/11923 (GE144640) (Youngaleena) should be reflected in the determination as an "other interest": [1386] above.

(19) As to a number of reserves discussed at [1387]-[1397], given the findings concerning the non-application of s 47B in most respects, relevant reserves will have extinguished native title (see reserves at [1389]). Also reserves 24849 and 25156 referred to at [1396] extinguished native title: [1397] above.

(20) Wittenoom roads 7, 8, 10 and 11 did not extinguish native title: [1412] above. Remaining Wittenoom roads however extinguished native title: [1415] above. Current roads 1-3 and historical roads 1-3 extinguished native title: [1419] above. Bolitho Road extinguished native title: [1426] above. The Roebourne-Wittenoom Road extinguished native title: [1432] above. Karijini Drive is excluded from the claim area: [1433] above. Nanutarra to Munjina Road is excluded from the claim area: [1437] above. Munjina to Roy Hill Road is excluded from the claim area: [1438] above. Road 17 is excluded from the claim area: [1440] above. Road 18 is

excluded from the claim area: [1442] above. Great Northern Highway is excluded from the claim area: [1444] above.

(21) As to the construction or establishment of water bores, they extinguished native title over an area required for their access and use: [1451] above. However, the area required for access and use should be limited to 0.10 ha: [1457] above.

(22) Gravel pits are not "major earthworks" and so are not "public works": [1469] above.

(23) However, the tourist information bay falls within s 251D NTA: [1474] above.

(24) The whole of the road corridors are previous exclusive possession acts attributable to the State for which there is statutory confirmation of extinguishment under s 23B(7) and s 23C(2) NTA; s 12J(1) TVA: [1479] above.

(25) Reserves 24824 and 26780 are the subject of public works: [1488] above.

(26) However, the Court finds that reserves 23278 and 24898 are not the subject of public works: [1490] above.

(27) As to pastoral improvements, the Court does not consider that any of these extinguished native title, although the use rights conveyed by pastoral leases prevail over subsisting native title rights: [1492] above.

(28) The resumption of the area of the Wittenoom townsite only extinguished any exclusive native title rights: [1508] above.

(29) Business areas, residential areas, market garden areas, mineral claims, mineral leases, miners' homestead leases, residence leases, tailings leases and prospecting areas granted under the *Mining Act 1904* did not extinguish native title: [1509]-[1611] above.

(30) Mining leases and general purpose leases granted under the *Mining Act 1978* did not extinguish native title: [1612]-[1652] above.

(31) As to the mineral leases ratified by the Yandicoogina State Agreement, it appears the parties agree that the non-extinguishment principle applies and the Court will hear further from the parties as to the appropriate determination: [1653]-[1656] above.

(32) As to BHP's Mt Goldsworthy (Area C) lease AML70/281, it did not extinguish native title rights and interests additional to those which had already been extinguished by

prior tenure and as a result it would appear the non-extinguishment principle applies: [1692]-[1693] above.

(33) As to BHP's Mt Newman mineral lease AML70/244, it did not extinguish native title to any greater extent than prior tenure and it would appear that it is subject to the non-extinguishment principle: [1730]-[1731] above.

(34) As to RTIO's Mt Bruce mineral lease AML70/252, it did not extinguish native title to any greater extent that earlier tenures did and would also appear to be the subject of a non-extinguishment principle: [1747]-[1748] above.

(35) As to minerals and petroleum, only a native title right to take ochre for ceremonial purposes may be claimed: [1757] above.

(36) As to geothermal energy and geothermal energy resources, the Court would not make any provision in the determination: [1773] above.

(37) As to the State's submission that holders of mining and petroleum tenements have a right to access their tenements by reason of necessity that affects native title rights, the Court would not determine that any such easements of necessity exist that would burden the native title rights established: [1791] above.

(38) In relation to pastoral leases, the Court rejects the claimants' claim to a qualified native title right to control access: [1872]-[1873] above; but otherwise finds that none of the rights granted by pastoral leases is necessarily inconsistent with the non-exclusive native title rights established on the evidence and, as noted above, improvements do not extinguish native title rights and interests: [1874] above.

(39) As to non-vested reserves the State appears to accept that reserves 46723, 46724 and 50105 should be recorded as "other interests" in the determination: [1883] above. As to reserves 24849 and 25156, I find that the use made of the reserves evidenced the exercise of the State's power of control of them and so extinguished native title: [1885] above. I also find that the reserves referred to in [1886] extinguished native title.

