Federal Circuit Court of Australia Decision: Narrier v State of Western Australia [2016] FCA 1519

Plus Company Updates(PCU)

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Body

Canberra ACT: Federal Circuit Court of Australia has issued the following decision 16 December 2016: FEDERAL COURT OF AUSTRALIA

Narrier v State of Western Australia [2016] FCA 1519

File numbers:
WAD 228 of 2011

WAD 302 of 2015

Judge:
MORTIMER J

Date of judgment:
16 December 2016

Catchwords:

NATIVE TITLE – application for the determination of native title – connection with land and waters by traditional laws and customs – section 223 of the Native Title Act 1993 (Cth) – whether the ancestors of the claim group members moved into the claim area and acquired rights and interests in the land and waters of the claim area in accordance with Western Desert laws and customs – whether the occupants of the claim area at the time of sovereignty were Western Desert people – whether the claim area was Western Desert ***country*** at sovereignty

NATIVE TITLE – extinguishment – future acts – validity of future acts – whether compliance with procedural requirements in Part 2 Division 3 of the Native Title Act 1993 (Cth) a precondition to a future act having force and effect against native title

NATIVE TITLE – extinguishment – section 47B of the Native Title Act 1993(Cth) – whether s 47B applies to disregard extinguishment – the creation of a prior interest for the purposes of s 47B(2) – whether the resumption of a road in favour of the Crown can constitute the creation of a "prior interest"

NATIVE TITLE – extinguishment – section 47B of the Native Title Act 1993(Cth) – whether s 47B applies to disregard extinguishment – occupation for the purposes of s 47B(1)(c) – the area that must be occupied for the purposes of s 47B(1)(c)

Legislation:
Acts Interpretation Act 1901 (Cth) s 33(2A)
Australian Telecommunications Corporation Act 1989 (Cth)
Constitution, s 109
Land Act 1898 (WA)
Land Act 1933 (WA)
Land Administration Act 1997 (WA)
Migration Act 1958 (Cth)
Mining Act 1904 (WA)
Mining Act 1978 (WA)
Native Title Act 1993 (Cth) Pt 2 Div 3, ss 10, 11, 23E, 24AA, 24GB, 24GD, 24HA, 24IB, 24IC, 24ID, 24KA, 24MD, 24NA, 24OA, 26(1)(c)(i), 28, 47A, 47B,47B(1)(b), 47B(1)(b)(i), 47B(1)(b)(ii), 47B(1)(c), 47B(2), 61, 61(1), 61(2),223, 223(1), 225, 227, 233, 242, 242(1), 242(2), 245, 245(1), 248, 251B, 253
Nickel (Agnew) Agreement Act 1974 (WA)
Petroleum Act 1936 (WA)
Petroleum and Geothermal Resources Energy Act 1967 (WA)
Post and Telegraph Act 1901 (Cth)
Public Works Act 1902 (WA) ss 17, 18
Racial Discrimination Act 1975 (Cth) s 10
Rights in Water and Irrigation Act 1914 (WA)
Road Districts Act 1919 (WA)
Telecommunications Act 1975 (Cth)
Telecommunications Act 1991 (Cth)
Telecommunications Act 1997 (Cth)
Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) ss 12I, 12J, 12M
Native Title Bill 1993 (Cth)
Native Title (Notices) Determination 2011 (No. 1) (Cth)

Cases cited:
AB (deceased) on behalf of the Ngarla People [2012] FCA 1268; 300 ALR 193
AK v Western Australia [2008] HCA 8; 232 CLR 438
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27
Attorney-General (NT) v Ward [2003] FCAFC 283; 134 FCR 16
Banjima People v Western Australia (No 2) [2013] FCA 868; 305 ALR 1

Banjima People v Western Australia [2015] FCAFC 84; 231 FCR 456
Banjima People v Western Australia (No 2) [2015] FCAFC 171; 328 ALR 637
Bodney v Bennell [2008] FCAFC 63; 167 FCR 84
BP (Deceased) on behalf of the Birriliburu People v Western Australia[2016] FCA 671
CG (Deceased) on behalf of the Badimia People v Western Australia[2015] FCA 204
CG (Deceased) on behalf of the Badimia People v Western Australia[2016] FCAFC 67; 240 FCR 466
Craig, Williamson Pty Ltd v Barrowcliff [1915] VicLawRp 66; [1915] VLR 450
Croft (on behalf of Barngarla Native Title Claim Group) v South Australia [2015] FCA 9; 325 ALR 213
Daniel v Western Australia [2004] FCA 1388; 212 ALR 51
Delgamuukw v British Columbia [1997] 3 SCR 1010
Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2) [2014] FCA 528; 317 ALR 432
De Rose v South Australia (No 2) [2005] FCAFC 110; 145 FCR 290
De Rose v South Australia [2003] FCAFC 286; 133 FCR 325
Erubam Le (Darnley Islanders) #1 v Queensland [2003] FCAFC 227; 134 FCR 155
FMG Pilbara Pty Ltd/NC (deceased) on behalf of the Yindjibarndi People/Western Australia [2012] NNTTA 103
Fourmile v Selpam Pty Ltd [1998] FCA 67; 80 FCR 151
Graham on behalf of the Ngadju People v Western Australia [2012] FCA 1455
Griffiths v Northern Territory [2007] FCAFC 178; 165 FCR 391
Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20;235 CLR 232
Griffiths v Northern Territory of Australia [2014] FCA 256
Gudjala People #2 v Native Title Registrar [2007] FCA 1167
Gumana v Northern Territory of Australia [2005] FCA 50; 141 FCR 457
Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31; 238 ALR 1
Harris v Great Barrier Reef Marine Park Authority [2000] FCA 603; 98 FCR 60
Hayes v Northern Territory [1999] FCA 1248; 97 FCR 32
Jango v Northern Territory [2006] FCA 318; 152 FCR 150
Mabo v Queensland (No 2) [1992] HCA 23; 175 CLR 1
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; 214 CLR 422
Minister for Immigration and Citizenship v SZIZO [2009] HCA 37; 238 CLR 627
Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW [2005] FCAFC 154; 145 FCR 523
Mitchell v MNR [2001] 1 SCR 911
Moses v Western Australia [2007] FCAFC 78; 160 FCR 148
Neowarra v Western Australia [2003] FCA 1402
Nordland Papier AG v Anti-Dumping Authority [1999] FCA 10; 93 FCR 454
Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135; 145 FCR 442
Parmar v Minister for Immigration and Citizenship [2011] FCA 760; 195 FCR 186
Patch on behalf of the Birriliburu People v Western Australia [2008] FCA 944
Peterson v Western Australia [2013] FCA 518
Project Blue Sky Inc v Australian Broadcasting Corporation [1998] HCA 28; 194 CLR 355
R v Small Claims Tribunal and Homeward; Ex Parte Cameron [1976] VicRp 41; [1976] VR 427
R v Van der Peet [1996] 2 SCR 507
Registrar of Titles (WA) v Franzon [1975] HCA 41; 132 CLR 611
Re Hamilton [1981] AC 1038
Re Kitchooalik and Tucktoo (1972) 28 DLR (3d) 483
Re Refugee Review Tribunal; Ex Parte Aala [2000] HCA 57; 204 CLR 82
Rrumburriya Borroloola Claim Group v Northern Territory of Australia[2016] FCA 776
Ruatita v Minister for Immigration and Citizenship [2013] FCA 542; 212 FCR 364
Rubibi Community (No 5) v Western Australia [2005] FCA 1025
Rubibi Community v Western Australia (No 7) [2006] FCA 459
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs[2005] HCA 24; 228 CLR 294
Sampi v Western Australia [2005] FCA 777

Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2) [2016] FCA 168; 215 LGERA 1
The Lardil Peoples v Queensland [2001] FCA 414; 108 FCR 453
Trade Practices Commission (Cth) v Tooth & Co Limited [1979] HCA 47;142 CLR 397
Travelex Ltd v Commissioner of Taxation [2010] HCA 33; 241 CLR 510
Wainohu v New South Wales [2011] HCA 24; 243 CLR 181
Western Australia v Commonwealth [1995] HCA 47; 183 CLR 373
Western Australia v Ward [2000] FCA 191; 99 FCR 316
Western Australia v Ward [2002] HCA 28; 213 CLR 1
Western Australia v Willis [2015] FCAFC 186; 239 FCR 175
Western Australia v Sebastian [2008] FCAFC 65; 173 FCR 1
WF (Deceased) on behalf of the Wiluna People v Western Australia [2013] FCA 755
Wyman v Queensland [2015] FCAFC 108; 235 FCR 464
Wyman on behalf of the Bidjara People v Queensland (No 2) [2013] FCA 1229

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1,312
Counsel for the Applicant:
Mr S Wright with Ms T Herrmann

Solicitor for the Applicant:
Central Desert Native Title Services Ltd

Counsel for the State of Western Australia:

Mr G J Ranson with Ms S Begg and Ms C I Taggart

Solicitor for the State of Western Australia:
State Solicitor's Office

Solicitor for Agnew Gold Mining Company Pty Ltd, BHP Billiton Nickel West Pty Ltd, BHP Billiton Yakabindie Nickel Pty Ltd, Albion Downs Pty Ltd and Cameco Australia Pty Ltd
Mr B J Willesee

Solicitor for MPI Nickel Pty Ltd
Ms S Carlin

Table of Corrections

22 February 2017
In the sixth sentence of paragraph 116, "Mr Lewis described to the Court the traditional method of butchering and cooking the animal" has been replaced with "Mr Allan Ashwin and Mr Bradley Wongawol showed the Court the traditional method of butchering and cooking the animal."

22 February 2017
In paragraph 240, "son" has been replaced with "great grandson."

22 February 2017
In the first sentence of paragraph 363, the word "station" has been replaced with "township."

ORDERS

WAD 228 of 2011

BETWEEN:
EDWIN BEAMAN, JAMES CALYUN, JA, KADO MUIR, KEITH NARRIER, CHARMAINE TULLOCK, and SHIRLEY WONYABONG

Applicant
AND:
STATE OF WESTERN AUSTRALIA, SHIRE OF LEONORA, ALBION DOWNS PTY LTD, MARILYN ANNE BERNHARDT AND COLIN LESLIE BERNHARDT (YOUNO DOWNS STATION), RANGEVIEW ASSET PTY LTD, WEEBO PASTORAL COMPANY PTY LTD, AGNEW GOLD MINING COMPANY PTY LTD, BHP BILLITON NICKEL WEST PTY LTD, BHP BILLITON YAKABINDIE NICKEL PTY LTD, CAMECO AUSTRALIA PTY LTD, MABROUK MINERALS PTY LTD, and MPI NICKEL PTY LTD

Respondents

WAD 302 of 2015

BETWEEN:
HENRY ASHWIN, EDWIN BEAMAN, BRETT ANDREW LEWIS, and KEITH NARRIER

Applicant
AND:
STATE OF WESTERN AUSTRALIA, CENTRAL DESERT NATIVE TITLE SERVICES LTD, TEC DESERT NO 2 PTY LTD, and TEC DESERT PTY LTD

Respondents
JUDGE:
MORTIMER J
DATE OF ORDER:
16 DECEMBER 2016

THE COURT DIRECTS THAT:

The parties in proceedings WAD 228 of 2011 and WAD 302 of 2015 confer with a view to agreeing on the orders and determination to be made by the Court to reflect the conclusions reached in these reasons for judgment. Any submissions on the question raised in [1280]-[1285] of the Court's reasons to be filed and served on or before 4 pm on 27 January 2017, and to be limited to 10 pages. Subject to paragraph 4, the parties file any agreed form of orders and determination within 15 working days of the Court's decision on the submissions filed pursuant to paragraph 2 of these orders. In the event that the parties are unable to reach agreement as to the form of orders and determination to be made by the Court, each party file and serve its proposed form of orders and determination within 15 working days of the Court's decision on the submissions filed pursuant to paragraph 2 of these orders. The proceedings are adjourned to a date to be fixed.

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

REASONS FOR JUDGMENT

INTRODUCTION In general terms, this application for determination of native title concerns an area of approximately 13,600 square km, taking in land and waters situated between the towns of Wiluna in the north and Leonora in the south. The west of the claim area extends over Booylgoo Range and part of Montague Range, and the east of the claim area extends over Mount Keith and Mount Sir Samuel. The title given to the claim – Tjiwarl – is the name of a spring located in the eastern part of the claim area. The application is brought on behalf of a group of Western Desert people, who claim through 11 identified apical ancestors. The connection issues which arise in this case concern whether the claim area was Western Desert ***country*** at sovereignty and, if so, whether the ancestors of the claim group members acquired rights and interests in the land and waters of the claim area in accordance with Western Desert traditional laws and customs. I have concluded that there should be a determination of native title in favour of the applicant, subject to my findings on extinguishment and s 47B of the Native Title Act 1993 (Cth) (NT Act). I note at the outset that the applicant is required to prove their case on all issues on the balance of probabilities. That includes on connection issues. A proceeding such as this illustrates the importance of recalling the difference between a court deciding, in an exercise of judicial power, that on the balance of probabilities certain events in the past did or did ***not*** occur, or certain circumstances did or did ***not*** exist, and a decision attended by some more absolute form of certainty which purports to declare absolutely that history ran its course in a particular way. It is also convenient to note at the start of these reasons that the evidence in this proceeding is, to say the least, considerable. I do ***not*** refer to all of it in my reasons. There is a need, indeed a requirement, in my opinion, to strike a balance between the length and complexity of the evidence and submissions in a claim such as this and the need for the Court's reasons to remain accessible and understandable. Over the last decade, several High Court judges have discussed the functions of judicial reasons, which include giving effect to the "open court principle" by allowing public scrutiny of judicial decision-making (see Wainohu v New South Wales [2011] HCA 24; 243 CLR 181 at [58] (French CJ and Kiefel J)), promoting sound and reasonable judicial decision-making through scrutiny and accountability, and giving effect to the court's institutional responsibility to the public: AK v Western Australia [2008] HCA 8; 232 CLR 438 at [89] (Heydon J). Pursuing those objectives in reasons for the determination of native title can be challenging. These reasons represent my findings of fact and law based on all the evidence, and I have identified in these reasons the key submissions and evidence which have been material to the conclusions I have reached. Where I have rejected particular evidence, I say so expressly.

TERMINOLOGY USED IN THESE REASONS The parties both used the term "Western Desert Cultural Bloc" to describe an area and groups of people who observed traditional laws and customs associated with the Western Desert region. The term seems to be traced to the work of Professor Ronald Berndt and what has become known as the "Berndt line", on which considerable argument turned in this proceeding. It is a term I prefer ***not*** to use. I will refer to relevant groups as Western Desert people or non-Western Desert people, otherwise by reference to their traditional group names, where those exist. I will refer to relevant areas as Western Desert or non-Western Desert ***country***. These reasons deal with two related proceedings: WAD 228 of 2011 and WAD 302 of 2015, which I will refer to as "Tjiwarl #1" and "Tjiwarl #2" respectively. Tjiwarl #1 was commenced by the filing of a native title determination application on 17 June 2011. Tjiwarl #2 was commenced by the filing of a native title determination application on 22 June 2015. I set out the procedural background to Tjiwarl #1, which is the principal application, at [39] below, and I address Tjiwarl #2 at [45] below. For the reasons I set out at [45]-[47] below, Tjiwarl #2 is an amplification of Tjiwarl #1, by reference to the application of s 47B of the NT Act. I have elected to use the singular word "proceeding" in these reasons when referring to Tjiwarl #1 and Tjiwarl #2. When I use the term "applicant" in these reasons, I refer to the persons who are authorised to be, jointly, the "applicant" for the purposes of s 61(2) of the NT Act (unless the context indicates that another meaning is intended). Therefore, I use the pronoun "they" for the applicant. When I use the terms "claim group" or "claim group members", I refer to the members of the native title claim group who authorised the making of the native title determination applications for the purposes of s 61(1) of the NT Act. I also use "claimant witnesses" to refer to those persons in the native title claim group who gave evidence in this proceeding. When I use the term "apical ancestors", I refer to the persons specified in the native title determination application in Tjiwarl #1 whose "birth, or long association with the area covered by the application" forms the basis of the claim to ***country*** of the claim group members, who are the descendants of those ancestors. There was a concession by the State in this case about the perpetuation, substantively unchanged, of the circumstances of Aboriginal people living in the claim area from the date of sovereignty in Western Australia (1829) until approximately 1912. A concession of that kind has occurred in other cases and enables the Court to treat the later date as the relevant one for the purposes of ascertaining the nature and extent of rights and interests

in land held by Aboriginal people in occupation of the claim area at that time. See, for example, the observations of Dowsett J in Western Australia v Willis [2015] FCAFC 186; 239 FCR 175 (Pilki) at [2]:In the present case, sovereignty was claimed in 1829. However, as in many other such cases, there was little or no contact between indigenous and non-indigenous persons for many years thereafter. Hence it can be inferred that there was little change in the relevant indigenous society until more intense contact occurred. This case has proceeded on the basis that such contact occurred in the early 1900s. Although, therefore, the Court proceeds by way of inference in relation to the factual circumstances obtaining in 1829 and those obtaining around (in this case) 1912, I shall nevertheless use the term "sovereignty" as encompassing that inference and meaning around 1912 in this case. Throughout the on ***country*** hearing, the applicant's counsel indicated that the witnesses preferred to be addressed by their first names, and that form of address was adopted. However, in these reasons, I return to a more formal style of referring to people by their surnames. Save as to some issues on extinguishment, the only active respondent was the State of Western Australia. The remaining respondents adopted the State's position and submissions on connection and took no active part in that aspect of the proceeding. Several did make separate submissions on extinguishment issues. I will refer to "the State" when I am dealing with connection issues. When I am dealing with extinguishment issues, and where necessary, I refer to the other respondents by name.

A note on spellings and names Throughout these reasons I use "Ngaiawonga" as spelt by the applicant in their submissions. Daisy Bates, the woman whose records from the early twentieth century feature so heavily in this claim, spelled the term "Ngaiuwonga". There are various other spellings, but I have elected to use the one chosen by the applicant. Some of the ethnographic and anthropological material uses names for people and languages that are similar, but ***not*** the same, as those used by claimant witnesses. For example, the anthropologist Ken Liberman, who worked in the area in the 1970s, used the term "Tjupany" because that is what he understood his informants to use, whereas the claimant witnesses in this proceeding used "Tjupan". Where appropriate, I have attempted to retain the name, or label, as used by the witness or source. All these labels are, as Dr Clendon (the anthropological linguist called by the applicant in this proceeding) observed, ephemeral: that is their nature.

Transcript misspellings Although the transcript of the on ***country*** evidence is highly accurate in terms of the use and spelling of the large number of group and language names used in this proceeding, the same cannot be said of the transcript of the expert evidence, nor of submissions. This has made the transcript difficult to follow and use. Where it is reasonably obvious what the misspelled word should be (for example, Dupon (incorrect) for Tjupan (correct)) I have ***not*** made any specific reference to the misspelling. Where the misspelling is less obvious (for example, Gulara (incorrect) for Kurrawa (correct)), I have made a specific reference to the misspelling, so that the way I have interpreted the transcript is clear.

THE MAIN ISSUES IN THIS PROCEEDING

Connection The connection issues in this case are particular, and can be approached by considering four sets of propositions. First, the claim group members are Western Desert people – the State accepts this. Their traditional laws and customs are Western Desert traditional laws and customs – the State accepts this as well. Further, it is common ground that, at sovereignty, Western Desert people comprised a "society" – as that term was used in Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58; 214 CLR 422 – which had certain shared customary, legal, linguistic and cultural features. It is also common ground that Western Desert society has continued to exist, and Western Desert people continue to be united by their shared observance of traditional laws and customs in relation to, amongst other things, land and waters. Within that broad society exist subgroups with intramurally recognised rights and interests over particular areas of land and waters. That intramural recognition does ***not*** affect the observance by the broader group of Western Desert people (or "society") of substantively the same traditional laws and customs. One of the critical aspects of Western Desert traditional laws and customs for the purposes of this proceeding is that individuals, families, or groups may move from one part of Western Desert ***country*** to another and may potentially obtain rights and interests in relation to the ***country*** to which they move. Second, there were Aboriginal people in occupation of the claim area at sovereignty. They, or their descendants, remained in occupation when non-Aboriginal people took up a regular presence in the claim area, which appears to have been from the early 1890s. The laws and customs of those Aboriginal people remained essentially the same from 1829 to the 1890s. The State extends a concession about this status quo further forward in time, to approximately 1912. The State contends these people (which the State calls the "Ngaiawonga") were ***not*** Western

Desert people. The applicant (who, with reservations, adopted the term “Ngaiawonga” as well) contends they were Western Desert people, and that the ancestors of the claim group members moved into, and acquired rights and interests in, the claim area in accordance with Western Desert traditional laws and customs. It was, the applicant contends, a movement of Western Desert people within geographical areas governed by, and in accordance with, their traditional laws and customs. In their statement of issues, facts and contentions, filed prior to the commencement of the hearing, the applicant said:Nevertheless, the influx of non-Aboriginal people into the Claimed Area in the late 19thcentury and early 20th century:

(a) materially affected the access by the Aboriginal occupants of the Claimed Area to traditional water and food sources;

(b) resulted in the spread of diseases to the Aboriginal occupants of the Claimed Area; and

(c) resulted in conflict between non-Aboriginal people and the Aboriginal occupants of the Claimed Area, and/or between Aboriginal people in occupation of the Claimed Area and other Aboriginal people.

The matters referred to in [the paragraph above] contributed to a situation where, by the early 20th century, those Aboriginal people who were in occupation of the Claimed Area at sovereignty, and the biological descendents of the Aboriginal people in occupation of the Claimed Area at sovereignty, died or moved away from the Claimed Area. It should be noted here that, in final submissions, the applicant was less absolute in submitting that all the original Aboriginal occupants of the claim area had either died out or left by or shortly after 1912. The applicant adopted a more nuanced position in final submissions which, as I develop below, is a position I accept. Third, the applicant accepts that if the claim area was ***not*** part of the “Western Desert cultural bloc” (or, as I prefer to express it, was ***not*** part of Western Desert ***country***) at sovereignty, then the claim group cannot have a connection to the claim area now by or through traditional laws and customs, because the claim group members are Western Desert people and their laws and customs are Western Desert laws and customs. Fourth, it is common ground that most – and the State submits all – of the apical ancestors of the claim group members were born outside the claim area, generally to the east. It is this feature of the evidence which gives rise to what the State describes as the “migration” issue in this proceeding. Nevertheless, there is a complicated factual matrix concerning where the claim group members’ apical ancestors were born and lived, and what (if any) relationships they had with the Aboriginal people occupying the claim area at times between the late 1800s and approximately 1912. The State contends that, even if the Court rejects its submission that the claim area was occupied by non-Western Desert people at sovereignty, the applicant has ***not*** proven that, when the ancestors of the claim group migrated to the claim area, they acquired rights to the land in the claim area in accordance with Western Desert traditional laws and customs. In my opinion, from these four sets of propositions, two lines of inquiry emerge. These are the lines of inquiry that I consider arise on the evidence and submissions; they may ***not*** dovetail exactly with the sequence of the parties’ submissions, but I am satisfied they reflect the substance of those submissions. The two lines of inquiry are:(1) Who were the people occupying the claim area at sovereignty (that is, up until approximately 1912) and what happened to them after approximately 1912?

(2) When did the claim group members’ ancestors move into the claim area, what was their relationship before that time to the claim area and to the Aboriginal people who held rights and interests in the claim area when the claim group members’ ancestors came to occupy and use the land? The connection evidence and arguments should be assessed with a view to answering these two lines of enquiry. If these questions are answered favourably to the applicant, then the third question will be whether the applicant has proven the other matters required by s 223(1) of the NT Act, namely the content of the traditional laws and customs observed by the claim group members, whether by those laws and customs the claim group members have a connection with the claim area, and whether that normative system has continued substantially uninterrupted since sovereignty.
Conclusions on the two broad inquiries and other connection issues

Summary of my conclusions on who the people occupying the claim area at sovereignty were and what happened to them I have found that the claim area was occupied at sovereignty by Western Desert people. I have found it is

more likely than ***not*** that the land and waters of the claim area are, and always have been, Western Desert ***country***. It is more likely than ***not*** that the people Daisy Bates called the "Ngaiawonga" were Western Desert people. In my opinion, it is impossible to say with any confidence that "Ngaiawonga" is an accurate label to apply to the people who had rights and interests in the land and waters of the claim area at sovereignty. I have found it is unlikely that, as the State contends, none of the original inhabitants were in the claim area in the early twentieth century. I have concluded that some of the original inhabitants of the claim area were still occupying the claim area when the claim group members' ancestors came into the ***country*** on a more permanent basis, and the claim group members' ancestors had, or established, relationships with those people.

Summary of my conclusions about when the claim group members' ancestors moved into the claim area, and what their relationship was to the claim area and the Aboriginal people who previously occupied the claim area The evidence in this proceeding suggests that the claim group members' ancestors entered the claim area at various times, and had varying degrees of connection and contact with the Aboriginal people who occupied the claim area before sovereignty. I have concluded that at least some of the claim group members' ancestors knew and interacted with the Aboriginal people who were in occupation of the claim area at sovereignty, and were themselves in and around the claim area at or before that time. It is more likely than ***not*** that some of the claim group members' ancestors had, and were exercising, rights and interests in the land and waters of the claim area before Daisy Bates undertook her work to the north of the claim area. I have found that the original occupants of the claim area recognised the claim group members' ancestors as Western Desert people entitled to acquire and exercise rights and interests in the ***country*** of the claim area in accordance with Western Desert laws and customs, and shared with them knowledge of the Tjukurrpa for the claim area.

Summary of my conclusions on the remainder of the s 223(1) connection issues I have concluded that the traditional laws and customs of the claim group which relate to the acquisition, transmission and exercise of rights and interests in land and waters have been continuously recognised and observed by the claim group and their ancestors in substantially the same form since sovereignty. I have found that there have been some adaptations of the traditional laws and customs of the claim group, but that these adaptations are within existing legal principles and do ***not*** reflect a lack of continuity with the normative system which existed at sovereignty. I have concluded that the claim group members have established the existence at sovereignty and the continuous acknowledgment and observance of the following rights and interests in the claim area, in accordance with traditional Western Desert laws and customs:(a) the right to possess, occupy, use and enjoy the claim area, to the exclusion of all others;

(b) the right to access, remain in, and use the claim area for any purpose;

(c) the right to access and take resources for any purpose, including commercial purposes;

(d) the right to engage in spiritual and cultural activities in the claim area;

(e) the right to maintain and protect places and objects of significance; and

(f) the right to receive a portion of any traditional resources (***not*** including minerals or petroleum) taken from land or waters by Aboriginal people who are also governed by Western Desert law. I have found that the applicant has ***not*** established the existence at sovereignty and the continuous acknowledgment and observance of:(a) The right to make decisions about the use and enjoyment of the land and waters in the claim area by other Western Desert people; and

(b) A separate right to "protect resources and the habitat of living resources" in the claim area.
Conclusions on extinguishment The parties agreed there had been partial extinguishment of native title over the whole of the claim area. Accordingly, subject to the Court's findings on s 47B of the NT Act, the parties agreed that the right of exclusive possession had been extinguished. The remainder of the extinguishment issues concern the parcels of land in the claim area where non-exclusive native title rights may still survive. Most of the tenure and extinguishment issues were agreed between the parties before trial. Four main issues remain in dispute regarding

extinguishment. They are:(a) Whether the renewals on 1 July 2015 of the pastoral leases that fall wholly or partially within the claim area are valid future acts;

(b) Whether two miscellaneous licences (L53/161 and L53/177) were validly granted;

(c) Whether seven specified miscellaneous licences are valid future acts; and

(d) Whether s 47B of the NT Act applies to disregard extinguishment in specified areas of the claim area. Determining the first three questions requires answering, among other things, the question whether compliance with applicable procedural requirements in Pt 2 Div 3 of the NT Act is a precondition to a future act having force and effect against native title. On the first three matters, I have reached the following conclusions:(a) Non-compliance with the procedural provisions deprives a future act of validity in the sense of having full force and effect against native title interests. I have ***not*** adopted the obiter statements of the Full Court in The Lardil Peoples v Queensland [2001] FCA 414; 108 FCR 453;

(b) The renewals of the pastoral leases on 1 July 2015 were valid future acts and each of the leases will be given the full force and effect against the applicant's native title;

(c) The grants of the miscellaneous licences L53/161 and L53/177 were invalid and have no force or effect in relation to the applicant's native title;

(d) In regard to the other seven specified miscellaneous licences, two are agreed to have been withdrawn and should ***not*** be listed on any determination as "other interests". In relation to L36/129, this is now "dead", but in any event I concluded that it satisfies either s 24IB(a) or (b) of the NT Act and, accordingly, the grant had full force and effect in respect of the applicant's native title. I have concluded that the grants of the licences L36/144, L36/148 and L36/152 were invalid because the procedural requirements under either s 24MD(6B) or 24MD(6A) of the NT Act applied to these licences and were ***not*** complied with. Accordingly, I have concluded that these three licences are invalid future acts. Finally, in relation to L53/109, I have concluded, as the State appeared to accept, that it was granted without reference to Pt 2 Div 3 and, as such, is an invalid future act. Each of the licences I have found to be invalid future acts has no force or effect in relation to the applicant's native title. The parties divided the parts of the claim area to which claims under s 47B attach into eight groups, some of which include more than one parcel of Unallocated Crown Land (UCL): UCL 239, UCL 245 and UCL 246; UCL 14 and UCL 15; UCL 247; UCL 11; UCL 4, UCL 5, UCL 6 and UCL 10; UCL 8; UCL 240; and Road 13. I have found that s 47B(2) is ***not*** applicable to Road 13. In relation to the seven other areas, I have found that none of the miscellaneous or exploration licences which cover these areas render inapplicable the terms of s 47B. However, I have concluded that the applicant has only proved occupation of two UCL parcels: UCL 245 and UCL 246. In relation to these two UCL parcels, s 47B of the NT Act applies to disregard extinguishment. I have allowed the parties a further opportunity for submissions on the application of s 47B(2) to UCL 11.

THE APPLICATIONS

Tjiwarl #1 Tjiwarl #1 is the principal application for a determination of native title over the claim area. I deal with Tjiwarl #2 at [45] below. The authorisation of the claim was referred to a meeting of the wati (initiated men) in accordance with traditional decision-making processes after the wider community could ***not*** reach consensus on certain issues (the claim name and the persons comprising the applicant). The meeting of the wati was held in September 2010. After the outcomes of that meeting were conveyed to the community, the authorisation meeting (for the purposes of s 251B of the NT Act) was held on 29 March 2011. The applicant filed the native title determination application on 17 June 2011. The claim was accepted for registration by the Native Title Registrar on 13 January 2012. There is no dispute that the Tjiwarl #1 claim was properly authorised within the meaning of s 61 of the NT Act. At a case management hearing on 12 April 2012, orders were made by McKerracher J referring the application to mediation either by the National Native Title Tribunal or a Registrar of the Federal Court and requiring the parties to inform the Court of their preferred mediator by 20 June 2012. As the parties did ***not*** comply with that

order, Barker J made a further order (administratively) on 29 June 2012, listing a case management hearing on a date to be fixed. At the next case management hearing on 2 August 2012, Barker J vacated the mediation orders of 12 April 2012 and referred the application to a case management hearing before a Registrar to give the parties the opportunity to agree or otherwise recommend to the Court the processes by which the connection issues might be resolved by negotiation between the parties. A case management hearing was convened by Registrar Gilich on 17 September 2012 and an order was made requiring the applicant to file a statement of issues, facts and contentions, which the applicant filed on 20 November 2012. The State and several other respondents filed separate responses to the applicant's statement of issues, facts and contentions. A further case management hearing was held on 21 June 2013 to discuss the outstanding connection issues and to agree on a process to address those issues. At the hearing, the parties agreed that the outstanding connection issues could be addressed by the applicant and the State settling a series of questions that could then be the basis of an expert anthropological report by Dr Sackett. An order was made requiring the applicant and the State to settle such questions, which they did. Dr Sackett's report was filed on 31 March 2014. I observe here that the questions asked at this stage did ***not***, ultimately, cover anywhere near all of the matters on which Dr Sackett's expert opinion was relevant. As Dr Sackett himself said, although the report comprehensively addressed all the questions asked of him, it was "***not*** the normal native title [report] that would be provided to the court." Further case management hearings were held on 11 April 2014 and 16 April 2014, at which the State advised the Court that it required until the end of October 2014 to complete both a legal and linguistic review of Dr Sackett's report. Case management hearings were also held on 1 August 2014 and 5 September 2014 to resolve outstanding issues and further prepare the matter for trial. On 5 September 2014, orders were made provisionally listing the application for trial and setting deadlines for the filing of outstanding documents. An experts' conference was held on 24 and 25 June 2015 so that the two principal experts who had prepared reports for the Court in this matter could confer and prepare a joint statement.

Tjiwarl #2 The Tjiwarl #2 claim was filed on 22 July 2015. The claim group is the same in both applications, although the persons comprising the applicant are different in each proceeding. In these reasons, when I use the singular word "applicant", I refer to the applicant in both Tjiwarl #1 and Tjiwarl #2 as constituted. The claim area in Tjiwarl #2 covers the UCL parcels in the Tjiwarl #1 claim area that the applicant claims s 47B of the NT Act applies to. These areas were ***not*** identified in the Tjiwarl #1 application, where the applicant stated, under a heading addressing the applicability of s 47B, among other provisions:No information at present, however should any or all of sections 61A(4), 47, 47A and 47B apply then the applicants will seek to ignore extinguishment in those areas. Accordingly, the Tjiwarl #2 application did specifically identify the areas to which the applicant says s 47B applies. On 27 July 2015, I made orders that Tjiwarl #1 and Tjiwarl #2 be heard together. The State initially submitted that the filing of the Tjiwarl #2 application was an abuse of process. The following exchange occurred during opening submissions:MR RANSON: They're ***not*** opposed, your Honour. If it assists, we maintain the view that there is a difficulty with the Tjiwarl 2 application, and we suspect, ultimately, we will maintain our submission that it's an abuse of process, but for present purposes we're content that the evidence that might be relevant to it can be taken in these two weeks - they can be heard together - and - - -

HER HONOUR: And you will develop the grounds on which you say it can be dismissed which may or may ***not*** include - - -

MR RANSON: Yes. Your Honour might recall we had foreshadowed an interlocutory application seeking to deal with that before the hearing. We're now content, on the basis of the amendment, that all of it can be folded into the hearing and dealt with at the same time. The State's argument was that, in making the Tjiwarl #2 application at a later date, the applicant's intention was to require the Court to consider two relevant dates when determining (for the purposes of s 47B(1)(c)) whether the claim group members had occupied the areas said to be subject to s 47B. Aside from the passage I have extracted, the argument was ***not*** developed in the State's final oral submissions (although it was mentioned once more in opening) and was ***not*** addressed in the State's written submissions. Given the findings I have made on the occupation issues for s 47B, it is ***not*** necessary to determine the State's argument,

if indeed it remained a live submission at the end of the trial. The occupation I have found proven existed in 2011, as well as in 2015.

THE CLAIM GROUP MEMBERS AND THE CLAIM AREA There have been a number of previous applications for determination of native title that have covered some or all of the claim area. Some of the claim group members were actively involved in those applications. I refer to those previous applications where necessary. The State did ***not*** submit any of the previous applications precluded a determination of native title in this proceeding.
The basis for membership of the claim group By final submissions, there was some dispute between the applicant and the State concerning the basis on which the applicant proposed to ask the Court to make any determination of native title. The dispute centred on the description of the claim group. Despite the considerable number of pages occupied in final submissions on this issue, in oral submissions at the final hearing counsel for the applicant submitted that the applicant's case is and has remained as set out in [63] of their statement of issues, facts and contentions dated 20 November 2012. That paragraph states:The persons who hold the native title rights and interests in relation to the Claimed Area are those persons:

(a) who, in accordance with the traditional laws and customs of Western Desert society, have a connection to the Claimed Area through:(i) their own birth, or long association with the Claimed Area; or

(ii) the birth, or long association with the Claimed Area, of their ancestors by which they claim ***country***; and(b) in respect of whom that claim is recognised according to Western Desert traditional laws and customs. It is also said by the applicant that the reason the claim group members hold rights and interests in the claim area as a group is that they "collectively have rights and responsibilities in relation to the tjukurrpa of the Claimed Area". Counsel for the applicant then emphasised that the claim group members were set out in [64] of the applicant's statement of issues, facts and contentions. This states:The group of persons who satisfy those criteria at present are:

(a) In respect of paragraph 63(a)(i) – Lenny Ashwin; and

(b) In respect of paragraph 63(a)(ii), the descendants of:(i) Alfie Ashwin;

(ii) Piman/Charlie Beaman;

(iii) Tjampula/Jumbo Harris;

(iv) Nampu/Scotty Lewis;

(v) Nimpurru/Spider Narrier;

(vi) Tjulyitjutu/Rosie Jones;

(vii) Kathleen Bingham;

(viii) Kurril/Scotty/Ted/Packhorse Rennie Tullock;

(ix) Pukungka/Dolly Walker;

(x) Manyila/Trilby; and

(xi) Dempsey James. I deal with the situation concerning Lenny Ashwin at [63] to [64] below. It is true that in their initial final written submissions, the applicant referred to other pathways such as conception, high ritual knowledge concerning the area, or responsibility for sites within the area. These pathways are referred to in other parts of the applicant's statement of issues, facts and contentions (such as [15(a)]) as part of the laws and customs of Western

Desert people, and the State admits that to be the case. The variations are, I consider, explained by the applicant's final submissions at [36(b)], which in turn refers to the applicant's statement of issues, facts and contentions. At [46] of that document, the applicant contends that the "presently acknowledged" laws and customs governing the claim area emphasise parental and grandparental connection and long association with the claim area as pathways to obtaining rights and interests in land and waters in the claim area, rather than some of the other pathways which may in any given circumstances be available under Western Desert laws and customs, for example conception on ***country***. The applicant contends this is an adaptation of traditional laws and customs. The State contests this. Taking those submissions into account, together with what was said in final submissions and the confirmation that the applicant's claim is as set out in [63] of the statement of issues, facts and contentions, I proceed on the basis that the applicant contends membership of the claim group is to be determined by reference to the smaller set of pathways set out in [63], while recognising that there are a larger set of pathways available under traditional Western Desert laws and customs. I do ***not*** consider, contrary to the State's submissions, that there has been any attempt by the applicant to elevate the claimant evidence about the various Tjukurrpa to some kind of independent pathway to acquiring rights and interests in the claim area. The Tjukurrpa is the principal manifestation of the claim group members' rights and interests in the claim area; and a principal manifestation of their contended connection to the area. That is how I have understood the applicant to use the Tjukurrpa. There has been a further issue raised by the applicant, concerning the terms of the description of native title holders in any determination of native title. In summary, the applicant contends for a description which embraces people ***not*** yet born who might acquire rights through pathways other than descent. The State contests the appropriateness of any such terms in any determination. The State proposes, and I understand the applicant to accept, that any such issues can await the Court's decision on the contested matters, and then be dealt with by agreement, or further submissions and determination if need be. In this case, aside from the matters I refer to later in these reasons in terms of how the claim group members' ancestors came to be in the claim area, there were no particular disputes between the parties, nor disputes arising with any other group of people, about who comprised the claim group. Those who claim rights in the claim area identify with one or more of the apical ancestors. However, I should here mention Lenny Ashwin, who was one of Dr Sackett's older informants and who was specified as one of the people who satisfies the criteria necessary to hold rights and interests in the land and waters of the claim area. Lenny Ashwin's mother (Pikuyu, her non-Aboriginal name being Doris) was the sister of Alfie Ashwin, one of the apical ancestors in the claim group. Dr Sackett notes in his report that Lenny Ashwin gave at least two differing accounts of where he was born, one of which was that he was born in the claim area. In final submissions the applicant accepted that, because Lenny Ashwin is now deceased and there are no people who seek to claim rights through him, he should ***not*** be included in any determination. The applicant also seemed to accept that the evidence about Lenny Ashwin having been born in the claim area (which was said by the applicant to be the source of his rights to ***country***) was equivocal.

The composition of the claim group The claim group includes, in no particular order, the following persons who each gave evidence in support of the application: Jennifer Narrier, Keith Narrier, Richard Narrier, Kado Muir, Allan Ashwin, Henry Ashwin, Victor Ashwin, Edwin Beaman, Leroy Beaman, Shirley Wonyabong, June Tullock, Allan James, Brett Lewis, Luxie Hogarth, Geraldine Hogarth, Douglas Bingham and Dallas Harris. My understanding is that each family group within the claim group had one or more family members who gave evidence. Ms Narrier, Mr Keith Narrier, and Mr Richard Narrier are siblings and are descendants of two apical ancestors: Dolly Walker (Pukungka) and Spider Narrier (Nimpurru). Mr Muir is the half-brother of Ms Narrier, Mr Keith Narrier and Mr Richard Narrier, sharing the same mother. He is a descendant of Dolly Walker (Pukungka). Mr Allan Ashwin, his younger brother Mr Henry Ashwin, and Mr Allan Ashwin's son Mr Victor Ashwin are all descendants of Alfie Ashwin. Mr Edwin Beaman and his son Mr Leroy Beaman are descendants of Charlie Beaman (Piman). Ms Wonyabong is a descendent of Trilby (Manyila). Ms Tullock is a descendant of Scotty (Ted) Tullock. Mr Allan James is a descendant of Dempsey James. Mr Brett Lewis is a descendant (by adoption) of Scotty Lewis (Nampu). Ms Geraldine Hogarth is a descendant of Rosie Jones (Tjulyitjutu). Mr Bingham is a descendant of Kathleen Bingham. Ms Harris is a descendant of Jumbo Harris (Tjampula). The applicant's submission, which I accept, is that the claim group members constitute a group capable of recognition under the NT Act because they are all persons who, under Western Desert laws and customs, have rights and responsibilities for the Tjukurrpa of the claim area. The evidence clearly establishes that they recognise each other as members of the group, with rights and interests under traditional laws and customs in all of the claim area, but with differing rights and responsibilities for particular

parts of the claim area. The division of responsibility is in accordance with the pathways mentioned above: namely, birth or long association of the claim group member or their ancestors.

A claim for group native title The applicant identifies the nature of the native title rights claimed as group rights. They submit:A finding of group native title within the broader Western Desert cultural bloc society was made in De Rose v South Australia. The Full Court in De Rose v South Australia (No.2) (2005) 145 FCR 290 at [44] said:" ... the appellants claim to be Nguraritja for the claim area and, by virtue of that status, they have common rights and responsibilities under the laws and customs of the Western Desert Bloc in relation to the claim area (although ***not*** necessarily in relation to precisely the same sites or tracks). Moreover, the appellants claim on behalf of all people who are Nguraritja for the claim area. The composition of that class will vary from time to time depending upon who can satisfy the rules identified by the primary judge for identifying Nguraritja ... On the appellants' case, native title rights and interests over the claim area will ***not*** cease on the death of the last survivor among them."This is consistent with what has been said in a line of cases concerning the nature of a native title claim group under the NTA. In Brown v State of South Australia [2009] FCA 206 at [19] Besanko J said that a native title claim group under the NTA is a group consisting of all the persons who, according to their traditional laws and customs, have the common or group rights or interests comprising the particular native title claimed. At [20] his Honour noted however that: "it may be that a sub-group of a community sharing traditional laws and customs alone possesses rights and interests in a particular area and that sub-group may itself constitute a native title claim group".

The facts and findings in De Rose on this issue were also discussed by Lindgren J in Harrington Smith v Western Australia (No. 9) [2007] FCA 31; 238 ALR 1 at [503] ff. In that case his Honour distinguished De Rose on the facts. At [930] he concluded that there were people outside the various claim groups who had rights and interests within or partly within the various overlapping claim areas, and people within the claim groups who had rights and interests at least partly outside the claim area of their claim group. His Honour said: "The level and form of aggregation has been adventitious, resulting from political affiliations at the times when the respective groups were composed. In the overlap areas, individuals might just as well have been in a different group. Pre-sovereignty laws and customs have ***not*** dictated the existence of the groups or their composition". See also [1154]-[1159].

This claim is clearly distinguishable from Harrington-Smith. It is brought on a similar basis to that in De Rose i.e. on behalf of a group that exists in accordance with traditional law and custom, being all the persons who together have rights and responsibilities in relation to the tjukurrpa of the Claimed Area in accordance with the mechanisms referred to in Applicants SIFC [15(a)]. See Applicants SIFC [15(b), (c)], [31], [32], [36]-[38], [42]-[47], [63]. Those mechanisms include, as a necessary condition, recognition. Thus if it is correct to say that group rights do ***not*** arise directly from the laws and customs of the society but are mediated through the group (cf paragraph 127), then that is satisfied in this case because those members of the native title holding group from time to time are those whose claim to have rights in the Claimed Area through one or more of the possible mechanisms (or pathways) must be recognised by the group as having such rights. That is the case with the claim group referred to in Applicants SIFC [64].

As with De Rose, the claimants do ***not*** claim to be a linguistic or dialect group. Also as with De Rose, the Claimed Area principally comprises pastoral stations which fall within a larger area in which the claimants have rights and interests (see Harrington-Smith (No.9) at [512]). The Applicants do ***not*** understand those matters raise any issue in these proceedings. The State did ***not*** cavil with these propositions and their application to the current proceeding. I accept the applicant's submissions, and proceed on the basis the group has been sufficiently identified.

The claim area boundaries The northern, eastern and southern boundaries are by reference to pastoral lease boundaries and are therefore arbitrary. The western boundary is by reference to two sets of ranges (Montague Range and Booylgoo Range), thus by geographical features, and is explained in the evidence by the claimant witnesses by reference to the outer limits of the ***country*** for which they can speak. Mr Keith Narrier addressed the artificiality of the boundary from the claim group members' perspective, and by particular reference to the Barwidgee area, outside the north-east claim boundary. His evidence is emblematic of why some flexibility needs to

be applied to the evidence (lay and ethnographic) about “areas” and “boundaries”, because lines on maps in the way the NT Act compels them to be drawn do ***not*** reflect traditional understandings, in accordance with Aboriginal laws and customs, of boundaries and, it would appear, particularly ***not*** for Western Desert people. Mr Narrier explained:My father’s ***country*** is all that there now; that Tjiwarl claim. But he was born in Barwidgee. Both sides are special to him, they didn’t have boundaries like this here today; they just travel around up and down like that. I don’t know why they have the boundary like this; that’s Tjiwarl ***country*** they just put it like that. The old people didn’t have this boundary, nup. They still would have went past that boundary, it didn’t make any difference to them, It’s the same today, we don’t have boundaries like this [claim boundary]. Mr Allan Ashwin gave similar evidence, in unequivocal language:We don’t have boundaries, that’s bullshit. ***Country*** is ***country***; you go from one waterhole to the next. Like when people used to go before any stations was there, people would go from water to waterhole, where there is permanent water like a spring.

When it’s a good season they go to all the little rockholes from one claypan to the next. There was no boundaries, they know that they go one side there might be a family group over there; they might make a fire and that other family would make a fire and they would see the smoke and go over. There’s a water hole over there they might go and meet, they know that’s their ***country*** and this is our ***country***, like that.

Sovereignty: dates It is ***not*** in dispute in this proceeding that the date of sovereignty, in relation to Western Australia, is taken to be a reference to 2 May 1829, being the date on which the British government formally took possession of what was then called the Swan River Colony: see Western Australia v Commonwealth [1995] HCA 47; 183 CLR 373 (Native Title Act Case) at 424. The parties, and in particular the State, also accept that there were no Europeans in the claim area, or regions around it, until the late 1800s. The State accepts that the group of Aboriginal people who were in occupation of the claim area in the late 1800s were the same group of people (or their descendants) as those who were in occupation at sovereignty in 1829. As I have already noted, the State also accepts that the same group of Aboriginal people remained in occupation of the claim area into the early 1900s, until around 1912. In final submissions, counsel for the State accepted the proposition that, whichever Aboriginal people were occupying the claim area in around 1912 (at the time Daisy Bates conducted her research, including speaking to some informants who told her about the situation in areas covered by the claim area), were likely to have been the same people who occupied the claim area at sovereignty. The State’s thesis is that those original occupants left or died out and the claim group members’ ancestors moved in from about the 1920s onwards (but mostly between the 1930s and the 1950s) introducing their own Tjukurrpa to the ***country***, and that is what was passed on thereafter.

History of non-Aboriginal presence in the claim area

Early contact with non-Aboriginal people There is no historical record of non-Aboriginal people being present in the claim area before the second half of the nineteenth century. Non-Aboriginal people moved occasionally through the claim area in the second half of the nineteenth century. In 1869, John Forrest’s party passed through the claim area, naming Depot Springs, Mount Leonora and other geographic features, as well as commenting on encounters with Aboriginal residents. In 1892, the Elder Scientific Exploring Expedition crossed part of the claim area. From 1892, David Carnegie prospected in and around Coolgardie and, in 1895, moved to the Lawlers and Lake Darlot areas. He later described the mining camps already established there. Carnegie also wrote of the involvement of Aboriginal people in prospecting expeditions:A good many prospectors, depending on their black-boys almost entirely, wander from one range of hills to another, dodge here and there for water, keep no count or reckoning, and only return by the help of their guide when the “tucker-bags” are empty ...

(Footnotes omitted.) In 1896, Lawrence Wells passed through the Lake Way area with the Calvert exploration party. May Vivienne travelled through the claim area from 1899 and later wrote and published a book about her experiences. H.G.B. Mason, a surveyor, travelled through the Sandstone region and the western part of the claim area in 1900. As well as Daisy Bates, the anthropologists Norman Tindale, Jud Epling and J Birdsell all spent time in the claim area on expeditions during the 1920s and 1930s.

Early mineral discoveries The early 1890s, when gold was discovered in the area, was the beginning of a more consistent non-Aboriginal presence in the claim area. By 1892, approximately 3,000 prospectors were arriving in

Western Australia each month, most of them streaming out to the Eastern Goldfields and Murchison Goldfields. Gold was discovered in or near the claim area:(a) at Leinster in 1892;

(b) at Lawlers in 1894;

(c) at Leonora in 1894;

(d) at Sir Samuel in 1895;

(e) near Wiluna (at Lake Way) in 1896;

(f) at Kathleen Valley in 1897;

(g) at Sandstone in the early 1900s; and

(h) at Vivien in the early 1900s.

Non-Aboriginal settlements As a result of the discovery of gold, more permanent settlements arose across the claim area from the mid-1890s. The claim area overlapped the East Murchison Goldfield, which was proclaimed in May 1895. Within 12 months, there had been 200 gold-mining leases taken up and Lawler's Patch (Lawlers) had been chosen as the centre of the district. By 1896, gold was also being sought at reefing centres including Lake Darlot, Lake Way and Mount Sir Samuel. From 1895, railway lines were extended from Cue to Mullewa to shorten the distance for carting goods, water and mail, which came across from the Murchison Goldfields district to the west (rather than from the Kalgoorlie area). Town sites were gazetted at:(a) Lawlers in 1896;

(b) Sir Samuel in 1897;

(c) Leonora in 1898;

(d) Wiluna in 1898;

(e) Kathleen (formerly Kathleen Valley) in 1900;

(f) Vivien in 1906;

(g) Sandstone in 1906; and

(h) Leinster in 1981 (although workings developed in the area in 1899-1900 and significant production of gold occurred between 1900 and 1906). By 1900, the population of the East Murchison Goldfield was 1,209. A railway link from Leonora to Kalgoorlie opened in 1902. A weekly mail service operated from Mount Magnet to the East Murchison Goldfield by 1903. Western Australia's gold production peaked in 1902 and was in decline until 1930, when production began to increase again.

Pastoral activity in the area Pastoral interest in the claim area grew after the initial peak of gold production had passed (that is, from around the start of the twentieth century). By 1903, the East Murchison area was described as a "promising pastoral district", with The West Australian reporting: "Nearly the whole of the ***country*** around Lake Darlot and Sir Samuel has been taken up in leases, and stocking operations are in progress". By 1928, pastoral operations were well established in the Goldfields from Sir Samuel to Wiluna, including: Lake Violet, Yakabindie, Vandal, Munroe, Mount Grey, Banjewarn, Bandya, Depot Springs, Mount Keith, Albion Downs, Lake Way, and Abercrombie Well.

Aboriginal employment in the pastoral industry Aboriginal people were employed on pastoral leases in the claim area throughout the twentieth century. In 1909, Keyser reported that Aboriginal people were working on a station near Lake Darlot. Aboriginal people "also gave a hand at various times" on Yeelirrie Station in the 1920s.

Government authorities Government authorities such as the Protector of Aborigines operated in the claim area from the early twentieth century. C.A. Bailey inspected the claim area in 1896-1897 in order to provide a report for the Aborigines Protection Board. Travelling inspectors visited the claim area throughout the early twentieth century on behalf of the Protector of Aborigines, reporting on the conditions of Aboriginal residents. In the early twentieth century, rationing for Aboriginal residents was provided at various locations in and around the claim area, including Lawlers and Wiluna.
Other authorities Aboriginal people also encountered other authorities in the claim area over time. Aboriginal people were utilised as trackers or assistants by the Western Australia Police throughout the late nineteenth and early twentieth centuries. A tracker was requested for Lawlers Police Station in 1926. In 1955, the Wiluna Mission was established by the Western Conference of the Seventh Day Adventist Church. The mission also operated a kindergarten and a primary school and sought to arrange station employment for a number of older children in the wider adjoining area. Several hundred Aboriginal families attended the mission in the years of operation, through to 1975. The Wiluna mission became the Nganganawili Village in 1983.

THE COURSE OF THE TRIAL The trial was divided into two parts: an on ***country*** hearing dealing with connection issues and a further hearing in Perth dealing with expert evidence and extinguishment issues. Final submissions were also taken in Perth.

Connection hearing in July 2015 The connection hearing was held at a number of locations throughout the claim area. When ***not*** travelling, the Court convened in Leinster. The Court convened exclusively at Leinster on the final two days of the hearing and also on the fifth day of the hearing.
Day one: 27 July 2015
Henry's Well/Ngarlpurti After the parties' opening submissions, the Court travelled to the site of Ngarlpurti, also known as Henry's Well. Ngarlpurti is associated with the Two Carpet Snakes Tjukurrpa and also with the Dragonfly Man Tjukurrpa. A chain fence cordons off two small rock holes which form part of these Tjukurrpa. The remains of a concrete water tank and a windmill also lay at this site. Ms Wonyabong and Mr Muir gave some of their evidence at Ngarlpurti.

Townsend Well/Tjumpurka (view only) The Court attended Tjumpurka for a view of the site only. The site, which was under water at the time of the on ***country*** hearing, is also associated with the Two Carpet Snakes and Dragonfly Man Tjukurrpa. No evidence was given at this site.
Lake Miranda/Yulkapa In the afternoon of the first day of the hearing, the Court attended Yulkapa, a red sand hill located inland from the banks of Lake Miranda. Yulkapa is also associated with the Two Carpet Snakes and Dragonfly Man Tjukurrpa. Ms Wonyabong, Mr Muir and Mr Leroy Beaman gave evidence at Yulkapa.
Day two: 28 July 2015

Yakabindie Claypan/Yakamuntu On the second day of the hearing, the Court attended Yakamuntu, a large claypan located on Yakabindie Station. Yakamuntu, which was underwater at the time of the on ***country*** hearing, forms part of the Two Carpet Snakes and Dragonfly Man Tjukurrpa. Both Ms Wonyabong and Mr Muir gave evidence at this site.
Jones Creek/Ngurlu Wiriwiri After attending the Yakabindie claypan, the Court drove to Ngurlu Wiriwiri, also known as Jones Creek. Ms Tullock gave evidence at this site, including that her father was born at Jones Creek, although she was unable to recognise the crossing the Court attended.
Mail Change Well/Tjilpur The Court then attended Tjilpur, which is also known as Mail Change Well. This site is also associated with the Two Carpet Snakes and Dragonfly Man Tjukurrpa. Mr Muir was the only witness to give evidence at this site.
Logan Spring/Tjiwarl/Tjiwarl Rock and Tjiwarl Soak On the afternoon of the second day the Court attended Tjiwarl, also known as Logan Spring. Tjiwarl, which means "shining", is the site from which the claim area takes its name. A large gum tree stands at the base of a natural spring. A rock at the base of the spring is carved with the date "1920". A large rock face is located adjacent to Tjiwarl. Tjiwarl is also associated with the Two Carpet Snakes and Dragonfly Man Tjukurrpa. Ms Wonyabong, Mr Muir and Mr James gave evidence at Tjiwarl.
Day three: 29 July 2015
Palm Sping/Pii On the third day of the hearing, the Court travelled to Pii (also known as Palm Spring), a natural spring surrounded by palm trees. The area is also associated with the Two Carpet Snakes and Dragonfly Man

Tjukurrpa. The Court was welcomed by Mr Muir and several other male claim group members to the area. Strangers to the area were invited to cleanse themselves with water from the natural spring. Ms Wonyabong and Mr Muir gave evidence at this site, including on the relationship of this site to the Two Carpet Snakes and Dragonfly Man Tjukurrpa.

Yakabindie Homestead On the afternoon of the third day of the hearing, the Court convened in the grounds of the Yakabindie Homestead. Ms Wonyabong and Ms Tullock completed their evidence at the Yakabindie Homestead. Yakabindie Station and the Yakabindie Homestead are important areas for many of the individuals who gave evidence at the hearing.

Day four: 30 July 2015

Pulyku Quarry The Court commenced the fourth day of the hearing at the Pulyku Quarry. The Pulyku Quarry is covered by shale rock and quartz. Mr Lewis gave evidence at the Pulyku Quarry. A mound above the quarry provided a vantage point.

The Lady The Court later attended a site known as The Lady. The site is named after a rock formation that resembles the profile of a female face. The Court convened at the top of a large rocky outcrop. Mr Lewis gave both non-restricted and male gender restricted evidence at The Lady.

Booylgoo Range/Pulyku The final stop on the fourth day of the hearing was at Booylgoo Range, also known as Terracotta or Pulyku. The low mountain range is associated with the wild potato Tjukurrpa. Ms Narrier, whose totem is the wild potato, gave evidence at the site. Ms Narrier demonstrated how a wild potato can be found and showed the Court that vines entangled in trees and shrubbery indicate the presence of wild potatoes in the earth below.

Day five: 31 July 2015 The fifth day of the hearing was held at the Leinster Tavern.

Day six: 2 August 2015

Mount Townsend and Mount Marion On the sixth day of the hearing, the Court convened at a location close to both Mount Townsend and Mount Marion on the Sandstone-Wiluna Road. On the way to the location, the Court stopped at a rock hole on Yeelirrie Station Homestead. The area is associated with a Tjukurrpa story restricted to initiated men. Mr Allan Ashwin and Mr Victor Ashwin gave unrestricted evidence before the luncheon adjournment. Following their evidence, a kangaroo was slaughtered and prepared in the traditional way by an initiated male member of the claim group. Mr Allan Ashwin and Mr Bradley Wongawol showed the Court the traditional method of butchering and cooking the animal. Following the demonstration, the Court travelled further along the Sandstone-Wiluna Road where Mr Allan Ashwin, Mr Victor Ashwin and Mr Keith Narrier gave male gender restricted group evidence. Mr Richard Narrier and Mr Henry Ashwin were also present, as was Dr Sackett. Following the restricted evidence, the Court shared in eating the kangaroo that had been prepared and cooked in the traditional way, along with damper cooked by claim group members.

Day seven: 3 August 2015

Leinster Soak/Warkarra and hearing venue The seventh day of the hearing commenced at Leinster Soak, also known as Warkarra. Members of the claim group welcomed the Court to the area through song. A hole was then dug out of the earth. Shortly after the hole was dug out, water rose up from underneath the ground, filling the hole with water. The Court then walked to the top of a rocky outcrop to view the surrounding area. The Court then convened back at the hearing venue, where Ms Luxie Hogarth, Ms Geraldine Hogarth and Ms Harris gave evidence.

Day eight: 4 August 2015 and day nine: 5 August 2015 The eighth and ninth days were held at the hearing venue at the Leinster Tavern.

Further tranches of the proceeding held in Perth

Expert and extinguishment evidence: 27-29 October 2015 There was a further tranche of the proceeding held in Perth over three days in October 2015, during which Dr Clendon gave expert linguistic evidence, the parties discussed and, in the case of the first respondent, led evidence in relation to extinguishment issues, and the two principal experts who prepared reports for the Court in this matter (Dr Sackett and Dr Brunton) participated in a concurrent expert evidence session.

Final submissions: 8-10 December 2015 Final submissions were heard in Perth from 8-10 December 2015.

CLAIMANT WITNESSES

My approach to the claimant evidence There is no suggestion that any claimant witness in this proceeding was doing anything but their best to give accurate and reliable evidence. As the applicant's submissions point out, there was no real challenge in cross-examination to the credibility of the claimant evidence. There were, however, points

of detail which were challenged as to accuracy; where those are significant, I examine them elsewhere in these reasons. Some witnesses may have been more forthcoming than others. Some might be said to have more direct sources. Some might be said to have given more of a contemporary flavour to their evidence: this factor might mean that some witnesses' evidence has more relevance to historical issues of connection, and other witnesses' evidence has more weight in relation to continuity. Overall, I found the claimant witnesses to be persuasive. I say more about each witness below. However, there are some propositions fundamental to my approach to what the claimant witnesses have said in this proceeding which I should make clear. In the absence of any challenges to credibility, I have taken what the claimant witnesses have said about their family history and their connection to ***country*** as their true understanding. That is in the context of a culture where identification with ***country***, rights to ***country*** and entitlement to speak for and protect ***country*** are paramount. I do ***not*** accept that the claim group members and their ancestors have somehow invaded or usurped the claim area and purport to speak for it without genuine belief that they, and their ancestors, have authority to do so. Acceptance of the State's case involves accepting that the grandparent generation of the claim group were purporting to do something they were ***not*** entitled to do: that is, to speak for ***country*** with which they had no traditional connection through laws and customs. It seems to me it also involves accepting that they knew they had no such authority. There is no basis to find that is what they were doing. In a different context under cross-examination, Dr Clendon made a similar point in relation to Bates' informants:I mean, what you're saying is certainly possible, but if people are coming out reporting to Daisy Bates that they are from a particular place and they speak a particular language, it's likely that they were from that place and they did speak that – that language. An approach of this kind was taken by Selway J in Gumana v Northern Territory of Australia [2005] FCA 50; 141 FCR 457, where his Honour said, in the context of the issue of exclusive possession raised for decision in that case (at [208]):But on the ultimate question was [sic] whether there was a right of exclusive possession, there was no dispute that the clans had a right of exclusive possession to their ***country*** which right was subject to various rights in others — all witnesses were relevantly in agreement as to that fact. Undoubtedly it is possible for a court to reject all of the evidence before it on the basis that none of it is creditable. But in this case there has ***not*** been any submission that the witnesses were ***not*** telling the truth. If the persons who know the relevant Aboriginal tradition give evidence to the Court that it consists of a right to exclude, then save for issues of credit or misunderstanding I can think of no reason why I should ***not*** accept their evidence. In this section, I set out my impressions of each claimant witness, the witness's family connections, and a brief summary of the witness's evidence. The findings I make about family connections are based on the claimant evidence and the genealogies that were prepared by Dr Sackett and tendered by the applicant. The State did ***not*** object to the accuracy of those genealogies. In some circumstances, I also rely on Dr Sackett's reports, and his opinions about various family connections. One purpose of considering the family history and connections of the claimant witnesses is to inform the Court's findings concerning which, if any, Aboriginal people occupied the claim area at approximately 1912. It will be recalled that the agreed position in the parties' submissions is that the Aboriginal people who occupied the claim area at approximately 1912 can be taken to be the same people, or descendants of the same people, who occupied the claim area in 1829, at sovereignty, and in the 1890s, when non-Indigenous people first made contact with Aboriginal people in this part of Western Australia. The issue of which, if any, Aboriginal people occupied the claim area in approximately 1912 is critical to the determination of a number of the factual issues in this case. It assists in the determination of the State's "migration" thesis. It assists in determining whether the Ngaiawonga were a separate people and whether (as the State contends in a reasonably absolute way) they died out or moved away from the claim area soon after 1912. It assists in determining how long the traditional laws and customs about which the claimant witnesses gave evidence have connected the claim group members and their ancestors to the ***country*** in the claim area. It also assists in evaluating the weight that should be given to historical ethnographic material, such as that prepared by Daisy Bates, and to other ethnographic and anthropological material. Finally, it assists in determining the appropriate context for the consideration of the anthropological opinions expressed in this proceeding. The artificiality of the claim boundaries, as I have noted above, should be borne in mind. When claimant witnesses describe ancestral connection to ***country***, it would be unreasonable to expect them to do so by reference to European boundaries. A good example of the claimant witnesses affirming the artificiality of the claim boundaries is the following evidence of Mr Keith Narrier (in speaking about his father's birth at Barwidgee):The old people didn't have this boundary, nup. They still would have went past that boundary, it didn't make any difference to them[.] The preponderance of evidence about where ancestors and family members were born is also important. In his first report, Dr Sackett said (at [48]):... the named apicals and/or their ancestors were said to have been born either on the claim area itself or in areas to the

northeast, east or southeast of it. None of the named apicals or their ancestors were recorded as having been born in, or having associations with, lands to the west of the claim area. This is consistent with much of the claimant evidence, some of which I have reproduced elsewhere. A further example is the evidence of Mr Richard Narrier about people from the claim area and the Darlot/Weebo area all being "one mob", and recounting how his grandfather used to walk between Mungkali (also spelled "Mangkali"), Barwidgee, Weebo, Darlot and the claim area. These are long distances. In a similar way, when Mr Allan Ashwin spoke about meetings between people from the claim area and people to the east at law grounds, he indicated that this kind of interaction had been going on for a long time, observing that he was in his sixties and "it was well before [him] that they were going to those places". The State's approach would require me to find Mr Ashwin's evidence was wholly mistaken, and I do ***not*** consider it is. The State does ***not*** dispute that the claim group members and their ancestors are Western Desert people. I consider this fact is ***not*** insignificant in assessing what conclusions can be drawn from the claimant witnesses' accounts of these movements from the north and the east into the claim area. It is consistent with the hypothesis that the claim area is Western Desert ***country***. It seems inherently unlikely that Western Desert people would feel entitled to move into non-Western Desert ***country*** in times when Aboriginal people were still living largely traditional lives. This might well explain why there is no substantive evidence of the movement of people from the west into the claim area: that is, because that would have involved movement of Aboriginal people belonging to one society into the ***country*** of a different society. Finally, I note the terms of a submission made by the State in relation to the apical ancestor Jumbo Harris, whom I discuss below. The State's submission is:The evidence of Jumbo's association with the Claimed Area is of occasional travel through it en route from Leonora to Wiluna. The evidence is that he never resided in the Claimed Area. The evidence is clear that Jumbo was primarily associated with the Thurraguddy area.

(Emphasis added; footnote omitted.) In my opinion, a focus on "residence" – putting to one side how easily or uneasily that sits with evidence about traditional Aboriginal ways of life in these areas – distracts from the approach required by the NT Act. The Act requires assessment of whether a person or group holds rights or interests in accordance with traditional laws and customs over the subject land. It does ***not*** ask whether a person "resided" on the land. The distances covered by people, at least until the early twentieth century, are also relevant to assessing whether the claim area was Western Desert ***country***, and more particularly how and why the claim group members' ancestors moved into it. Ms Harris gave some helpful and reliable evidence on this issue:My dad and his brothers were born in different places. Uncle Les was born in Darlot, Uncle Dan was born in Laverton, near Mia Mia somewhere. Uncle Arnold was born out in the bush, between Thurragaddy and Mulga Queen. They were born in such different places because my grandparents, Jumbo and Bella, travelled around a lot for law business, and moving with the seasons, for hunting and gathering food. Mulga Queen would be half way for the law business for old peoples. So if they were coming from other side of Tjukarli, they would walk, camp at Mulga Queen and do their law practice. Then people would walk on to Wiluna. In those days it would take 3 to 6 months. There was no horse and cart, they had to walk the distance. My mum and my old aunties told me about that. These are very long distances. The distance between Tjukarli and Mulga Queen is approximately 385 km as the crow flies. The distance between Mulga Queen and Wiluna is approximately 190 km as the crow flies.

Shirley Wonyabong Ms Wonyabong was a somewhat shy and softly spoken witness, but her evidence was very clear, including in cross-examination. She was clear about what she did and did ***not*** know and what she could and could ***not*** speak about. She sometimes appeared to know much more than she was willing to say. As she gave evidence over a series of days and site visits, her confidence and comfort with the process appeared to increase, which resulted in her volunteering a little more by way of evidence. She knew her ***country*** and its Tjukurrpa well, but did ***not*** necessarily have a deep knowledge of other customs. For example, she did ***not*** follow the 'skin system'. I accept her evidence that her knowledge was based on what she had learned from, and been told by, her family. Although it is clear she also learned some information from station owners, in my opinion the connections to her ***country*** were forged when she was very young and included receiving knowledge about her ***country*** from family members who were consciously passing that knowledge to her. For example, her witness statement included the following passages:My dad told me that Yeelirrie and Albion Downs was my ***country***, our ***country***. I get my ***country*** through my mother Trilby, and through my father, but more from my mother. My connection to the ***country***

around Wiluna is through my father. Only some of your family tree got to be from the ***country***. You can claim both sides of your family.

...

My father used to talk to me about the Wangkalara hill near Albion Downs and he talked to me about Palm Springs. He learned about it because he was a man, and all the old mens knew. The old men know the dreamtime stories. They never told me where they learned the stories; they just told me that they knew it from a long time.

In oral evidence, she also indicated that traditional knowledge about a "small soak" had been given to her by "Aunt Angeline and my father" and that "[a] lot of old people", including her aunt Doris Fahey, had told her that her cousin Scotty Tullock had been born at Jones Creek, in the claim area.

Family connections Ms Wonyabong said her father, Micky Wonyabong, was born "somewhere north of Granite Peak station", on the Canning Stock Route north of Wiluna. Her source for that information was family research papers. That location is a fair way north, and a little east, of the claim area. According to Dr Sackett, Micky Wonyabong was born in 1898 and died in 1973. Dr Sackett also noted that he came from the area of the Birriliburu native title consent determination (see Patch on behalf of the Birriliburu People v Western Australia [2008] FCA 944 (Birriliburu); see also BP (Deceased) on behalf of the Birriliburu People v Western Australia [2016] FCA 671), which on the evidence is a determination over an area to the north-east of the Wiluna determination (see WF (Deceased) on behalf of the Wiluna People v Western Australia [2013] FCA 755 (Wiluna)). Ms Wonyabong's mother, whose name was Trilby or Manyila, was born in a shearing shed on Barwidgee station. That appears to be just outside the north-eastern part of the claim boundary, but as the northern and eastern boundaries of the claim area are artificial boundaries I do ***not*** consider that Trilby being born there is material to the issues in this proceeding. The position would be no different if she had been born a few kilometres south-west inside the artificial boundary of the claim area. Earlier ethnographers referred to by Dr Sackett described Trilby as a Tjupan woman from around Wongawol. Relying on these sources, Dr Brunton in his supplementary report expresses a view that Trilby was born in Wongawol. However, I prefer Ms Wonyabong's own evidence about where her mother was from: namely, that she was born on Barwidgee station. It is unclear where the "Tjupan" label came from, or who first attached it. Ms Wonyabong did recount that her mother's parents came into Barwidgee from Wongawol, and she relates this to violence against Aboriginal people by a pastoralist named Tommy Mellon that occurred around Wongawol. While Ms Wonyabong could ***not*** give an approximate date on which her grandparents moved from Wongawol, other evidence (including the oral evidence of Mr James and an opinion of Dr Sackett) indicates that the violence to which she referred took place in the early 1930s. Ms Wonyabong claims through her mother's side. She herself was born in either Wiluna or Meekatharra, but she explained that, unlike when a person is born on ***country***, being born in a town "doesn't make that place your ***country***" and instead "[your] place is where [your] mother and father are from". Her evidence was that, at the time she was born, her parents were living on Yeelirrie station in the claim area, where she was conceived. Hence she could "talk for Yeelirrie", as well as other places in the claim area. Her cousin, Harvey Scadden, was born on Barwidgee station, and his mother (Ms Wonyabong's mother's sister) lived in Yeelirrie and Yakabindie in the 1940s. Ms Wonyabong gave evidence that her parents met at Yakabindie in about 1942 and travelled together to Yeelirrie in 1942 or 1943. Ms Wonyabong was born in 1949. She has one sister, Lizzie, who is about the same age as her. If Trilby was in her mid-twenties or so when she had her two daughters, that would mean Trilby was born in the early to mid-1920s. Recalling that Ms Wonyabong's father was born, according to Sackett, in 1898, this might mean her mother was considerably younger than her father. However, Ms Wonyabong's evidence was also that, at some stage prior to meeting her father, her mother lived with a non-Indigenous man on Banya station, closer to Darlot and near Mulga Queen. Her mother was looking after Harvey Scadden at that time. This might indicate that her mother was born earlier, perhaps in the first decade of the twentieth century, and was somewhat older when she gave birth to Ms Wonyabong and Lizzie. The evidence is inconclusive on this matter. If Ms Wonyabong's mother was born on Barwidgee station, this seems to me to be close enough to the claim area (on the evidence, about 9 km as the crow flies) that it is appropriate to describe her mother as "from around" the claim area, recalling that birth on ***country*** is one of the pathways to rights and interests in ***country*** (and bearing in mind the State does ***not*** dispute that Ms Wonyabong's family are Western Desert people). Ms Wonyabong's evidence was that she could speak for certain areas in the north-east of the claim area.

Her mother may have been born in the area only 8-10 years after Bates was interviewing those who identified to her as “Ngaiawonga”.

Kado Muir Mr Muir was a confident and articulate witness. Like Ms Wonyabong, he gave evidence at several different sites and took the Court walking around several sites, including Tjiwarl (also known as Logan Spring). At Pii (also known as Palm Spring) he and several other younger men conducted a ritual which he said was necessary to “greet” the water snake that lived in the spring, and to avoid the visitors being harmed. When asked about this ritual and why it needed to be performed at this site, while no rituals had been required at Tjiwarl, I found his explanations lacked depth. At times, I found it difficult to determine whether Mr Muir’s knowledge had been gained through his own studies and reading or through the handing down of knowledge in traditional ways. That is ***not*** to diminish the breadth of his knowledge and his genuine desire to be as well-informed as he can about his culture and about the ***country*** to which he has a connection. Nor is it to doubt the sincerity of the connection he feels to the claim area. What I found difficult to ascertain, however, was whether Mr Muir’s knowledge was gained in traditional ways and can properly be described as knowledge of laws and customs which have been continuously practiced in the claim area since sovereignty. My impression was that he possessed a hybrid of knowledge: part gained in traditional ways and part gained by other means. That may explain, for example, why his account of the skin system differed from others. It may also explain why aspects of what he said about the Tjukurrpa differed from other accounts. I do ***not*** mean this as a criticism of Mr Muir, and certainly I do ***not*** question his genuine commitment to his people and his community. However my uncertainty about the sources of his knowledge has led me to place less weight on some of his evidence.

Keith Narrier Mr Keith Narrier was obviously uncomfortable about the process of revealing to a woman matters which are usually kept only between wati. To begin with, he simply listened, but as the evidence continued he began to interject more – sometimes to supplement or explain what was being said, sometimes to correct. On one occasion he interjected to stop Mr Victor Ashwin, clearly being of the view that Mr Ashwin had gone far enough in what he said. This was, it seems to me, a living application of traditional law: the enforcing of limits set by traditional law to ensure that normative rules about who can possess certain knowledge are preserved, even in the face of the competing imperative to prove connection to ***country***. Mr Narrier was the oldest wati to give evidence. Although I cannot reveal in these reasons the content of what he said during the restricted session, it was clear to me from what he said that his knowledge about the connection of the generation before his with the ***country*** in the claim area was direct and reliable. It was also clear that, ***not*** only had he been taught the laws and customs he described, he lived by them and saw the world through them. In his open evidence, Mr Narrier was also ***not*** especially forthcoming. However, I formed a positive impression of him during the restricted session and I am prepared to give weight to his written statement, especially given his recognised seniority within the claim group.

Jennifer Narrier Ms Narrier gave some brief evidence at Booylgoo Range about the Tjukurrpa associated with that site and about the bush potatoes found there, the bush potato being Ms Narrier’s totem. She also gave evidence about how the bush potato became her granddaughter’s totem as well. Ms Narrier gave evidence that Booylgoo Range was her Dreaming. She stated that the story for that ***country*** comes from the Tjukurrpa and was told to her by her mother. I extract some of her evidence about the connection between the Tjukurrpa and the landscape of this ***country*** below at [706]. She was clearly a knowledgeable person and well-respected by others in her community. Her answers in cross-examination about what would happen to Aboriginal people from other areas who came to Booylgoo Range were telling: she laughed and was clearly puzzled by the question, ***not*** understanding how it could be asked. She replied that they would ***not*** come to this place without someone like her, as if the question was ridiculous. It was a telling example of the gulf between the way Aboriginal laws and customs work and the way non-Aboriginal people view the land and entry onto it. Her evidence on ***country*** was given confidently and with authority. The contrast when she came to give the remainder of her evidence in Leinster the next day was, in my opinion, a paradigm example of why it is so important in native title proceedings to allow Aboriginal and Torres Strait Islander people to give evidence on ***country*** rather than in a courtroom setting. Despite having her granddaughter seated next to her, it was apparent Ms Narrier felt very uncomfortable speaking in a more formal setting, with a considerable number of lawyers seated around her and a formal assembly of people in a public gallery. Although the same number of people (and indeed, for the most part, the very same people) had been in attendance when she gave her evidence on ***country***, her demeanour was quite different. She spoke so softly it was

difficult to hear, her answers were short, and she had lost the expansiveness she exhibited the day before. There were many questions she was clearly unwilling to answer at all and sometimes she did little more than shake her head. Counsel for the State presented her with several written documents which seemed to confuse her, such was her state of nervousness. I mean no criticism of the State's counsel but use this as an example of Ms Narrier's very different demeanour in unfamiliar and challenging surroundings. While Ms Narrier had clearly gone through her written statement with great care, it was also apparent that, even for her as a senior woman, there was a tremendous gulf between what she was prepared to say in writing – which would be shown to the Court and to other lawyers but otherwise ***not*** publicly broadcast – and what she was prepared to say orally, for all to hear. Again, this indicates the difficulties in asking Aboriginal and Torres Strait Islander people, in particular those whose adherence to traditional customs is apparent, to behave in ways which are culturally foreign to them. Having seen her the day before, I have no hesitation in accepting the evidence in her written statement, although if she had only given evidence in the courtroom setting one could see how a judge might, quite wrongly, find her a less than impressive witness and be prepared to discount the weight of her evidence. That would have been, in my opinion, a grievous misreading of its importance, entirely due to the foreign setting in which she was required to speak.

Richard Narrier Mr Richard Narrier remained relatively quiet during the restricted evidence session and he was ***not*** forthcoming during his open session evidence either. I was ***not*** able to form much of an impression of him. I am satisfied his witness statement is reliable, but little was added through his oral evidence.