(40) Water rights granted under the *Mining Act 1904* only extinguished any exclusive native title right to water on subject land: [1894]-[1895].

(41) Similarly rights of occupancy over temporary reserves under the *Mining Act 1904* only extinguished any subsisting exclusive native title rights: [1903]-[1904] above.

(42) Prospecting and exploration licences, to the extent that they are current, should be recorded as "other interests": [1909]. As to the post-NTA licences of the BHP Billiton respondents and the RTIO respondents, the non-extinguishment principle applies: [1919] and [1929]-[1930] above.

(43) As to miscellaneous licences, the non-extinguishment principle applies: [1935] and [1937]-[1938] above.

(44) As to the petroleum titles discussed at [1939] and following, they extinguished any exclusive native title rights: [1948] above. No "qualified" native title right to control access remained: [1948] above. The permit to explore extinguished any exclusive native title rights, if they survived: [1954] above. Exploration permit 34 was a category C past act: [1962]-[1963].

(45) The Pilbara Ground Water Proclamation did not extinguish but regulated native title, and licences and permits granted under the RIWI Act did not extinguish native title. Proclamations should be recorded as "other interests", as should licences and permits: [1974]-[1975] above.

(46) No determination would appear necessary in respect of the *Wildlife Conservation Act 1950* (WA): [1978] above.

PROPOSED CONFIDENTIALITY ORDER

1985 Finally, the claimants seek an order in the following terms, to ensure the confidentiality of certain anthropological material filed in the proceeding on their behalf:

> (1) Unless otherwise ordered or agreed by the solicitor for the Applicant, the following shall be the subject of the restrictions in this order, unless the information is otherwise in the public domain:
> (a) Joint Report of the Anthropologists, Palmer and Robinson, November 2011, Ex 54, [61]-[81];
> (b) Change in Material Opinion, Palmer, April 2011, Ex 50, [4]-[12];
> (c) Supplementary Expert Report, Palmer, August 2011, Ex 51, [91], [94]-[131], [148];
> (d) Expert Anthropological Report, Palmer August 2010, Ex 48, [291]-[336], [357], [360]-[361], [372]-[388], [392]-[421], [423]-[435], [438], [443], [451] second sentence, [456]-[491], [509]-[521], [524]-[544], [547]-[563], [579] [590], [592]-[611], [614]-[628], [634]-[651], [666]-[700], [726]-[816], [824]-[837], [847]-[861], Appendix B, Appendix C and Appendix D.
> (2) Subject to further order, the documents in paragraph 1 of this order shall be subject to the restrictions that, from the date of this order:
> (a) They are not to be copied other than by the Court for the purposes of the Court;

(b) Their contents are not to be communicated to any person apart from the legal advisors of the parties, the parties and any expert engaged by a party for the purposes of:
  (i) these (WAD 6096/98) proceedings,
  (ii) negotiations, mediations or inquiries (except as per paragraph 2(c)-(e));

(c) They are not to be used for the purposes of:
  (i) any other legal proceedings, negotiations, mediation or inquiry without first obtaining an order restricting the communication of the information in similar terms to this order; or
  (ii) any negotiations, mediation or inquiry without first applying any statutory limitation of communication or obtaining an undertaking in similar terms to the terms of this order.

(d) The documents can be used by any party for the purpose of assessing only, their suitability for use in other proceedings, negotiations, mediation or inquiry to which an application for further orders may be sort.

(e) The documents can be used by and communicated by the officers, servants representatives and advisors of any prescribed body corporate the subject of a determination pursuant to section 56 or 57 of the Native Title Act 1993 (Cth) for the purpose of any other proceedings, negotiations, mediation or inquiry. The legal officers of such a prescribed body corporate are free to distribute the documents as they deem appropriate.

(f) Information otherwise in the public domain may not be attributed to the informant identified in the paragraphs the subject of restrictions.

(3) In each case of a disclosure to a person in accordance with sub-paragraph 2(b) and 2(e) of this order, the person shall be informed of this order prior to and as a condition of disclosure.

1986 The anthropological material contained in proposed order (1) includes materials that relate to:

- Claimed apical ancestor Daisy Yijiyangu and the opinions of the anthropologists concerning her ancestry.
- The change in material opinion of Dr Palmer in relation to that same claimed ancestor.
- What various claim group members (including some deceased members) told Dr Palmer for the purposes of his first report and the relevant appendices, including about families, kinship, traditional boundaries and places, aspects of the Wardirba, exercise of rights in country, dangerous places, religious beliefs and practices, aspects of Law business, apical ancestors and the use of some resources.
- The interests of David Stock.

1987 By Pt VAA *Federal Court of Australia Act 1976* (Cth) (***FCA Act***) the Court is empowered to make suppression and non-publication orders and so protect information or its sources and ensure confidentiality.

1988 Section 37AF provides as follows:

> **37AF Power to make orders**
>
> (1) The Court may, by making a suppression order or non−publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:
>
> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
>
> (b) information that relates to a proceeding before the Court and is:
>
> (i) information that comprises evidence or information about evidence; or
>
> (ii) information obtained by the process of discovery; or
>
> (iii) information produced under a subpoena; or
>
> (iv) information lodged with or filed in the Court.
>
> (2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

1989 Section 37AG specifies grounds for making an order as follows:

> **37AG Grounds for making an order**
>
> (1) The Court may make a suppression order or non-publication order on one or more of the following grounds:
>
> (a) the order is necessary to prevent prejudice to the proper administration of justice;
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
>
> (c) the order is necessary to protect the safety of any person;
>
> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).
>
> (2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

1990 Section 37AE prefaces these provisions and provides that in deciding whether to make a suppression order or non-publication order, "the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice".

1991 A number of observations should be made about the power of the Court to make any such order and the grounds for doing so. They include at least the following:

- That in deciding whether an order is necessary, the Court must take account of the fact that a primary objective of the administration of justice is to safeguard the public interest in open justice.
- It follows that safeguarding the public interest in open justice is not the only objective of the proper administration of justice and, depending on the circumstances, others may be relevant and also need to be taken account of.
- That there are only the four grounds specified in s 37AG(1) upon which such an order may be made and so the Court cannot entertain grounds falling outside those specified.
- In the case of each of the four grounds, the order may only be made if it is "necessary" to prevent the prejudice referred to, or to protect the safety of a person or to avoid causing the undue duress or embarrassment referred to.
- That any order made must specify the ground or grounds on which it was made, emphasising that the Court's power is constrained in the ways just described.

1992 These provisions replace the former s 50 FCA Act that was considered by the High Court in *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 (***Hogan***). Nonetheless a number of observations made by the Court in *Hogan* bear on the proper construction and application of these provisions. For example, as Perram J noted in *Australian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 at [19], the word "necessary" appeared in s 50 and continues to preface each of the grounds for the making of an order under s 37AG(1). In *Hogan*, the Court (at [30]) observed that "necessary" is a strong word and so it may be taken that Parliament was not dealing with trivialities.

1993 It would also continue to be relevant in relation to these provisions, as it was considered in relation to the former s 50 in *Hogan*, to appreciate they are examples of provisions authorising the Federal Court to make orders for the exercise of its jurisdiction other than in open court as mandated by s 17, and that "the administration of justice" mentioned in s 37AG(1)(a) "is that involved in the exercise by the Federal Court of the

judicial power of the Commonwealth; this is a more specific discipline than broader notions of the public interest". In other words, the test for whether any such order should be made is not simply whether it is in "the public interest" to make such an order.

1994 Thus, it would appear important to observe, consistent with what was also said of the former s 50 in *Hogan*, that in making or continuing an order under these provisions it is insufficient that it may appear to the Court to be "convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as a result of some 'balancing exercise', the order appears to have one or more of those characteristics".

1995 In that regard, in *Hogan* (at [33]) the Court noted, in relation to former s 50, that it may tend to distract attention from its particular terms to describe the Federal Court as embarking upon the exercise of a "discretion" when entertaining an application under s 50. Thus, the Court said, it would, for example, be an odd construction of that provision which supported the refusal of an order, notwithstanding that it appeared to the Court to be necessary to make an order to prevent prejudice to the security of the Commonwealth. I consider the same might be said for these provisions.