Family connections: Kado Muir, Keith Narrier, Jennifer Narrier and Richard Narrier I place these claimant witnesses together because they share the same mother: Dolly Walker, also known as Pukungka, who is a named apical ancestor. The father of Mr Keith, Mr Richard and Ms Jennifer Narrier (with their other full siblings, Roslyn and Graham, who did ***not*** give evidence) was Frank Narrier and his father was Spider Narrier, also known as Nimpirru. Spider Narrier is a named apical ancestor. Mr Muir's father is a non-Indigenous man (although Mr Muir gave evidence that his father had been initiated and taught traditional knowledge) and so his claim is through his mother. Mr Keith Narrier is the eldest of all his siblings. He gave evidence that his father, Frank Narrier, was from around Wiluna and was born at Barwidgee. I take that to mean the area of Barwidgee station, rather than the dot on the map representing the homestead. Frank Narrier was one of Mr Liberman's informants for his Yeelirrie Uranium Project report, written in the 1970s, and Mr Liberman records Frank Narrier's place of birth as Barwidgee and his approximate age – in 1976 – as 45 years. Mr Keith Narrier's grandfather, Spider Narrier, came from around Wongawol, although Mr Narrier's evidence was that he had "been around this [Tjiwarl claim] area a lot". Mr Richard Narrier's evidence about his grandfather, Spider Narrier (whom he never met), was that he was from "around Mungkali", quite a long way north-east of the claim area, but that he used to "walk around Mungkali, Barwidgee, Weebo and Darlot and all this ***country*** [in the claim area] too". Mr Keith Narrier's description of Spider Narrier's movements was slightly different and included his father and grandfather doing "a lot [of] jobs" around Yeelirrie, then going to Sandstone, back to Albion Downs and back to Barwidgee. His father and grandfather are buried at Barwidgee and he characterised the area around Barwidgee as his father and grandfather's ***country***. It is therefore clear that, in Mr Narrier's mind, Barwidgee is, in addition to the claim area, part of his father's and grandfather's ***country***. Contrary to the State's submissions, I do ***not*** understand his evidence to be drawing some kind of demarcation between the area around Barwidgee and the claim area. I have no evidence regarding why the area around Barwidgee was ***not*** included in this claim, but I am ***not*** prepared to infer it was because the claimant group members disavow it as part of their ancestors' ***country***. Dolly Walker was born at Skull Creek. The exact location of Skull Creek is ***not*** revealed by the evidence, although, from the claimant evidence, it appears to be near the town of Laverton. Laverton is, as the crow flies and based on the scales on the maps in evidence, about 180 km south-east of the southern end of the claim boundary. Mr Keith Narrier was born in August 1951. He did ***not*** know when either of his parents were born, nor did he give evidence about how old either of them were when he was born, but his date of birth would place his grandparents as the generation who were occupying, or who moved into, the claim area in the first or second decade of the twentieth century. Mr Keith Narrier claims through both his father and his mother, although, as the State correctly submits, his evidence was that his mother's claim was through her husband rather than in her own right. However, he also seemed to consider his mother's ***country*** to be south-east of the claim area, around Leonora and Laverton. This is somewhat contrary to the evidence of Mr Muir, who claims through Dolly Walker and whose evidence is that she had rights and interests in the claim area in accordance with traditional laws and customs. Further, as the State submits, while Mr Keith Narrier's evidence was that a woman

could obtain rights to ***country*** through marriage if the marriage lasted "a long time", Mr Allan Ashwin indicated in his evidence that his wife "***can't*** claim this ***country***" because she is ***not*** from the claim area. Ms Narrier was ***not*** able to add much to the picture about her parents and paternal grandparents. She was born in 1957 and so is younger than Mr Keith and Mr Richard Narrier (Mr Richard Narrier having been born in 1954). She deferred in her evidence to Mr Keith Narrier's knowledge about her grandparents. Her evidence was that her parents "must have been from this way, from the desert round Wongawol and Carnegie", although she recalled that her mother was born in Skull Creek around Laverton. Ms Narrier places her mother's ***country*** as around Albion Downs and Mount Keith, which are in the north-east corner of the claim area. She also stated that Yakabindie and Yeelirrie were part of her mother's ngurra (home), but the basis on which she did so was unclear. Her evidence was that this was the area her mother "felt ... was mostly her ***country***". Ms Narrier said her mother's mother had a nickname of "Hairpin" and her mother's father was called Pinika, but that is all she knows of them. Like Mr Keith Narrier, she claims through both her father and her mother. Consistently with the evidence of Mr Muir, it is Dolly Walker who Ms Narrier says taught her the most about her ***country***. Her evidence is that Dolly Walker learned those places from her own mother, although she was ***not*** able to give any more detailed evidence about her maternal grandmother. Mr Muir did give a little more evidence about his maternal grandmother. His evidence was that she had moved into the Darlot area from the Mangkali area in the 1940s. He explained this by saying she was a "giveaway [wife]" to one of the Darlot elders. Mr Muir gave evidence that his grandmother had lived in Yeelirrie, Darlot, Weebo, Albion Downs, Yakabindie, Agnew, Leinster and "eventually" in an area towards Meekatharra. She was born in the early 1900s, "if ***not*** before then", and died as an old woman in the 1960s.

Leroy Beaman Mr Leroy Beaman was born in 1989. He gave evidence on two occasions. On the second occasion, he seemed more comfortable, giving his evidence with a degree of maturity beyond his years. Nevertheless, there were times he appeared uncertain. For example, when asked about skin systems he seemed somewhat unsure of the rules governing whether a person would take the same skin as one of their parents, or a different skin. When asked about his daughter's skin, the following exchange occurred:MR RANSON: ... And you've got a daughter, I think, who's got a skin, as well? And which one is she? What skin has she got?

LEROY BEAMAN: She got milangka.

MR RANSON: Panaka [sic]. And how does she get that - - -

MR WRIGHT: I think – sorry. Your Honour, I heard the witness differently.

LEROY BEAMAN: Mm?

MR WRIGHT: Sorry. Which one is she?

HER HONOUR: Just say your answer again - - -

MR RANSON: Sorry, your Honour.

HER HONOUR: - - - that was given.

LEROY BEAMAN: Oh, my daughter's purungu.

MR RANSON: Oh, purungu. Okay.

LEROY BEAMAN: I think.

MR RANSON: I – the reason I thought you said panaka – and I – is in paragraph 99 of your statement, where you say:My daughter is a panaka.LEROY BEAMAN: Yes, I missed – that was a mistake, spelling.

MR RANSON: So that's a mistake?

LEROY BEAMAN: Yes.

MR RANSON: She's purungu, as well?

MR RANSON: Yes.

LEROY BEAMAN: Okay.

MR RANSON: So she gets the same one - - -

LEROY BEAMAN: Yes.

MR RANSON: - - - from you. And does that – that idea of skins: does a person figure out what their skin is by looking at their father or by looking at their mother?

LEROY BEAMAN: Their father.

MR RANSON: Father. It comes down the father's side? That's why – that's why it's passing down through you?

LEROY BEAMAN: Mm. There were also some differences between the content of Mr Beaman's evidence and that of older people such as Ms Narrier and Ms Wonyabong. For example, there appeared to be more fluidity in how he understood children could choose, and move between, the ***countries*** of their parents, or ***countries*** into which they had moved as children or young people, in order to claim connection to that ***country***. Whether this could be explained by some adaptation in laws and customs was unclear.

Edwin Beaman As I have described above, Mr Edwin Beaman is the father of Mr Leroy Beaman and claims through his father, Roy Beaman, who was born in Wiluna and worked on stations in the claim area, especially Yakabindie. Mr Edwin Beaman's evidence was that Roy Beaman was a wati and that he "walk[ed] on" to Yakabindie station to get a job when he was about 15 or 16 years old. Mr Beaman said his father identified as Tjupan and denied that his father identified as Koara. Mr Beaman was clear in his evidence about what he could and could ***not*** speak about. For example, he gave clear evidence that Mr Brett Lewis could speak for the area around Depot Springs, but he could ***not***.

Family connections: Leroy and Edwin Beaman Mr Leroy Beaman is the son of Mr Edwin Beaman and, accordingly, I discuss their family connections together in this section. Both Mr Leroy Beaman and Mr Edwin Beaman claim through Charlie Beaman, also known as Piman or Piiman, their great-grandfather and grandfather respectively. Dr Sackett records Piman's year of birth as about 1900. It seems from the evidence that Mr Leroy Beaman and Mr Edwin Beaman might also claim through Ada Beaman, their great-grandmother and grandmother respectively, although I note she is ***not*** named as an apical ancestor. Nevertheless, I discuss their evidence about her below because, in my opinion, it is relevant to some of the questions in this proceeding about who occupied the claim area in the early twentieth century. Mr Leroy Beaman's grandfather, and Mr Edwin Beaman's father, was Roy Beaman. Roy Beaman was Charlie Beaman's son. Roy Beaman was also one of Mr Liberman's informants. Mr Liberman records Roy Beaman as being approximately 45 years old in 1976, which would mean he was born in or around 1931. That appears consistent with Mr Edwin Beaman's evidence that he (Mr Edwin Beaman) was born in 1967. Mr Edwin Beaman's evidence was that his father was born "there in Wiluna", although he doesn't know whether it was on the Aboriginal reserve, or in the township. Mr Leroy Beaman's evidence was that Mr Roy Beaman was the first person, at age 15, to go and work for non-Indigenous people on Yakabindie station. Interestingly, Mr Liberman records Roy Beaman as being born at Leonora: that is, to the south of the claim area rather than to the north of it. This is ***not*** the only time where there appears to be interchangeability between areas to the north and to the south of the claim area, with the concept of "Wiluna" possibly being a rather flexible one. Either way, whether he was born to the north or to the south, Roy Beaman was born close to the claim area. Mr Leroy Beaman's grandmother and

Mr Edwin Beaman's mother, Ms Joyce Bond, was born in Mulga Queen and her parents were from around the Warburton Ranges. Mr Edwin Beaman said of his parents:At Warburton [Ranges] they have the same law as here [Tjiwarl claim area]. That's why my parents could understand each other. My mum spoke Ngyaanyatjarra language and my father spoke Tjupan but they could understand each other. Mr Leroy Beaman described his great-grandmother Ada Beaman as being from "in-between Yakabindie and Mt Keith". Both these places are in the east of the claim area. Assuming his great-grandmother was more or less the same age as his great-grandfather, this would place her in the claim area prior to the dates at which Daisy Bates was gathering information north of the claim area. These dates are consistent with the evidence of Mr Leroy Beaman and Mr Edwin Beaman that Ada Beaman bought a house in Wiluna (the first Aboriginal person to do so) in the 1950s, which would place her in her early 50s at this stage. I do ***not*** accept, as the State suggests, that this evidence may show Charlie and Ada Beaman did ***not*** stay very long in the claim area, and went instead to Wiluna. Whether both Charlie and Ada Beaman went to Wiluna, how long they stayed there and, indeed, whether Ada Beaman lived in the house are ***not*** the subjects of any evidence. I do ***not*** understand the State to have challenged Mr Leroy Beaman's evidence about where his great-grandmother was from. This evidence, together with what else is known about Ada and Charlie Beaman, would suggest they were indeed in the claim area at about the time Daisy Bates was gathering information.

June Tullock Ms Tullock gave some brief evidence at Jones Creek about 12 km directly north of Yakabindie station in the mid-eastern portion of the claim area. Ms Tullock said Jones Creek was the birthplace of her father, an acknowledged law man. However, she did ***not*** recognise the crossing where the Court sat to hear this evidence. She was adamant the crossing was ***not*** concreted in the past when she had visited, but, more than this, her evidence was that she did ***not*** recognise the trees and surrounding ***country***. In other words, she had in her memory a different crossing to the one which she had been asked to identify as the birthplace of her father. Nevertheless, both on this occasion and subsequently, and despite questions from the State and various documents being shown to her that might contradict what she said, she adhered firmly, and in my opinion genuinely, to her evidence that her father had told her he was born at Jones Creek and that other relatives had confirmed this to her, including her father's aunt. Ms Tullock gave the balance of her evidence at Yakabindie. On this occasion, her evidence was clear. Like Ms Wonyabong, she was prepared to be quite firm about what she did and did ***not*** know and what she could and could ***not*** speak about. Her explanation for why the claim area was her ngurra was that it was the birthplace of her father, but also that she grew up there, had been taught about the area, and knew the traditional stories. Her claim was thus more complex than simply descent.

Family connections Ms Tullock was born in 1946 at Wiluna. Her mother came from Brookton and the Moore River mission, was "sent" to Meekatharra, and then went to Wiluna with Ms Tullock's father. Ms Tullock's father was Ted Tullock, also known as Scotty Tullock or Kirril. Scotty Tullock was the eldest of three boys and his mother was called Biddy Foley or Nyuringka. According to Ms Tullock, Biddy Foley was a "full blood Aboriginal woman". Doris Foley was one of her sisters. Trilby (or Manyila) was another sister. Ms Tullock's evidence was that she could claim the Tjiwarl area through her father and her paternal grandmother. Her grandmother died before Ms Tullock was born and Ms Tullock frankly admitted she "wouldn't have a clue" when her father was born. Dr Sackett records that Scotty Tullock believed his father was John Anaeus Tolloch, a non-Indigenous man who perished south of Wiluna in January 1897. As Scotty Tullock died in approximately 2005, that would have made him very old indeed, but Dr Sackett also records that other locals have disputed Scotty Tullock's view of his age and that one man, Tony Green, stated that Scotty Tullock began shaving in approximately 1931 or 1932. On the evidence, I consider it more likely that Scotty Tullock was born in approximately 1915, as stated by Dr Sackett, and ***not*** in the late nineteenth century. This is consistent with Ms Tullock's family history, to the effect that Scotty Tullock had three children before Ms Tullock was born, all of whom were stolen. He had those children with another Aboriginal woman. Ms Tullock is the second eldest of Scotty Tullock's second family. It would seem her father must have been well into his thirties by the time Ms Tullock was born. That would place his date of birth at around 1915. Dr Sackett states that Scotty Tullock's mother was Biddy Foley (or Nyuringka), who was said to have been born at Waru, a place to the north-east of Lake Carnegie, on the Carnegie pastoral lease. Based on the scale of the maps in evidence, Lake Carnegie is about 200 km from the north-eastern edge of the claim boundary. Ms Tullock's evidence was that she had never heard that her paternal grandmother was born out there and she repeated that her father was born in the claim area and so her grandmother was in the claim area at the time he was born. That is, around 1915. Dr Sackett records

claims by Scotty Tullock that he was Tjupan man, having been through primary initiation rites in Wiluna and then also further initiation rites on Barwidgee station. There was some debate at trial about whether Scotty Tullock was in fact born at Jones Creek. The issue has significance because the State's case is that none of the apical ancestors were born in the claim area, and were certainly ***not*** in the claim area around 1912 when Daisy Bates was conducting research to the north of the claim area. Ms Tullock was adamant that her father was born at Jones Creek. Her father told her this, and he in turn was told this by his aunt, Doris Foley, who Ms Tullock described in the following way in her evidence:Because she [Doris Foley] used to tell him off and growl about him when he used to – when he went up north. She said you wasn't ... She said you never born wherever, you know they say? He was born in Jones Creek ... And she was a very close family and she had a lot to do with us growing up. Ms Tullock also gave some evidence about her great-grandmother, Biddy Foley's mother, being poisoned with flour at a place she called "Poison Creek", which on further questioning Ms Tullock clearly considered to be located within the claim area near Yakabindie, although she said she had never looked at it on a map. In other words, she was placing Scotty Tullock's own grandmother in the claim area, at least towards the end of her life. This must have been well before 1915. When shown, in cross-examination, birth certificates of herself and her brother which had an entry to the effect that Scotty Tullock was born in Kalgoorlie or Leonora, Ms Tullock denied these were accurate. The birth certificates were neither proved nor tendered. I do ***not*** accept they are a reliable record of where an Aboriginal man, such as Scotty Tullock, was in fact born. There is any number of explanations, other than accuracy, for why towns such as Leonora and Kalgoorlie might have been nominated, whether by an official, by Mr Tullock, or by someone else, and I note there is no evidence Mr Tullock nominated either of those towns as his birthplace. There is no other evidence about Mr Tullock living in these towns. Dr Sackett's opinion is that Scotty Tullock was born at Jones Creek. I am satisfied on the balance of probabilities that Scotty Tullock was born in the region of Jones Creek, in approximately 1915. I am also satisfied his grandmother was in the claim area at this time, as well as (obviously) his mother. Ms Tullock also gave some evidence about "Koyl" being an uncle of Scotty Tullock. "Koyl" is one of the names given to Jinguru, one of Bates' informants. Ms Tullock did ***not*** know what had happened to him, but gave the following evidence:My dad spoke of him and as a – he was his uncle. He only just saw him on and off you know through the years because that old bloke sort of moved around a lot. ... And he was always in trouble, so they called him when he was passing through like they did in the early days. ... But I think he belonged around here to these people. I consider this to be a good example of one of the claimant witnesses speaking reliably from her memory, unaffected by the circumstances of this claim. Ms Tullock's recollection of Jinguru being seen as a troublemaker is consistent with Bates' account of him being imprisoned on Rottnest Island. Despite the considerable amount of evidence about Jinguru in this proceeding, Ms Tullock did ***not*** embellish or expand her account. I am satisfied she spoke from her genuine recollection of her oral family history and I found her account reliable and persuasive.

Allan James Mr James gave some brief evidence at Tjiwarl, known also by its European name of Logan Spring. He claims that ***country*** through his father, Dempsey James. On the second occasion he gave evidence, at Leinster, he gave a firm account of his knowledge coming from what his father had told him. He was quite clear regarding how he understood rights to ***country*** arise.
Family connections Mr James was born in 1968 at Kalgoorlie hospital. His father was Dempsey James, who was born in about 1922, although Mr James thinks it could have been before that. Dr Sackett's first report places Dempsey James' year of birth as 1924. Dempsey James was born "under a tree" near Wongawol. His father was non-Indigenous. Mr James' evidence is that his father ran away from Wongawol and came into the claim area when he was about eight or nine years old, staying with a "mob" at Albion Downs. This would have been in the early 1930s. He gave some evidence about who the "mob" at Albion Downs might have been. He says (at [17] and [30] of his witness statement):Dad told me that there was a mob that lived near the old homestead at Albion that he knew and he stayed with them for a while, before he got a job there as a station hand. Those old people stayed at the old homestead until the last of them, an old man nicknamed old Wati, passed away. I never saw that old Wati but my sisters have memories of old Wati visiting Albion and our place for weekly stores.

...

Most of the people that I have memories with are people from this claim. The only memory that I have is that there was a mob at Albion already when he came across. The language wasn't that "that mob were here before us" it was just "that old mob that were here". I never heard any names for those old people. Mr James also gave evidence about his understanding and living memory of the history of Aboriginal occupation of and connection with the claim area. At [39]-[40] of his witness statement, he says:From my living memory the people that were living in this area had always been there; there was always a connection to this ***country***. I don't have any other memories that there was any animosity or clash between different groups as regards to ownership ...

My dad never spoke of anyone who came before him for this ***country*** but he did say that there were families around there at the same time that he moved across to Albion that he knew from Wiluna way. And, at [63] of his witness statement, he discusses his understanding of the migration of people from east of Wiluna into the claim area in the early 1900s:What the timeframe of that migration was, I'm ***not*** sure, but my understanding is that there was a lot of law business happening over in this claim area anyway, so the migration wasn't such a noticeable thing, because they were often going to that area. Dempsey James' mother was Fanny James or Tjilu, also called Tjilunga Tjilu, who was said to have been a Tjupan woman born in about 1905 at a hotel located about 30 km from Agnew or Lawlers and, according to Dr Sackett's first report, inside the claim area. Dr Sackett records Tjilu's mother as a woman called Biddy (***not*** Biddy Foley, Scotty Tullock's mother), who was said to have been from Wongawol. There is no evidence about where Biddy lived or travelled.

Brett Lewis Mr Lewis was an impressive witness. His adopted father was a senior law man named Scotty Lewis or Ngumbu. Although Mr Lewis was adopted, this did ***not*** prevent his father from sharing a significant amount of knowledge with him. However, as Mr Lewis candidly recognised, there were limits on the knowledge his father could pass on to him because Mr Lewis had ***not*** been through the law. Mr Lewis gave open evidence and then some evidence with a limited number of women present. My impression was that Mr Lewis knew his ***country*** very well, that he knew the stories associated with it, and that he had been taught those stories by his father, who, as a lawman for the area, had authority to speak for the places Mr Lewis discussed in his evidence. Even though Mr Lewis himself declined to characterise his role as speaking for the ***country***, he accepted that he had been chosen to give evidence about certain parts of the ***country*** because he knew them best. On his second tranche of evidence at Leinster, Mr Lewis remained a most impressive witness. He was very clear about what he could and could ***not*** say about Koara ***country***: he could speak about ***country*** that was his father's ***country*** and identified as Koara, because his father shared knowledge with him about those areas; but he otherwise could ***not*** draw boundaries in respect of ***country*** which other people spoke for. In the course of cross-examination about the boundaries of Koara ***country***, the following exchange occurred:MR RANSON: Well, you – you tell me. Where do you think that Koara ***country*** runs to today in this claim area?

BRETT LEWIS: I'm just taking it off my father's side. The – you know, where he was custodian and looked after and called it his – his area. So I'm ***not*** saying it's ***not*** Koara claim or it's ***not*** Tjiwarl ***country*** or whatever. So I'm just talking on behalf of what he told me in that area where we went yesterday. So ... I'm ***not*** saying, "Well, no, that's Koara; no, this is part of Tjiwarl", or this or that. No, I'm ***not*** saying that. ... I'm just talking on behalf of the area that my father showed me and was custodian of.

MR RANSON: Yes. Yes. I know that's the area - - -

BRETT LEWIS: Yes.

MR RANSON: - - - you're talking for - - -

BRETT LEWIS: Mm.

MR RANSON: - - - in this claim.

BRETT LEWIS: Yes.

MR RANSON: But if – let's pretend there were no Native Title claims at all,

anywhere ... and I met you here and said ... "Where is Koara ***country***?".

BRETT LEWIS: I would - - -

MR RANSON: Where would it go?

BRETT LEWIS: I'd say, well, that's the ***country*** I can take you to and talk to and show you, Booylgoo, Depot, because that's what I've been told from my father. And I'd say that's his ngurra, that's his tjukurrpa, that's his parna. So that's – you know, that's his ***country***.

MR RANSON: Okay.

BRETT LEWIS: But ***not*** only his ***country***, and there's other families too. So – but I'm just here telling you that's what he told me. That's his run. He – he looked after that area.

...

MR RANSON: So – so, in your mind, that – that idea of Koara ***country*** ... is mixed up with where your father's ***country*** – and I don't mean mixed up in the sense that it's wrong, but it – your idea of where Koara ***country*** is is connected to where your father's ***country*** was.

BRETT LEWIS: Yes.

MR RANSON: Okay.

BRETT LEWIS: You know, it's connected to the – to this Tjiwarl area and ... other overlap claims that was put on there in the past.

...

MR RANSON: It may be a very specific question. So if we went to Mount Keith, where the mine is? ... Is that still in Koara ***country*** in your mind, or is that north?

BRETT LEWIS: Oh, I – I wouldn't say it's in Koara ***country*** or it's ***not*** in Koara ***country*** or that it's in – in the – somebody else's ***country***. But I – I go off of the people who speak for that ***country***.

MR RANSON: Okay.

BRETT LEWIS: Who – who've got knowledge and can tell, you know, stories and the tjukurr [an abbreviation of Tjukurrpa] about that ***country***. So I'm ***not*** going to sit here and say, "No, that's Koara ***country***. No, that's ***not*** Koara ***country***", because I – I'm ***not*** about that. In my opinion, some of the cross-examination of Mr Lewis revealed confusion on the part of the State about the approach claim group members took to speaking about their rights to

country. Mr Lewis' evidence made clear the distinction between being a member of a group entitled to an area of ***country*** and being a person who could speak publicly and authoritatively about particular parts of that ***country***.

Family connections Mr Lewis was born in 1965 in Leonora hospital. His adopted father, Scotty Lewis, was born around 1917 or 1919 in Lancefield, just outside Laverton. Mr Lewis described his father's birth in his evidence: his father's parents were on a ceremony trip and his grandmother, who was heavily pregnant, gave birth to his father while on that trip. She then stayed in Lancefield while his grandfather continued on to Burtville for the ceremony. Burtville was, Mr Lewis stated, a "big ceremony ground" in those times; that is, in the early twentieth century. Burtville was also a goldfields township about 30 km south-east of Laverton. I find Mr Lewis's evidence about Burtville to be an example of a place being identified by its European township name, but I consider no significance should be attached to the use of that name: what is significant is the general region indicated by Mr Lewis's evidence. The "Lancefield" to which Mr Lewis referred was Lancefield gold mine, located about 8 km north of Laverton. Again, I take this evidence as indicating the general region in which these events occurred, rather than the reference to the Lancefield gold mine meaning any more than this. Mr Lewis's adoptive mother was originally from just outside the Warburton Ranges, much further to the east. He described in his evidence how she came to be at Mount Margaret Mission, rather closer to the claim area:My mother's name was Mary Forward. My mother's Wongai name was Liddiwarra, which means long neck. She comes from Blackstone, Jameson, Wingellina; out beside the Warburton Ranges. She was part of the Simms family. She came over when she was about ten years old. She came over traveling for ceremony. She came down towards Tjuntjuntjarra, Neale Junction way, for ceremony, and then she come back to Burtville to the big ceremony ground there. When she got to Burtville, for the ceremony, nearby Laverton was a bit of a town. The missionaries were running around and catching kids for Mount Margaret Mission. She got caught, and stayed there in the mission for a few weeks before she run away, and came through towards Lancefield, Nambi and Leonora with the mob. She never went back to her home ***country*** to live. Mr Lewis's evidence was that he was never told the names of his grandparents because people did ***not*** like to say the names of those who had died. This evidence, which I accept, is an example referred to by Dr Sackett as part of the explanation why there is little positive identification of those Aboriginal people who may have been occupying the claim area and its surrounds at sovereignty or first contact. But given Mr Lewis's evidence about his father's date of birth, it is clear that his grandparents were adults in the early twentieth century, around the time of Daisy Bates' work. As Dr Sackett noted, one important aspect of Mr Lewis's evidence was the way he described how his father acquired knowledge of ***country*** and sites. Mr Lewis recounted being shown sites by his father that "he had been shown by the old people". Who these old people were is contentious. On some occasions these references were, as Dr Sackett pointed out, likely to be references to the claim group members' ancestors. However, given Mr Lewis's father's age, this can only be a reference to Aboriginal people who held traditional knowledge about the Tjukurrpa and sites of the claim area in the late 1920s or early 1930s. There is nothing in the State's working hypotheses (or those of Dr Brunton) about who those people might be. On the other hand, the applicant's thesis is clear: there were at least some people in the claim area, or who knew about the claim area, who recognised the entitlement of people like Mr Lewis's father to learn the Tjukurrpa and learn about the sites in the claim area. Scotty Lewis told Mr (Brett) Lewis about Scotty Lewis's uncles and aunties at Darlot and Weebo "coming through here". Taking into account Mr Lewis's other evidence in his witness statement at [35] (where he described his father telling him about the "old people" who came from Weebo and "[t]hrough Agnew and Yakabindie station to North End, and through to the Barwidgee area" – all places in the eastern part of the claim area or close to it), and the evidence he gave when at the site of 'The Lady', in my opinion this was a reference to the movement of Western Desert people from around Darlot into the claim area, and areas close to it. One story told by Mr Lewis, about his father having a job as a tracker for the Leonora police, placed his father in and around Leonora when he was approximately 20 or 25 years old: that is, in the late 1930s or early 1940s. Mr Lewis described his father being given a pushbike with cane wheels, and how his father would ride it up and down the Leonora road, taking the law stick to Agnew (which is on the southern boundary of the claim area) and across to Darlot and to Dada, which are both to the east of the claim area. Where Scotty Lewis was before this is unclear on the evidence. However it is clear from the remainder of Mr Lewis's evidence regarding how he learned the Tjukurrpa and about the sites and lands of the claim area, that his father was intimately familiar with all parts of the claim area, and in particular with the western parts. I am prepared to find that, at least from some point in the 1930s, Scotty Lewis was recognised as one of the men who had knowledge of the Tjukurrpa and sites of the claim area. How and when he acquired that knowledge is less clear.

Victor Ashwin Mr Victor Ashwin is the son of Mr Allan Ashwin. Both father and son gave evidence on ***country*** out near Mount Townsend and Mount Marion in a restricted men's session, as well as in Leinster. The evidence in the restricted session was given partly individually and partly by the group, in the sense of one man adding, supplementing or correcting what another had said. Mr Victor Ashwin had been chosen by the group of senior men present in the restricted session to give the principal evidence in that session. All men present were wati. He was the youngest of the four witnesses. He clearly took his role very seriously, and was careful and deliberate in what he had to say. I accept he has been chosen as one of the wati who is to carry on the law and knowledge for this claim area. That said, his age nevertheless has an effect on the weight I place on historical aspects of his evidence. The fact-finding in this case is complex, and there are parts which focus on trying to piece together what happened at earlier points in history, both in and outside the claim area. Then there are other parts which focus on understanding what are the traditional laws and customs said to connect the claim group members with the land and waters in the claim area, and to have always done so. On the latter topic, I give substantial weight to Mr Victor Ashwin's evidence. On the former topic, I give less weight because he is, as far as I can see, one generation further removed from events than his father, Mr Allan Ashwin. I place more weight on Mr Allan Ashwin's evidence in those circumstances. I emphasise that approach is ***not*** intended to challenge or diminish Mr Victor Ashwin's standing within his community, but rather to recognise that, being a younger man, his knowledge and experience of some historical matters is further removed than that of his father's generation.

Allan Ashwin Mr Allan Ashwin was an impressive witness. He spoke with great authority and I had the strong impression that he spoke from direct knowledge and experience, in particular from long and close association with old people from the claim area, including his own ancestors. The fact that he is one generation closer to those old people than his son, Mr Victor Ashwin, gave me some cause to rely more heavily on his evidence. That is ***not*** to detract from Mr Victor Ashwin's evidence; rather, it is to acknowledge that closer connections by way of being of a different generation can enhance the reliability and persuasiveness of descriptions of historical events. Mr Allan Ashwin was ***not*** only a witness of great depth of knowledge, but was also quick to correct what was said by others if he saw it as inaccurate or incomplete. In this sense, I find he was intent on ensuring the most accurate evidence was given by the claimant witnesses.

Henry Ashwin Mr Henry Ashwin is the younger brother of Mr Allan Ashwin and the uncle of Mr Victor Ashwin. Mr Henry Ashwin was ***not*** comfortable in the restricted session. It appeared to me that he did ***not*** really approve of it occurring with a female judge, although he did seem to acknowledge the necessity for it. He was the person who interjected the most to warn Mr Victor Ashwin when he thought Mr Ashwin was saying too much. He left about halfway through the restricted session. I drew no adverse inference from his departure: rather, it seemed to me he simply felt he was unable to stay any longer in circumstances where he was clearly concerned that what was occurring was ***not*** in accordance with his traditional laws and customs. Mr Henry Ashwin's discomfort at sharing his knowledge outside his own community continued when he gave open evidence in Leinster. I have no difficulty relying on his witness statement because I consider him to be a genuine and honest witness. However, little was added through his oral evidence.

Family connections: Victor, Allan and Henry Ashwin Mr Allan Ashwin was born in approximately 1951. He was born in Weld Springs in what he described as "Windidda ***country***". Windidda pastoral station is approximately 165 km north-east of the claim area. Mr Ashwin is a native title holder under the Wiluna determination. His father's name was Alfie Ashwin or Wamultjukurr, although Mr Victor Ashwin also gave evidence that Alfred Ashwin's Martu name was Yalpie, and this name was sometimes used in the evidence instead. Alfie Ashwin's sister was Doris Foley. Mr Allan Ashwin's evidence was that his father was born "around Barwidgee". Again, I do ***not*** take that to indicate only the location of the homestead of Barwidgee station, but rather to encompass other parts of the station itself. He was a lawman for parts of the claim area (Yeelirrie, Albion Downs and Yakabindie). Neither Mr Allan Ashwin nor Mr Victor Ashwin gave evidence about Alfie Ashwin's date of birth, but Dr Sackett records that he was born near Barwidgee in approximately 1920. Alfie Ashwin's father was Tom Wanal or Jinapika, who is buried at Six Mile Creek near Wiluna. He died when Mr Allan Ashwin was going to school, perhaps in the late 1950s or early 1960s. This means, given the approximate date of birth of Alfie Ashwin (1920), that Tom Wanal may have been born around the turn of the century, or earlier. Mr Allan Ashwin's paternal grandmother was Telfa Ashwin. Mr Ashwin described her ***country*** as "around Windidda and Yelma and Wongawol, Lorna Glen around Carnegie and all that

area". Mr Allan Ashwin's mother was Rosy Wongawol or Tjipinka. She was Martu. His maternal grandfather was from Carnegie ***country***, near Wongawol, and her name was Nimangka or Tjinapika. His maternal grandmother was a Martu woman named Lilly Wongawol or Munta. According to Mr Henry Ashwin (Mr Allan Ashwin's brother), Rosy Wongawol was from the Birriliburu determination area (near Glen Ayle pastoral station), ***not*** Tjiwarl. There was no sense from the evidence of Mr Allan, Mr Henry or Mr Victor Ashwin that their ancestors had consciously moved into ***country*** they were ***not*** familiar with, or with which they had no connection. Rather their evidence suggested (as did that of some of the other witnesses) that their ancestors moved around ***country*** to which they considered they had rights, interests and connections – evidenced from their passing on of knowledge to the claim group members' parents and to the claim group members themselves. Indeed, Mr Allan Ashwin's evidence was that there were already connections between the old people in the claim area (which I understood to be a reference to those Aboriginal people who were in and around the claim area prior to the start of the twentieth century) and families such as his own, through law business. The State submits that there is no direct evidence of when Alfie Ashwin might have first come into the claim area, but that the Court should find it was during his children's childhood in the 1950s because he migrated to work at Yeelirrie and Albion Downs. I doubt that is the case if he was born in Barwidgee, immediately adjacent to the claim area, but I accept there is simply an absence of evidence on this point.

Luxie Hogarth Ms Luxie Hogarth was an elderly witness whose memory was fading a little, but her evidence was nonetheless clear in terms of her own family and life history. She did ***not*** add substantively to the contents of her witness statement. She did confirm, in reasonably firm terms, the status and role of Waiya, who seems to be the oldest ancestor of the claim group, and of the Hogarth family in particular. She also gave some evidence about having met Rosie Jones, or Tjalajuti, who was Waiya's daughter and the ancestor of Ms Hogarth's husband, Wimmie Redmond. However, Ms Hogarth made it clear that the claim area is ***not*** her ngurra and that what she knows comes from a long and obviously close and loving marriage to her husband. That does ***not*** necessarily diminish the weight to be attached to that knowledge, but simply places her evidence in a slightly different category.

Geraldine Hogarth Ms Geraldine Hogarth spoke eloquently and in detail about her ***country*** and her people's customs and laws as she understood them. She clearly felt very strongly about past injustices and the need to speak out now to claim ***country***. In that sense she was one of the more forthright witnesses in the proceeding. I was impressed by her evidence in the sense that it was given genuinely and from her heart. I accept what she says is what she has learned, especially from her "uncle-dad". It was clarified in cross-examination that her participation in the Wongatha claim (see Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31; 238 ALR 1 (Wongatha)) stemmed from a claim to that ***country*** through her mother, and can be put to one side.

Family connections: Luxie and Geraldine Hogarth As Ms Luxie Hogarth is the mother of Ms Geraldine Hogarth, I have grouped them together for the purpose of discussing their family connections. Ms Luxie Hogarth was born in 1941 at Moore River at Mogumba Mission, which is on the coast of Western Australia north of Perth, although her mother was from Darlot and was only visiting her sister at Moore River when Ms Hogarth was born. Ms Luxie Hogarth was the oldest witness in the proceeding. Her mother's name was Kugila, or Daisy Cordella, and her father was a Bunuba man from the Kimberleys named Peter Hogarth. Kugila was from Darlot and Ms Hogarth's evidence was that "[h]er mother, and her grandmother, and her grandfather, they were always there, living in the Darlot area". I have made findings at [340] to [352] above about what comprises the Darlot area. Ms Luxie Hogarth's husband was Wimmie Redmond, who is now deceased. Ms Luxie Hogarth claims through Mr Redmond as his wife and Ms Geraldine Hogarth claims through Mr Redmond as his daughter. Mr Redmond's grandmother was Rosie Jones, or Tjalajuti. There was more evidence about Rosie Jones than there was about her children (that is, Mr Redmond's parents). This is consistent with some of the observations made by Dr Sackett (with Dr Brunton making a similar statement) to the effect that, under Western Desert laws and customs, a person can take the ***country*** of a grandparent. This issue came up in the expert evidence in the context of a dispute about the inferences that could be drawn from the Bates material, which did ***not*** itself show examples of connections to ***country*** through grandparents. Dr Brunton concluded the absence of examples in Daisy Bates' material of people taking rights in ***country*** through grandparents meant the taking of rights in ***country*** by the Ngaiawonga was ***not*** in accordance with Western Desert law. Dr Sackett disagreed, saying:Western Desert people are able to take the ***country*** of a

grandparent, but they need ***not*** do so. That there is no evidence in the Bates materials of it happening does ***not*** mean that it did ***not*** happen. In any event, as Dr Brunton points out, there are cases in the Bates materials were [sic] it is wholly unclear how or why a person was Ngaiuwonga. It is possible that some of these cases were instances of people taking the ***country***/identity of a grandparent. This is an example where Dr Brunton too readily sought to draw absolute conclusions from the absence of information in the Bates records. I prefer the opinion of Dr Sackett. In relation to Wimmie Redmond, I consider the emphasis on him acquiring knowledge and rights from his grandparents is consistent with Western Desert laws and customs being practised over the claim area early in the twentieth century. Dr Sackett's evidence records earlier anthropologists being told by Rosie Jones's great grandson:Nyinyitjim/ James Calyun (SSN 6/129), said of her, "She's from that area there, in the [claim] map." His view in this regard was supported by other family members at a meeting in Leonora on 1 March 2011, where it was held that Tjulyitjutu/Rosie was born in Tjiwarl ***country***. What Ms Luxie Hogarth knew about Rosie Jones/Tjalajuti was that she lived around Albion Downs, Yeelirrie and Wiluna. This was also Ms Geraldine Hogarth's evidence, although she added Agnew-Lawlers and Sir Samuel to the list. Rosie Jones was married to Andy Fisher, who was therefore Wimmie Redmond's paternal grandfather, who seems to have been from Wongawol. Ms Luxie Hogarth's evidence is that, later, Andy Fisher was with another wife called Dulcie Fisher who was an aunt to, amongst others, Ms Shirley and Ms Lizzie Wonyabong. I note this as an illustration of the connections between the families in the claim group. Ms Hogarth's evidence was that Andy Fisher and Rosie Jones showed her husband the ***country*** in the Tjiwarl claim area and told him all the Tjukurrpa for the area. Rosie Jones's father was Waiya. Waiya was therefore Wimmie Redmond's great-grandfather. If Ms Hogarth's husband, Wimmie Redmond, was her age, then his grandmother, Rosie Jones, would have been born in the nineteenth century. Ms Hogarth met Rosie Jones when Ms Hogarth was about 18, which would be around 1959 or 1960. Ms Hogarth said that Rosie Jones was then older than Ms Hogarth was at the time of her evidence; namely 75. If Rosie Jones/Tjalajuti was about 75 in 1960, that would mean she was born in about 1885. That would place Waiya's date of birth well back in the nineteenth century. However, Ms Geraldine Hogarth's evidence was that Waiya was buried on Albion Downs, but that he was still alive in the late 1950s. Dr Sackett's report also records that he was buried on Albion Downs, although it would appear his informant for this was Ms Geraldine Hogarth herself. Therefore, even if he was an old man in the 1950s, that would mean he may have been born around 1870. This might mean Ms Hogarth's estimate about Rosie Jones's age when she met her in 1960 is ***not*** quite accurate because it does ***not*** leave enough of an age gap between father (Waiya) and daughter (Rosie Jones). Further, Rosie Jones being born in the nineteenth century does ***not*** fit quite so well with the age of Wimmie Redmond, even allowing for him to have been born (as the eldest son, it must be recalled) quite a few years before Ms Hogarth in 1941. On balance, these discrepancies are small. On any view, the evidence of Ms Luxie and Ms Geraldine Hogarth would have Waiya born in the last quarter of the nineteenth century and his daughter born around or before the turn of the century. Ms Luxie Hogarth's evidence about Waiya was:I never saw old Waiya, but I heard from my husband, who told me the story about his parents and grandparents, roaming around that middle ***country*** – round Albion Downs and that spring called Pii – and then back to Wiluna, and all around that area. Pii, that spring, it belonged to that old man Waiya, and he looked after that area right until he passed away. He was buried there too. Waiya, his last name was Hill. My husband said that he was his great-great-grandfather. My husband told me all the story for Waiya.

...

My husband was telling me about the tjukurrpa, and I got to listen to him, learn what he told me. But I ***can't*** talk for that ***country***, because that's his parents' ***country***. My husband told me that his great, great grandfather – old Mr Hill – he was looking after that spring Pii at Albion Downs, and then he got old and passed away there. And that snake must still be there. Mr Hill was looking after that tjukurr because he belonged there, he was from there. He must have been taught to look after it. If he hadn't looked after it, the water would go dry and it would be nothing, he'd know no stories for that area. The account of a connection between Waiya and the site known as Pii, and the Tjukurrpa there, is important. Given the age of Waiya, it is probable in my opinion that this responsibility existed early in the twentieth century, or perhaps in the late nineteenth century. Ms Geraldine Hogarth was born in 1959 in Leonora. Her early years were spent on Yeelirrie station. She was brought up by her "uncle" father, Wimmie Redmond, ***not*** by her biological father. She identified Wimmie Redmond as coming from Wiluna and said his ***country*** included Lorna Glen (which is in the Wiluna determination area), Wongawol, Albion Downs, Yeelirrie,

Agnew and Sir Samuel. The last four places named are inside the claim area. Her evidence was that, although she does ***not*** know when Wimmie Redmond was born, he was a "bit older than my mum". As I have noted, Ms Luxie Hogarth was born in 1941, so it is a reasonable inference that Wimmie Redmond might have been born in the mid-1930s. Ms Geraldine Hogarth gave evidence about longstanding connections and relationships between Western Desert people to the east of the claim area and people in the claim area. She described having been told by the old people about a "road" from Darlot to Mount Sir Samuel and about women coming from Darlot to Depot Springs to perform a ceremony in relation to the Seven Sisters Tjukurrpa. Consistently with this, she also explained that the "mob" from Darlot and Wongawol were the same people as those from Albion Downs and Yeelirrie because "we follow the same law". In his first report, Dr Sackett records that Rosie Jones was born in around 1910 and died in 1979. That places her, and her father Waiya, in the claim area a little later than the Hogarths' evidence. However, even on this hypothesis, both Rosie Jones and Waiya would have been in the claim area by the time of Bates' reports in 1912. There is no suggestion they identified themselves, or that anyone else identified them, as "Ngaiawonga". The State accepts the Hogarths are Western Desert people. It follows that it must accept their ancestors were also Western Desert people.

Dallas Harris Ms Harris's evidence was clearly given and measured, in the sense that she was forthright about accepting the limits of her knowledge and in disclosing the fact that she had spent a considerable amount of time away from the ***country*** in the claim area. Nevertheless, she has returned to the area and it is clear she feels a strong connection to it. She claims through her father's family and gave some helpful evidence about their activities in the claim area.

Family connections Ms Harris claims through her paternal grandfather, Tarrukati, also known as Tjampula. Ms Harris's evidence was that he was also called "Jumbo Harris" because non-Indigenous people could ***not*** say his Aboriginal name. Ms Harris was born in 1969 in Leonora hospital. She has two older brothers. Her mother was Eileen Harris (n233;e Jones), who was born in Wiluna and grew up in the Wiluna determination area. Ms Harris is also a native title holder on the Wiluna determination. Her maternal grandmother was Kitty Hill (or Yungkutjuru) and she came from Carnegie station, which is in the Wiluna determination area to the east of the Tjiwarl claim area. Ms Harris's father was James Harris, and her evidence was that he was born in a creek bed "along on the Agnew to Leonora road, in Lawlers ***country***". Agnew is a town sitting just outside the claim boundary to the south, and Leonora is further south and a little east, with the township of Lawlers in between them. Ms Harris said her father grew up at Mount Margaret mission, which is further east towards Laverton. Ms Harris's evidence was that her father's parents travelled around a lot on law business and with the seasons, moving from east of Mulga Queen, then back through Mulga Queen and onto Wiluna, every three to six months. Dr Sackett's research confirmed that the family did appear to move around through those areas. Ms Harris's paternal grandfather had the same name (Tarrukati) as a creek near Carnegie, and she learned that the area around the creek was her grandfather's ***country***. Her paternal grandmother was from Mount Margaret Mission. Ms Harris's evidence was that Jumbo Harris came from an area called Thurraguddy Creek (or Tarrukati), between Windidda and Mungkali, close to Carnegie. Dr Sackett describes this area in the following terms in his Tjiwarl Registration Report (Attachment 2 to his first report in this proceeding):Tarrukati is a site (in the vicinity of places mapped as Thurraguddy Creek, Thurraguddy Bore and Thurraguddy Trucking Yards) on Wongawol Pastoral Lease, on the Wiluna claim area. As the crow flies that is about 160 to 170 km from the north-eastern boundary of the claim area. According to Ms Harris, that is where she was told Jumbo Harris "came from and grew up ... hunted ... and practiced his culture". As Dr Sackett points out in his first report, this area was on the Wongawol pastoral lease and was the area where, in the early 1930s, there was considerable violence and antagonism towards Aboriginal people. Ms Harris's evidence was that her grandfather Jumbo's "boundary" would have been from Thurraguddy Creek, down to Leonora, around Kaluwiri (which is the centre of the claim area) and up to Wiluna. She identified in her evidence the old people who told her about this. Ms Harris's evidence was that, after her grandfather married her grandmother, they moved towards the goldfields area and "came in from the bush" to Leonora. She was told by her aunties that they were "the first old people at the old reserve in Leonora". Ms Harris does ***not*** put any dates around these events in her evidence. Dr Sackett estimates in his first report that Jumbo Harris was born in about 1890. He also notes that Norman Tindale showed Jumbo Harris and Telpha (or Telfa) Ashwin as siblings, but the Harris family dispute this. On the evidence, and accepting Dr Sackett's evidence about Jumbo Harris's date of birth, it seems that Jumbo Harris was moving in and around the claim area with his parents at or around the turn of the century.

Douglas Bingham Mr Bingham claims through his mother, Kathleen Bingham, whom he thinks was born in about the 1920s. Her father, Mr Bingham's grandfather, was (he said) "one of the big law men" for the Tjiwarl area, although in oral evidence he said he was from the Laverton area, which is some way south-east of the claim area. In his witness statement, Mr Bingham identified his grandfather as Mickey Warren, but in oral evidence he stated that he called both Mickey and Tommy Warren (who were brothers) "grandfather" and that both were law men. During cross-examination, Mr Bingham said that Ruby Shay was a sister to Jumbo Harris, but it was difficult to tell whether he was sure about that or just agreeing with the question put to him. That relationship is suggested by Dr Sackett but ***not*** confirmed. Mr Bingham seemed a little reluctant to be giving evidence, which might be explained by the fact that, at the time, his brother Irwin was in hospital and Mr Bingham said Irwin would be the one to do the talking in this trial, if he could. Mr Bingham gave evidence about having seen people using spears and spear throwers to give tribal punishment at funerals and gatherings, including recently, although he admitted that, if the police saw that, people would get into trouble. He was clear that he could ***not*** "get into that" because it was a tribal thing. He is a wati, and gave some restricted evidence.

Family connections Mr Bingham was born in 1962 in Meekatharra but grew up with his maternal grandmother at Cunyu station, which is about 80 km north of Wiluna. His father was from Fitzroy Crossing in the Kimberleys, but Mr Bingham said he does ***not*** think he could claim in that area because he does ***not*** know it. His evidence was that his mother was from around Leonora and "from that Tjiwarl area". Dr Sackett's report records Mr Bingham informing Dr Sackett that his mother was born in the Kathleen Valley in the claim area, and that is where she took her European name from. It appears this had been said before to Dr Sackett in preparation of his Tjiwarl Registration Report, where (at [41]) Dr Sackett records Mr Bingham as explaining his rights and interests in the claim area by saying "Well my mother bin born here". He is the youngest of 10 siblings, with four sisters and five brothers, so his parents may have been born in approximately 1920, or perhaps earlier. Dr Sackett in his report puts Kathleen Bingham's date of birth as circa 1924. Mr Bingham's evidence is that both his maternal grandparents were from the claim area. His maternal grandfather was Mickey Warren, who was "from around this Tjiwarl area" and "one of the big law men around there". His maternal grandmother, Ruby Shay, was also from the claim area – she died in Wiluna but Mr Bingham does ***not*** know where she was born. Dr Sackett records Kathleen Bingham's father as having been born in approximately 1900 and her mother, Ruby Shay, as having been born in approximately 1910, although he also names Tommy Warren rather than Mickey Warren as Kathleen Bingham's father. Dr Sackett also records information from Mr Bingham that Ruby Shay might have been born in the ***country*** covered by the Weebo pastoral lease, to the near east of the claim area, and that Ruby's mother was born in the Darlot area. Mickey Warren was one of Mr Liberman's informants and Mr Liberman recorded Mickey Warren as being approximately 75 years old in 1976, which places his date of birth at around 1901.

Timmy Patterson Mr Patterson was ***not*** called to give evidence in the proceeding, but his witness statement was tendered as an exhibit. I am prepared to accept the evidence set out in his witness statement. Mr Patterson's evidence is that he is a member of the Gingirana native title claim group and a native title holder under the Birriliburu determination, the Martu determination (see Peterson v Western Australia[2013] FCA 518) and the Wiluna determination. He was born in or around 1950 and his parents were both Kiyajarra, although later in life his mother married a Putijarra man who raised Mr Patterson as his son. He is a senior wati and elder, but his evidence is that the Tjiwarl claim area is ***not*** his ***country*** and he cannot speak for it.

EXPERT EVIDENCE

Dr Mark Clendon Dr Clendon is an anthropological linguist. He was called by the applicant. At the time of giving his evidence and preparing his reports, Dr Clendon was a lecturer and independent researcher associated with the University of Adelaide. Dr Clendon has worked extensively with Western Australian languages and has prepared a number of reports for native title claims. Dr Clendon prepared two reports for use in the proceeding.

Dr Clendon's first report dated 29 May 2015 Dr Clendon's first report was prepared in the proceeding after receiving a brief from Central Desert Native Title Services (CDNTS), the solicitors for the applicant. In his first report, Dr Clendon draws conclusions about the Aboriginal languages spoken in the Tjiwarl claim area by reference to Jinguru's wordlist and the "Lawlers word list" referred to by Daisy Bates. The three languages he identifies are (using his spelling) the Western Desert, Wajarri, and Badimaya languages. Dr Clendon's report refers to Dr Sackett's first report of January 2014 and Dr Brunton's first report of March 2015.

Dr Clendon's supplementary report dated 4 August 2015 Dr Clendon's supplementary report dated 4 August 2015 was prepared to address the opinions expressed in his earlier report at paragraphs [5], [7]-[10], [13], [15]-[19], [21]-[25], [32], [41] and [43] by reference to two important Badimaya language resources that came into Dr Clendon's possession after preparing his first report.

Dr Lee Sackett Dr Lee Sackett prepared three expert anthropological reports in the proceeding at the request of the applicant. I have set out Dr Sackett's qualifications and experience at [484]. It was Dr Sackett's evidence that he commenced research into the claim area in 2000 or 2001 for what was then known as the Sir Samuel native title claim. The Sir Samuel claim was discontinued and a number of other claims, including the Tjiwarl claim, were made.

Dr Sackett's first report dated January 2014 Dr Sackett's first report was filed in the proceeding on 31 March 2014 and is dated January 2014. This report was filed in accordance with orders made by Barker J on 21 June 2013 and orders made by Registrar Daniel on 18 October 2013. Dr Sackett undertook the research contained in his first report for the purpose of the claim passing through the registration test with the Native Title Tribunal. Dr Sackett's first report amplifies his Tjiwarl Registration Report and also addresses specific questions the solicitors for the State asked to be addressed in the report, and which CDNTS included in their brief for the report dated 20 September 2013. Dr Sackett's report provides an analysis of the claim area and an analysis and opinion on the origins of the claim group.

Dr Sackett's further expert report dated May 2015 Dr Sackett's further expert report was filed in the proceeding on 29 May 2015. This report was filed pursuant to orders made by Barker J on 5 September 2014, as varied by me on 1 May 2015 and later on 20 May 2015. The purpose of Dr Sackett's further expert report was to respond to the expert anthropological report by Dr Brunton filed by the State on 6 March 2015 and to address any revised opinions that may have arisen in response to Dr Brunton's report.

Dr Sackett's supplementary expert report dated August 2015 Dr Sackett's supplementary report was filed on 3 September 2015. This report included Dr Sackett's opinions after hearing the evidence of the claimant witnesses at the connection hearing and responded to a series of questions put to him by the applicant following the connection hearing. The report also covers any additional evidence in reply to the evidence contained in Dr Clendon's linguistic reports of 29 May 2015 and 4 August 2015 and Dr Brunton's first report, and new and altered opinions arising from the conference of experts.

Dr Ron Brunton Dr Ron Brunton was called by the State. Dr Brunton has been involved in the discipline of anthropology for fifty years. Dr Brunton obtained his PhD in anthropology from La Trobe University and has lectured at Macquarie University, La Trobe University and the University of Papua New Guinea. Over the last twenty five years, Dr Brunton has focused on a number of issues related to Australian Aboriginal people including native title, cultural heritage, social welfare and reconciliation. Dr Brunton has been retained by the State to provide anthropological reports for a number of native title claims in Western Australia and has also provided anthropological reports for respondent parties to native title claims in South Australia and Queensland. Dr Brunton prepared two reports for this proceeding.

Dr Brunton's first report dated March 2015 Dr Brunton's first expert anthropological report dated March 2015 responds to a number of questions posed by the State and provides detailed comments on Dr Sackett's first report. In summary, the specific questions Dr Brunton was asked to address in the expert report included his opinions on the identity of the people and groups of people who held native title rights in the claim area at sovereignty, whether the pre-sovereignty community maintained its identity and has continued to acknowledge and observe traditional laws and customs without significant interruption from sovereignty to the present day and whether any persons have rights in the claim area.

Dr Brunton's supplementary report dated October 2015 Dr Brunton's second report was filed in the proceeding on 2 October 2015 and was limited to providing any new or altered expert opinions having regard to the Aboriginal witnesses at the connection hearing, any additional expert opinions arising out of the expert conference, and any additional evidence in reply to Dr Sackett or Dr Clendon.

Joint report filed by the expert witnesses and the conference of experts On 5 September 2014, Barker J ordered that any experts whose reports have been filed in this proceeding must attend an experts' conference before a Registrar of the Court to confer and prepare a joint statement addressing a list of issues to be agreed upon and prepared by the parties. On 23 October 2015, the applicant and the State filed a joint list of questions to be asked of both Dr Sackett and Dr Brunton, focusing on anthropological issues about which the experts' opinions differed. The joint questions asked of Dr Sackett and Dr Brunton covered a range of issues, separated broadly into four

categories: the nature and characteristics of the society of people occupying the claim area at sovereignty; the rights and interests in land that the occupants of the claim area possessed at sovereignty; the nature of the society of the claim area at present; and the claim group members' connection to the claim area. The experts' conference was held on Wednesday 24 and 25 June 2015 in Perth. The joint report was finalised and filed on 2 July 2015. Dr Sackett and Dr Brunton also participated in a concurrent evidence session on 28 and 29 October 2015. The parties agreed upon and filed a joint list of questions to be resolved at the concurrent evidence session. The hearing on 28 October commenced with counsel for the applicant and counsel for the State leading evidence in chief from their respective experts. The concurrent evidence session followed, where the Court led the experts through the questions that had been settled by the applicant and the State and the experts responded to each of these questions in turn. Some of the concurrent evidence was given in a male gender restricted session. Both of the experts were then cross-examined and re-examined.

Evaluation of the expert witnesses All three expert witnesses were diligent and cooperative in their approach to the evidence in this matter. None expressed opinions that were unreasonable or obviously without foundation. I have set out elsewhere in detail my reasons for accepting Dr Clendon's evidence, but in summary I found his expertise impressive, and his opinions measured and appropriately qualified, but nevertheless firm in their ultimate conclusions. As between Dr Sackett and Dr Brunton, I generally prefer the evidence of Dr Sackett. This is especially so when dealing with the claimant evidence – ***not*** only because Dr Sackett had access to the claimant witnesses and Dr Brunton did ***not***, but also because of Dr Sackett's much longer and deeper familiarity with Western Desert people and their customs and laws, in and around the claim area. I also preferred the evidence of Dr Sackett in other aspects of the case. I found Dr Brunton's approach too document-based, and too literal. He tended to treat sources he worked with as having some absolute authority, without in my opinion making appropriate allowance for the time and context in which they were produced or recognising that they are only part of the picture. He tended to analyse the sources with a degree of precision that was greater than they could properly bear. He was also too ready to draw inferences from what was ***not*** in the material, which again stemmed, in my opinion, from his tendency to see these sources as absolutely authoritative. This is no reflection on his qualifications and experience, which I accept are of a high standard. Nor is it a reflection on his approach during the trial, which was always cooperative. Rather, it is his perspective and method with which I have some difficulty.

APPLICABLE LEGAL PRINCIPLES It is fair to say there was no real dispute between the parties – at least on connection issues – about the applicable legal principles, although there were differences in emphasis. It is also fair to say that the State's submissions tended to dissect and divide the components of s 223 in a way which I would prefer ***not*** to adopt entirely. For example, in [162] of its submissions, the State presents a summary of the "elements" of proof of native title, and contends there are five steps. I do ***not*** read the authorities as requiring a five step process in the order set out by the State. The legislative scheme of the NT Act was recently reviewed and explained by a Full Court of this Court in CG (Deceased) on behalf of the Badimia People v Western Australia [2016] FCAFC 67; 240 FCR 466 at [6]- [38]. At [7]-[8] the Full Court said:The main objects of the Native Title Act (s 3) include providing for the recognition and protection of native title and establishing a "mechanism for determining claims to native title". The first of these objects, in particular, is intended to reflect the statement of intention in the Preamble to the Act that the people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The overview of the Native Title Act, set out in s 4, explains that the Act "recognises and protects native title" (s 4(1)) and, essentially, "covers two topics" (s 4(2)), being:

(a) acts affecting native title (see subsections (3) to (6));

(b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)). It is as well to set out the terms of ss 225 and 223. Section 225 provides:A determination of native title is a determination whether or ***not*** native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:

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

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

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

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

(e) to the extent that the land or waters in the determination area are ***not*** covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease--whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others. Section 223 relevantly provides:Common law rights and interests

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

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

(c) the rights and interests are recognised by the common law of Australia.Hunting, gathering and fishing covered

(2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests. I have discussed the applicable principles in Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2) [2014] FCA 528; 317 ALR 432 at [121]- [131] and [135]-[137] and I adopt those passages, and need ***not*** repeat them. By way of further elaboration, there are two passages from Jagot J's reasons for judgment in Wyman on behalf of the Bidjara People v Queensland (No 2) [2013] FCA 1229, which I would respectfully adopt. Her Honour's decision was upheld by the Full Court (Wyman v Queensland [2015] FCAFC 108; 235 FCR 464), including on her Honour's analysis of the applicable legal principles. At [450], Jagot J stated:As explained in Yorta Yorta, native title, being rights or interests in relation to land or waters, "survived the Crown's acquisition of sovereignty and radical title" but such rights and interests "owed their origin to a normative system other than the legal system of the new sovereign power", the normative system being "the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned" (at [37]). Accordingly, "it is clear that the laws or customs in 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" (at [38]). In this proceeding, the normative system upon which the applicant relies is the system of traditional laws and customs followed by Western Desert people. And at [454]-[455] her Honour stated:As to laws and customs, in Yorta Yorta at [42] it was said that:... because the subject of consideration is rights or interests, the rules which together constitute the traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but ***not*** rights or

interests in relation to land or waters.In this regard, “normative content” means established behavioural norms in accordance with the recognised and acknowledged demands for conformity of a society (Akiba v Queensland (2010) 204 FCR 1; [2010] FCA 643 (Akiba) at [171]-[173]). The “body of persons united in and by its acknowledgment and observance of a body of law and customs” is thus said to be a society for this purpose (Yorta Yorta at [49]), albeit recognising that the word “society” does ***not*** appear in s 223 which focuses on “communal, group or individual rights and interests” (see Akiba at [162]-[165]). For the purposes of the NTA if a society ceases to be a body of persons united in and by its acknowledgment and observance of a body of law and customs, then the adoption of former traditional laws and customs by a new society will ***not*** make those laws and customs traditional, at least ***not*** for the purposes of the NTA (Yorta Yorta at [53]). In the present case, it is said by the applicant that both the Aboriginal people who occupied land and waters in and around the claim area at and before sovereignty, and the claim group members and their ancestors, were united in and by their acknowledgment and observance of a body of laws and customs found amongst Western Desert people. At [180]-[181], the Full Court in Wyman made the following points about continuity:Ultimately, what the plurality said in Yorta Yorta at [89], having observed that acknowledgement and observance of traditional laws and customs must have continued “substantially uninterrupted since sovereignty”, is important in this regard. Their Honours noted that this qualification must be made to recognise that European settlement has had “the most profound effects” on Aboriginal societies and that it is “inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement”. The plurality then added: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.This last quoted dicta emphasises at least three things. First, as the State submits, that change to laws and customs caused by European settlement cannot simply be ignored. Secondly, that it is almost inevitable that change will have occurred. Thirdly, nonetheless, if it can be shown that there is still a “normative system”, out of which rights and interests arise, which is rooted in the sovereignty system, then those rights and interests may be recognised under the NTA.

Depending upon the evidence that is led in any case, claimants may establish that they continue to have a normative society rooted in the classical, sovereignty society out of which rights and interests contended for continue to be possessed, even where a range of rules and practices under laws and customs have ceased to be followed. The applicant contends that there is sufficient continuity of observance of traditional laws and customs to satisfy the threshold, principally because of the continued recognition and adherence to the Tjukurrpa, but also to other traditional laws and customs. They contend (and the State does ***not*** dispute) that there can be some change or adaptation of traditional laws and customs, so long as the normative system which existed at sovereignty can still be discerned, and remains the source of the rights and interests in land and waters: see Bodney v Bennell [2008] FCAFC 63; 167 FCR 84 at [74]. The extracts above make it clear there is no need for biological descent to be established. The applicant is correct so to submit. What is critical is proof, on the balance of probabilities, of an enduring normative system of traditional laws and customs out of which rights and interests in land or waters arise for the group who makes the claim (and it is the observance of this normative system which unites the claim group members as a group). The content of that normative system (with allowances as described in Bodney) in each given case will determine how people acquire rights and interests in land or waters, and how they are united as a group (or ***not***, as the case may be). This may, or may ***not***, involve biological descent. The State submits (at [139] of its submissions) that there must be a “sufficient” continuing acknowledgement of relevant traditional laws and customs, namely enough acknowledgement to still produce and sustain rights in a society which has vitality enough for a normative system. It referred to De Rose v South Australia (No 2) [2005] FCAFC 110; 145 FCR 290 at [58], [63] and Jango v Northern Territory [2006] FCA 318; 152 FCR 150 at [352], [358], [364], [366], [378], [395]. It is uncontroversial that there must be continuing acknowledgement and observation of traditional laws and customs connected to the possession of rights and interests in land or waters (see, for example, De Rose (No 2) at [60]). However, introducing language such as “sufficient” or “vitality enough” might tend to put a gloss on the description in Yorta Yorta at [47]:Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and

customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has ***not*** existed 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. In my opinion, this passage does ***not*** suggest "vitality" is an independent requirement. Rather, it suggests (as the meaning of vitality implies) that the system of traditional laws and customs is a living system amongst the members of the claim group, or society. Relying on Bodney at [178] and [186], the State also made the following submission:Bodney confirms that it is necessary to demonstrate connection to all parts of an application area. Connection to a broad region or places simply in the vicinity of the area claimed is insufficient. Further, a substantial absence of any real acknowledgement and observance of traditional law and custom by persons associated with a particular area would be fatal for native title over that area, even if it could be shown that other claimants, associated with other areas, continued to acknowledge and observe traditional laws and customs.

(Footnotes omitted.) The passages at [178] and [186] of Bodney do ***not*** use the term "all parts" and I consider the State's submission is put too absolutely. At [178] and [179] of Bodney, the Full Court said:It is ***not*** uncommon for the traditional laws and customs of a community to connect that community to a claim area by connecting groups within the community both to each other (often in complex ways) and, respectively and immediately, to their own particular portions of the claim area (in the latter case by granting rights to, and imposing responsibilities on, each such group in respect of its portion). In such cases, it is entirely appropriate that the connection inquiry consider ***not*** merely evidence of the general connection of the claimant community to the claim area, but also the evidence of the particular connection of the particular groups and their members to their respective portions of the claim area: see Neowarra [2003] FCA 1402 at [353]- [356]. The latter evidence, we would suggest, will ordinarily be necessary in some degree if the claimants' assertion of connection is to be sufficiently manifest over the claim area as a whole — the more so, in communal claims, if rights and interests are held differentially across the community — though there can be cases where, because of long-standing occupancy of the claim area, the s 223(1)(b) inquiry (as distinct from that under s 223(1)(a)) will ***not*** loom large: cf Griffiths v Northern Territory (2006) 165 FCR 300 at [561]-[562].

What, in our view, is indispensable where a matter put in issue in a proceeding is whether connection has been maintained to a particular part of a claim area, are the needs:(i) to examine the traditional laws and customs for s 223(1)(b) purposes as they relate to that area; and

(ii) to demonstrate that connection to that area has, in reality, been substantially maintained since the time of sovereignty.(Emphasis in original.) At [186], the Full Court said:What we wish presently to emphasise is that if those persons whom the laws and customs connect to a particular part of the claim area have ***not*** continued to observe without substantial interruption the laws and customs in relation to their ***country***, they cannot succeed in a claim for native title rights and interests even if it be shown — which it has ***not*** been — that other Noongar peoples have continued to acknowledge and observe the traditional laws and customs of the Noongar: cf De Rose FC (No 2) 145 FCR 290 at [57]-[58]. As the Full Court noted in Alyawarr FC 145 FCR 442 at [92], continuity of observance of laws that connect is itself "a manifestation of connection". A substantial absence of any real acknowledgment of traditional law and observance of traditional custom, as these related to the Perth Metropolitan Area, would occasion a substantial failure to maintain connection with that area which could ***not*** later be revived for contemporary recognition: Mabo (No 2) 175 CLR at 60. These observations were made, as the extracts demonstrate, in relation to a claim over the Perth metropolitan region, and their Honours' observations must be understood in that context. There is no issue of the kind raised in Bodney in the present proceeding. If the point the State is attempting to make, relevantly for this proceeding, is that to secure a determination in the terms sought the applicant must establish the continued observance of traditional laws and customs in relation to the whole of the claim area by members of the claim group (rather than other people), and ***not*** just the eastern portion, then I accept that is the case. I deal with the claim in De Rose and the first Full Court decision (De Rose v South Australia [2003] FCAFC 286; 133 FCR 325) again in the section of these reasons dealing with the more permanent movement of the claim group members' ancestors into the claim area. However, the following observations from that decision at [218]-[219] are also apposite:We should add that the "usurpation" thesis perhaps carries with it overtones of a

Eurocentric notion of “occupation”. The joint judgment in Ward (HC) at [14], pointed to a difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests because the “spiritual or religious is translated into the legal”. Their Honours also suggested (at [14]) that the:... difficulties are ***not*** reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.Similarly, there is a danger that a term such as “occupation” of land, as applied to Aboriginal people of the Western Desert Bloc, may create a false reference point. Such language, which is ***not*** found in s 223 of the NTA, tends to convey an impression that the holders of native title must have enjoyed physical possession of defined tracts of land in ways ***not*** dissimilar from the European settlers who arrived in the twentieth century. It may be appropriate to apply the language of “occupation” to a freeholder or leaseholder, or even to the settled existence of the Meriam people whose claims were upheld in Mabo. But as the evidence in the present case makes clear, the Western Desert peoples were comparatively few in number and led a lifestyle that required adaptation to the extraordinarily harsh conditions of the land. The relationship between them and the sites or tracks of spiritual significance to them is ***not*** readily captured by the familiar language of Anglo-Australian property law. The approach to the analysis of native title claims must be sufficiently flexible and adaptive so as to cover the range and variety of traditional laws and customs, and living and environmental conditions, in which these claims arise. The manner in which people “occupy” the arid lands of inland Australia is, literally, a world apart from the manner in which people “occupy” the verdant land and waters of the Torres Strait. The law’s approach must ***not*** be so inflexible as to favour one kind of traditional life, laws and customs, over another. That would be to frustrate both the objects and purpose of the NT Act and to cast aside the High Court’s decision in Mabo v Queensland (No 2) [1992] HCA 23; 175 CLR 1. Further, the fact that the characterisation of the claims to native title shifts in emphasis, especially where there are unique or unusual issues, may be expected: De Rose [2003] FCAFC 286; 133 FCR 325 at [229]. The applicant also made submissions about the civil standard of proof and the drawing of inferences. They referred to the judgment of Bennett J in AB (deceased) on behalf of the Ngarla people v Western Australia (No 4) [2012] FCA 1268; 300 ALR 193 at [724] and the authorities there referred to, especially Selway J’s judgment in Gumana at [201] where his Honour said:This does ***not*** mean that mere assertion is sufficient to establish the continuity of the tradition back to the date of settlement: contrast Yorta. However, in my view where there is a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement supported by creditable evidence from persons who have observed that custom or tradition and evidence of a general reputation that the custom or tradition had “always” been observed then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement. That was ***not*** the case in Yorta. It is the case here. It is worthwhile setting out a little more of Selway J’s judgment in Gumana which, with respect, is persuasive. At [194]-[196], his Honour said:Ultimately the evidence of the existence of the relevant Aboriginal tradition and custom as at 1788, and of the rights held by the particular clans in 1788 and thereafter pursuant to that tradition and custom, is based upon evidence derived from what the Yolngu claimants currently do and from what they have observed their parents and elders do and from what they were told by their parents and elders. Mr Gumana, who was perhaps the eldest of the Yolngu witnesses who gave evidence, described it this way:MR KEELY: Where does – so as I understand the answer given through the interpreter, “rom” is your word for law. And where does that law come from?

GAWIRRIN GUMANA: Rom is come from land, and also from the sea. That’s what we call rom.

MR KEELY: And is that something that you know about?

GAWIRRIN GUMANA: Yes, because my father told me – or ***not*** only my father, but people, old people – about land and sea and the water.

MR KEELY: So, your father and other old people told you about land and sea and water?

GAWIRRIN GUMANA: Yes.As already discussed, there is nothing peculiar or unique about this sort of evidence. It is oral evidence of a custom. It is evidence of fact, ***not*** opinion. To the extent that it consists of what Mr Gumana was told by his father and by other old people it constitutes a recognised exception to the rule against hearsay.

However, there is still a problem with it. On its face the evidence of what Mr Gumana and the other Yolngu witnesses were told by their fathers and other elders is ***not*** able, by itself, to establish what the facts actually were as at 1788. On its face all that it may be able to establish is that the witnesses and the relevant elders believed that there was a long standing custom that predated them.

(Emphasis added.) His Honour then described (at [198]) the common law's solution to this problem: namely to infer from proof of a current custom that the custom had continued from time immemorial. His Honour held:The inference was a strong one: see Jessell MR in Hammerton v Honey (1876) 24 WR 603 at 604:It is impossible to prove the actual usage in all time by living testimony. The usual course taken is this: Persons of middle or old age are called, who state that, in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that usage has prevailed from all time. A similar approach has been taken in Canada. Re Kitchooalik and Tucktoo (1972) 28 DLR (3d) 483 was a customary adoption case rather than a native title case, but the principle applied was the same. At 488, the Court said:It is said that the Court of these Territories cannot recognize or give effect to custom adoptions by the Eskimo. While the Indian Act, R.S.C. 1970, c. I-6, recognizes such adoptions by Indians there is no corresponding legislation for Eskimos. From this, it is argued that Parliament did ***not*** intend to extend recognition of this practice to these people. Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal, C.J., in Bastard v. Smith [1837] EngR 942; (1837), 2 M. & Rob. 129 at p. 136[1837] EngR 942; , 174 E.R. 238, points out that such evidence is no longer possible or necessary and that evidence extending "... as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case. The work of inferential reasoning in relation to claimant evidence was also the subject of earlier observations by the Full Court in De Rose [2003] FCAFC 286; 133 FCR 325 at [259], and I respectfully adopt that approach:In Yorta Yorta (HC), the joint judgment endorsed (at [59]) an observation by the trial Judge in that case that:... the difficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated.For obvious reasons, the Aboriginal witnesses could ***not*** give direct evidence of the way in which pre-sovereignty population shifts were viewed by the traditional laws and customs of the Western Desert Bloc. The primary Judge was therefore forced to rely on inferences from necessarily incomplete evidence. Bearing that in mind, in our view, the evidence was sufficient to support the inference he drew, namely that population shifts to and from the claim area that occurred in the twentieth century were consistent with and recognised by the traditional laws and customs of the Western Desert Bloc, in the sense that, under those laws and customs, the newcomers could acquire the status of Nguraritja in relation to sites or tracks on or near the claim area. There is no difficulty in a Court preferring, as more reliable and persuasive, the evidence of Aboriginal witnesses over the evidence of anthropologists or anthropological sources. In De Rose at [264]-[265], the Full Court said:As the primary Judge made clear at several points in the judgment, it was because of the testimony of the Aboriginal witnesses that he was prepared to find that the four-fold test for determining Nguraritja was acknowledged by the traditional laws and customs of the Western Desert Bloc. He plainly regarded that evidence as more cogent and persuasive than the writings of Professor Berndt on this particular issue.

His Honour took this view notwithstanding that he was by no means uncritical of the evidence of Aboriginal witnesses. As we have noted, he rejected the evidence of certain witnesses on important issues. His Honour's acceptance of their evidence as to the ways of becoming Nguraritja plainly took account of his assessment of their reliability and understanding of the questions. His Honour must also have taken into account the fact that they were recounting elements of an oral tradition. Contrary to the State's submissions (at [83]), I do ***not*** accept that where the claim group members gave evidence about their own beliefs and practices, and their own understanding, in 2015, of the traditional laws and customs which give rise to their connection to the claim area, the principles set out above can have little or no application because the claim group members' ancestors moved into the area from elsewhere. That contention assumes the applicant has failed in their case and the State has succeeded on its migration thesis. Rather, the claim group members all gave evidence of what they understood the position had

"always been" in the claim area, in terms of the laws and customs which existed in accordance with Western Desert traditions, and governed the connection of people to the land and waters in the claim area. They spoke of what was within their own living memories, and within the knowledge (and living memories) of their parents, grandparents and other family members. Whether their ancestors were habitually resident within the boundary of the claim area or ***not*** does ***not***, in my opinion, affect the ability to draw inferences of the kind explained by Selway J in Gumana. The claimant evidence was about traditional laws and customs that applied in the claim area, and which united a particular group of Aboriginal people because they all observed it, and recognised they were bound to live their lives according to it. The Supreme Court of Canada has recognised and emphasised the important and unique role of evidence given by Indigenous people from an oral tradition. In Mitchell v MNR [2001] 1 SCR 911, drawing on the earlier decisions of the Court in R v Van der Peet [1996] 2 SCR 507 and Delgamuukw v British Columbia [1997] 3 SCR 1010, McLachlin CJ said (at [37]-[39], Gonthier, Iacobucci, Arbour and LeBel JJ agreeing):Nonetheless, the present case requires us to clarify the general principles laid down in Van der Peet and Delgamuukw regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in Delgamuukw, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" (para. 84).

Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does ***not*** negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must ***not*** be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" (Sopinka and Lederman, supra, at p. 524). As Lamer C.J. emphasized in Delgamuukw, supra, at para. 82:[A]boriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does ***not*** strain "the Canadian legal and constitutional structure" [Van der Peet at para. 49]. Both the principles laid down in Van der Peet – first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit – must be understood against this background. [Emphasis added.]There is a boundary that must ***not*** be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should ***not*** be confused with a vague sense of after-the-fact largesse" (R. v. Marshall, [1999] 3 S.C.R. 456, at para. 14). In particular, the Van der Peet approach does ***not*** operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should ***not*** be undervalued "simply because that evidence does ***not*** conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (Van der Peet, supra, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated. Ultimately the Court concluded there was insufficient evidence to support the claim of an Aboriginal right of the kind that would allow the respondent to cross the border with the United States carrying goods purchased in the United States without having to pay duty. The Court's conclusion is illustrative of the approach it had earlier set out:As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. With respect, this is exactly what has occurred in the present case. The contradiction between McKeown J.'s statement that little direct evidence supports a cross-river trading right and his conclusion that such a right exists suggests the application of a very relaxed standard of proof (or, perhaps more accurately, an unreasonably generous weighing of tenuous evidence). The Van der Peet approach, while mandating the equal and due treatment of evidence

supporting aboriginal claims, does ***not*** bolster or enhance the cogency of this evidence. The relevant evidence in this case – a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade – can only support the conclusion reached by the trial judge if strained beyond the weight they can reasonably hold. Such a result is ***not*** contemplated by Van der Peet or s. 35(1). While appellate courts grant considerable deference to findings of fact made by trial judges, I am satisfied that the findings in the present case represent a "clear and palpable error" warranting the substitution of a different result (Delgamuukw, supra, at paras. 78-80). I conclude that the claimant has ***not*** established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade. Giving due weight to Indigenous evidence from an oral tradition will inevitably involve drawing inferences about how and over what period of time the traditional laws and customs spoken of have given rise to rights and interests in land or waters. The Court's approach must be sufficiently flexible to accommodate this, while bearing in mind the limits articulated by the Canadian Supreme Court in Mitchell, and being astute to ensure there is sufficient evidence for the discharge of the legal burden of proof. It will be obvious that, therefore, I do ***not*** entirely accept the State's related submission on this issue: namely that the position at sovereignty must be proved through expert or historical ethnographic (and therefore, inevitably European) evidence. Such evidence is to be considered along with the evidence of Aboriginal witnesses but it has no more necessary intrinsic probative value, and may suffer from weaknesses affecting its probative value, such as lack of understanding and the inability to test its provenance and reliability. For example, and as I set out later in these reasons, the work of Daisy Bates has some of these weaknesses.

FINDINGS ON CONNECTION ISSUES

A note on places referred to frequently in the evidence There are several places, or areas, the geographical location and extent of which should be clarified. This can be done with more certainty for some than others.

Yander – as referred to by Daisy Bates' informants "Yander" was ***not*** a term used frequently by the claimant witnesses but it was one of the principal geographical terms recorded by Daisy Bates as identifying where her Ngaiawonga informants were said to have connections. In answer to a question asked of him by the solicitors for the applicant for his first expert report, Dr Sackett summarises how the location of Yander arises. The question asks about the laws and customs of what the parties have now called the Ngaiawonga in relation to rights and interests in land. Dr Sackett provides the following summary answer:Unfortunately, we do ***not*** have statements by the original occupants of the claim area as to their laws and customs regarding acquiring rights and interests in land. What we do have, though, is (1) a summarizing statement by Bates on the subject and (2) information contained in a few Ngaiuwonga Pedigrees, specifically those she linked to an area named Yander. These, as it happens, are somewhat contradictory. At the same time, taken as a whole, they offer at least glimpses into the situation at about the time of settlement. (While, as will be seen, Yander lies to the north of the claim area, the Pedigrees show people from the wider Ngaiuwonga area.) Dr Sackett describes the way Daisy Bates set out, in summary, how people acquired rights and interests in land and waters:Regarding the law and custom of the claim area, and the region more generally, Bates stated that:[e]very pool, spring or lake in every tribe is associated with the family or group occupying the vicinity, or with some individual member of that family, whose birth occurred beside the pool, etc. Such pool belongs to the family of the person born there as long as the family exists.Elsewhere, Bates elaborated on this, averring that "[i]t appears from the association of certain individuals with certain pools, that these have been the camping grounds of a local family or group, consisting of fathers and sons only." I take this to mean that as Bates saw it, any given tribe (and for her the Ngaiuwonga constituted a tribe) was divided into, or made up of, local patri-groups; these in turn were associated with, or held, the local component places and ***countries*** that made up the total tribal area.