1996 It is also important, in these various respects, to note that the power to make orders under s 37AF is specifically conditioned by reference to the "grounds permitted by this Part" and thus is limited by the grounds specified in s 37AG(1) and by the requirement that the ground relied upon must be stated in any order made. Plainly, such an order is not to be made lightly.

1997 In this proceeding the claimants initially proposed the making of confidentiality orders in quite broad terms that would have encompassed all of the various anthropological reports filed by Dr Palmer on behalf of the claimants as well as the joint expert report. The order now proposed, however, seeks to refine the order so that it applies only to particular information considered by the claimants to be sensitive.

1998 The claimants' application for the order is supported, in the submission of the claimants, by:

- the affidavit of Dr Palmer affirmed 19 December 2011 at [6]-[8];

- the claimants' statement of cultural and customary concerns filed 17 September 2010 at [6]-[8] and [14]; and
- the grounds why restrictions were sought and granted on male gender restricted evidence pursuant to orders made 13 May 2011 (5)-(6) and 18 October 2010 (2)-(6) addressing some witness statements and the conduct of some hearings and transcript from them.

1999 In his affidavit at [6]-[8], Dr Palmer states:

> 6. In my work interviewing Banjima people for the above reports, consistent with many Aboriginal informants I have worked with, I am often told information that the person would not relate if they thought the information or their identity would be publicly available. There are two main reasons for this:
>
> (a) people want to protect genealogical information which may concern the discussion of family relationships that may not be common knowledge; and
>
> (b) there is also a fear that if certain sorts of information falls into the wrong hands and if the people who obtain that information are not ritually qualified the recipient may be punished.
>
> 7. I have been provided with a copy of the Applicant's Statement of Cultural and Customary Concerns filed 17 September 2010 (**SCCC**). From my study, training and experience with the Banjima People over many years I have observed their reticence at revealing information that they consider could be compromised or revealed to others. The Banjima People believe that they could be punished by spiritual forces if information is revealed to the wrong people. I particularly refer to [6]-[8], [14] and [38] of the SCCC that gives examples of instances where Banjima people do not like to reveal cultural or customary information.
>
> 8. My standard practice, when commencing an interview with Aboriginal people for an native title inquiry is to explain that the information that I may collect will be recorded as field notes and may be used as part of my expert report. As such, it would become available to those parties directly involved in the native title claim. However, the information will not otherwise be made publicly available.

2000 The claimants' statement of cultural and customary concerns at [6]-8] and [14] states:

> 6. Knowledge is differentially spread throughout the claimant community. Not every person with traditional links to land can speak with equal knowledge and authority concerning Banjima country or concerning Banjima laws and customs. There are also restrictions and limitations on what an individual Banjima person can or should know and can or should disclose to others.
>
> 7. One of the rules which the claimants acknowledge and observe is that certain pieces of information about country are only passed to those persons specifically chosen to be recipients. This results in particular members of the claimant community only holding knowledge for some places. This may result in siblings having different levels of knowledge and can result in particular persons being the main persons to speak for different places. Differential knowledge may also be because of gender.

> 8. Consistent with Aboriginal customary law and practice, some cultural knowledge is only know or talked about by senior men, or alternatively, by senior women. These men and women are deemed by the claimants to have the authority or status to speak about these cultural matters and can also bear witness to the events or places that relate to them. As a consequence, it is often the case that only those who are of a particular status or level of authority within their community can, consistent with customary practice, receive and give out such knowledge. A person who is considered to have trespassed into areas of knowledge transmission where he or she is not qualified to go is considered to have committed a serious customary offence which may have far reaching social and spiritual consequences.
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> …
>
> 14. The first and by far the most important, is that in the claimants' belief, the world which is inhabited by Dreamings and spirits is unpredictable and potentially dangerous. Great care must be taken in case discussion of a spirit or a Dreaming evokes its presence and causes harm. People fear that they or family members may suffer physical harm, illness and, even death if they speak publicly about particular spirits or Dreamings. Witnesses may deny all knowledge of spirits or of Dreamings in order to avoid having to answer questions in relation to an issue which they consider to be dangerous.

2001 The gender restricted orders referred to by the claimants were made on the basis that the Law issues to be discussed could only be heard ordinarily by qualified men under pain of traditional punishment or spiritual retribution.

2002 It would appear that the relevant grounds upon which the claimants would rely for the making of the proposed order are that it is necessary to prevent prejudice to the proper administration of justice and to protect the safety of persons.