At the same time Bates wrote of families or patri-groups, she spoke of Ngaiuwonga "tribelets", ie of intermediate subdivisions of the Ngaiuwonga people – of some type of grouping above the family or patri-group level, but below the tribal level. As Bates related it, these, at least at times, took their name from a named place in the area of the subdivision.

Yander possibly was one of these latter. It certainly is a name that figures regularly in Bates' Ngaiuwonga genealogies. That is, she labelled some Pedigrees relating to Ngaiawonga people as "Yander" Pedigrees, and associated some of the people named in such Pedigrees with an area called Yander. Concerning this later point, she, for example, stated that "Jinguru [one of her primary informants] is from Yander."

This said, it needs to be noted that there is ambiguity in the location of Yander, and inconsistency in the rendering of the term Yander. At times Bates said Yander was Lake Way; other times she said it was a place some 60 kilometres west of Wiluna township. On these latter occasions, Lake Way was said to be Wilurna or Wilurira. Bates also seemingly rendered Yander as: Yarnder, Yarnderi, Yanderguna and Yander bubba.

(Citations omitted.) As Dr Sackett subsequently concluded, Daisy Bates' records did sometimes link specific individuals with named places, but said nothing about the nature or source of their associations with those places, nor indeed whether they had associations with other places. The area Bates variously called "Yander" or some like formulation was one such place. Commenting on these opinions, Dr Brunton's view was that Yander was likely to be near Lake Way, although a little to the south-west. He based this on a map Daisy Bates obtained at Rottnest Island which has "Cork Tree" written under the word "Yarnder". Dr Brunton identified a bore called "Cork Tree Well" on the Geoscience Australia database, and obtained its coordinates, which would place this bore inside the north-eastern boundary of the claim area, about 5 km in from the boundary. In response, Dr Sackett noted that, elsewhere in her records, Ms Bates showed Cork Tree ***not*** as Yander but as Yalgojibi. Dr Brunton nevertheless maintained that Yander could be near Cork Tree. It does seem that the place Ms Bates identified with some of her informants as "Yander" (and its variations in her records) lies somewhere either just in, or just out, of the north-eastern boundary of the claim area, bearing in mind that Lake Way pastoral station is shown on the maps in evidence as only about 5 km from the claim boundary. There is no evidence why a place which seemed to play such a significant part in Bates' geographical records apparently has no identifiable parallel on maps created by Europeans, while most other places identified by Aboriginal informants could be aligned with a geographical feature, a mining or pastoral location, or a settlement. On the balance of probabilities, I am satisfied on the basis of Dr Sackett's evidence, considered with that of Dr Brunton, that the "Yander" and similarly spelt places recorded by Bates (as identified by Dr Sackett) was at or very close to the north-eastern boundary of the claim area. It is ***not*** possible to make any findings, in my opinion, about the size of this place Yander, nor to be certain whether it was an area, or a site.

Lake Way – as referred to by Daisy Bates' informants On the evidence before me, "Lake Way" can mean one of three things. First, it can be a reference to the pastoral station called Lake Way Station, which is marked on the maps in evidence as being about 5 km outside the north-eastern boundary of the claim area. I infer this is the location of the station homestead. Second, it can be a reference to the lake itself, which is some way further north of the claim boundary. The lake is very large (it appears to cover about 460 square km), and is generally a dry salt pan, save for exceptional floods. There is, and has been for some time, mining activity in the lake. Third, according to some evidence given by Dr Sackett in his supplementary report, there was, at least during the gold rush time, a township called Lake Way. Dr Sackett records an early European prospector – Lawrence Wells – noting in April 1892:At several of my [gold] discoveries of that year (notably Mount Sir Samuel, Lake Darlot, and Lake Way) there are now townships and goldfields (Wells 1902:5) The evidence before the Court does ***not*** suggest a township still exists at Lake Way. When the references are taken in context, it seems more likely to me that the claimant witnesses, when they spoke of Lake Way, were using the term reasonably interchangeably as between the pastoral station and the lake itself, simply to indicate a vicinity. It seems unlikely they were referring to a township established during (and perhaps only during) the late nineteenth century gold rush in the area. Where evidence was given about working on Lake Way, it was generally clear it was the pastoral station the witness was referring to.

Darlot Lake Darlot is another large salt pan lake to the east of the claim area. Running north to south and taking in Lake Darlot are a number of places referred to in the evidence: Barwidgee, Mount Grey, Yandal and, to the south of Lake Darlot, Weebo. The use of "Darlot" as a name for locating people and places was familiar to Dr Sackett from his earlier anthropological work on claims in this region. Dr Sackett recounts how Lake Darlot was another place where Lawrence Wells discovered gold in about 1892. Other records to which Dr Sackett refers place the discovery of gold in the Darlot area (which, in this context must refer to Lake Darlot) at about 1894. Dr Sackett then refers to a historical account of the Darlot area by Lyn Hatch (Darlot: The Centennial Publication 1894-1991 (Plutonic, 1994)), where the author describes the establishment, around 1901 onwards, of pastoral stations in the area, following upon the discovery of gold, and the eventual amalgamation of three leases to become three large pastoral stations:

Weebo Station, Banjawarn Station and Melrose Station. As Dr Sackett observes, the claimant witnesses tended to use the term "Darlot" in several different ways. Sometimes there were references just to Lake Darlot itself. For example, Mr James' evidence was that there were groups of Western Desert people at Lake Darlot (the "Birriliburu mob" was one he referred to). He thought they called themselves "Koara", and he recognised they had similar traditions or customs to his own mob, however he then said: "but they are about a different part of the ***country***". Other witnesses referred to Darlot in terms of a larger region or area. For example, Ms Geraldine Hogarth's evidence was that all her grandchildren could "say that the Darlot area is their ***country***, because my mother's grandmother was born there". This reflects the evidence Ms Hogarth's mother, Ms Luxie Hogarth, gave. Ms Luxie Hogarth's evidence was:My mother was from Darlot. Her name was Kugila and her whitefella name was Daisy Cordella to start with. Then my mother married my father, and she became Daisy Hogarth. Her mother, and her grandmother, and her grandfather, they were always there, living in the Darlot area. My mother taught me how to live in the ***country***, and she showed me a lot of things, on the Darlot side. In oral evidence, Ms Geraldine Hogarth said:MR WRIGHT: And I just wanted to just clarify one thing about your grandmother on your mum's side, your mother's mother, what's your understanding as to where she's from?

GERALDINE HOGARTH: From Darlot, Lake Darlot, at that place, yes.

MR WRIGHT: So, the actual lake?

GERALDINE HOGARTH: Oh, no around that area Darlot when we talk about Darlot, yes. When Ms Luxie Hogarth was asked during her evidence in chief to explain what Darlot means and whether it refers to a particular place or a large area, she answered:It's just a big area where all my – my grandmother and grandfather and they all lived there, and to the great, great grandfather and all – and my – that's where my mother stay and us family lived there in that area. There is no more precise indication from Ms Geraldine or Ms Luxie Hogarth's evidence regarding what region they had in mind when they gave this evidence. Given their evidence was frequently an account of what they had been told in oral tradition, it seems likely that little more specificity was given when the information was passed on. Of course, those who were the first generation conveying this information would have had a more specific idea of the geographical boundaries of the region they identified as "Darlot", because they would have been speaking about their ***country***, the ***country*** in which they had rights and interests. That was likely internal knowledge, so to speak, embedded in the person passing on the information. But as the information is handed down, unless more inquiries are made or questions asked, the later generations may ***not*** have the same internal knowledge of the particular geographical region the speaker had in mind. That is why the Court is particularly assisted by a person with the knowledge, experience and expertise of Dr Sackett, acquired over a long period of working with Aboriginal people in the wider region that includes the claim area and the areas to which the witnesses refer. He is better placed than the Court to try and fit pieces of the jigsaw together: it is then up to the Court whether it accepts his evidence, and how that evidence fits with the matters the applicant has the burden to prove. Two witnesses did attempt to describe in a geographical sense the area they, at least, meant when they used the term "Darlot". Mr Muir's evidence was that he meant "Darlot, Weebo, Wardadda, Darda, Yandal; mostly the ***country*** to the east of the Tjiwarl claim". In the next part of his evidence, he contrasts this description with other areas:That's where most of the people lived in my grandmother's time when my mum was a little girl, in Darlot. They moved around following ceremonies even my mum was a little girl, walking from Mulga Queen through Croft, north of Darlot, using a yiwarra [a traditional track] that goes through Henry's Well and Townsend Well. That's really the walking journey that people took into this claim. That's the yiwarra, the pathways. Following the dragonfly, the Tjiinkuna dreaming. I note from the maps in evidence that Croft does ***not*** appear on them. Mr Lewis also gave evidence that when people say "Darlot" they are talking about the area running north to south between Yandal and Weebo with Lake Darlot in the middle. I take this evidence to mean that is what Mr Lewis understands by the region he calls Darlot, and further what he understands when other people within the claim group, and perhaps outside it (the latter being less clear), use that regional description. There is a reasonable level of consistency between the evidence of Mr Muir and Mr Lewis, and between that evidence and Dr Sackett's understanding of how the term is used. For the purposes of my findings in this proceeding, I take references to Darlot to be references to the area east of the claim area between approximately the stations of Yandal in the north and Weebo in the south, with Lake Darlot in between them.

Wongawol Just as with the references to Darlot, it became apparent during the on ***country*** evidence that the name "Wongawol" was used to refer to possibly different places, or a region which is ***not*** defined or easily discernible on any of the maps in evidence. On one of the maps in evidence (Map 3 of the applicant's bundle), Wongawol is shown as a pastoral station approximately 150 km as the crow flies from Barwidgee, which means it is approximately 155 km outside the north-eastern edge of the claim boundary. Dr Sackett's view is that the claimant witnesses use "Wongawol" in at least two ways. First, as a reference to the pastoral station. This is clear from the way Mr Allan Ashwin used the name in parts of his evidence, where it is one of several pastoral stations being referred to:I was born at Weld Spring, Banja on Prenti Downs, which used to be part of Windidda ***country***. I grew up around Wiluna and Albion Downs. I still went back to the places I was born when my old man was working around Windidda and Wongawol. I used to go out there as a kid and more or less grew up at Windidda and Wiluna.

...

After Yeelirrie I went to work on Windidda. But I've worked all over this area. Yakabindie, Albion Downs, Mt Keith, Lake Mason, Lake Way and Matuwa, Jundee, Glen Ayle, Carnegie, Wongawol. I've mainly lived and worked in this area my whole life. I spent some time in Meekatharra district and Leonora district and worked up at Yandeyarra, around Kalgoorlie for Main Roads patching roads, I used to do the road from Withcimulda to Kalgoorlie. Another example is his evidence about his grandmother Telpha Ashwin:My grandmothers [Telpha Ashwin] ***country*** was from around Windidda and Yelma and Wongawol, Lorna Glen around Carnegie and all that area. When she was living with old Arthur Ashwin, he the one who started Lorna Glen and Yelma Stations and started Dada over towards Darlot. He started them properties up. Ms Harris's evidence about her mother's ***country*** was:My mother was born in Wiluna, and grew up in Carnegie, Windidda, Wongawol, all around that station area [in the Wiluna determination area]. In the case of both Darlot and Wongawol, although he set out how earlier ethnographers and anthropologists had recorded peoples' self-identification with these areas by reference to a variety of labels, which were sometimes related to language or dialect and sometimes ***not***, Dr Sackett's opinion is that the use of station names by people had no real relevance to the analysis of the movement of people from the Darlot or Wongawol areas into the claim area. I accept that evidence. Rather, pastoral stations are an obvious contemporary reference point. All that need be found in relation to Wongawol is that in a particular context it may refer to the pastoral station, and in another context it refers to a larger region, no doubt including all or part of the pastoral station, but which was considered by the ancestors of those witnesses who spoke about the region as their ***country*** under traditional laws and customs. There is no dispute that, whatever the outer limits of this region, it is a considerable distance to the east of the claim area.

Wiluna I have put a reference to Wiluna here because of some of the evidence given by the claimant witnesses in particular, which I consider should be noted. While there is no lack of clarity about where the Wiluna township is (having been established in approximately 1898), nor about the area covered by the Wiluna native title determination (which was in evidence in Map 13 of the applicant's maps), what is striking is the way in which some of the claimant witnesses would speak about Wiluna and Lawlers in combination, as if they considered them to be the same area. As can be seen on the map attached to these reasons, Lawlers is south of the claim area, and Wiluna is north of the claim area. It seems to me this may be a little like the "Darlot" references in the evidence, where station names are used to refer to what is actually quite a large area, rather than a specific location on a map, which is where the European mind naturally goes. For example, Ms Geraldine Hogarth, when speaking of her paternal grandmother Alice Redmond Curtin (whose Wongai name was Koyungati), said she came "from this Wiluna area, and she was born in Lawlers". Similarly, Mr Lewis gave the following evidence:Before this boundary, we had a Koara claim. It's just a name change. Before then they had the Sir Samuel claim. It's just changing names. Before native title claims come along, people would talk about their ngurra by using the pastoral station names. That was how you described your area. If you said, "I'm going back to Depot" you would mean you were going back to "Depot, Booylgoo and Kaluwiri". I take references to "Wiluna" in the evidence to be references to a region, rather than express references to where the township is located (and shown on a map). In context, as the evidence to which I have referred demonstrates, it may include quite a large region that takes in all or part of the claim area.

References to where people "lived" There is no historical town or Aboriginal community located in the claim area. Leinster was established for those working in, or servicing those working in, the mines in the region. The townships which grew up as a result of Europeans entering the area prospecting for gold, and establishing pastoral stations, were mostly outside the claim area, although some surround it. Aside from working on the pastoral stations and thereby remaining within the areas they identify as their ***country***, the claim group members and their ancestors were compelled to locate themselves in or near the townships created by Europeans if they wished to access regular supplies of food, services, work, housing and the like. Therefore, where the evidence is that a person was born in towns such as Lawlers, Leonora, or Wiluna, or "lived" in one or more of those places, contrary to the thrust of the State's submissions, I do ***not*** consider this as evidence capable of demonstrating lack of connection with the claim area. It might ***not*** be positive evidence of connection, but nor is it evidence against it. People "lived" where they could, and if they remained close, in Western Desert terms, to the area they identify as their ***country***, the fact they could ***not***, or did ***not***, find a place to "live" inside a boundary that did ***not*** exist at the time they were making these choices is of little relevance to the matters of which the Court needs to be satisfied.

Preliminary matters

Use of geographical locations close to the claim area As I have already noted, the parties accept the boundaries for this claim area are arbitrary as to the north, the south and the east. The western boundary, it is accepted, runs along geographical features. This fact assumes some importance in the way evidence about people who occupied areas just outside the claim area should be treated, especially historical evidence. The undisputed evidence is that, like its surrounds, the claim area would have been sparsely populated by people living a traditional life. To sustain life, large areas of ***country*** were required. Geographical features assume importance for practicalities such as finding shelter, food and water, as well as for ceremonial and spiritual reasons. There is a tendency however, since European contact, to identify regions by reference to European towns or pastoral stations: even Aboriginal witnesses tended to do this, although in my opinion their evidence was inevitably more nuanced and talked about an "area" near a town or "around" a pastoral station. This indicated, it seems to me, a consciousness that Europeans, including people such as anthropologists, lawyers and judges, will identify with town names and pastoral station names, so descriptions were put in this way. They are, in my opinion, no more than rough approximations of larger areas the Aboriginal witnesses are generally referring to. Much more authentic and reliable in descriptive terms are references to geographical features which figure in traditional laws and customs, or have practical significance, such as waterholes, shelter or paths and routes between significant places. Unless there is clear evidence to consider otherwise, in my opinion where evidence refers to places relatively close in geographical terms to the claim boundaries, there is no reason to consider that evidence is irrelevant as ***not*** touching on connection with ***country*** inside the claim area. Its relevance must be assessed by factors wider than the line drawn on a map for the purposes of this claim under the NT Act. Those lines are ultimately the lines on which the Court's orders and determination may be based, but it is mistaken to see those lines as reflecting anything precise about the ***country*** to which the claim group members and their ancestors may be connected by traditional laws and customs. An example is the place identified on the maps in evidence as Lake Way (rather than the lake itself), which is approximately 5 km from the north-eastern part of the claim boundary. When this place is spoken of in the evidence, it is usually difficult to discern whether the speaker is referring to the area of the lake, to the European named pastoral station, or both (or neither). But this area is so close to the claim area that it is counter intuitive to suppose that people living a traditional life and who were connected by traditional laws and customs to the Lake Way area did ***not*** also have connections to ***country*** inside the claim boundary. Unless, for example, a previous native title determination had made it clear that there was a different landholding group immediately adjacent to a claim boundary which, in my opinion, is the kind of "clear evidence" one would need to make a different assumption.

The content of Western Desert Laws and Customs and the "Western Desert Cultural Bloc" Although there was no dispute between the parties that the claim group members are Western Desert people, and no dispute that the areas from which their ancestors came were Western Desert areas, it is necessary to make some findings on the features of Western Desert traditional laws and customs because the Court is asked to determine, amongst other things, whether it was these laws and customs which governed peoples' relationships with the land in the claim area at sovereignty. These matters can be set out with some certainty because they were the subject of admissions by the State in its response to the applicant's statement of issues, facts and contentions. I also set out below some relevant evidence from Dr Sackett on this issue. As an introductory matter, I consider it useful to

reflect on the population size of the groups to be discussed. In a paper published in 1959, Professor Berndt gives his own estimates of the historic and current (as in 1959) population size of Western Desert people: see Berndt R, "The concept of 'the tribe' in the Western Desert of Australia" (1959) 30 Oceania 81. First, it is necessary to bear in mind the area to which Professor Berndt referred to as the Western Desert covered more than 647,000 square km (Professor Berndt's estimate in square miles was 250,000). In this context Professor Berndt estimated that in 1959 the maximum population for the region covering Jigalong, Wiluna, Leonora, Laverton, Mulga Queen, Mount Margaret, Cosmo Newberry, the Warburtons, the Blackstone range and Winggalina, the Rawlinsons and up to Lake McDonald might be 2,000 to 2,200 people. He estimated no more than 3,200 Aboriginal people would be living in the entire Western Desert. The estimate he gave of the pre-European contact population was approximately 10,000 for the same region and 18,000 for the Western Desert as a whole. In this part of his paper, Professor Berndt gives some examples of 1957 and 1959 population sizes in some of the places to which he refers. He estimates (for example) that in 1957 there were 46 Aboriginal people in Leonora, 243 people in Laverton and 48 in Wiluna. I make this point to illustrate that in the critical years with which this proceeding deals – the first and second decades of the twentieth century – the original inhabitants of the claim area, and land around the claim area, were likely to have been few in number. So when claimant witnesses in this case speak about the "old people" in and around the claim area and how their own ancestors may have mixed with them, it need ***not*** be thought there were very large numbers of such people. Numerical strength is ***not*** the issue, nor a criterion for connection. In terms of language, there is one Western Desert language with a large number of varieties or dialects associated with different people and different areas. As Dr Clendon's evidence shows, labels given by Western Desert speakers to themselves by reference to language are ephemeral and it is difficult to draw any links between dialect and rights to ***country***, especially since many Western Desert people were multilingual in Western Desert dialects, and in other Aboriginal languages. Just as with their language, groups of Western Desert people did ***not*** identify themselves with a single Indigenous name. The source of laws and customs for Western Desert people is the Tjukurrpa. It governs all aspects of their lives, including rights to land, social rules and spiritual practices. One of the key features of Western Desert society which differs from other Aboriginal societies is the way that individuals and groups gain association with, and rights and interests in, particular areas of land. It is ***not*** simply by descent, whether biological or adoptive. It is broader than that – hence the expression used frequently by Dr Sackett in his evidence of "multiple pathways" to rights and interests in land and waters. A person may acquire rights and interests by conception or birth on ***country***, growing up or initiation on the ***country***, or the acquisition of knowledge through long residence. Rights and interests may also be acquired in ways more familiar in other Aboriginal societies: namely, descent from a person who has the requisite connection. A landholding group for a particular area is determined through a shared association amongst the group members with sites associated with the Tjukurrpa in particular parts of the land and waters. Since there are multiple pathways, landholding groups tend to be more open and fluid, and individuals may have access to a number of different parts of ***country*** through different pathways. None of the pathways is exclusive of another. Nor are these groups formed along patrilineal or patrilocal lines. The rights and interests of different groups in particular areas are recognised by other groups. There are rules about strangers or visitors entering ***country*** – access can be refused and conditions can be imposed, including that the visitor or stranger has to be accompanied by a person recognised as having authority in respect of the area. Access to and disclosure of knowledge about sites and rituals associated with sites can be restricted on the basis of gender, age and ritual knowledge. Sanctions can be imposed for non-adherence to these kinds of rules. Spiritual features of the landscape have to be respected and cared for, including by the observance of rituals and practices specific to certain sites or features. There needs to be particular and appropriate transmission of knowledge relating to those features, which also means restrictions on which members of the group have, and can use, that knowledge. In contrast to some of the laws and customs about how people gain rights and interests in ***country***, none of the rules I have set out in this paragraph were suggested to be unique to Western Desert society, but were said to be features of that society. In his first report, Dr Sackett traced the development of the concept of a Western Desert society, which he described in the following terms:In discussing the places of origin of the apicals and their ancestors I mentioned the Western Desert. The idea of the Western Desert as a culture area has its roots in the work of AP Elkin.

Based on research undertaken in 1930, AP Elkin concluded that peoples in and from the southwest of the Northern Territory, the western half of South Australia and the southeastern portion of Western Australia "are characterized

by a number of common features in their social organization and beliefs, which ***not*** only serve to link them together, but also to mark them off from [the peoples in the southeast of the Northern Territory, southwestern Queensland, and eastern half of South Australia]."

Specifically, Elkin said:(a) people in the area had neither patrilineal nor matrilineal moieties (and that the presence of alternate generation levels and sections should ***not*** be construed as suggesting they did).

(b) "[a]ll the tribes of [this area] have practically the same kinship system, and, indeed, use much the same terms".

(c) there were birth totems, wherein ***not*** only did a person's totem depend "on his place of birth and the totem associated with that place", "this totemism is ceremonial; the totemite ... [if] a fully initiated male, is taught the myths and ceremonies which enshrine the story of the culture-hero or heroes associated with the totem".

(d) a common mythological "theme ... is associated with the totemism of the area and enshrines the exploits of the totemic heroes of the time long past. The one term, djugur ... denotes a person's totem and the myth of his particular totemic hero".

(e) another totem was "the species associated with a person's conception".

(f) conception was thought to occur when "spirit-children enter women in the guise of food".

(g) "[t]he pattern of cicatrization on the backs of all fully initiated men of all tribes in this area is the same".It also should be noted, although Elkin himself did ***not*** do so, that the people he worked with, and the peoples of the Western Desert more generally, spoke dialects of the same unnamed Western Desert Language, meaning the area on the whole had certain common social, cultural and linguistic features.

Ron Berndt developed and extended on Elkin's work, saying that Elkin's "common features" extended across a much greater area of land than even Elkin had considered. As Berndt presented it, that area, which he said constituted the Western Desert Cultural bloc, was made up of two parts. One part extended:eastward from Kalgoorlie, Laverton and Leonora as far as Oodnadatta; and south from the central mountainous core (including the Everard, Musgrave, Man, Tomkinson, Petermann, Warburton and Rawlinson Ranges) to the Trans-continental Railway Line, including Lake Phillipson, Ooldea, Cundeelee and so on. This part has been called the Great Victoria Desert.The other part ran:from the Rawlinsons north-west past Lakes Gregory, Nabberu and Carnegie to Wiluna, and to Jigalong ... and [was] bounded on the north (beyond the Canning Stock Route) by the southern and eastern Kimberleys.(Citations omitted.) To reiterate the particular nature of Western Desert society, I adopt the following description by Dr Sackett:Unlike patrilineal landholding groups, Western Desert landholding groups are neither fixed nor predictable; they, as Myers observed, "are ***not*** a given." Rather, Western Desert landholding groups, traditionally at least, were emergent bodies. That is, rather than it being the case that the landowners of a ***country*** were constituted as a group through their shared defined descent from prior land holders, they were landowners of the ***country*** through their shared associations with and to the land itself.

(Citations omitted.) As the applicant sets out in their final written submissions, there was agreement between Dr Sackett and Dr Brunton on two key matters pertinent to this issue. First, and in broad terms, the matters to which I have referred above, including the "multiple pathways" to rights to ***country***, which, as Dr Sackett expressed in his evidence (with Dr Brunton agreeing), means there is the "possibility of taking father's ***country***, mother's ***country***, grandparent's ***country***, growing up in the ***country***, learning about it and making claims to it on the basis of one's knowledge of the ***country***, and particularly, birth [on] ***country***". Second, ***country*** associated with Western Desert people is ***not*** represented by a clear line which can be drawn on a map, with Western Desert society on one side

and another kind of Aboriginal society on the other. Instead, the characteristics of Western Desert society "fade" (or perhaps become less apparent as a point of difference) until the point is reached that, overall, the Aboriginal society would be characterised as a non-Western Desert society. The relevant example accepted by both Dr Sackett and Dr Brunton in the regions around the claim area are the communities to the west of the claim area, around Cue and Meekatharra, which both experts agree are comprised of non-Western Desert people. The argument is then about the applicant, representing a landholding group which occupies ***country*** in between lands now clearly recognised (at least anthropologically) as lands of Western Desert people (such as the Warburton Ranges) and lands clearly recognised (at least anthropologically) ***not*** to be so (such as Cue and Meekatharra). I should add here that, as the evidence in this case discloses, the claimant witnesses themselves also see clear distinctions between their own laws and customs and those of the people to the west of them.

My conclusions It is clear, as both Dr Brunton and Dr Sackett accept, the concept of a Western Desert society (even if one leaves out the "cultural bloc" part of the label) is an anthropological concept. More recently, it can also be said to be a native title concept, as Dr Sackett also noted in his first report. Dr Brunton said in his evidence, and I agree, it is ***not*** an emic reality. Its function is to enable a classification of groups of Aboriginal people by non-Aboriginal people, whether for the purpose of study (as by the early anthropologists) or for the purpose, in more contemporary times, of ascertaining a landholding group for the purposes of the NT Act. To that extent, care must be taken in the way the concept is used. It is partly for that reason that I prefer ***not*** to use the phrase "Western Desert Cultural Bloc" which is an expression coined by Professor Berndt. The Court is ***not*** engaged in any anthropological study or existential classification of Aboriginal people: rather, the Court is engaged in determining whether the applicant has proven the matters required for a determination of native title. Central to that task is proof of matters in s 223 of the NT Act, which do ***not*** include any necessary determination of who might be correct on where a line can or should be drawn about the extent of the rights and interests in land of other groups who may identify as Western Desert people. Rather, the utility of the classification process in which anthropologists and Courts have engaged is to see whether there is a single set of laws and customs which unite a particular group of people in their connection to particular areas of land and waters, and to decide whether those laws and customs are traditional ones. In that sense, the anthropological analysis about the traditional laws and customs of Western Desert people is important. But it is ***not*** a classification of where the traditional laws and customs of Western Desert people begin or end as an independent exercise. It is also for this reason that I would, with respect, take a different approach from the one taken by Lindgren J in Wongatha.

The place for inferences in contested issues about laws and customs in the claim area at sovereignty This was the subject of detailed submissions by both the applicant and the State. The role and application of the approach set out by Selway J in Gumana was contested. In any native title case, there will be an important role for inferential reasoning, because of the passage of time between the circumstances at or before sovereignty, and the circumstances prevailing at the time the Court must determine whether the requirements of s 223 of the NT Act are satisfied. A case such as the present poses additional challenges in the use of inferential reasoning. That is so for two reasons. First, the additional questions posed by the movement of the claim group members' ancestors (or at least some of them) into the claim area in the early twentieth century requires more steps in inferential reasoning than might usually be the case. Second, the paucity and nature of any broadly contemporaneous evidence concerning the situation in 1912 also means the applicant must rely on inference, and on expert evidence, to a greater extent than may be the case in some other claims. Relying on Sackville J's judgment in Jango at [460]-[464], the State submits that the applicant needs to adduce "anthropological evidence to establish the link between current laws and customs (or those observed in the recent past) and the laws and customs acknowledged and observed by the claimants' predecessors at the time of sovereignty". The claimant evidence alone cannot, the State submits, establish that the laws and customs to which they depose are "traditional", in the sense of existing at the time of sovereignty. The State repeated this contention at several points in its submissions. In my opinion, the State seeks to elevate Sackville J's observations in Jango to some kind of legal requirement, which they are ***not***. There is no legal requirement that ethnographic or anthropological evidence must directly establish the existence, nature and content of laws and customs observed by the Aboriginal people who occupied a claim area at sovereignty. Inferential reasoning may operate on anthropological and ethnographic evidence and opinion, just as it may on the evidence of claimant witnesses. In Jango at [441], Sackville J said:In Yorta Yorta (HC), as I have noted, the joint judgment pointed out that laws and customs do ***not*** exist in a vacuum, but derive from all forces that go to make

society. In that case, the content of the laws and customs was known, but there was no society which continued to acknowledge and observe them. Here it is the content of the laws and customs that is in issue.

(Citations omitted.) In the present case, unlike Yorta Yorta, the issue is ***not*** whether there is a present society which continues to acknowledge laws and customs. The State ultimately conceded continued acknowledgement by the claim group of Western Desert laws and customs. Nor, unlike Jango, is the content of those laws and customs in real dispute – save for perhaps the question whether the traditional rights and interests identified by the applicant include a right to take resources. The issue in the present case is the identity (or characterisation) of the people who, at sovereignty, recognised and practiced what the State accepts were traditional laws and customs giving rise to rights and interests in the land and waters of the claim area. The question is: whose traditions? Traditions of the Western Desert people, or ***not***? The State also relied on remarks by Lindgren J in Wongatha (at [345]), to the effect that:... the permissible drawing of inferences requires careful consideration of the practice or activity, the frequency or rarity of its occurrence as observed, the circumstances of earlier times in so far as they are known and the general probabilities. So far as it goes, there is little to object to in these remarks: they represent an orthodox approach to inferential reasoning. However, the application of this approach will be very much dependent on the evidence adduced, and the arguments put, in any given case. The State also relied on observations of Barker J in CG (Deceased) on behalf of the Badimia People v Western Australia [2015] FCA 204 at [116], to the effect that a Court must carefully weigh earlier ethnographic data, to determine whether the claim group members' understanding of the pre-sovereignty position had been affected by post-sovereignty events. While those observations may have been pertinent to the issues raised before his Honour, the present situation is different. It is ***not*** the State's case that "post-sovereignty events" affected the claim group members' understanding of the pre-sovereignty position. The State did ***not*** identify any such events, and did ***not*** submit the claim group members laboured under any misunderstanding of the pre-sovereignty position. The State's case was that the claim group members' ancestors had "imposed" Western Desert laws and customs on the claim area. The State did ***not*** really dispute that the laws and customs to which the claim group members deposed were traditional. Rather, it said they were ***not*** "traditional" to this claim area: it contends they were imported. That is quite different from the circumstances in Badimia to which Barker J's remarks were directed. The emphasis on historical European evidence in the State's submissions continued with somewhat in terrorem submissions, said to be based in part on the Full Court's decision in Bodney. The State submits it would be a "serious error" for the Court to:... simply draw inferences from contemporary Aboriginal evidence about the nature and identity of traditional laws and customs and traditional "society" in the Claimed Area at sovereignty. Moreover, if the Applicant is unable to identify the system for allocating rights and interests in land at sovereignty, then the Applicant cannot succeed. The phrase "serious error" was taken from the Full Court's decision in Bodney, but in my opinion (and contrary to the State's submissions) the Full Court was describing another kind of difficulty when it used that phrase. The "serious error" to which the Full Court in Bodney was referring was ***not*** a failure to take anthropological evidence into account at all, nor a failure to take it into account in assessing what the normative system of laws and customs was at sovereignty. Rather, as the passages at [84]-[95] make clear, the Full Court identified error in the trial judge's failure to have regard to anthropological evidence from the period after settlement and up to the time of determination (for example, evidence from the 1970s – put forward in that case by Dr Brunton – that the Noongar people had "lost" their customs and traditions). As the heading to this part of the Full Court's reasons makes clear, the error the Full Court was describing related to the way the trial judge dealt with evidence regarding the continuity of traditional laws and customs. This is quite a different issue from the one raised in this proceeding, which concerns – as I have noted – the characterisation of the laws and customs which governed rights and interests in the claim area at sovereignty. In any event, there is no sense in which any evidence – ethnographic or anthropological – is being "ignored". The real question is what records such as those created by Daisy Bates are capable of proving, and what are they ***not*** capable of proving. The State's reliance on Bodney is in my opinion misplaced.

Onus of proof The State submits that onus will be important in this case, in particular because there is doubt concerning the identification of the Aboriginal occupants of the claim area at, and before, sovereignty. The State submits that, to discharge its onus, the applicant will need to confront the presence of another explanation based on historical records (essentially, the position put by Dr Brunton), which especially by reference to the work of Daisy Bates, lays a factual foundation for a conclusion that non-Western Desert people inhabited the claim area. In that

sense, the State submits the applicant cannot discharge its onus. The applicant must prove their case on the balance of probabilities. They need ***not*** exclude or resolve all doubts, disconformities and possibilities. They must persuade the Court that the thesis for which they contend is more likely than ***not***. To the extent that, at some points, the State's submissions appeared to suggest a higher onus, they must be rejected. There are a number of ways to approach the parties' competing theses in this case, and to fit them into a framework of onus of proof. In my opinion, a matter which is critical to bear in mind, and which the State's submissions tend to overlook or diminish, is that the Court must evaluate all the evidence before it in terms of its reliability, persuasiveness and probative value. No category of evidence starts with any presumptions of reliability, accuracy or superiority. That includes the materials of Daisy Bates.

The work of Richard Kingsford Mr Richard Kingsford is one of the anthropologists whose work is referred to by both Dr Sackett and Dr Brunton. The purpose of Mr Kingsford's Masters thesis was to consider the laws and customs of the Yamatji groups of the Murchison region. It is common ground that the Wadjari and Badimia groups were ***not*** Western Desert people and were located further west of the claim area and of Daisy Bates' Ngaiawonga. In his thesis, Mr Kingsford expressed the view that Wadjari and Badimia are "distinct languages ... associated with a distinct territory and a distinct people, and enduring over time". Mr Kingsford noted that the Wadjari and Badimia language units conform to the characteristics of a tribe. Mr Kingsford observed the Yamatji view of "wanmala", being the ***country*** to the east of Meekatharra, as acting to reinforce ethnocentrism, or Yamatji solidarity against the wanmala. In terms of the local organisation and laws regarding rights in land applicable to Wadjari and Badimia, Mr Kingsford reported that a person may be affiliated to the "estate" of his or her father, mother and mother's brother, and/or birth. However, he went on to say that the weight of evidence tends to favour patrilineal descent and a person should preferably be born near a site associated with his or her father or mother. He contrasted the position of the Western Desert people. He said that the Western Desert people accepted that childbirth may ***not*** be possible in a desirable location as a result of the large distances sometimes covered by people in the search for food. Mr Kingsford also said that, in contrast, Western Desert people are generally more mobile and place greater emphasis on long mythic tracks. Mr Kingsford described the local organisation of the Yamatji and some Western Desert groups as similar or comparable, despite considering that there was a closer parallel to the Aranda region which adjoins the east of the Western Desert. Overall, the applicant submits that two conclusions can be drawn from the work of Mr Kingsford:(a) Firstly, what can be said with confidence is that linguistically and culturally Wadjari and Badimia ***country***, to the west of Meekatharra, is distinct from the Western Desert. That is, there is a line beyond which the ***country*** and people are clearly ***not*** part of the Western Desert cultural bloc, and that line is to the west of the Claimed Area.

(b) Secondly, in terms of their laws and customs, even the Murchison Yamatji groups such as Wadjari and Badimia are likely to have observed somewhat similar laws and customs in relation to rights in land, to those of the Western Desert cultural bloc ... The differences are matters of degree, and may be explicable in terms of the differing environments. The State submits that it is somewhat surprising that the applicant argues that weight should be given to Mr Kingsford's work given that neither Dr Sackett nor Dr Brunton placed any reliance upon Mr Kingsford's work. The State submits that Dr Sackett was ***not*** asked about this issue, nor did he express a view about the cogency or reliability of Mr Kingsford's opinions. In his oral evidence, Dr Brunton suggested that Mr Kingsford had relied on two or three informants in his work and, although his thesis was comprehensive, it contained "inconsistencies that were difficult to reconcile", there were "many things missing" and there were "problems with his accounts". The State referred to the decision of Badimia, where Barker J observed that the applicant's expert anthropologist said that Mr Kingsford's maps were ***not*** intended to be geographically accurate or to represent tribal boundaries. Further, the State pointed to Barker J's observation that Mr Kingsford's work may have depended too much on the views of persons in the 1980s and their life experiences on pastoral stations. Ultimately, the State submits that the conclusions sought to be drawn by the applicant from Mr Kingsford's work are ***not*** supported by the material itself. There is nothing in Mr Kingsford's work, the State submits, which indicates there is a line west of the claim area which separates the Western Desert from other groups. Further, the State submits that Mr Kingsford's account of descent-based "estate groups" does ***not*** correspond with Western Desert notions of "multiple pathways" for rights in land. The State's submissions have force. The proposition I accept from the applicant's first suggested conclusion (at [407] above) is that, linguistically and culturally, Wadjari and Badimia ***country*** – to the

west of Meekatharra – is distinct from the Western Desert. So much was essentially common ground between the parties and the experts. Otherwise I do ***not*** place any weight on Mr Kingsford's work. In particular, the concept of a "line" being drawn to the west of the claim area based on Mr Kingsford's work is no more persuasive to me than the "line" identified by Professor Berndt.

Other historical anthropological material As the parties' submissions demonstrated, Aboriginal people in and around the claim area have been the subject of inquiry and study from the early twentieth century. After Daisy Bates, Norman Tindale worked in and around the area in the 1940s and then Professor Berndt worked in the area in the late 1950s and early 1960s. With Mr Tindale was another anthropologist called Jud Epling. He did some field work in the early 1950s which has some bearing on one of the (many) labels Aboriginal people in the region of the claim area have given themselves: Tjupan. Mr Tindale again considered the location and composition of Aboriginal people in the area in the early 1970s. I refer to the work of Mr Tindale, Mr Epling, and Professor Berndt as necessary in making my findings. Dr Brunton referred to the work of Professor Robert Tonkinson. I accept the applicant's submissions (and Dr Sackett's opinion) that the work done by Professor Tonkinson is ***not*** of any relevance to the issues to be decided in this case.