2003 The claimants note that confidentiality orders have been made or agreed in a number of other proceedings, including in *Murray v Western Australia (No 3)* [2010] FCA 1455 (***Murray***) where an order was made by consent in terms not dissimilar to, though more expansive, than those proposed here. Here, the claimants have sought to claim confidentiality for only specific paragraphs in the reports, not generally.

2004 The claimants submit the basis of identification of the particular paragraphs in the reports is that they report on information provided to Dr Palmer by his Aboriginal informants, which the informants did not expect would generally be publicly available information, as explained in [6] of his affidavit; and would not have been revealed if it was understood to thus become generally publicly available.

2005 The claimants say that the information sought to be restricted was provided from the knowledge of individuals which was passed to Dr Palmer for the purpose of the proceeding and which would ordinarily be regarded as intellectual property of the individual acquired by the individual's life experiences and participation in the cultural life of the Banjima people, which qualify him or her to have or be entrusted with that knowledge. In accordance with the traditional laws and customs of the Banjima people, it is a significant aspect of the maintenance of their culture that such knowledge is acquired only with some effort on the part of the individual and it is jealously guarded by that individual, because the holding of that knowledge by the individual accords him or her status and authority within the community.

2006 It is also submitted that knowledge of law and custom, traditionally transmitted narratives concerning the creation and nature of the land and its connection to individuals and groups and the genealogical heritage of individuals and groups are all matters which fall within the body of knowledge which is the subject of the intellectual property sought to protected.

2007 Thus, the proposed order seeks to limit itself to the paragraphs of the report which contain such information.

2008 The claimants submit there is a public interest in such information being provided to an expert and contained in reports to enable the expert to provide an expert opinion to the Court in the course of the hearing of an application for determination of native title. That public interest would be defeated, it is submitted, if it became the case that such information thereafter became publicly available. Aboriginal informants would be likely to avoid providing information and frustrate the ability of the expert to provide an opinion of assistance to the Court. In making that submissions, I understand the claimants to be saying that the administration of justice would be served in this case by that interest being protected to the extent proposed.

2009 The claimants observe that whatever form of restriction the Court may order, the Court will permanently maintain a record of all of the documents to which the parties would be entitled to access for any proper purpose at any time, and so this is not a case of any party being denied access to the Court record from the hearing.

2010 The claimants add that the management of the Court's documents after the proceeding is finished is regulated under a Records Authority agreed between the Court and the National Archives of Australia on 19 October 2011: *National Archives of Australia–Federal Court of Australia Records Authority 2010/00315821*.

2011 Thus, the claimants submit the order as proposed:

- Assists the claimants but does not unduly restrict the respondents' use of materials during the proceeding and allows the use of materials in the future for the purposes identified in the orders subject to reasonable conditions.
- Does not unreasonably affect the public in that the Court's reasons and any determination can adequately explain the necessary anthropological information as required for the decision made.
- For the future, all anthropological reports will be permanently maintained under the Records Authority with the National Archives.

2012 The State opposes the proposed order in its entirety, essentially because it has not been demonstrated that such an order is necessary to prevent prejudice to the proper administration of justice and in any event should not be made because it is vague, unclear, imprecise and "inutile".

2013 The State rejects the nature of the interest that the claimants seek to protect identifying it as a "private", not a public, interest.

2014 The State contend the sole question is whether each proposed order is necessary to prevent prejudice to the proper administration of justice. It says the very fact that much of the evidence has been given in public proves that such public disclosure did not prejudice the administration of justice. Much of the information in Dr Palmer's reports has been published in open court on public transcript, and is tendered and available in witness statements and in tendered documents.

2015 The State also observe there is no evidence from an Aboriginal person to support the making of the proposed order and that no reluctance to give such evidence could be detected

during the trial, and this is a fundamental deficiency in the claimants' application for the order.

2016 In relation to the statements made by Dr Palmer in his affidavit, the State notes that he in fact told informants that their information would become available to the parties directly involved in the native title claim, hence there was no restriction promised by him about the copying or internal use of information by a respondent such as the State.

2017 The State further says that the assurances that their information would not be made public was an assurance that no party had otherwise given and was not conveyed to the Court as there were no relevant orders under the form of the former s 50 then in place. Additionally, there is no suggestion from Dr Palmer that he provided any indications to his informants on the basis of any legal advice.