The importance of Ken Liberman's work in the 1970s It is necessary to spend some time on Mr Liberman's work because of the various uses to which the parties put it in their final submissions. I take a different view of his work to the view I take of Mr Kingsford's work. As I understand it, Mr Liberman was awarded his PhD after he completed his work in the claim area. Accordingly, I have ***not*** used the title "Dr" when referring to Mr Liberman. In ***not*** doing so, I intend no disrespect to Mr Liberman. The work of Mr Liberman which is in evidence before me (aside from the opinions of Dr Sackett and Dr Brunton based on, or reporting on, Mr Liberman's work) is an extract from a report Mr Liberman prepared in 1976, and revised in 1978 entitled "A Survey for Aboriginal Sites: Yeelirrie Uranium Project". The entire report is ***not*** in evidence before me, because it essentially contains two parts: an ethnographic part and an archaeological part. The parties agreed the archaeological part is ***not*** relevant to the issues to be determined by the Court and it was ***not*** tendered. What is in evidence is, as I understand it, a complete copy of the ethnographic part of Mr Liberman's report, although the gender restricted part of his report was tendered separately and is subject to the same confidentiality orders as the other gender restricted evidence in this proceeding. Yeelirrie is the name of a pastoral station approximately in the middle of the claim area, but slightly towards the northern half of the claim area. It is an area about which Ms Wonyabong, Mr Allan Ashwin, Mr Henry Ashwin, Mr Victor Ashwin, Ms Narrier, Mr Richard Narrier, Mr Keith Narrier, Mr Muir and Ms Geraldine Hogarth gave evidence in particular. In the introduction to the report, B J Wright, the Registrar of Aboriginal Sites for the Western Australia Museum describes the report as part of an environmental impact study of the Yeelirrie Uranium Project, which was at that stage a project being investigated by the Western Mining Corporation. The report was undertaken under the auspices of the Western Australian Museum. In the introduction Mr Wright (who undertook the archaeological part of the report, along with Mr Liberman and a number of other people) describes the research done by Mr Liberman (for the ethnographic part of the report) as having been done in:... the Cue, Meekatharra, Wiluna and Leonora area during the period from September to November, 1976. An attempt was made to locate and consult Aborigines –(a) who were born in the Yeelirrie area;

(b) who had lived a traditional life in the Yeelirrie area;

(c) who have worked on Yeelirrie during the lifetime of people in the foregoing categories;

(d) who have lived on nearby pastoral properties or towns, and who may know traditions concerning the Yeelirrie area. The report noted it was ***not*** possible to locate any Aboriginal people in group (a), but people in the remaining categories were found and participated in the investigation. It can immediately be seen that one of the critical distinctions between Mr Liberman's work and that of other earlier anthropologists is that it was expressly focussed only on a region inside the claim area and, indeed, right in the middle of the claim area. The report commences with the observation that when Yeelirrie was established as a pastoral station in 1924 "there appears to have been no group of Aboriginal people occupying the area". Mr Liberman suggests this is consistent with accounts reproduced further on in the report, to the effect that many Aboriginal people moved "away from their traditional

territories towards centres such as Cue, Meekatharra, Wiluna and Leonora soon after the establishment of those towns towards the end of the last century". The State's submissions seek to have the Court place some weight on these factual observations and I return to them below. Broadly, Mr Liberman identified two groups of people as having connections to the claim area – and, therefore, to the sites he was instructed to investigate for the purposes of the report. He found there was a dialect group he called the Tjupany (Tjupan) to the north of Yeelirrie and another, which he called Kuwarra (Koara), to the south. Dr Sackett notes in his Tjiwarl Registration Report that one of Mr Liberman's informants told him that Tjupany was the "oldest name around. Other names have come later". I deal with my conclusions on the evidence about these dialect/identity labels, such as Tjupan, Kuwarra or Koara, Ngalia and the like at [449]-[461] of these reasons. In his report, Mr Liberman refers to his informants in a de-identified fashion. However, there is a confidential annexure to the report which identifies his 38 informants. Several of those people were relatives and/or ancestors of the claim group members, including: Diamond White and Frank Narrier (the sons of Spider Narrier), Jimmy Hennessey (the husband of Spider Narrier's daughter, Mavis White/Narrier), Ken and Adeline Hennessey (the son and daughter of Jimmy Hennessey and Mavis White/Narrier), Micky Warren (who Mr Douglas Bingham identified as his grandfather) and Roy and Croydon Beaman (the sons of Charlie Beaman (Piman)). As Dr Brunton recounts, there were only four informants whom Mr Liberman considered had lived a "traditional life" – by which, as Dr Brunton observed (and Dr Sackett agreed) he seemed to mean a life based heavily on hunting and foraging rather than depending on European rations or employment with Europeans. Those four people are described by Dr Brunton in his report:These four were all women, around eighty years of age, who had lived in the vicinity of Yeelirrie either as small children, or in one case, as a young woman. And all had a Western Desert language speaking background: Reila King who was born around 1898 at Hillview Station, which is around 50 km south east of Meekatharra, the daughter of Jack Merrick, who was probably a white man, and an unknown Kuwarra speaking mother;

Dolly Ward, born in the 1890s at Lake Violet, around 50 km east of Wiluna, the daughter of a Nanga speaking woman, and a European father, who had lived at Yeelirrie as a young woman;

Annie Leak, born in the 1890s near Glen-Ayle, which is around 250 km north east of Wiluna, whose mother spoke Tjupany, and whose father spoke an unknown dialect;

Nellie Graham, born in the 1890s at Kulele Creek, a little north east of Wongawol, whose mother and father spoke Purtitjarra.(Citations omitted.) One of the difficulties with Mr Liberman's report, in common with some of the earlier ethnographic material, is pointed out by Dr Sackett in his supplementary report:We do ***not*** know whether the accounts presented by Liberman were edited or the wholly complete versions, at least as far as his informants were concerned, of the stories he recorded. We cannot know if he might have asked questions to elicit further details from informants. It is clear that some of the versions he related were the product of more than one voice, ie he associated them with more than a single informant. As for the claimant statements, we know each tells his or her own version of the Tjila myth-story. But again, we cannot know whether more time or questions might have led to a more detailed version of events. In his supplementary report, Dr Sackett spends some time analysing the different versions of the Two Carpet Snakes Tjukurrpa, including those recorded by Mr Liberman, both for the Yeelirrie report and then later in 1980 (in a published journal article). Dr Sackett draws two critical propositions from Mr Liberman's work. The first is an opinion, which Dr Sackett shares, that the existence of different versions is ***not*** problematic for the authenticity (if that be the correct word) nor the provenance of a Tjukurrpa. Dr Sackett states:No two tellings of the Tjila Kutjara [the Two Carpet Snakes Tjukurrpa] story are the same. A comparison of the versions recorded by Liberman and those put forth by claimants indicates that this is ***not*** a recent phenomenon. In fact, as Liberman saw it:such discrepancies [between versions] must be considered a natural phenomenon characteristic of widely spread communities carrying on the same Dreaming. There is no question of which one is the correct version...(Citation omitted.) The second proposition concerns what can be said about the continuity of traditional laws and customs in the claim area. Dr Sackett states:By my reading, Bates did ***not*** report any rendering of the Two Snakes story. Rather, it appears first to have been recorded in the area of the claim in the mid-1970s by Liberman. However, Liberman saw the story as having an earlier history, writing:it is clear that the major Dreaming track in the region is that of the two Carpet Snakes. This track comes from Ngaanyatjarra and Martutjarra territories (both Western Desert areas) and enters the Kuwarra [ie Koara] region. As recently as thirty years ago Ngaayatjarra and

Martutjarra people participated in ceremonies with Kuwarra people at sites associated with the Carpet Snake Dreaming (ngalpiri and tjampua)...That is, by Liberman's reckoning, ceremonies relating to the Tjila Kutjara were last performed on the Tjiwarl Claim area in the mid-1940s.

However, there is no reason to suppose the Dreaming and its associated rites were new to the area in the mid-1940s. That is, that Bates did ***not*** mention the Tjila Kutjara does ***not*** mean the Dreaming necessarily was any less important to people in the early years of the last century (and to people before them) than it was to Liberman's informants in the mid-1970s or is to Tjiwarl Claimants today.

Liberman did ***not*** discuss or relate how his informants came to have and hold their knowledge of the Tjila Kutjara. Dr Sackett goes on in this section of his supplementary report to express his opinion, which I have accepted elsewhere, that notwithstanding Daisy Bates' failure to record any such Tjukurrpa in the area (bearing in mind Ms Bates did ***not*** in fact work in the claim area) and that the first European recording of it was by Mr Liberman, when one considers the claimant evidence, it is apparent that the oral tradition of the Tjukurrpa extended back to sovereignty and earlier. In this sense, Mr Liberman's work in the late 1970s is consistent with the opinions of Dr Sackett, whose evidence I have generally accepted in this proceeding. However, there is a further aspect of Mr Liberman's report which is important in this proceeding. Mr Liberman also concluded that the claim area was Western Desert ***country***, and that its original inhabitants were Western Desert people. Although Dr Sackett agreed with Mr Liberman's conclusion, he did ***not*** agree with his reasoning, or the basis for that reasoning, and this is a matter which should be set out. Nor did he agree with some of Mr Liberman's findings, such as that Tjupan people were some of the original inhabitants of the claim area. Dr Sackett's view is that, although Tjupan people are "very much" Western Desert people, they also came down into the claim area at some time. Clearly, Dr Brunton disagreed with the conclusion that the original inhabitants were Western Desert people. The basis for Mr Liberman's conclusion that the people in the claim area had always been Western Desert people was largely linguistic. That is, the dialects spoken by the two sets of speakers Mr Liberman identified in the claim area – the Tjupan or Tjupany to the north of Yeelirrie and the Kurrawa or Koara to the south – had much in common with Western Desert dialects, and much less in common with Badimia and Wadjari to the west. Mr Liberman also relied on the fact that the Two Carpet Snakes Tjukurrpa was essentially consistent across the claim area and came from the land east of the claim area. In his report, Mr Liberman said:Speaking in Ngaanyatjarra, a dialect from the Warburton Ranges, I was capable of communicating in the Aboriginal dialect with both Kuwarra and Tjupany people, whereas it was ***not*** possible for me to communicate with the Patimaya and Watjari people further west.

...

Finally, it is clear that the major Dreaming track in the region is that of the two Carpet Snakes. This track comes from Ngaanyatjarra and Martutjarra territories (both Western Desert areas) and enters the Kuwarra region. As recently as thirty years ago Ngaayatjarra [sic] and Martutjarra people participated in ceremonies with Kuwarra people at sites associated with the Carpet Snake Dreaming (ngalpiri and tjampua) and several Martutjarra men were instrumental in getting another site in the Kuwarra region west of Berndt's line, Weebo, declared a "protected area" under the Aboriginal Heritage Act (1972).

Given this evidence, the western limit of the Western Desert cultural bloc must be extended westward to include the Kuwarra and Tjupany people. This would incorporate the Yeelirrie location as part of the Western Desert Aboriginal area. Although Dr Sackett's ultimate opinion was broadly consistent with the conclusion in Mr Liberman's final paragraph, both Dr Sackett and Dr Brunton disagreed with Mr Liberman's analysis. They did ***not*** accept the location Mr Liberman had given to speakers of the Tjupan and Koara dialects, nor did they consider language as important a marker as Mr Liberman did. For example, Dr Sackett confirmed that in his opinion the Tjupan were more in the eastern and north-eastern regions of the claim area, rather than right in the middle of it as Mr Liberman proposed. However, as I have noted, Mr Liberman's overall conclusion was that he was dealing with Western Desert people, with rights and interests in land arising from traditional Western Desert laws and customs.

That was Dr Sackett's opinion as well and, as I explain in these reasons, they are opinions with which I agree. Dr Sackett was also cross-examined and then re-examined on observations he made about Mr Liberman's analysis in a report Dr Sackett prepared for the Wiluna determination. The relevant observation was made in the Wiluna report by Dr Sackett while he was discussing Mr Liberman's analysis of the Two Carpet Snakes Tjukurrpa as indicating the Yeelirrie area was Western Desert ***country***. Dr Sackett's comment in brackets at this stage of his report was the following:(I'm ***not*** sure that a shared Dreaming and shared ritual participation can safely be read as indicating shared culture.) Dr Sackett, in re-examination, explained what he meant in the following way:... that Dreamings, because they go in and out of the desert or across cultural or social boundaries, they needn't be the – the people that share that Dreaming needn't be of the same culture. What he had also said earlier in cross-examination, is that the doubt he expressed here was about Dreamings leaving the Western Desert. I infer what Dr Sackett meant by this clarification is that where a Dreaming travelled through the Western Desert and then left it, just because the Dreaming came out of the Western Desert and was known to people outside the Western Desert did ***not*** make those people Western Desert people. That, it seems to me, must be a correct proposition. Notwithstanding this, what Mr Liberman's informants told him, especially about the Two Carpet Snakes Tjukurrpa, was seen by Dr Sackett as significant. This extract from his cross-examination explains why:Yes. Liberman's informants were what he said were Dupan [Tjupan] people, effectively, in relation to that issue?---Some were, ***not*** all of them.

Yes?---He described some of them as Dupan [Tjupan], yes.

Those Dupan [Tjupan] people, on your view, are ***not*** – be careful, bearing in mind my conversation with your Honour earlier – that your view about the Dupan [Tjupan] is they're ***not*** locals in the sense that they weren't there at sovereignty, in the claim area?---No. But they learned from people that were, in my view.

Yes. There's no direct evidence that they learned. That's your assumption?---But it's an assumption based on the stories that people tell, how their old people learned from older people. And these stories hook up with other stories in some way, shape or form.

Yes?---It's ***not*** like the Jilla Kogara [Tjila Kutjara] are there and only there. It's an extensive dreaming with the same features as it moves through the countryside.

(Emphasis added.) Thus, Mr Liberman's work is of some real significance. It was recorded and completed well before the native title regime was introduced. As both the applicant submits and Dr Sackett's evidence supports, the accounts given by Mr Liberman's informants about the Tjila Kutjara are broadly consistent with the accounts given by the claimant witnesses. Further, Mr Liberman's informants (mostly aged between 50 and 80 years in the 1970s) were speaking from what they had been told by their elders, which would place their elders in the claim area before Daisy Bates was working there in 1912. As Dr Sackett observed, the assumption (based on the way oral history generally operates in Aboriginal societies) is that the old people who spoke to Mr Liberman had been told the Tjila Kutjara by their old people. There is no suggestion – and I do ***not*** accept – that they had invented it. It is more likely they were telling it for the area around Yeelirrie because others, who were authorised to do so, had told them. At another point in his report, this is precisely the point Mr Liberman makes about what one of his informants told him about Mr Micky Wonyabong. Mr Wonyabong is Ms Shirley Wonyabong's father, and Mr Liberman's informant was describing what Mr Wonyabong knew about sites, and laws and customs in the Yeelirrie area. This is what Mr Liberman records:Mick Wonyabong worked on Yeelirrie Station for a period of ten years, from 1942 to 1952. He was a Puntitjara man who was born near Wongawol Station. He told Informant PP that he had heard the traditions about the sites at Yeelirrie from "the old people" from the area. Mr Liberman observes at the start of his report (and repeats throughout it) that there were, at the time of his research, no Aboriginal people alive from the original descent groups in the area. The State submits I should take those remarks from Mr Liberman at face value as they support its thesis that the claim group members' ancestors simply migrated into the area and imposed Western Desert laws and customs on the area. I find the position to be more nuanced. First, it must be recalled that Mr Liberman was dealing only with the ***country*** on Yeelirrie station. I see no basis for extending his remarks about

there being no original Aboriginal inhabitants to the whole claim area. There is no suggestion he was sufficiently informed to make any more widely applicable assertion. In relation to Yeelirrie, what Mr Liberman recorded is that Micky Wonyabong was told, between 1942 and 1952, about sites around Yeelirrie by the "old people". While those "old people" may well ***not*** have survived into the 1970s when Mr Liberman was conducting his research, what Mr Wonyabong had related to Mr Liberman's informant was the passing on of knowledge, ***not*** the imposition of it. Second, it seems to me that even allowing for the state of affairs he believed existed on Yeelirrie (that is, that there were no "original" inhabitants left), Mr Liberman nevertheless remained of the opinion that the land at Yeelirrie was Western Desert ***country***, and the way he reconciled what he was being told in the 1970s with what could be seen as traditional laws and customs for the area was through what he described as the "Desert Praxis". In his report, he described the Desert Praxis in the following terms:The relationships with the Dreaming tracks discussed do ***not*** represent a reality which is past. Contemporary Aborigines in the areas concerned continue to have an active relationship with the tracks. Any active relationship implies also that the relationship is ***not*** stagnant; and I would propose that this relationship is best viewed as a praxis held by Aboriginal people. That is to say; Aborigines have the capacity for continued interpretation of the landscape according to the structural properties of the networks of tracks and Dreaming activities we have been discussing. Any human interpretive order will ***not*** long survive as a passive schema. In realising its interpretation, such a conceptual world-view becomes projected onto wordly phenomena, transforming the world, and reflexively, itself in the process. Such an active, dialectical relationship is characteristic of any live conceptual system.

As we are dealing with a praxis which is still a live, emerging reality, it must be acknowledged that the locations of specific tracks may be shifted according to the discovery of new "evidence". Therefore, it is ***not*** surprising to find instances, such as occurred at Warburton only months ago, where a new deposit of smooth, large white stones was evaluated as evidence of where the Kangaroos passed during the Dreaming. This resulted in a shift of the perceived location of the track of several hundred metres. This being the way Mr Liberman saw the practice of laws and customs for Western Desert people, he then went on to describe what he appeared to have considered actually happened:This discussion of Desert praxis is relevant to our study at hand, in that many traditional Aborigines, associated with the Carpet Snake Dreaming track and Dingo Dreaming track in regions to the east of the study area were aware that these world-creative powers entered the territory we are now examining. They may ***not*** have known each particular site, but they may have some spiritual affiliation with the track as a whole just the same. As they migrated westward, their adoption of the Dreaming sites of those people who were originally located in the western regions is to be understood as a natural consequence of the Desert Aborigines' spiritual praxis. Their concern for sites to which they may ***not*** be related genealogically must be acknowledged as valid. Described in this way, there is no "imposition" of laws and customs, but rather the continuation of existing practices in new areas where traditional spiritual affiliation with Dreaming tracks already existed. Therefore, I do ***not*** accept the State's submissions (and Dr Brunton's opinion) that Mr Liberman was describing a "replacement" of the rituals of the original inhabitants with the rituals of people from further east. Rather, he was describing how members of the same society as those who occupied the area originally could move into the area, and continue to observe the Tjukurrpa of the area into which they moved.

References in the evidence to Tjupan, Koara and Ngalia I have put these self-identifying labels used by witnesses in this proceeding together under one heading, although the evidence (and the opinions of Dr Sackett and Dr Brunton) leads me to different conclusions about each of them. As I have noted elsewhere in these reasons, the labels or names used by Aboriginal people to identify themselves, and to identify themselves with a group, are fluid. On some occasions, sufficient links can be drawn between multiple sources referring to the use of specific names or labels so that it can be said with some confidence that people who use a name or label have a connection with particular ***country***. Sometimes that is ***not*** the case. The examples of Tjupan and Ngalia reflect, in my opinion, each of those possibilities. In his Tjiwarl Registration Report, Dr Sackett notes that several of the older claim group members, who are now deceased, had identified as Tjupan and had identified the language they spoke as Tjupan. In this proceeding, several witnesses also identified the language they spoke as Tjupan, including Ms Wonyabong, Mr Richard Narrier, Mr Allan Ashwin, Mr James and Ms Tullock. Ms Tullock also used Tjupan to describe a group of people, when she spoke of "the Tjupan and the Wongai mob". Mr Leroy Beaman also used the identifier Tjupan to

describe his group membership:I say I'm a Wongai, but really my blood flows Tjupan. I'm Wongai through my dad's mother and Tjupan through my dad's dad. I'm more of a Tjupan person.

My father Edwin Beaman is a Wongai through his mother or Tjupan man, through his father. Dr Sackett notes that a colleague of Mr Tindale's, Mr Jud Epling, was the first anthropologist to mention Tjupan. This occurred in 1953, after some fieldwork, which resulted in Mr Epling recommending that Mr Tindale change an entry on his 1940 map from "Pini" to "Tjubun" in relation to identifying the group occupying ***country*** in the eastern part of what is now the Tjiwarl claim area. Dr Sackett records that Mr Tindale did ***not*** agree, and did ***not*** change the entry, but in his 1974 version of the map, he did add "Tjubun" as an alternative entry. It is clear that Tjubun is another spelling of Tjupan. When Professor Berndt was working in the area from the late 1950s through to the 1980s, Dr Sackett records that Professor Berndt saw the people he described as "Djuban" (again, another spelling for Tjupan) as different people, occupying different ***country***, from the people whom he described as "Biniridjara" (which he equated with Mr Tindale's "Pini" or "Birni"). Professor Berndt located the Djuban people east of Wiluna and north of Mulga Queen (which, depending on how far north of Mulga Queen, would take the area close to Wongawol). He located the Biniridjara people north-west of Lake Carnegie, which would appear to place their ***country*** north of Wongawol and up towards the Canning Stock Route. As I have noted in the section of these reasons where I deal with the work of Mr Liberman in the 1970s, as well as identifying them as Western Desert people, Mr Liberman located those he identified as "Tjupany" in ***country*** around Yeelirrie station. In his work, Mr Liberman appeared to hold the view that the Tjupan or Tjupany (around Yeelirrie) and the Kuwarra or Koara (further south), were the original occupants of the area. However, neither Dr Sackett nor Dr Brunton agreed with this view, and during their concurrent evidence in this proceeding both expressed the opinion that Tjupan or Tjupany (and, Kurrawa or Koara, it would appear) peoples had moved into the claim area from further east. I note here that the transcript of the expert evidence records Kurrawa as "Gulara" and this is one of the many misspellings which make it rather difficult to follow the evidence in the transcript. Notwithstanding this qualification imposed by Dr Sackett on some of Mr Liberman's conclusions, Dr Sackett did agree with Mr Liberman's conclusion that the "close similarities" in language between people who identified as Tjupan or Tjupany (and Kuwarra or Koara – see below) supported a conclusion that these people were Western Desert people. This lead Dr Sackett to reach the following overall conclusions:In my view, two things emerge from this. First, the reports of researchers from earliest to more recent appear to track a shift in name: from 'Pi'ni to Tjupan. At the same time, they appear to track a shift in the area of the 'Pi'ni/Tjupan to the west.

Whatever the case in this regard, in my view the evidence is solid that the Tjupan were/are part of the Western Desert/Western Desert society. As best can be determined, Tjupan origins were/are in lands to the northeast/east of the Tjiwarl claim area. In other words, those lands are comfortably east of the western extents of the Western Desert/Western Desert society. It is ***not*** surprising, then, that Liberman found his Tjupany to be culturally and linguistically Western Desert.

That is, in my opinion, Tjupan was/is merely one of the Western Desert Language's many dialects. Its speakers originally occupied Tjupan lands, and shared a language and culture with their Western Desert neighbours. The views of Dr Brunton and Dr Sackett on Mr Liberman's work and the identification by some claimant witnesses in this proceeding as Tjupan are consistent with the basic thesis underlying the applicant's contentions in this proceeding: namely, that there was a movement of Western Desert people into the claim area from areas to the east, including the areas that Dr Brunton and Dr Sackett appear to agree were the areas the Tjupan and Kuwarra had previously occupied. The experts' positions remain as they otherwise were in this proceeding: namely, that Dr Brunton is of the view that notwithstanding the more recent presence of Western Desert people in the claim area (including those who identify as Tjupan and did so to Mr Liberman in the 1970s), at sovereignty the people who occupied the claim area were ***not*** Western Desert people and did ***not*** have connections with the ***country*** of the claim area according to Western Desert laws and customs. Dr Sackett remains of the view the original occupants did have such connections. In my opinion, the evidence from the claimant witnesses about their and their ancestors' identification as Tjupan, and the use of Tjupan as a way of speaking, together with the opinions of Mr Liberman and Dr Sackett, confirm the view I have formed that the claim group members' ancestors were, as Western Desert people, moving

within Western Desert ***country*** when they moved into the claim area. It also confirms my view they were doing so in accordance with the traditional laws and customs of Western Desert people, including in accordance with the recognition of such of the older Western Desert occupants of the claim area as remained when the claim group members' ancestors came into the ***country***. I take the same approach, and reach the same conclusions, to the evidence relating to claimant witnesses, and evidence about their ancestors, identifying as Koara or Kuwarra. The apical ancestors who were identified in this way include Mr Charlie Beaman and Mr Scotty Lewis. The claimant witnesses who identified in this way include Mr Bingham, Mr Lewis and Ms Geraldine Hogarth. There were some claimant witnesses who appeared to see the label "Tjupan" as now a label identifying language rather than anything else. This was Mr Leroy Beaman's evidence:I speak a few languages. I speak my mother's language, Yamatji-Wajarri, and I speak my grandmother's language, Ngaanyatjarra. That's because she grew me up and around her we were talking her language.

I understand the Tjupan language around here, it's similar to Ngaanyatjarra. Things are the same. The Tjupan language is the language for this claim. Auntie Maxine speaks Tjupan and a few other families from that area speak it too. Like the Narriers, they speak that. I speak a little bit of it, but ***not*** too much, it's a bit of a tricky language because they got their own language there. Ngalia and Tjupan, they got the same tongue. They different names for it but they the same, all one, but they just different group names.

My mum's language is different again, a long way different. As for the label "Ngalia", the witness who used that as a way of identifying himself in this proceeding was Mr Muir. Dr Sackett did ***not*** have the same kind of opinion about the use of this label. He notes in his Tjiwarl Registration Report that this label or way of identifying was used by Mr Muir's mother Ms Dolly Walker, who is one of the apical ancestors in this claim, but who had also been a claim group member on a native title application called Ngalia, which overlapped almost entirely with the Birriliburu application. Indeed, on the evidence before me, there were several claims which were either dismissed or discontinued which used the word "Ngalia" in the title of the claim. Dr Sackett was of the view that although some references to Ngalia could be found in ethnographic literature (such as that by Mr Tindale), it was "questionable" whether the Ngalia reported in such research (or their descendants) would have had any traditional rights and interests in lands in the Birriliburu claim area or in the Tjiwarl claim area. Dr Sackett noted the evidence given by Ms Walker's older brother in the Wongatha proceeding, which also suggested he did ***not*** identify as Ngalia, nor associate this label with his ancestors. Dr Sackett states:Patjata/Paddy made a couple of remarks apropos of the idea of Ngalia identity. Asked what "tribe" his mother was a member of, he said "Mantjintjarra Ngalia". Asked what language his mother spoke, Patjata/Paddy answered "Mantjintjarra". Asked if he knew of "any other tribal name" she called herself, he replied "No". Then, asked how many languages he spoke, Paddy said "Mardu Ngalia".

(References omitted.) Dr Sackett concludes that Ngalia is a label which has emerged in the Walker-Muir family as a self-identifier, but without any support as a group identifier on any wider basis. I accept Dr Sackett's opinion on this, although, as he goes on to note, the label is ***not*** really the central issue. To the extent it is important to confirm which identifiers are common to members of the claim group, while I accept that Tjupan and Koara are common to some family groups within the claim group and are consistent with the ethnographic and anthropological evidence before me, Ngalia does ***not*** fall into this category. That said, it seems to me that the final point made by Dr Sackett on this issue is the more important one:In my view, what is crucial here is ***not*** what, if anything, Ngalia might be, but the fact that the few Walker-Muir family members who self-identify as Ngalia associate the name with ***country*** that is clearly in the Western Desert/Western Desert society. That is, they are, however they self-identify, part of the Western Desert society. That proposition is ***not*** really contested by the State. What is contested is the connection which is then drawn to association with the claim area by reason of traditional Western Desert laws and customs, at sovereignty, and thereafter.

The use of Daisy Bates' material and the "Ngaiawonga" This became a critical question in the assessment of the competing contentions on connection, and the weight to be given to large parts of the evidence on connection. In summary, I accept the applicant's submission that caution should be exercised in the treatment of Ms Bates'

material, including her material about the people she called the Ngaiawonga. In particular, I accept the applicant's submissions that positive conclusions should ***not*** be drawn from the absence of information in Ms Bates' material, and that the reliability and weight to be given to her material (and the experts' use of her material) should be approached on a case by case basis. That said, it is correct that Ms Bates was an eyewitness to certain events she recorded, although she did ***not*** venture into the claim area itself. As an eye witness, her notes do provide contemporary accounts (at least as at 1910 or 1920) of what those she spoke to said to her. There is no basis to believe she did anything other than try and faithfully record what she was told, indeed both Dr Sackett and Dr Brunton accept she was careful and methodical. The real issue is the reliability, breadth and representativeness of her source material, and the fact we cannot know the accuracy of its relationship to the people who were occupying the claim area at sovereignty. Nor can we know what questions Ms Bates asked, how knowledgeable her informants were, and how much of what she was told she actually recorded, how much she correctly understood, what the level of interpreting was like, if there was interpreting, and so forth. In those circumstances, I accept that Ms Bates' notes have some probative value where they reflect what she recorded she was told. In that sense, her word lists have an acceptable level of probative value. That is ***not*** because I accept they should be treated as complete or exhaustive, but because we can be reasonably confident she was careful and methodical in writing down what she was told, without any determination being made about whether what she was told was all, a large or a small part of people's language range. To that extent, I accept her word lists are a sufficiently reliable source for Dr Clendon's opinions, at least in terms of what they positively record. It is, as I explain elsewhere, ***not*** possible to draw inferences from what they do ***not*** record. I turn now to explain in more detail why I have reached those conclusions.

Daisy Bates' experience and travels in Western Australia In his report, Dr Brunton sets out in some detail the background of Ms Bates, and I base my findings on his material, supplemented where necessary by what is contained in Dr Sackett's report. I have also consulted the full version of the anthropologist Dr Isobel White's book on Ms Bates' work entitled The Native Title Tribes of Western Australia (National Library of Australia, 1985), a substantial extract of which was in evidence before me. Both experts agreed Dr White's edited work of Ms Bates' journals is the authoritative source for a description of Ms Bates' work. Dr Brunton described Dr White as "an accomplished anthropologist and specialist on Aboriginal culture who became intimately familiar with Ms Bates' voluminous manuscripts in the process of editing them for publication". I see no difficulty in circumstances where both experts agree about the qualifications and quality of Dr White's work in my referring to the entire book. In particular, I have drawn on the "Introduction" in Dr White's book for what I set out below about Ms Bates' background and attitudes. I have been unable to locate any similar details about Ms Bates in previous native title decisions. Ms Bates was born in October 1859 in County Tipperary, Ireland. She was born Daisy Mary O'Dwyer, and was orphaned by the time she was in her teens. She studied French and German, having as White observes a "facility for learning languages" which would be useful in her work in Western Australia. She obtained a free passage to Australia and arrived in Townsville in January 1883, aged 24. Dr White observes that "we have no record of how she spent the rest of 1883", but in early 1884 she began working as a governess on various pastoral stations in Queensland, and then on a property south of Sydney. It appears that she married in Charters Towers in Queensland in March 1884, but this marriage was kept secret (and her then husband turned out to be the infamous "Breaker Morant"). Dr White explains how strong the evidence is, nevertheless, that the marriage occurred. Despite this marriage, she got married again in February 1885, in Nowra New South Wales, to John Bates, the son of a drover. A year later she gave birth to a son. She parted company with Mr Bates soon after and travelled alone with her child to various parts of Australia. In 1894, when the child was around seven, Ms Bates left him in the care of the Bates family and went to England to pursue a career in journalism. She returned to Australia in 1899, and Dr White records that she arrived in Perth with the intention of investigating allegations (made in, amongst other places, The Times in London) that the settlers were ill-treating Aboriginal people. She reunited with her husband at this stage and the two journeyed north from Perth searching for a property. It is unclear whether her son went with them. She also befriended people such as Bishop Matthew Gibney, the Catholic Bishop of Western Australia, and spent time at places such as the Beagle Bay Trappist Mission on the western side of the Dampier Peninsula, in the far north of Western Australia. She spent time droving with her husband until they finally parted company and she returned to Perth and to her work as a journalist. It was in this capacity, in May 1904, that Ms Bates wrote a piece for The Times rejecting criticism that Aboriginal people on pastoral stations in Western Australia were worse off than American "negro slaves". Dr White reports that Ms Bates had previously disagreed with Bishop Gibney's

criticism of the chaining of Aboriginal prisoners. Ms Bates claimed they "preferred" to be chained by the neck as this left their hands free. She wrote, and Dr White states that Ms Bates apparently believed, "[n]o State in the Commonwealth is doing more for its aboriginal population than this State". I note these matters because May 1904 was when Ms Bates commenced her work for the Western Australian government that was to form the material relied on by the parties, and especially by the respondents, in this proceeding. Dr White records that, in May 1904, Ms Bates became an employee of the Western Australian government in the Department of the Registrar General. Her task was to collect and write a compilation of the languages of the Aboriginal people of the State. What it was in her background and experience that was thought to qualify her for such a task remains a mystery. Once she had begun this work, Dr White reports that Ms Bates read whatever books she could find on anthropology, and collated the work of previous investigators, looking also at the main publications about Aboriginal people which existed in other States. In her book, Dr White reports on Ms Bates' investigations on this project between 1904 and 1910 in the following way. After a year in Perth working in a government office, Ms Bates set up a tent with some Aboriginal people on an Aboriginal "reserve" about 10 km from the centre of Perth. She then visited various "reserves" in the south-west of Western Australia, in particular a "reserve" north of Albany. In 1907 and 1908 she travelled to Esperance and, Dr White states, "as far north as the Goldfields, everywhere meeting Aborigines and collecting information from them". In 1909 and 1910, she was back in an office in Perth sorting and writing up her material, writing journal papers, newspaper articles and giving speeches. In 1910, she was given permission to go on an expedition with Professor Radcliffe-Brown. Dr White describes the difficulties of Ms Bates' working relationship with Professor Radcliffe-Brown, and describes how Professor Radcliffe-Brown "abandoned" Ms Bates at Sandstone, a town ***not*** far to the west of the southern part of the claim area. The rest of the expedition then proceeded to the "lock hospital" at Bernier Island. This "lock hospital" was a place to which Aboriginal men with venereal disease were forcibly removed and imprisoned. Ms Bates' main involvement with Aboriginal people in Western Australia appears to have started in May 1904, when she was commissioned by the Western Australian government to prepare a publication on the Aboriginal languages of the State. Dr Brunton described, by reference to other secondary sources, that Ms Bates' brief was later expanded to cover social and cultural information as well. Ms Bates was ***not*** trained in anthropology or any other related discipline. Ms Bates did join the expedition at Bernier Island, although Dr White records that Ms Bates "stayed mostly at the adjoining island, Dorr233;, where there was a similar institution for women". From these islands, Dr White records Ms Bates as moving to work in the Peak Hill area, which was a Goldfields area in the Murchison region, about 120 km north of Meekatharra. It seems that after this time in Peak Hill, Ms Bates spent time writing up the information she had collected, and when Professor Radcliffe-Brown returned to England in 1912, Dr White reports that he took "some or all of the manuscript of the book with him". As Dr White describes in some detail, the Western Australian government then refused to publish it because of the expense and the manuscript remained unpublished until Dr White took the project up in the 1980s. Dr White reports that Ms Bates subsequently lived on Rottnest Island for a time, interviewing Aboriginal prisoners there, as well as spending time in the south of Western Australia at Eucla. Ms Bates ended her days at Ooldea in South Australia. In another text (White I, "Daisy Bates – Legend and Reality" in Marcus J (ed), First in their Field: Women and Australian Anthropology (Melbourne University Press, 1993)), Dr White describes Ms Bates' time at Ooldea, and some of the attitudes towards Aboriginal people that Bates expressed during that period, including in published newspaper articles:She always regarded miscegenation as unspeakably horrible and believed, as did many of her contemporaries, that 'half-castes' shared the bad traits of both races and the good traits of neither. She was ***not*** afraid to say so, providing a reason for the dislike and disdain she inspired in those Aborigines who were forming political organisations in the 1920s and 1930s.

...

Though she learnt some of the languages spoken at Ooldea and wrote down long vocabularies, her other findings lack the quality of her work among the Western Australian Aborigines, and do ***not***, in my opinion, enhance her reputation. She became more and more deluded in certain respects. Examples are her absolute conviction that the Aborigines of the Western Desert habitually killed their fellows in order to eat them and that a pregnant woman looked forward to the end of her pregnancy so that she could eat the baby. She even wrote about these so-called discoveries in the major newspapers, so it is no wonder that her reputation went down with the academic community and among those who were trying to help the Aboriginal cause. I note that Dr White herself travelled to

Ooldea to interview some older Aboriginal people who had known Ms Bates when she lived there. The following observation from Dr White is, in my opinion, telling:I found it rather sad that they did ***not*** remember her with the respect and admiration that her dedication to them and their parents and grandparents would seem to warrant, but remembered rather the curious figure she cut with her old-fashioned clothes and her parasol. Of course, this observation may also reveal something of Dr White's own attitudes to Aboriginal people, but it is a reminder that looking at Ms Bates' work from a European perspective may provide much less than the full story of how she was regarded by Aboriginal people, and what information they were prepared to share with her. Dr Brunton's report made the following additional points about Ms Bates' experience. He notes, as Dr White does, Ms Bates' work and travels with Professor Radcliffe-Brown. He notes also that while working as journalist for The Western Mail, Ms Bates visited the Murchison region in December 1903, reporting on the mining industry there. Dr Brunton notes this visit seems to have lasted for a few weeks and, according to her biographer Ms Elizabeth Salter, during this time Ms Bates "made the most of the opportunity to study the Aborigines of the district".

Evaluation of Daisy Bates' material It is fair to say Ms Bates' attitude towards Aboriginal people had positive and negative aspects and it is ***not*** possible, from this historical distance, to be clear about how her attitudes influenced her work. The work she did which is relevant to this proceeding arises from some short-term visits by Ms Bates to an area ***not*** far from the claim area, for other purposes. During these visits, Ms Bates pursued, at some unspecified times, her interests in Aboriginal people. Dr Brunton's conclusion drawn from the list of Ms Bates' visits to the Murchison region, Peak Hill, Sandstone, the lock hospitals and Rottnest Island is that "while the time she spent on her investigations in the region was comparatively short by contemporary anthropological standards, it was nevertheless substantial, particularly for its time". Whether or ***not***, measured against time spent with Aboriginal people by other Europeans in the early twentieth century, the time Ms Bates spent in the area should be considered "substantial" is ***not*** a matter that assists the assessment of the reliability of her material in this proceeding. Dr Brunton places some reliance in his account of Ms Bates' work on Dr White's observation that Ms Bates' methods were "***not*** common in anthropological research for many years to come", because they involved "going to live with the people themselves, setting up her tent amidst their huts and makeshift shelters, sitting on the ground and sharing her food with them, observing their behaviour and listening to their accounts". However, this appears to be a reference by Dr White to what Ms Bates did in her time in Perth on the "reserve". This was ***not***, at least on Dr White's account, the manner in which Ms Bates gathered the information used by Dr Brunton and Dr Sackett in this proceeding. Dr Brunton refers to Dr White's opinion that many people "who were regarded as anthropologists at the beginning of the century would ***not*** qualify today, first because they had the wrong ideas, second because as fieldworkers they did ***not*** ask the right questions, and third because their fieldwork was ***not*** up to today's rigorous standards". Dr Brunton then refers to Dr White's conclusion on Ms Bates' work, measured against those criteria, which is that although Ms Bates – together with her contemporaries – would ***not*** qualify in terms of current standards by the first or second criteria, Ms Bates would pass muster on her fieldwork methods because she was "a splendid observer and an ever-patient listener". Dr Brunton then refers, with apparent approval, to Dr White's concluding observations that:On the positive side are her genuine additions to knowledge about the Aborigines of the west and her innovative methods of discovering knowledge. The reasons on the negative side are serious, but entirely due to her being a product of her own generation whose beliefs and values she shared. The balance is, in my opinion, in her favour. In my opinion, whether Ms Bates was a "splendid" observer or an "ever-patient listener" is a conclusion which is difficult, if ***not*** impossible, to glean from her material, without a great deal more evidence and information about the circumstances in which she gathered her material. There are no independent and detailed accounts in evidence about how she behaved with her Aboriginal informants. We do ***not*** know whether she recorded all she was told, or was selective. As both experts conceded, we know nothing at all about her methods. We simply have what we have. I am ***not*** prepared to accept Dr Brunton's characterisations of Ms Bates on these issues. Having set out the amount of time Ms Bates spent in areas which could be broadly described as in the same region as the claim area (matters of weeks only), it is as well to emphasise my own opinions on what Dr Brunton (himself, and relying on Dr White) has to say about the quality of Ms Bates' work. It cannot, in my opinion, be measured against contemporary anthropological work. I take Dr Sackett's qualifications and experience as a relevant comparison. This is ***not*** to ignore the qualifications and experience of Dr Brunton, but the relevant comparison here is between the work done by Ms Bates, and the work done by a contemporary anthropologist who was able to work closely with Aboriginal people for the purposes of understanding their accounts of laws and customs in the claim area. Dr Brunton, as he freely admitted, did ***not*** have this opportunity and worked entirely from

secondary sources. Dr Sackett obtained a Bachelor of Arts in Anthropology from (then) Fresno State College in 1969, and was awarded Masters of Arts in Anthropology from the University of Oregon in 1971. He earned his Doctor of Philosophy in Anthropology from the University of Oregon in 1975, with his preliminary doctorate work focussing on the ethnography of Aboriginal Australia. His PhD research included fieldwork undertaken in 1972 and 1973 with Aboriginal people then living in and around Wiluna. Wiluna is just to the north of the claim area, and the consent determination under the NT Act in relation to that area is the subject of [758] to [779] of these reasons. Many of the claim group members are also native title holders in the Wiluna determination. The ***country*** in the Wiluna determination was recognised by this Court (and agreed by the State) to be Western Desert ***country***. Dr Sackett's PhD was supervised by (then) Dr Tonkinson and informally supervised by Professor Berndt, both of whom I refer to elsewhere in these reasons. Dr Sackett then spent 20 years teaching anthropology at the University of Adelaide, including teaching Aboriginal anthropology. He continued to do research in Aboriginal anthropology and returned to Wiluna for the best part of a year at one stage during this time. From 1998 to the present time, Dr Sackett has been involved in the provision of anthropological research and advice to various Aboriginal land councils, organisations and claim groups. He has been involved in eight Western Desert native title claims between 1994 and 2013. From his PhD work in the Wiluna area, he came to know and was familiar with some of the apical ancestors for the Tjiwarl claim group. He prepared a report in 2009 for the Wiluna claim. His research in the claim area began in January 2000 and continued through until 2006 under a brief from the then Goldfields Land Council. He then worked, as I have noted, on the Wiluna claim in the late 2000s. His Tjiwarl Registration Report was completed in November 2011. It then appears from the evidence that Dr Sackett has been preparing reports and continuing his research into the claim group and their connections to ***country*** from about September 2013 to September 2015 (when his final report in this proceeding was filed). Taken overall, Dr Sackett has spent more than 20 years working with Aboriginal people in and around this claim area (including in the Wiluna determination area), and with Western Desert people, spending very large amounts of time indeed with them, and getting to know them over several generations: their families, their laws and customs and the way they explain their connection to ***country***. It was apparent to me during the on ***country*** hearings that Dr Sackett had a strong and respectful relationship with members of the claim group and I have no reason to doubt, having seen his approach and his manner of interacting with them, that he would have had the same kind of relationship with the apical ancestors of the claim group with whom he worked in earlier times, especially (but ***not*** only) during his PhD research around Wiluna. While it might be correct to describe (as Dr White does, and Dr Brunton accepts) Ms Bates' work in the early twentieth century as "genuine additions to knowledge about the Aborigines of the west and ... innovative methods of discovering knowledge", it pales against the qualifications and experience, but more importantly the depth and longevity of the work, of an anthropologist such as Dr Sackett with the Aboriginal people of these areas. Thus, while historians, and those who write about historical anthropology, may have genuine and valid cause to refer positively to Ms Bates' fieldwork methods as ahead of her time, and admirable, when a Court determining native title examines such material, it must do so, in my opinion, through the same prism as it deals with any other opinion evidence. Where suitably qualified and experienced experts who have been called to give expert evidence in the proceeding itself adopt the information, opinions, or conclusion of early ethnographers, anthropologists or non-Aboriginal people visiting claim areas or regions near claim areas, that may lend additional reliability to those source materials. However, ultimately it is a matter for the Court to determine the reliability, strengths, weaknesses, and relevance of all the material put forward to support or contradict factual propositions which form part of a party's case or submissions. I accept the applicant's submissions at [166]:While Bates undertook a detailed recording of genealogical information and information about kinship, which did include some information about places to which her informants were associated, she did ***not*** conduct any systematic inquiry into the laws and customs under which Ngaiawonga and other surrounding groups obtained rights to ***country***. As Dr Sackett explained ... in the context of discussing Bates' genealogies and the differing views of the anthropologists based on them, Bates:"...didn't provide us with the material that we might want. She didn't say, "Well, we've got generation levels here. We don't have them there." She didn't say, "This is the rule for taking ***country***." Whether she provided us with some genealogies from which we might extract insights into that rule, but she doesn't head them by saying, "Well, you could see here that patriliny is at work," or you can see here that people are taking ***country*** through birth, through their mothers, their fathers, and so force [sic]. So I – so to – to come back to the answer, I – I suppose that we're looking at the same body of material but coming to different conclusions because, I suppose, of the limits in the material and the limits in itself and some of the ambiguity in the material."(Citations omitted.) In my opinion, Dr Sackett's approach more reasonably and realistically measures the limits of Ms Bates' material than that of Dr Brunton. Dr Brunton

tends to take too literal an approach to Ms Bates' material, including drawing inferences from what is ***not*** there without, in my opinion, giving enough weight to the absence of any information about why Ms Bates wrote down what she did.

My approach to Daisy Bates' material The approach I propose to take to Ms Bates' material is as follows:(a) Where her own notes are in evidence, either directly or indirectly through the reports of Dr Brunton and Dr Sackett, and where those notes record matters that she saw or heard, I broadly accept they are a reliable record of what she saw or heard.

(b) There are, as both experts acknowledge (as does Dr White in her work) many inconsistencies in names and spellings, which means that a complex reconstruction process must often be undertaken to try and match the people and places Ms Bates records with other information, whether contemporary or historical. Where such reconstruction has been undertaken by Dr Sackett or Dr Brunton (or both) then I will take that reconstruction into account in reaching my own findings on particular factual issues, where required.

(c) Ms Bates' records should, in my opinion, be taken for what they are, but should ***not*** be seen as purporting to supply the universe of the relationship between Aboriginal people and areas of land in the early twentieth century in the areas she visited. In other words, I decline to view them as anything like a complete picture. There is no evidence about what proportion the people she spoke to formed of their overall group or community, whether they were representative or ***not***, whether they were entitled or authorised to speak to Ms Bates on behalf of their group or community or ***not***, whether they were in fact outliers from their group or community, who translated for Ms Bates and how expert they were, what questions she asked, what proportion of what she was told she wrote down, and what her methods were with the information she did choose to write down. Her short visits in and around the claim area cannot be seen as anything like a comprehensive "tour" through all parts of the region. Even if they were, the nature of Aboriginal and non-Aboriginal relationships in that time inevitably means there can be no confidence about how much she really saw in each area, let alone how much she understood what she was seeing.

(d) In evidence, both Dr Sackett and Dr Brunton agreed that there was nothing known of these matters.

(e) Where Ms Bates' information is used, as it is by Dr Brunton, to draw out conclusions on which the Court is asked to rely, I decline to do so because I have no basis (and nor does Dr Brunton, in my opinion) for knowing how comprehensive or reliable the sample provided by Ms Bates is. The overall population sizes of the groups where she spoke to some individual members are ***not*** known. As I have noted, the representativeness of the individuals in terms of their relationship to other group members is ***not*** known. The reliability of what Ms Bates was told is ***not*** known: that is, was the informant reliable? With current anthropological work with informants, the anthropologist may express an opinion about the reliability of a particular informant or, at least, is available to be questioned about such issues. Even if one accepts (as Dr Sackett, Dr Brunton and Dr White all seem to) that Bates attempted to be "meticulous" in what she wrote down from her informants, it is difficult to decide whether she was being meticulously wrong or meticulously right in what she was writing down.

(f) It should ***not*** need to be said, but Ms Bates' work is ***not*** to be given any preference, or particular weight, because she was a European writing about Aboriginal people at a time when the voices of Aboriginal people themselves were ***not*** permitted to be heard: see generally my comments in Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2) [2016] FCA 168; 215 LGERA 1 at [225]. A telling exchange occurred during the concurrent session, while Dr Sackett was being cross-examined. I reproduce it to illustrate the point I consider important. It concerns the presence or absence in Ms Bates' records of accounts of the Tjukurrpa identified by the claim group members:[MR RANSON].... This is in response to Dr Brunson [sic] making the point that Daisy Bates, although she had recorded quite a number of dreaming stories – we've talked about some of those this morning – she hadn't recorded the ... story amongst the Ngarlawangga [sic] informants that she met. And you say there's no reason to suspect, given that Liberman recorded it in the 70s and

was told it had been there for some time, there's no reason to think it wasn't there when Bates was recording. So your premise there is that it was probably there but she just didn't record it?---Didn't record it.

You would accept that it's equally possible on the evidence that she didn't record it because it wasn't there?---Well, she didn't record it. That's ... it's like some of the other things we're facing with her data. They're - - -

But it's possible?---It's possible, true.

(Emphasis added.) The point Dr Sackett was making, correctly in my view, is that there is no basis whatsoever for the conclusion that Ms Bates' records are a complete account of all aspects of the lives, beliefs, practices, laws and customs of the people whose information she records. Rather, they say what they say – and even then, there are many inconsistencies and difficulties in interpretation. Piecing together what Ms Bates has recorded requires, as in my opinion Dr Sackett went on to make clear after the extract I have just quoted, checking her work for consistency with other sources where there may have been more thorough, transparent and focussed recording of information (the example given by Dr Sackett was Mr Liberman's work in the 1970s). A similar approach should be adopted to the work of other early anthropologists and ethnographers. Their work was undertaken in a society where Aboriginal people were treated wholly unequally: they were ***not*** entitled to vote or participate on an equal footing in Australian democracy at any level of government, they were susceptible to forcible removal from their places of residence, and they were required to hold "passes" to move about in certain regions. If they were part of the workforce at all, it was in subjugated positions working for non-Indigenous people and generally being paid little or no wages, and certainly ***not*** being paid equal wages for equal work with non-Aboriginal people. These matters are now well recognised. Acknowledging those matters does ***not*** involve attributing any lack of good intentions to those researchers, or diminishing their work to nothingness. However, nor should their work be elevated unduly because it is from an earlier time. The contemporaneity or historic nature of the material is ***not*** in and of itself an indicator of reliability, accuracy or completeness. In contrast, the way it might be used by experts who give evidence in the case, and assessed as reliable or accurate, may be a different matter.

Daisy Bates' informants Consistently with my observations to this point, there is very little information available about Daisy Bates' informants. In their respective reports, Dr Sackett and Dr Brunton referred to Jal (or Jaal) and Jinguru, who were two of Ms Bates' Ngaiawonga informants. Ms Bates described Jal as "a rather powerful Lake Way district native". Jinguru was from Yander, but was imprisoned on Rottnest Island. Dr Sackett recorded the following account of Jinguru provided in Ms Bates' material:Bates ... related how her informant Jinguru had, along with some other men, killed a man they held responsible for magically causing the death of his mother. As Jinguru told her "I was 12 months in jail for that". Following this, Jinguru killed two other men; his "brother died from the mobarn [magical practices] of these fellows and he had to revenge his brother's death"... In its written submissions, the State contends that "most of Bates' informants were ***not*** residing in the Claimed Area by the time she spoke to them". In their written submissions, the applicant contends that "[e]ven where the informants are known, we have relatively little information about them". There was some opinion evidence that Jinguru was the same person as "Koyl", an uncle of Scotty Tullock. Both Dr Sackett and Dr Clendon expressed an opinion in their oral evidence that Koyl (or Coyle) was another of Jinguru's names. The conclusion that Koyl and Jinguru were the same person is of significance in determining how long the claim group members' ancestors have been in or around the claim area. Given the opinions of Dr Clendon and Dr Sackett, I am prepared to find that Koyl and Jinguru were, on the balance of probabilities, the same person. Dr Sackett's opinion about how the claim group members' ancestors may have acquired knowledge through people such as Jinguru is important. So is the familial connection between Jinguru and the Tullock family.

The use of "Ngaiawonga" as a description of the people in the area at sovereignty The significance of Ms Bates' description of people for whom she recorded genealogies and other details as Ngaiawonga people is at least twofold. First, it is evidence capable of identifying the group of people said to be in occupation of the claim area at sovereignty and assisting to decide what happened to them and what, if any, relationship the claim group members have to these people. Second, and on the assumption that the Ngaiawonga people were in occupation of the claim area at sovereignty, Ms Bates' material about them is part of the evidence on which the decision whether they were

Western Desert people rests. What is meant by the use of that word "Ngaiawonga"? This requires consideration, primarily, of the evidence of Dr Clendon, together with the opinions of Dr Brunton and Dr Sackett. Dr Clendon confirmed, and both parties accept, that the literal translation of Ngaiawonga is "I speak". Several claimant witnesses also identified the term in this way. Ms Geraldine Hogarth understood it to mean "my talk" or "my language". Mr Victor Ashwin understood it to be translated as "this" and "speak" in a Western Desert language. Mr Muir understood it to translate as "my speech". It is also true that several witnesses whose evidence I considered the most reliable (such as Ms Wonyabong and Mr Lewis) had never heard of the term. It appears neither had Mr Patterson, despite his status in the Wiluna claim area, which is geographically closer to where Ms Bates was working. Dr Sackett's Tjiwarl Registration Report describes how Ms Bates used the descriptor Ngaiawonga (my spelling). First, he notes in the fifth footnote that:Bates herself did ***not*** draw any 'tribal' maps for the area, halting with rough verbal descriptions of the locations or directions of the tribes of the region. In fact, she appears to have been of the view that, at least in this area, "definite ['tribal'] boundaries" would have been difficult-to-impossible to map.

(Citation omitted.) He then continues:Bates made a number of further points about the Ngaiuwonga and their neighbours. Of significance here, she noted that Ngaiuwonga ***country*** embraced ***not*** just the immediate "Lake Way district", but lands to the north, and, as well, ***country*** south to "Mt. Sir Samuel, and Lawlers", ie Ngaiuwonga lands extended southwards to the southern portions of the lands of the Application area. (Bates sometimes referred to the Wiluna to Lake Nabberu and Carnarvon Ranges Ngaiuwonga as the northern Ngaiuwonga, and to the Wiluna to Sir Samuel and Lawlers area Ngaiuwonga as the southern Ngaiuwonga.)

In much the same way that Bates reported that the ngaiu of Ngaiuwonga meant "I, me" she noted the ngadha of Ngadhawonga likewise meant "I, me". While it is possible that this sort of dialect/language, and group, distinguishing occurs in non-Western Desert areas, it certainly is common across the Western Desert, where dialect names or labels commonly flag or point to instances of difference. (This probably is best known in the case of the Pitjantjatjara and Yankunytjatjara, and vice versa. The Pitjantjatjara speak the Western Desert dialect which uses or has [the -tjara suffix means 'has' or 'having'] the word pitjantja [meaning 'to come' or 'to go']. The Yankunytjatjara [who happen to be neighbours of the Pitjantjatjara] speak the Western Desert dialect which uses or has the word yankunytja [meaning 'to come' or 'to go'].

(Emphasis in original; citations omitted.) In his report, Dr Brunton did ***not*** disagree with this analysis, but added that Ms Bates also spoke of local groups associated with particular areas, indicating their names came from the dialectical variations in the first person pronoun. He continued:In one document she wrote of the Ngaiuwonga as located around Balju Springs near Mount Alice, the Ngaiawonga around Yarnder (or Yander, Yarnderi), Wiluna and towards Lawlers, and the Ngai-yuwonga between Yarnder and Lawlers (which is just to the south of the claim area). Insofar as these 'tribelets' seem to have had different rules about the intermarriage of sections or skins, and even differences in one of the section names, distinguishing between them seems justified ... But the different labels for the groups are ***not*** applied consistently in her manuscript.

(Citations omitted.) I make some findings at [326]-[334] concerning where "Yander" is likely to be located, because it is of some significance in the fact-finding about ***not*** only who lived in the claim area at sovereignty, but about where people came from who moved into the area. Despite his qualifications, Dr Brunton himself was content in his report to speak of the "Ngaiawonga" as a single group of people: see for example where Dr Brunton referred to the Ngaiawonga identity at [126], [128], [130], [132], [142], [144], [146], [166] and [170]. However, both Dr Sackett and Dr Brunton agreed that "Ngaiawonga" was a dialect label and ***not*** a land owning group. I understood their evidence on this to mean that they accept that the way the people to whom Ms Bates spoke identified themselves to her was through the language they spoke. Their agreement on this issue is significant, as is the development of this issue by Dr Clendon. Dr Clendon's evidence, which I accept, was that Western Desert language has a spread of regional varieties or dialects and all native speakers can communicate with and understand each other, although the more geographical separation there is between dialects and varieties, the more difficult this might be. His evidence also

was that to the west of the claim area, Western Desert language "gives way" to non-Western Desert languages in the Kartu family, relevantly the Badimaya and Wajarri languages. His evidence was based on the word lists collected by Ms Bates from her informants Jaal and Jinguru, and four informants from Lawlers. In cross-examination, he explained this as follows:MR RANSON: ...So, back to the Lawlers list, now, Lawlers is or was a historic mining town and it was quite prosperous and large, I think, at the time of – at Bates' time?That's my understanding, yes.

Yes. And that word list was compiled from four different individuals that she named?Yes.

Do we know anything about those individuals, who they were or where they were from?I don't know anything about them, no.

And Bates doesn't provide any detail about that other than ?***Not*** that I could see from her document.

And there's no explanation as to how those individuals came to be in Lawlers at the time that she recorded the material?***Not*** – ***not*** – ***not*** to my understanding.

So, while you might be able to attach the words in that list to those four individuals, it's ***not*** necessarily the case, is it, that you can attach them to a particular point on the map in that sense, can you?Well, except that she does say they are of Lawlers, and from my reading of her work she was fairly meticulous, because the point of this – the point of all these exercises was to document language where – in – in its geography, where language occurred, and it seems to me highly likely that she would have sought reassurances from them that they were actually from the Lawlers or – Lawlers, or from that area.

Okay?Because that was the purpose of these word lists, was to show how language varied and altered across a landscape.

...

You said there [referring to Mr Clendon's first report]:Four people contributed to the Lawlers word list. It may be that we are seeing here two or more different languages from different regions of Western Australia.So it seems to me you were leaving open that possibility, there, that these individuals may have come from different places, in fact?Certainly. It's a possibility.

Yes?I don't think it's a strong possibility; I don't think it's a probability, but it must be a possibility.

If that isn't the case, if they were – let's assume, for argument's sake they were all locals to Lawlers, how would you account for the two or more different languages in that circumstance?Because they were offering words that were shared between Wadjari, Badimaya and the Western Desert language in that area. It was an area where, almost certainly, Badimaya and Wadjari were spoken, as well as the Western Desert language. Leonie Dunn and, I think it was, James Bednell locate Badimaya ***country*** directly to the south-west of the Tjiwarl claim area. It would be extremely likely that, as I was talking about before, that people in there were multilingual.

You mention that – use that expression that Bates "was offered" two or three different languages?Yes.

From my layperson's look at the words lists, there's no – there's ***not*** really an explanation from Bates in there as to precisely what the exercise was, is there? She's ***not*** – she doesn't really explain exactly what questions she was

asking, so how do you come to that interpretation that she was being offered alternatives, as opposed to ?Well, she had a word list – well, she had a – she had, I guess, a pro forma, and these questions, like, “Kangaroo”, “Where shall I find water?”, whereas these questions recur in each of her word lists that I’ve looked at in this area.

Yes?And I would imagine a situation where there’s four men sitting with her, and one of them offers a response in a Western Desert language, another one offers a response in, perhaps, Badimaya, or, perhaps, the same man offers her – gives her three different alternatives.

Okay. So she, in your mind, was actually engaged in a slightly comparative exercise in that sense?Well, no, she would ***not*** have known that they were different languages.

Okay?I mean, she was ***not*** a linguist. She appeared – everything I can see – especially, the fact that she wasn’t distinguishing between languages – she did ***not*** know that she was being offered two or three different languages.

But in your opinion, that’s what was happening?Yes.

Yes. Okay. I understand that. Now, if I can take you, Dr Clendon, to your supplementary report, just dealing, still, with this Lawlers word list, and to paragraph 5 on page 4 of that report?Yes.

And that’s your conclusion about that list, effectively, or a description of that list, and you say it shows a large portion of the language in there is Western Desert language, a portion of it is Wadjari, and the third portion is a language or languages, the identity of which have been uncertain. But I think, as you’ve said to us this morning, and, perhaps it’s already indicated in the report – I must say I’ve taken it from the report already – you seem – your best guess is that that was Badimaya Well, I know

based on that ?----I know a lot of it is Badimaya, yes.

Yes. And that was information you didn’t have at the time of your first report?---That’s correct.

...

Now, that Badimaya dictionary is a relatively recent publication?---Yes.

And, without wishing to be unfair to anyone, it’s a fairly sparse dictionary. It’s ***not*** as detailed, for example, as the Wadjari one. Is that fair characterisation?No, it’s ***not*** as detailed as the Wadjari one and it’s nowhere near as detailed as the Ngadjunmaya.

Yes. And you make an interesting comment at paragraph 6 after – just after where we were, which seems to me to suggest that, perhaps, if we had a more comprehensive Badimaya source, it might be that even a higher proportion of the words in the Lawlers word list might---?---That’s absolutely possible, yes. Despite the State’s submissions to the contrary, in my opinion Dr Clendon’s evidence was clear that, in his opinion, the self-description recorded by Ms Bates indicated her informants’ principal language was a Western Desert language, accepting (as he did) that some of the informants were clearly multilingual, including in non-Western Desert languages or dialects. I deal with Dr Clendon’s evidence in more detail at [711]-[756], where I find that his opinions and conclusion provide support for the proposition that the people who occupied the claim area at sovereignty were Western Desert people. For the moment, the relevance of his opinions is to confirm that Ms Bates’ use of the term “Ngaiawonga” appears to have stemmed from no more than the self-identification given by Jaal and Jinguru (and possibly others) about what they

considered to be their principal language. Thus, "Ngaiawonga" appears to have been a self-description used by Ms Bates' informants, but as a way of identifying the principal language they spoke, perhaps without intending (or knowing) that Ms Bates would adopt it as a nomenclature for the people they had described themselves as part of. What is most significant is that their principal self-identification was with a Western Desert language. It does ***not*** have any further significance than that. I accept Dr Clendon's opinion that at sovereignty there were two regional dialects spoken by those Aboriginal people who occupied the claim area – Tjuparn (or Tjupan, Tjupany, or Djubun) and Mantjintja – both of which formed part of the Western Desert Language. I find that Ms Bates' use of the label "Ngaiawonga" was a label she derived from words spoken to her by her informants, as a way of identifying themselves by reference to their language. She came to use it, as Dr Clendon identifies in his report, in a mistaken way, but it is nevertheless a label which has "stuck" and which the parties and experts in this proceeding have been content to use. It should be given no higher status than that.

What area did the Ngaiawonga occupy? Ultimately, both Dr Sackett and Dr Brunton agreed that Ms Bates' material indicated the people she described as "Ngaiawonga" occupied the whole of the claim area as their traditional ***country***. Dr Brunton said, in his first report at [512]-[514]:As noted in the previous chapter, Bates' account of the places at which the Ngaiuwonga were to be found does appear to encompass the whole of the claim area. She specifically stated that the people she identified as 'south Ngaiuwonga' had their burna – which she translated as 'home', and elsewhere as 'group area', and which Kingsford said can mean 'estate', 'home ***country***', 'language territory', etc – included 'Wiluna, Lake Way, Mt Sir Samuel and Lawlers'. This would indicate that she saw these places as comprising the ***country*** with which the south Ngaiuwonga were traditionally identified, and in which they would have what are now seen as native title rights. While this includes only the eastern third of the claim area, two other kinds of statements can be cited to show that the Ngaiuwonga's ***country*** extended over more of the claim area.

The first are references to the 'runs' or associated sites of individuals who were identified as Ngaiuwonga – Lungu and Wilamada – being in the Barrambie and Sandstone districts, to the west of the claim area. As both of these men were deceased and in the first or second generation above Bates' informants for the genealogies on which they appeared, it seems reasonable to assume that the links to these sites predated European settlement. The genealogy on which Lungu appeared was headed 'Ngaiuwonga south'. Bates also identified Mt Townsend, in the north west of the claim area, with Peter Yandarga, who was said to be both Ngadawonga and Ngaiuwonga, although he was of a younger generation and one of Bates' informants.

The second kind are statements about the supposed Ngaiuwonga local group, the 'Ngaiyu', in the Boolygoo Range area, which is in the south west of the claim area, and at Mt Holmes, outside the southern boundary. (However, as noted in paras 43-44 for example, there are problems about the consistency with which 'Ngai-yu' or 'Ngaiyu' was applied). As already stated in para 74, and as will be readily apparent from Maps 9 and 10, Bates also located Ngaiuwonga far to the south and south-east of the claim area, usually camped with members of other tribes, although in my opinion, some of these locations, such as those around Leonora and Laverton, reflect post-European, and possibly temporary movements.

(Citations omitted.) When one takes all the geographic references in these passages, it is clear that all parts of the claim area are included. Lawlers is just to the south of the claim area. Booylgoo Range is in the south-western part of the claim area. Mount Townsend is in the north-west corner of the claim area. Sandstone is ***not*** far outside the south-western boundary of the claim area. Wiluna is to the north of the middle of the claim area. Lake Way is right on the northern boundary of the claim area, to the east of Wiluna. Dr Brunton made what was no more than a passing suggestion that the southernmost parts of the claim area may have been occupied at sovereignty by Badimia people. However as the applicant submits, no Badimia people came forward to make a claim over any part of the area, despite a recent claim to areas to the west. The better view is that the whole of the claim area was occupied at sovereignty by a group of people whose own descriptions of themselves may never be fully ascertained, but who Ms Bates called Ngaiawonga.

Dr Brunton's analysis of Ngaiawonga marriage patterns Dr Brunton conducted a detailed analysis of marriage patterns based on Ms Bates' genealogies and the identification of places referred to in her notes. He concluded that "by far the heaviest concentration of marriages [of Ngaiawonga to non-Ngaiawonga people] ... lie in an arc from the north to the west, with an additional marriage located in the south western quadrant." Dr Brunton concluded that this pattern "presumably reflects a concomitant paucity of social interaction" with people to the east, which he said is very difficult to reconcile with the idea that the Ngaiawonga were Western Desert people. Had they been, Dr Brunton said he would have expected at least a more even distribution or, more probably, a skewing to the east. Dr Brunton considered the data he used was based on a representative sample of Ngaiawonga people. In his further expert report, Dr Sackett expressed doubts that Ms Bates' data was a representative sample of the people in the claim area, pointing out that Ms Bates did ***not*** undertake fieldwork in the Yander area, but rather worked in the Peak Hill-Meekatharra and Sandstone areas, as well as Rottnest, Bernier and Dorr233; Islands. Sackett commented that "had Bates recorded information at Wiluna or Sir Samuel, the picture generated might have been very different indeed." Dr Sackett's view was that intermarriage between Ngaiawonga and non-Western Desert groups to the west was ***not*** inconsistent with the Ngaiawonga being Western Desert people. He referred to data from other areas suggesting that, where Western Desert and non-Western Desert peoples elsewhere abut one another, they interact and marry. As the applicant submits, the ultimate issue is whether at sovereignty the Ngaiawonga and people to the east constituted a single society and, even if Dr Brunton's analysis of Bates' data does reflect some preference amongst some Ngaiawonga located in the west of the claim area for marrying people further to the west over people further to the east, it does ***not*** follow that the Ngaiawonga and people to the east had different laws and customs. I agree with the applicant's submissions. More importantly, for the reasons I have outlined, I do ***not*** consider it is possible to conclude that Ms Bates' data was representative. I do ***not*** consider her materials provide a reliable source for any overall conclusion about the marriage patterns of Aboriginal people occupying the claim area at sovereignty. They record what a small number of people told her. It was ***not*** even a remotely comprehensive study, it was conducted outside the claim area, and it had a focus on lands and people to the west. Finally, I accept Dr Sackett's view that there is no necessary inconsistency between the Ngaiawonga being Western Desert people and such marriage patterns as exist showing interactions and marriage with non-Western Desert people. As Dr Clendon also noted, it was a feature of Western Desert societies that their mobility over large areas meant there could be much interaction with other societies.

What happened to them? The question of what happened to the Ngaiawonga is vexed. In their statement of issues, facts and contentions, the applicant states:Nevertheless, the influx of non-Aboriginal people into the Claimed Area in the late 19th century and early 20th century:(a) materially affected the access by the Aboriginal occupants of the Claimed Area to traditional water and food sources;

(b) resulted in the spread of diseases to the Aboriginal occupants of the Claimed Area; and

(c) resulted in conflict between non-Aboriginal people and the Aboriginal occupants of the Claimed Area, and/or between Aboriginal people in occupation of the Claimed Area and other Aboriginal people.The matters referred to in paragraph 29 contributed to a situation where, by the early 20th century, those Aboriginal people who were in occupation of the Claimed Area at sovereignty, and the biological descendents of the Aboriginal people in occupation of the Claimed Area at sovereignty, died or moved away from the Claimed Area. The State is correct to point out that, initially, Dr Sackett's opinion was that:... evidence suggests there was something of a decimation of the original population of the Tjiwarl area, through the consequences of introduced diseases, dispossession, violence, forced (and possibly voluntary) removals. Prior to this conclusion, Dr Sackett had discussed in more detail the evidence for his conclusion. It seems apparent from his discussion that the effects of European diseases such measles and influenza were devastating. Venereal disease was also a noted problem, leading, as I have noted above, to some Aboriginal people being removed in inhumane ways to "lock hospitals" on the islands of Bernier and Dorr233;. What proportion of the population was removed in this way is ***not*** revealed by the evidence. For whatever combination of reasons, the original occupants were finding it hard to survive in the most basic of ways. Dr Sackett extracts a report from the Chief Protector of Aborigines in 1902, which said the local people:wander about in a starving condition from one mining centre to another; their own water-holes appropriated by the white race, the few animals completely destroyed, and therefore [they have] nothing but grasses and insects

... to rely on. Dr Sackett refers to the work of E Watson, in his 1968 autobiography (Watson E, Journey under the southern stars (Abelard-Schuman, 1968)) which provided, amongst other things, an account of the expedition of Professor Radcliffe-Brown, accompanied by Ms Bates and Mr Watson, in the Murchison area in 1910. Dr Sackett quotes Mr Watson as saying that, although there was some intramural fighting:it was rather the diseases brought by the white man. Whole countrysides were killed by measles and influenza ...

(Citation omitted.) An informant to another anthropologist, quoted by Dr Sackett, and who lived around Sandstone in the early part of the twentieth century was reported as saying that there were:"[t]wo bouts of severe influenza among the Aborigines [which] decimated their numbers ... as they had no resistance to it." Dr Sackett notes these effects were, in his opinion, occurring from, or even (in the case of disease) before, the settlement of this area by Europeans, and the effects continued throughout the First World War. He also notes the evidence establishing, in his opinion, how low the numbers of children were during the early part of the twentieth century in the area, although he observes that caution is needed in taking too literally contemporaneous observations on these issues, because many Aboriginal families were astute to conceal their children, lest they be removed by the authorities. Dr Sackett continues:All the same, evidence from Bates suggests there were few(er) children to hide. In fact, Bates' Pedigrees point to something of a fracture in the reproduction of the local population. Take, for example, those for Jal, Jangari, Kaligurdaji, Ngaiajara, Wonga and Janjimara. These were people Bates identified as Ngaiuwonga, and associated with ***country*** to the near north of the claim area.

(a) Jal was shown with four wives, but only one child.

(b) Neither Jangari, nor his sister, nor his three brothers, one of whom had three wives, were shown as having children.

(c) Kaligurdaji, said to have been about 60, had a son and two daughters, none of whom themselves was shown with children.

(d) Ngaiajara, said to have been about 75, had two sons, neither of whom was shown with children.

(e) Wonga, said to have been about 50 and twice married, was shown with no children.

(f) Janjimara, said to have been about 60, was shown with no children.

(Citations omitted.) Dr Brunton substantially agreed with Dr Sackett's assessment of the decimation of the population in this period, describing it as a "demographic catastrophe". From these propositions, the State submits that the last Ngaiawonga people appear to have died, or moved out, in the immediate period after 1912. I do ***not*** accept that a finding with that degree of certainty can be made on the evidence. Rather, the situation was more fluid and complex than the State submits. Dr Sackett's initial conclusion was that he knew of no descendants of the original occupants. He did ***not*** revisit this conclusion in his supplementary report, or in oral evidence. What I take Dr Sackett to mean by his statement is that, in his considerable and long-ranging studies concerning the connection of contemporary Aboriginal family groups with ***country*** in and around the claim area, he has ***not*** come across any people who claim to be descendants of the "original occupants" of the claim area. That is, no-one else is claiming rights and interests in this ***country*** under traditional laws and customs. I take him to be saying no more than that. And in my opinion, it would be difficult to put the statement in any more absolute terms. The evidence in this proceeding is replete with accounts of forced removals of Aboriginal adults and children from their ***country***, of Aboriginal people fleeing violence from and mistreatment by early European settlers, of Aboriginal people moving to avoid starvation and the ever encroaching tide of gold prospectors, combined with the tremendous toll taken on Aboriginal people from introduced disease and illness. There are, accordingly, any number of reasons why no other

descendants may be visible. That proposition does ***not*** deny, of itself, the connection of the claim group members through traditional laws and customs to the claim area.

The role of Tjukurrpa in the applicant's claim The evidence – claimant and expert – about the Tjukurrpa is what provides a frame of reference for my own navigation through the legal landscape of the applicant's claim and the State's fundamental criticisms of it.

Explaining the Tjukurrpa The Tjukurrpa is a central part of the world view of all the claimant witnesses. Translation of its meaning and significance into written non-Aboriginal language has its challenges. In the findings I make in the following section, I rely to a significant extent on the evidence of Dr Sackett, whose opinions about the Tjukurrpa I accept. Dr Brunton does ***not*** disagree to any real degree with how the Tjukurrpa might be described, nor about the role it plays in Western Desert laws and customs. His point of disagreement concerns whether the members of the claim group have "imposed" their own Tjukurrpa on the claim area with the consequence that they have a new and post-sovereignty relationship with the land, rather than a "traditional" one for the purposes of the NT Act. Dr Sackett's description of the Tjukurrpa is:For Western Desert people, proof of the reality of the Tjukurrpa was/is seen in the way lives were/are led and experienced, and the landscape was/is organized and related. Put another way, as Western Desert people saw/see it (in what for Westerners would be circular logic), if it were ***not*** for the Dreaming and the Dreaming beings, things would ***not*** be the way they are.

In my experience and opinion, Western Desert people, Tjiwarl Claimants amongst them, view the Tjukurrpa in a couple of intertwined ways. At one level, it was the time when (1) the world was given shape and (2) a way of life for humans to follow was laid down. Both acts were carried out by supernatural Beings who themselves are referred to as Tjukurrpa. Many of the commentators, anthropologists and ethnographers to whom Dr Sackett refers in his supplementary report use the description "religious" to describe the characteristics of the Tjukurrpa. There is, based on the evidence I have heard, no doubt a spiritual dimension to the way the claim group members understand the Tjukurrpa. The Tjukurrpa comes from mythical beings that shape and mould the landscape, but its nature and function is ***not*** limited to being a spiritual, religious or mythical account of the creation of the landscape and natural world in which Aboriginal people live. Rather it is also, as Phillip Toyne and Daniel Vachon described it, in a book to which Dr Sackett referred, the "rational and moral order to their existence": see Toyne P and Vachon D, Growing Up the ***Country***: The Pitjantjatjara struggle for their land (McPhee Gribble Publishers/Penguin Books, 1984). Scott Cane, also quoted by Dr Sackett, described it as "'the Law', to which they consider themselves beholden": Cane S, Pila Nguru: The Spinifex People (Fremantle Arts Centre Press, 2002). Thus combining many concepts in one word, the Tjukurrpa is past and present, myth and reality, belief and law. It connotes beings who have always existed and still occupy the landscape, and that continued presence is part of the reason that there is a body of rules of behaviour which exists around sites and knowledge related to the Tjukurrpa. Transgressions have a real and immediate effect. The Tjukurrpa is ***not*** consigned to history, but rather is a living guide for the lives of Aboriginal people. Tjukurrpa does contain, as Dr Sackett elucidated, something that to a non-Aboriginal person might seem like circular logic. This extract of Dr Sackett's evidence from the concurrent evidence session makes the point well:MR RANSON: It's on page 9. Dr Sackett, there you say:For Western Desert ... proof of the reality of the Tjukurrpa was and is seen in the way lives were and are led and experienced and the landscape was and is organised and related. Put another way, as Western Desert people saw it or see it, in what, for Westerners, would be circular logic, if it were ***not*** for the dreaming and the dreaming beings, things would ***not*** be the way they are.So what you're saying there is: Aboriginal people look at the landscape, they interpret it as having been created in the dreaming and then they use the way the landscape is as proof of the truth of the dreaming. Does that make sense?---You're close. They're told about the significance of the landscape – what's in the landscape. They're taught it by elders, their parents or somebody else. So they're taken to and shown places and told about it. But the proof that that happened is evident because it's there.

Is that - - -?---To go back to the example of the hill, south of the Wiluna, the Lawrence Wells – those little ... beings were frightened and ran and tried to get into their burrow and in so doing pushed up the hill as evidence that that happened. Some evidence given in the restricted session by Mr Victor Ashwin and Mr Allan Ashwin was also persuasive about the nature of Tjukurrpa. I set it out here because, although given in the restricted session, I do ***not***

consider it touched on any restricted subject matter. The evidence was given in the context of questions about handing over rights to ***country***, a topic to which I return later in these reasons. However, it is the emphasised passage which is important to the present topic:MR RANSO[N]: Oh, okay. That was going to be my next little question was, that handing over, was that handing over the law, the men's law or was it handing over the ***country*** or was it both?

VICTOR ASHWIN: Both. It comes hand in hand.

MR RANSO[N]: Yes.

ALLAN ASHWIN: ***Can't*** hand them - - -

VICTOR ASHWIN: You ***can't*** have one or the other.

MR RANSO[N]: Okay.

VICTOR ASHWIN: You got to have the law and the ***country*** where the Tjukurrpa went through.

MR RANSO[N]: So when that law gets handed over, the ***country*** comes with it maybe.

ALLAN ASHWIN: Mmm.

VICTOR ASHWIN: ***Can't*** – Tjukurrpa went through the ***country***. Tjukurrpa

is the ***country***, that's what I'm explaining to you.

(Emphasis added.) The claimant evidence demonstrates that the Tjukurrpa of the claim area links the land and waters of the claim area with land and waters outside the claim area, especially (but ***not*** entirely) to the east, and a long way across the Western Desert region. In linking the land and waters, it also links the people of the ***country*** of the claim area with the people of ***country*** through which the Tjukurrpa travelled, and in which it existed, and exists. Dr Sackett confirmed in his evidence that this was his understanding of the effect of the claimant evidence. However, as Mr Victor Ashwin emphasised in the passage I have set out above, the linking occurs because Tjukurrpa is the ***country***. Ms Wonyabong explained the linking or unifying nature of the Tjukurrpa – between ***country***, and between people, in this way:People in Ranges [Warburton] and other parts of the desert, like north around Wiluna, know these stories as well. They know the story coming right from Alice Springs. The old people would know the stories, because they learn it through the law. It is thetjukurrpa that makes it the same law. As Dr Sackett noted, the evidence of Aboriginal people outside the claim area also supported this understanding of the Tjukurrpa. The evidence of Mr Patterson was:It's the same tjukurrpa in that Tjiwarl claim area as my ***country***. My ***country*** is up north – but it change the language and so we leave it to that lot. It's the same tjukurrpa. But that's for the mob who talk for the area to talk about. Different people have different responsibility for different parts of the tjukurrpa. Mr Patterson is ***not*** a member of the claim group. He is a senior wati of the Gingirana native title claim group, as well as being a native title holder on the Birriliburu, Martu and Wiluna determinations. His evidence has particular weight because, as a Western Desert man, speaking about his own ***country***, he is very clear that the same Tjukurrpa runs through the claim area. There is no sense from Mr Patterson's evidence that this is a recent occurrence, after the arrival of settlers.