2018 The State also submit that the statements made by Dr Palmer constitute hearsay and are non-specific. In any event, if the affidavit does go into evidence little weight should be accorded to it. In relation to that objection to the affidavit of Dr Palmer on the basis that it constitutes hearsay, I am not satisfied that it does. It seems to me that what Dr Palmer is saying in his affidavit is that, based on his general experience and manner in which he dealt with informants in this case, and having regard to the evidence as a whole, the confidentiality issue arises. The implications perhaps are that Aboriginal people in native title claims generally, and the Banjima claimants here in particular, respect a cultural practice to protect information held by individuals; and that the maintenance of such confidentiality may assist the proper administration of justice in that, without protective confidentiality orders, anthropologists who seek to assist the Court in native title proceedings might not gain the sort of information that Dr Palmer was able to elicit from his informants in this case. In any event, I do not consider that the affidavit should be ruled inadmissible on the basis of hearsay. Rather, what is said in it needs to be assessed having regard to the submissions made more generally.

2019 The State also submit that what is said in paras [6] and [7] of Dr Palmer's affidavit refers only generally to genealogical information and cultural and customary concerns. Regard must be had to the particular paragraphs that the claimants seek to protect by the proposed order.

2020 As to a "reticence" by claimants to reveal certain information, particularly genealogical information, as a customary concern, the State contend that it should not be equated with a cultural rule or norm prohibiting revelation. It says the affidavit does not establish the existence of any such rule or norm. Kinship rules, the State submits, are insufficient to explain the need for confidentiality. The State says that if Dr Palmer means to indicate that some (perhaps embarrassing) genealogical information is sensitive, then such sensitivities do not meet the requirement under *Hogan*.

2021 The State also contends that the proposed order should not be made because it is too broad and would apply to a substantial proportion of Dr Palmer's reports. Further, there is little utility in the proposed order as much of the information is in Mr Robinson's reports and elsewhere in the possession of the computers of the lawyers, the transcripts of evidence, various reports of other anthropologists and in books, articles and theses on all of the topics identified in the proposed order. Further, much of Dr Palmer's materials has been distributed since 2010 and given to other experts.

2022 The State also submits that if such a proposed order were made, it could cause prejudice to the administration of justice in that it would have the effect of restricting the ability of the State and other parties to use Dr Palmer's reports in other proceedings, where they may be required:

- for example, in an application under s 13(1)(b) NTA to revoke or vary an approved determination of native title;
- to assess whether an intramural allocation of rights by a prescribed body corporate is in accordance with traditional laws and customs;
- in an action which involves determining whether an individual is a native title holder or not;
- in an action to determine whether the exercise of rights and interests is in accordance with traditional laws and customs or not;
- in a future native title claim hearing to test new evidence for consistency with the evidence in this trial.

2023 The State says additionally that if native title in any degree is determined, the Court's reasons will be necessary for a very long time in order to interpret the determination, and documents in contention will be required because they will be referenced by the Court.

2024 Thus, if the State and other respondents could not use Dr Palmer's reports for these purposes these parties may be prejudiced due to an inability to bring their case in such future proceedings with the benefit of all relevant evidence.

2025 The State also submits that the proposed order is unduly restrictive in respect of public availability and might otherwise be considered unclear, imprecise or unworkable.

2026 The BHP Billiton and RTIO respondents adopt much of these submissions and say:

- The focus of the claimants' submissions is on the relevant material staying out of the public domain, but the proposed order goes beyond that.
- If the Court is minded to make orders then they should be limited to addressing the concern about the material entering the public domain and not prejudice respondents' legitimate needs to use the material in the future; and should achieve the necessary restrictions as simply as possible.
- An alternative proposed order is tendered by those respondents.

2027 The Hancock respondents support the State in opposing completely the orders made.

2028 The claimants indicate in reply that they would not oppose the Court making orders in terms of the alternative proposal put forward by the BHP Billiton and RTIO respondents, which, they submit, reflect the substance of the proposed order.

2029 As noted, a primary consideration is whether the proposed order is *necessary* to prevent prejudice to the proper administration of justice. As to the circumstances in which that ground might be made out, it is understood it requires the Court to exercise judgment and to take into account relevant objectives of the administration of justice. In this regard, s 37AE requires the Court to take into account that "a primary objective of the administration of justice is to safeguard the public interest in open judgment". Thus, it is well understood

that simply because a person may be embarrassed by the publication of evidence is no reason to make a suppression order or a non-publication order.

2030 It is also accepted, however, that the administration of justice will be served by other interests, for example, maintaining the protection of material which is, for example, commercially sensitive or falls within the category of a "trade secret". In *Australian Broadcasting Commission v Parish* (1980) 43 FLR 129 (a decision referred to with approval in *Hogan*) Bowen CJ observed as follows in relation to the then s 50 FCA Act (at 132):

> Again, we are familiar with cases where an order forbidding or restricting publication is appropriate. Thus, where the proceedings concern a secret process and publication of the process would destroy the subject matter of the proceedings and render them nugatory, an order is necessary to prevent prejudice to the administration of justice. Where proceedings are brought to restrain publication of confidential material, similar considerations apply. Disclosure would prejudice the court's proper exercise of the function it was appointed to discharge, to do justice between the parties. The possible cases where an order may be necessary to prevent prejudice to the administration of justice range fairly widely. The categories of this public interest are not closed and must alter from time to time whether by restriction or extension as social conditions and legislation develop…

2031 Bowen CJ further observed that it was not possible to define in advance the degree of prejudice to the administration of justice which will justify the making of such an order. His Honour noted the collocation of the alternative phrase "security of the Commonwealth" (s 50) suggested Parliament was not dealing with trivialities. Thus, the Chief Justice said the case where failure to make an order would lead to the destruction of the very subject matter of the suit would seem to be the kind of case which might ordinarily attract the exercise of the power. The refusal to make an order in such a case, the Chief Justice observed, "might well defeat the purpose of achieving justice between the parties and disappoint the public interest in having the court deal responsibly with the confidential affairs of its citizens".

2032 In the circumstances of parties who are claimants in a native title determination proceeding, and who are, by the law which governs proof of native title, obliged to reveal customary knowledge in order to establish that they are members of a vital society which remains connected to its traditional country by its traditional laws and customs, there is every possibility that what is customarily secret to, or held confidentially by, certain elders (with the respect and understanding of other members of that society) will need to be revealed to the Court and other parties to the proceeding. There may be considered a public interest in continuing to protect such information nonetheless, as it is that very information that gives

life and meaning to the society for whose advantage the Parliament has enacted the NTA. To violate the confidentiality of such information, or to render useless the customary processes by which such information or knowledge is held and controlled, would be calculated to undo the society and so the purpose of the proceeding to which it relates.

2033 The present question focuses on the extent of the reach of such a protective order; the extent to which it may be considered necessary to prevent the unreasonable dissemination of information to persons outside the claimant group (notwithstanding its provision in the course of the proceeding) or to prevent the possible misuse of information which traditionally is held by a few and but for the proceeding would not have been disseminated in the first place.

2034 The argument put on behalf of the claimants in support of the making of the proposed order, as I apprehend it, is essentially to the effect that the claimants should be put, at the end of the hearing, in the same position, as far as possible, as they were in prior to the proceeding in relation to the holding and dissemination of important cultural information, recognising that for the purpose of the proceeding (and possibly in the future) other parties have been given access to this information and may require to have access to it again in the future.

2035 It may be said at the outset that there may be considered a general public interest, expressed in the terms in which I have just set it out, that might support an order in terms of the proposed order and which might explain why such an order could be considered appropriate, suitable or convenient. The question is, however, whether it is *necessary* to prevent prejudice to the proper administration of justice or to protect the safety of a person. As pointed out above, the word *necessary* has been emphasised by the High Court in *Hogan* as indicating that some discipline is required in considering whether an order should be made, that it is not a matter of balancing the value of open justice with other interests, and in that sense the Court does not simply exercise a "discretion" in the public interest.

2036 From the evidence given in this proceeding, both by claimants directly at trial and by Dr Palmer, it may be accepted that certain evidence about family histories can be contentious, that evidence about Law business and anything touching on mytho-ritual matters is usually sensitive and that some (and not all) claimants have particular or specialist knowledge about places and culture that they prize and sometimes control. That said, not all family history matters fall into the contentious category. Nonetheless, I accept there was at trial a marked

reluctance in the case of many witnesses to speak about the family of others and their rights and interests. To speak out of turn may obviously cause trouble in a community and customarily seems not to be appropriate. There was indeed some general evidence of disharmony, but this was between certain people as to who had primary rights to speak for particular areas of country. There is also some information which the evidence discloses should not be spoken of publicly at risk of persons who breach a cultural or customary rule being at risk of punishment from other members of the group or from a wider group of Aboriginal persons engaged in customary and ritual concerns or from spiritual forces. But that has already been made the subject of restricted evidence orders. The special knowledge of some claimants of particular places and customs otherwise was undoubted, obviously held dear by them, but not shown to fall into a secret category.

2037 The general sense, from the evidence, is that to the extent that customs can be respected, they should be. Offence should not be given unthinkingly. Knowledge should be respected. But still, there is a recognition in the evidence of the claimants, and the process of their giving evidence, that in order to gain recognition of the traditional interests under the NTA a degree of disclosure about important things, albeit things that would not normally be spoken about publicly, is inevitable.

2038 Dr Palmer's affidavit, in effect, confirms these are the particular reasons why he considers the relevant content of various of his reports, and the joint expert report, should be the subject of the proposed order. He says that in interviewing Banjima people, he is often given information that the person would not relate if they thought the information or their identity would be publicly available. He suggests two main reasons for this:

(1) people want to protect genealogical information which may concern the discussion of family relationships that may not be common knowledge; and

(2) there is also a fear that if certain sorts of information falls into the wrong hands and if the people who obtain that information are not ritually qualified, the recipient may be punished.

2039 Dr Palmer is not here saying that an anthropologist who is to give expert evidence in a proceeding is entitled to undertake on behalf of the Court that information he or she receives will never be revealed in court or will be produced for subsequent disclosure. Rather, he is

saying something more subtle, namely, that as a matter of usual anthropological practice in the field, informants expect that the anthropologist, who is familiar with the usual customary rules of their society, will take care before conveying significant information or their identity and about how that information is conveyed; that their cultural practices relating to information sharing will be respected. Nonetheless, his informants understood their information may find its way into his reports.

2040 One can understand the concern of claimants, in relation to information about family relationships that may not be common knowledge and cultural information that is held and controlled by a few, to achieve some level of protection to limit the extent of its dissemination. Nonetheless, in this case, having considered the materials in question to which the proposed order would apply, I do not consider it necessary to prevent prejudice to the proper administration of justice or to protect the safety of any person that the proposed order be made. Much of the family relationships information mentioned in Dr Palmer's reports has been the subject of discussion in open court and indeed is discussed above. None of the information in my view is such that it can only be put into the hands of persons who are ritually qualified to receive it or that its further dissemination would be wrongfully conveyed or exploited unless restricted. Again much of it is referred to above. That latter concern, as I have already said, has been obviated by the restricted evidence orders made in the course of the hearing in relation to highly sensitive information.

2041 In the result, taking into account the principle of open justice articulated in the FCA Act, I am not persuaded, on the evidence, that the confidentiality order proposed is necessary to prevent prejudice to the proper administration of justice or to protect the safety of any person. That is not to say that in an appropriate case such an order could not be made in a proceeding such as this under the NTA. One assumes that in the case of *Murray*, for example, the relevant parties, and the Court recognised the appropriateness of the orders there made.

2042 I should add there is also a range of practical considerations that militate against an order being made, a number of which have been raised by the respondents. Much information is already referred to in the expert reports of Mr Robinson, and there has been public discussion in open court of much of the evidence the claimants now seek to protect.

There seems to me to be little efficacy in all of the circumstances in making the proposed order. Each case, however, no doubt will turn on its own facts.

2043 The result is that, on the basis of the evidence presented to me in support of the application for the making of the proposed order, I am not satisfied that an order in the terms proposed (or as proposed in the alternative minute of the BHP Billiton and RTIO respondents), is necessary in this case.

2044 For these reasons, I decline to make the confidentiality order sought.

CONCLUSION AND FINAL DETERMINATION

2045 The claimants are entitled to a determination of native title under the NTA. The Court will now invite the claimants to bring forward a minute of proposed determination in relation to which the Court will hear from the parties in due course.

I certify that the preceding two-thousand and forty-five (2045) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 28 August 2013