Two Carpet Snakes and the Dragonfly The principal Tjukurrpa disclosed in the evidence (both claimant and expert) is called Tjila Kutjara: two carpet snakes being chased by a dragonfly (Tjinkuna). During the on ***country*** hearing, the Court viewed some of the principal sites related to this Tjukurrpa. Most claimant witnesses gave evidence about this Tjukurrpa, but the principal claimant witnesses who spoke about it in oral evidence were Ms Wonyabong and Mr Muir. Mr James and Mr Richard Narrier, among others, gave accounts in their written evidence. Ms Wonyabong took the lead in many of the sites visited by the Court during the on ***country*** evidence. Both Ms Wonyabong and Mr Muir principally learned the story of Tjila Kutjara from Ms Walker, Mr Muir's mother. Ms Wonyabong also gave evidence that she heard part of it from the station owner at Albion Downs, although she said she had previously heard it from Angeline Narrier and Doris Foley. Angeline Narrier was the aunt of Ms Narrier, Mr Richard Narrier and Mr Keith Narrier. She was married to Micky Wonyabong. Doris Foley was part of the Ashwin family. Her brother was Alfie Ashwin and she was the aunt of Mr Allan Ashwin. Doris Foley had a son called Lenny Ashwin. In his witness statement, Mr Muir described Doris Foley and Angeline Narrier as the main custodians for the ***country*** in that they were "responsible for looking after the tjukurrpa stories and places throughout the Tjiwarl ***country***, because it was their ***country***". It is an open Tjukurrpa (that is, ***not*** knowledge restricted by gender or some other attribute) although, at least based on Mr Liberman's report, there may be aspects of it which are ***not*** open. Before descending into any detail about the story, it is important to set out that this Tjukurrpa comes into the claim area from the east – from Weebo (which is ***not*** far outside the south-eastern corner of the claim boundary) and up through Lake Darlot and then across west into the claim area, although, as I set out below, it has long been said this Tjukurrpa starts in the Northern Territory. When it enters the claim area, the Tjukurrpa runs north up the Barr Smith range, ending (on one version at least) at "Pii", a spring on Albion Downs station, and one of the locations visited during the on ***country*** hearings. Mr Liberman's report also dealt with this Tjukurrpa in considerable detail, and I refer to aspects of his report below. Although something was made of changes or differences in this (and other) Tjukurrpa by the State, I am satisfied those changes or differences are ***not*** material to the issues I have to determine. By way of introduction, Mr Liberman notes in his report that throughout the Western Desert region and the Pilbara, the carpet snake is associated with water. He reports that carpet snakes "have great difficulty making long journeys over hot dry grounds, so their presence at a water hole is a strong indication that the water is permanent". He notes that when a waterhole becomes dry "it is often said that the snake has died". He also notes this Tjukurrpa starts "from the region of Ayer's Rock" and extends "across some 1600 kilometres of desert to pii (the Barr Smith Range) near Albion Downs on one version ... and to Walga Rock on Austin Downs Station on another version". Walga Rock is a very large rock formation located west of Cue, and north-west of Mount Magnet. Uluru is also where Mr James places the start of this Tjukurrpa, although other claimant witnesses (Ms Harris, Mr Victor Ashwin, Mr Muir, Mr Allan Ashwin and Ms Wonyabong) simply describe it coming from further east of the claim area. Mr Allan Ashwin said it "came from over in Mungkali ***country***", which is ***country*** well to the east beyond Lake Carnegie. Mr Liberman also noted that:This yiwarra ("track") of the tjila kutjarra (Two Carpet Snakes) is primarily associated with the creation of vital waters in this transection of the Western Desert, and there are many highly secret-sacred sites located on the track-sites which have been important centres of ceremonial activity.

(Footnotes omitted.) In his witness statement, Mr James gave an account of this Tjukurrpa. His ngurra is around Albion Downs. He learnt this Tjukurrpa from his father, Dempsey James. This is how he tells the story:We call the dreaming, the tjukurrpa. The main one that I've been told is the Carpet Snake Dreaming, the Tjila and the Dragonfly man, Tjiinkuna. The story is coming from Uluru coming through Weebo and focusing on this area, the journey through Lake Miranda [K8/L8], Lake Darlot [L8] and up to Tjiwarl and has them being chased across the ***country*** and shaping some of the landforms and lake systems and being caught on the other side of Albion Downs.

The Dragonfly shaped two rocks in Uluru and left them to dry. They turned into the Tjila, the Carpet Snakes and they traversed their way across the ***country*** as the Dragonfly was chasing them through to Weebo and then the story picks up around here.

The part that I know a bit more in depth is around Lake Miranda [K8/L8], Albion, Yakabindie and Barr Smith ranges. There's a red sandhill in the middle of the lake that is where they the Carpet Snakes were speared. I have

been told two different versions of that, one is that the blood red sandhill is where they were speared and the other one is where one of the snakes had eaten regurgitated bad emu fat which caused the sandhill.

Where Jones Creek is, there is a place called Mail Change Well, Tjulpu, that is linked to some of the Carpet Snake and Tjiinkuna stories; the part of the Barr Smith Ranges where there are lots of soaks. There is munta there, a crevice or opening to the hills with two springs with a camping ground. I was told ***not*** to go to that area at certain times of year because the mob would do law business there, coming down from Wiluna.

The two snakes being chased made their way to around Albion Downs where they were subsequently tracked down, around Tjiwarl. One was speared around there and the area to the west of the Barr Smith Ranges which you see it's all flat. It's flat because when the snake was writhing in agony and in dying it flattened out all the ***country*** through there. When one of the snakes was caught it was wounded and when it was thrashing around outside of Tjiwarl it created the land there to the west of Logan Springs.

When he cooked it, he took it back to around Tjiwarl and there is a quartz hill there along a rocky outcrop where it exploded. Some of the quartz there represents the scales, and the honey opals and stuff like that around there evidence the body of the snake. The other snake went further north.

There are some specifics about the landforms around Tjiwarl that are specific to that area. Like when you see those karlkula's around Logan Springs, that's the Dragonfly man dropping seeds there out of his tjilly bag and that explains the formation of the karlkula's there. That's part of the story, the Dragonfly man used the plants and they are only found there in that section.

There are other different landforms and things that are linked to that Dreaming story as well which can be seen around Palm Springs or Palm Well. The Carpet Snake is there and that's one area I was told when I was growing up that we had to make noise and let it know our smells. It's a place where I've taken my son and taught him that protocol. Mr Liberman also describes, in a part of his report which has been tendered in evidence under orders restricting its publication, other parts of the journey of the two carpet snakes, pursued by the dragonfly. Without revealing its content in these reasons, it is clear those parts of the journey have broader ceremonial and ritual significance, and had done for decades prior to Mr Liberman's report. The matters he described are consistent with there having been ongoing, traditional laws and customs practiced in the claim area.

Other open Tjukurrpa There is the Watja Tjukurrpa (bush potato), which in the on ***country*** evidence was a Tjukurrpa for which Ms Narrier principally spoke. Mr James, Mr Muir and Mr Victor Ashwin also gave evidence about it. In her evidence, Ms Narrier described this Tjukurrpa and explained how Tjukurrpa and ***country*** connect with conception and birth, and with people themselves:That watja is important to me and my granddaughter, Irandia. It is like my own tjukurrpa, and Irandia has the same one. My mum was waiting for me, and she used to dig a lot. She was picking them plants, in the middle of a stream in the Booylgoo Ranges. She found a white potato, and that told her that she was pregnant with me. I have a mark on my navel the same shape as those ranges. My mum told me the story of that.

It is the same for my granddaughter Irandia. We were out in that ***country*** when my daughter Amanda dug up a really big watja with a funny shape – it looked like a little person. That is how we knew that Irandia was on her way. Irandia has a little mark on her head near her left ear; that's where the watja got a little mark from the crowbar when we were digging it up. There is a Mallee Hen Tjukurrpa, referred to particularly by Ms Luxie Hogarth and Ms Geraldine Hogarth. Mr Lewis and Mr Muir also gave evidence about it. Ms Luxie Hogarth told the story in the following way:I also know about the Mallee Hen dreamtime story. It comes from Menzies [which is to the south-east of the claim area]. There's a spot along the Agnew to Sandstone road [which runs east/west along the southern part of the claim area] where you can see the Mallee Hen Dreaming. That's where the Mallee Hen is making a nest. That's his hollow there, where he's been dreaming there. In Menzies, there's a big hill, a granite one, same as the sand one here in the Tjiwarl claim. I been to that granite one, but I couldn't climb up to see.

The Mallee Hen Dreaming comes from Menzies, makes its nest in this ***country***, and then is all across the sand hills, right across to Lake Mason [which is a large lake system located inside the western side of the claim boundary, but extending out to the west and outside the claim boundary], and then it keeps going. It goes past Lake Mason, and keeps following the sand hills. The other side of Lake Mason, other people they take it on and carry the story. Two further Tjukurrpa should be mentioned, to which Dr Brunton refers, having found references to them in Daisy Bates' material. One is a Waiurda Tjukurrpa (oppossum), which was ***not*** referred to in the claimant evidence. Professor Berndt refers to it in his 1959 paper I have cited above at [373]. He states (at 97) that the "whole Western Desert is criss-crossed with the meandering tracks of ancestral beings, mostly though ***not*** invariably following the known permanent and impermanent waterhole routes". He refers to the wajurda"track" amongst a number of others, some of which are also mentioned in the evidence before me, such as the Mallee Hen, Two Goanna Men and the Seven Sisters. I take "wajurda" to be a reference to "Waiurda", that is, the oppossum Tjukurrpa. Dr Sackett confirmed he is aware of a Western Desert Tjukurrpa by this name, but he recorded it out to the east of Warburton. Warburton is a considerable distance (approximately 600 km as the crow flies) from the easternmost point of the claim area near Barwidgee. It is closer to the Northern Territory border. This evidence, of course, raises the question of why or how Daisy Bates had recorded it in areas to the north of the claim area. The applicant suggested to Dr Brunton in cross-examination, at least impliedly, that what Ms Bates had recorded was the same Western Desert Dreaming identified by Dr Sackett, and by Professor Berndt. The question was tentative, because it is impossible to know why Ms Bates recorded what she did. This is another example of how the absence of knowledge about Ms Bates' methods, her questions, her selection of informants and the like can mean incongruities admit of no clear answer. It is ***not*** possible to reach any conclusion whether (as the applicant submits) this evidence shows a connection between the Ngaiawonga and other members of the Western Desert. As I understand it, Dr Brunton's view in his supplementary report that the disconformity between Ms Bates' recording of this Tjukurrpa and the absence of it from the claimant evidence told against any connection or relationship between Ms Bates' informants and the claim group members' ancestors, or between the claim group members' ancestors and the claim area (or perhaps both). This is an example of Dr Brunton elevating too readily, in my opinion, the comprehensiveness and reliability of Ms Bates' material, when nothing is known about her methods. There is also a Maruwa Tjukurrpa (bush rat) in the claim area. Mr Keith Narrier mentioned it briefly in his evidence, saying it is "just a hill." Dr Sackett described how he had recorded this Tjukurrpa as coming from Mount Lawrence Wells on the Lake Way station, which is just outside the northern boundary of the claim area, and south of Wiluna. He said:It's a large hill and people have told me that the little beings were out, wandering around gathering things, and they heard the dingo cry out and there's a dingo dreaming nearby, Irrawalla, and they heard the dingo call out and they raced back – scurried back towards their home at Mount Lawrence Wells and that's how the well came into being, because they were diving into the – their little cubbies and the hill came up, and they travelled down into the claim area. In fact, I – when I was doing research earlier on I recorded Murriwa activity at around Dingo Pool, which is on the claim area, and Yakabindie Claypan as well. They came down and went back up. Relying on the references to the Maruwa Tjukurrpa in both Ms Bates' material and the evidence, the applicant submits this is "supportive of a continuity between Ngaiawonga and the present claimants". Just as I have found the absence of the Waiurda Tjukurrpa from the evidence, although mentioned in Ms Bates' material, to be inconclusive, so it seems to me is the presence of the Maruwa Tjukurrpa. It might be said, as I have noted elsewhere, that something can be drawn from the fact Ms Bates recorded it: that is, from a positive recording, whereas it is much harder to draw any inference from the absence of material being recorded, when we know nothing about her methods. In my opinion, the stronger point is that, since I accept Dr Sackett's opinions that the Maruwa Tjukurrpa is a Western Desert Tjukurrpa, the fact that it emerges in the landscape in the claim area (and in areas just outside it to the north which are, it is agreed, Western Desert ***country***), and forms part of the claim group members' understanding of the landscape of the claim area strengthens the probability that the claim area is, and always has been, Western Desert ***country***.

Restricted Tjukurrpa Some of the Tjukurrpa in evidence were gender restricted. I heard evidence about each of them to some extent, although the men plainly limited what they spoke of in the restricted men's session. Since the applicant's written submissions refer to these Tjukurrpa by name, and with brief identifying details, I will also do so, but will ***not*** traverse in these reasons the details of any evidence given in restricted sessions, or in the written restricted claimant and expert evidence. Ms Narrier talked for the Seven Sisters Tjukurrpa. She located an

important site for that Tjukurrpa, in her open evidence, as south of “Red Well”, which is a well a little north-east of the Tjiwarl site, in the east of the claim area. She spoke in more detail about that site in her restricted evidence. Ms Geraldine Hogarth described another site in the claim area connected with Seven Sisters in her open evidence:There was a place at Depot Springs for Seven Sisters dreaming. It’s where they met, last time back in the 1970s. That was my nannas, my grandmothers. The old ladies had a big cry, hit themselves; they knew they were going to pass away. And they passed away a couple of years after. The Darlot mob went across for it. And then they just leave that place. Aunty Tjalajuti [Rosie Jones] was there. Old nanna Trixie Wheelbarrow was there, and her sister Aurelia. I’ve never seen that place. Depot Springs is in the south-western part of the claim area. Yeelirrie (in the central part of the claim area) was identified in the evidence as another part of the claim area where the Seven Sisters Tjukurrpa is located. Ms Wonyabong gave the following evidence:There’s some woman’s stories from the tjukurrpa. There are some women’s stories on Yakabindie, but Jennifer will know that more than me. Me, Jennifer Narrier, Roslyn Narrier and Maxine [Beaman], we go out to look after those stories on surveys. We’d like to go more often, but we don’t have the help; nobody to take us, no Toyota.

I know that there is a woman’s story near to Mount Keith station, just south of Red Well. I’ve been to that place but I ***can’t*** talk about it in this statement because it is just for women. Jennifer Narrier and her sister Roslyn is the right person to talk for that story. Their mother Dolly Walker told them about that story.

Yeelirrie, that’s the Seven Sisters Tjukurrpa going through. They are passing through that ***country***. Lots of rockholes around in that ***country***. I don’t know the names for those rockholes. The old people didn’t tell me those names, because we were too young, just kids, and those old people passed away before they could tell us the names. That uranium at Yeelirrie, that’s the kumpu [urine] from the Seven Sisters Tjukurrpa. Aunty Doris [Foley] told me about that one. That’s the only part of that story I know. There is another matter I note from this evidence, as something of an aside, but which is nevertheless important. Ms Wonyabong described the difficulty of getting access to these sites. There was at times a sense in some of the State’s cross-examination and submissions that inferences against the claim group members should be drawn from the infrequency of visits to some of the places about which they gave evidence. I draw no such adverse inferences, although the whole issue of presence on the land becomes important in my consideration of the application of s 47B of the NT Act. Many of the witnesses, such as Ms Wonyabong, are getting older, and while she in particular displayed tremendous steadiness and adeptness on some of the very rocky ***country*** we encountered on the on ***country*** evidence, it is clear she would require people to drive her to sites. ***Not*** only are most of these places on pastoral leases, they are reasonably remote. It is clear many of the claim group members would face other challenges – practical, financial and logistical – in visiting these sites. The fact that in recent years they have ***not*** been there very often, and depend on support from an organisation such as CDNTS for visits to be arranged, does ***not*** affect my view about the genuineness of their evidence. The restricted men’s Tjukurrpa were: the Wati Katjura (the Two Goanna Men); the Tjarntu/Papa (the Dingo), the Marlu (Kangaroo), and the Karlaya (Emu). The latter three are all associated with the northern, western and north-western parts of the claim area. Very little substantive evidence was given about these Tjukurrpa: in the men’s restricted session, Mr Victor Ashwin in particular made it clear he was “***not*** allowed” to talk about them. The Wati Katjurra Tjukurrpa featured significantly in the men’s restricted session. As I have noted elsewhere, most of the claimant witnesses present demonstrated varying degrees of discomfort in speaking about this with a female present. For some, the discomfort was acute and little or nothing was said. For others, there was what appeared to be a conscious but difficult effort to convey enough to satisfy the lawyers, so to speak. The on ***country*** evidence about the Wati Katjurra was taken in the south-western part of the claim area, with Mount Townsend and Mount Marion in the background, both of which feature in this Tjukurrpa. There were also a number of locations identified in the restricted evidence in the north-western part of the claim area relating to this Tjukurrpa, which travels out of the claim area to the north, into areas around Wiluna. The evidence was clear it was a Tjukurrpa shared with people from that ***country***. I do ***not*** think it is revealing anything restricted to indicate that several of the men described links between this Tjukurrpa and the Seven Sisters Tjukurrpa. There is also a Tjukurrpa relating to the ant, which comes from around Yeelirrie, and features heavily in the restricted section of Mr Liberman’s report. Some of the female claim group members spoke in somewhat opaque terms about this, the opaqueness making the demarcation very clear between what they considered they were allowed to say, and where they were allowed to go, and where they

were ***not***. Two examples suffice. Ms Wonyabong's evidence was:Places that are sacred for men, no womans and no kids can go. You'd get growled at if you did. There's men's stories in the claim area. I was told ***not*** to go to those places by old Roly Hill, Jennifer Narrier's grandfather, Dolly Walker's uncle. He was a wati who is gone now. He didn't tell me what would happen if they went there, he just say 'don't come here'. He used to talk about it after they took him out to Yeelirrie. One anthropologist took him and a lot of old mans out, doing some work for the uranium. That was when I was living at Yakabindie, maybe in the late 1970s. Ms Luxie Hogarth said:I know there are dreamtimes that I'm ***not*** allowed to talk about or go near in Yeelirrie, and I heard that from my husband, ***not*** to go on that side. The restrictions, and their implementation, are themselves aspects of the traditional laws and customs which operate on the land and features of the claim area, and on the claim group members. In my opinion, the claim group members observed those restrictions in a way which made it clear the restrictions operate as normative rules.

Changes or differences in the Tjukurrpa, as it is related or explained It is accepted by the applicant, and by Dr Sackett, that there are different versions of some Tjukurrpa (in particular, the Tjila Kutjara), and that there were also changes apparent in Tjukurrpa over time. It is also apparent that ***not*** all the Tjukurrpa articulated by the claimant witnesses, and to which Dr Sackett (and Mr Liberman) referred, can be found in the records created by Ms Bates. This was really the thrust of the State's arguments about the Tjukurrpa, and why the state contends they lack probative value in terms of proving either that the claim area was Western Desert ***country*** at sovereignty, or proving that the claim group members have had the requisite connection with the claim area continuously since sovereignty. The points made by the State in its submissions are the following:(a) The Tjukurrpa (or some of them) extend out of the claim area, and there was some evidence they extend to the west; that is, into what is agreed ***not*** to be Western Desert ***country***.

(b) Daisy Bates recorded the Ngaiawonga people as using the term "maiamba" or "miamba" rather than Tjukurrpa, a term used by other Murchison tribes to the west.

(c) The accounts of the Tjukurrpa vary between the claimant witnesses, and have varied over time. The State then made submissions about several of the individual Tjukurrpa described in the evidence. Some of these contentions appear to go to the question whether the Tjukurrpa as related by the claim group members existed at sovereignty and was "traditional"; others seemed to go to whether the Tjukurrpa beliefs were properly characterised as part of Western Desert laws and customs. As to the first point, in my opinion the claimant evidence, and that of Dr Sackett, made it clear that many Tjukurrpa travelled through the ***country*** of many different groups. In each ***country***, the Tjukurrpa provided reference and explanation for the landscape, and the place of people in it, and how they must behave – where they can go and where they cannot. None of the claim group members purported to know anything by way of substance or detail about where the Tjukurrpa went after they left the claim area (or land close to the claim area): they made it clear that was ***not*** their business to know. As I understood Dr Sackett's evidence in particular (and I did ***not*** understand Dr Brunton to dissent on this issue), it is in the nature of Tjukurrpa that they travel through the ***country*** of different groups. To take but one example from Dr Sackett's evidence, where he was ***not*** speaking about anything contentious in this particular claim, but rather was attempting to interpret an entry in Daisy Bates' records that he described as "cryptic". He then referred to a Tjukurrpa located in the Wiluna determination area (which, it will be recalled, was agreed and then determined to be Western Desert ***country***):I have come across kangaroo dreaming. It travels down from the north and ends up around – well, enters the more immediate Wiluna area around Lake Nabberu, which is the north of Wiluna, and moves across that lake system, heading east, through some pastoral leases up further in the Wiluna claim area and then moves off to the east into other areas. This is quite an important dreaming.

(Emphasis added.) I fail to see how this affects adversely the way the applicant puts the claim in this matter. On the second matter, Dr Sackett recognised "miamba" as an alternative word for "Dreaming". There was no real evidence about its provenance, from either Dr Sackett or Dr Brunton. In the absence of any evidence which indicated why Ms Bates used the word "maiamba" or "miamba", I again fail to see how this is material. The State's submissions proceed on an assumption that Ms Bates' expression was undoubtedly correct, and that she intended to exclude the use of other terms. There is no basis whatsoever for assumptions of this kind about Ms Bates'

material, as I have explained elsewhere in these reasons. On the State's contentions about individual Tjukurrpa, I do ***not*** accept that any of those contentions should lead to the conclusion that Tjukurrpa "from the Western Desert were imposed upon, or extended into, or elaborated upon in relation to, the Claimed Area by the desert immigrants." In large part, the State's contentions relied on what was (or was ***not***) contained in Ms Bates' material and I have set out my reasons elsewhere for concluding that her records are ***not*** necessarily reliable, and are certainly ***not*** to be considered in any way comprehensive. The State's contentions about the Tjukurrpa are premised, consistently with its concession, on the fact the claim group members are Western Desert people, and their Tjukurrpa is Western Desert Tjukurrpa. That, in my opinion, tells strongly against many of the State's other basic contentions. Where it leaves the State's argument (supported by Dr Brunton, as I understand it) is with the proposition that, in the 1930s and 1940s, a group of Western Desert people have appropriated, or taken over, the entirety of Aboriginal interests in the land and waters in the claim area (being originally ***not*** even Western Desert ***country***) and made up a series of sacred Dreamings (which happen to fit with the landscape, or which, on this thesis, they deliberately crafted to fit with the landscape). The State's argument (with Dr Brunton's support) is that the claim group members' ancestors did this intending to apply to the ***country***, and to their own relationship with it, a set of rules which they knew to be foreign to that ***country***, and ***not*** in accordance with the traditional laws and customs applying to that area. It is a startling proposition, and should be rejected. I turn now to the State's third point in a little more detail. The State did ***not*** challenge any of the witnesses about changes or differences in Tjukurrpa on the basis that one or more of the witnesses' accounts were ***not*** credible, nor that one account was the credible or correct one and others were ***not***. There was no suggestion in cross-examination by the State that witnesses were inventing Tjukurrpa, or versions of the Tjukurrpa. Yet, in my opinion, that is what the State's third point must to some extent amount to. I have set out what the witnesses' evidence was about the nature of Tjukurrpa, and I have set out Dr Sackett's opinion describing it, including from other anthropological sources. Dr Brunton did ***not*** disagree with these descriptions or characterisations. In an oral tradition within a community of people where knowledge about and rights and interests in ***country*** are held and assigned in complex ways, I see no real difficulty with variations in accounts and different emphases placed on aspects of Tjukurrpa by different people. I accept the following explanation given by Dr Sackett, and do ***not*** presume to improve upon its expression:No two tellings of the Tjila Kutjara story are the same. A comparison of the versions recorded by Liberman and those put forth by claimants indicates that this is ***not*** a recent phenomenon. In fact, as Liberman saw it:such discrepancies [between versions] must be considered a natural phenomenon characteristic of widely spread communities carrying on the same Dreaming. There is no question of which one is the correct version ...Berndt and Berndt hinted at how it could happen that different versions could emerge and be maintained. In an introduction to a collection of myths from around the ***country***, they started by noting that the stories they were relating were "set out in the form in which they were told on particular occasions." They went on to say:However, this is ***not*** the only way in which stories were transmitted. Quite often, fragments would be told, referring to places or to characters without expanding on the actions or following through the story-line. A child travelling though the ***country*** of some close relative ... might be told the name of a special site and of its spirit-presence, or a wife might be given such information on her first visit to her husband's ***country***. These items would probably be expanded later into more complete accounts ... In Aboriginal Australia there were no professional story-tellers ... Everyone was a potential if ***not*** an actual storyteller ... Myth-stories could be told or exchanged during ceremonial gatherings, or on informal occasions such as leisure-time gatherings around camp-fires. In any such situations the most knowledgeable story-tellers were those who had direct links with the places were the stories they told were located, and were old enough or experienced enough to know these stores well. Of course, some were more articulate and more competent – and acknowledged as better story-tellers. The aspect of creativity and the 'personal touch' was always present in any sphere of individual performance ... and the actual telling of stories provided one medium for this kind of expressionThat myth-stories may be learned piecemeal, from different teachers, and a wider picture and deeper understanding only develop across the years, opens the door to variation(s).

By my reading, Bates did ***not*** report any rendering of the Two Snakes story. Rather, it appears first to have been recorded in the area of the claim in the mid-1970s by Liberman. However, Liberman saw the story as having an earlier history, writing:it is clear that the major Dreaming track in the region is that of the two Carpet Snakes. This track comes from Ngaanyatjarra and Martutjarra territories (both Western Desert areas) and enters the Kuwarra [ie Koara] region. As recently as thirty years ago Ngaayatjarra and Martutjarra people participated in ceremonies with

Kuwarra people at sites associated with the Carpet Snake Dreaming (ngalpiri and tjampua).That is, by Liberman's reckoning, ceremonies relating to the Tjila Kutjara were last performed on the Tjiwarl Claim area in the mid-1940s.

However, there is no reason to suppose the Dreaming and its associated rites were new to the area in the mid-1940s. That is, that Bates did ***not*** mention the Tjila Kutjara does ***not*** mean the Dreaming necessarily was any less important to people in the early years of the last century (and to people before them) than it was to Liberman's informants in the mid-1970s or is to Tjiwarl Claimants today.

Liberman did ***not*** discuss or relate how his informants came to have and hold their knowledge of the Tjila Kutjara. However, some claimants, in their statements, do this. For example: Allan James says "Dad showed me these stories and back then it was something that everyone knew and we all shared it. Other people, some of the old ladies like Aunty Angeline Narrier [deceased] and Adeline Hennessey [deceased] taught me too about different things. I remember my family and I went with Aunty Angeline [Narrier] to a few of those places and she showed me what to do to stay safe." Shirley Wonyabong notes "Dolly Walker helped me by telling me the same story that she had put in that paper, the letter. Dolly taught me the story about the dragonfly and the snake, which we call the Tjila. That story goes through Yakabindie, right to Albion Downs and through Mt Keith. Mrs Walker told me that story, and so did Aunt Angeline Narrier and Doris Foley, they knew that story too."In this, they recount learning of the myth-story and places associated with it from senior, more knowledgeable, people. As I earlier noted, as claimants see it, their own knowledge comes from those who acquired their knowledge from those before them. Again, there is no reason to suppose that the oral tradition of the Tjila Kutjara does ***not*** extend back to sovereignty and beyond.

(Citations omitted.) As the applicant pointed out in oral submissions, and despite suggestions in the State's submissions to the contrary, Dr Brunton did ***not*** dispute that the Two Carpet Snakes Tjukurrpa was traditionally associated with the claim area, as I have noted above. If that is the case, as I understand it, his thesis is that the claim group members' ancestors knew about it in some kind of vague or general way and then only developed it in detail once they moved into the claim area, and in this sense "imposed" their own version on the claim area. This thesis is so wholly antithetical to what I have found to be the genuine evidence of the claimant witnesses about the role of Tjukurrpa in their lives, and to the picture painted by Dr Sackett about how the claim group members and their ancestors receive and disclose knowledge, that I cannot accept it. The remaining issue to deal with in this part of my reasons is the State's submission about whether the Two Carpet Snakes Tjukurrpa was connected with Jones Creek. The State adopted the suggestions implicit in Dr Brunton's evidence that it was ***not***, and this was some kind of recent invention, which itself illustrated (although this was never really made express) that the claim group members would make up or adjust their accounts of Tjukurrpa to fit the circumstances, and that there was no real connection to the ***country*** of the claim area, just some kind of self-serving imposition of Tjukurrpa as and when required. Of course, it was ***not*** put so bluntly, but that must it seems to me be the effect of raising this issue. As to the reliance by the State on what Dr Brunton said about Jones Creek, I do ***not*** accept the interpretation Dr Brunton put on this sequence of events, even if (contrary to my opinion) there was sufficient evidence before the Court about what occurred, and why, during the 1990-1991 consultations about mining in the area. This was Dr Brunton's evidence on the issue:MR WRIGHT: So what point were you trying to make by referring to that dispute?---I was trying to point out that whereas Liberman did ***not*** record any sites of importance in Jones Creek in 1977, by, I think, 1990/91, there were a significant number of people who had come to believe that really it was extremely important, and this is reflected in some of the claimants' evidence. And my point was then to show how, if you like,***country*** can be reinterpreted under different circumstances. It was a similar example to the one that I spoke of generally with Liberman in my first report about the – I don't want to say the word, but you know the - - -

Yes?--- - - - the – the – the one I'm referring to – extending over to the Darling Ranges.

Yes. But they're quite different situations, aren't they, because the Jones Creek example is really just about a particular site or sites along what you're acknowledging is an existing track?---The – it was – I mean, there are a number of – there was a number of different situations which I was identifying in the – in the second report. One is,

if you like, the extension of a – of a track, which is the – the one that I'm talking about with the Darling Ranges. The other is reinterpretation of the movement of a – of a particular track, and the Jones Creek was the – was the – was the second.

(Emphasis added.) This evidence was, frankly, skirting around what seems to me to be the inevitable implication from Dr Brunton's opinion: namely, that in 1990-1991 some Aboriginal claim group members had made up, changed or readjusted the Tjukurrpa in order to prevent mining occurring. There is no other basis for the use by Dr Brunton of this kind of language. Under cross-examination, Dr Brunton denied that was the implication he was making. However, I did ***not*** find his explanation, when pressed further under cross-examination, satisfactory. He said:In terms of the issue around Jones Creek, I don't wish to make a comment and I don't think it's necessarily relevant to the kind of point that I was trying to make, which was a question of what was accepted at different times. He then expressly accepted and agreed with the proposition that the Two Carpet Snakes Tjukurrpa is a "traditional dreaming story in the claim area". Despite accepting that proposition, he then went on to express the opinion I have extracted above about people coming to believe certain matters, and reinterpreting ***country***. All Dr Brunton bases this on is the absence of any reference by Mr Liberman to Jones Creek as a significant site. Again, there are many hypotheses about why Mr Liberman may ***not*** have been told this information that do ***not*** involve recent invention. No suggestion of recent invention was put directly to any Aboriginal witness. There may have been any number of reasons for differences between what was recorded or mapped by Mr Liberman and what was said by certain individuals in 1990-1991 and why Jones Creek was only mentioned in 1990-1991 as an important site for the Two Carpet Snakes Tjukurrpa, if indeed that is the correct description of what occurred. Even if "re-interpretation" (or, as I understand what is really being said, invention) is one of them, that says nothing about the veracity of the evidence given before me, in the absence of any challenges to the credibility of the witnesses.

Conclusions on Tjukurrpa It is clear from the claimant evidence, supported by the opinions of Dr Sackett and Dr Brunton, that knowledge of the Tjukurrpa (its relationship to particular parts of the claim area and how the Tjukurrpa fits into the overall landscape, both inside and moving out of the claim area) provides a principal mechanism of connection to ***country*** for the claim group members. Possession of that knowledge, its use and divulgence forms part of the normative rules that unite the claim group members. I do ***not*** consider the Tjukurrpa of which the Court heard evidence is any recent, post-sovereignty invention or development. I consider the Tjukurrpa of which I heard evidence are Tjukurrpa that have been passed on, held and disclosed in accordance with a set of normative principles – based partly on descent and kinship and partly on birth and long association with the land (and then internally within the group, with particular parts of it). Consistently with my findings in other sections of these reasons, in my opinion the evidence establishes on the balance of probabilities that there was a mixing of the claim group members' ancestors with the Aboriginal people who were the original inhabitants of the claim area in a way which facilitated the sharing of knowledge and the recognition of the claim group members' ancestors connection with the claim area, albeit no doubt that connection strengthened once the ancestors were living in and around the claim area. That mixing, sharing of knowledge and recognition could occur because in my opinion it is more likely than ***not*** that the original inhabitants of the claim area were Western Desert people. As I have found, some of the claim group members' ancestors were established in the claim area before 1912. Whether they are properly described as descendants of the "original inhabitants" is ***not*** possible to ascertain. The important point is that some of them were associated with, living in, using and occupying parts of the claim area before Ms Bates' work to the north of the claim area in 1912. Their co-location with non-Western Desert people to their west no doubt led some of them to be able to speak non-Western Desert languages, and to establish and maintain some ties with people to their west through marriage and ceremony. Like other societies anywhere in the world, people must learn to live with their neighbours.

Using the Tjukurrpa as described by the claim group members as evidence of the laws and customs at sovereignty Evidence of the Tjukurrpa described by the claim group members serves two purposes in this proceeding. Obviously, it is the critical concept of traditional laws and customs the claim group members contend connects them with the claim area. However, in the context of the particular issues in this proceeding about occupation of the claim area at sovereignty, the applicant also relies on evidence about the Tjukurrpa to prove that the claim area was Western Desert ***country*** at sovereignty and, at least by final submissions, to contend that the claim group

members' knowledge of the Tjukurrpa proved, or was capable of proving, that some of the claim group members' ancestors had been in occupation of or associated with the claim area at sovereignty (that is, around 1912). I have dealt with the Tjukurrpa in detail in the section above at [532]-[595], where I examine the evidence concerning the traditional laws and customs on which the applicant relies as connecting the claim group members with the land and waters in the claim area, and giving rise to rights and interests in that land and those waters. In this section, I confine myself to my findings whether the claimant evidence about Tjukurrpa does, as they contend, inform the decision whether the claim area was Western Desert ***country*** at sovereignty

The applicant's argument The way this argument was put is set out at [265] of the applicant's final written submissions as follows:The contemporary evidence about tjukurrpa is relevant to the issue of the society at sovereignty, because if, as the Applicants submit, the Claimed Area is replete with Western Desert tjukurpa [sic], then that raises an obvious inference that the area is part of the Western Desert cultural bloc society, unless it can be shown that either this is a case of Western Desert tjukurrpa:

(a) being imposed onto the ***country*** in contemporary times by incoming Western Desert migrants; or

(b) extending beyond the borders of the Western Desert.

For the reasons submitted below, neither is a likely scenario. The State is correct to submit that the applicant's contention on this use of the Tjukurrpa relies on inference. I am prepared to draw the inferences for which the applicant contends.

The State's arguments and my responses and findings The State makes three substantive contentions. First, there was clear and considerable evidence that the Tjukurrpa for the claim area extended beyond it, and indeed a long way to the west: that is, into non-Western Desert ***country***. The State referred to the evidence of Mr Allan Ashwin, who said some Tjukurrpa extended to Cue and Mount Magnet and may have been known by the ancestors of the people in those places. Mr James said Tjukurrpa storylines he knows also traverse the Badimia ***country***, and he knows this because he knows this ***country*** through his mother. The State also pointed out that Mr James said the Tjukurrpa covered long distances in other directions. The State pointed out that Mr Muir identified that the Wati Katjura Tjukurrpa (the Two Goanna Men Tjukurrpa) extends to Perth and to Docker River in the Northern Territory and that other stories come from outside Western Desert ***country***. In evidence that ranged similar kinds of distances, Mr Victor Ashwin stated that the Tjukurrpa starts in the ocean at the Burrup Peninsula on the Pilbara coast and it continues to other places, such as Albany. The State also referred to Ms Luxie Hogarth's evidence that the Mallee Hen Tjukurrpa comes from Menzies and continues west apparently into Wadjari or Badimia ***country***. Finally, the State pointed out that Ms Wonyabong said the Seven Sisters Tjukurrpa runs all over Australia, although she was ***not*** sure where it starts or finishes. I note Ms Wonyabong did say that the "main one" for the Seven Sisters Tjukurrpa is at Yeelirrie. As I understand this first point, the State's emphasis was on evidence from the claim group members who identified the Tjukurrpa running to the west, and sometimes far away – that is, into ***country*** which was ***not*** Western Desert ***country***. It drew support from the acceptance by both experts that the Tjukurrpa extend both within and beyond the Western Desert. The State submits that Dr Sackett gave a number of examples of Tjukurrpa moving in and out of peoples' ***country***, including of Tjukurrpa referred to in this proceeding, and said such movements were "if ***not*** common, by no means extraordinary". That submission is correct, so far as it goes, but it does ***not*** capture the tenor of Dr Sackett's evidence in his supplementary report. The point Dr Sackett was making by reference to two Dreamings from other areas was that it is ***not*** unknown that Dreamings travel in this way, but it does ***not*** prevent the Dreaming being one which is associated with a particular society – such as Western Desert society. Rather what it shows is the expansion of knowledge (including general knowledge) and increasing communication and contact (now more possible than in previous generations) between Aboriginal people who hold the Dreaming stories. In his supplementary report he develops this by reference to further examples:I too have recorded stories of Dreamings moving out of and/or into the Western Desert. In the more immediate area of the Tjiwarl Claim, for instance, I have recorded stories of: a Female being, sometimes referred to as Minyma (Woman) who travels from Wilgie Mia, west of Tuckanarra, ie from ***country*** to the west of the Western Desert, to the vicinity of Wiluna, and on eastward to the area of Blackstone. Karlaya (Emu Beings) who were chased south

along the line of some of the waters which later became 'wells' on the Canning Stock Route, ie through parts of the Western Desert, to Yagungku southeast of Meekatharra, and west of the Western Desert, then easterly across the desert and into South Australia. Seven Sisters, and their pursuer Wati Nyirru, who were said, in recent years, to have travelled to the Wiluna area from far to the west – "near the sea" – and then on east into the Gibson Desert and beyond.A couple of things are relevant here. First, in my experience, over the years when discussing the Minyma Dreaming people at Wiluna consistently have indicated that in their view she came from, or began her travels from, Wilgie Mia. Similarly, they consistently have indicated that in their view Karlaya travelled to Yagungku and then moved back into the desert.

Second, the "near the sea" reference to the Seven Sisters is a more recent view. Earlier, people indicated they did ***not*** know from whence they came.

This strikes me as paralleling views that saw certain Dreamings come "from near Burrup Peninsula" or go to Albany. When I first arrived in Wiluna, I doubt anyone was aware of the Burrup Peninsula, or knew of its location. (I was with various people when they saw television for the first time, saw the sea for the first time, rode in a lift for the first time.) When I asked, for instance, where the very important and wide ranging Marlu Dreaming began, I was told it had its origins somewhere, undefined and unnamed, to the north. And while I early on heard the Dingo Dreaming went to south Leonora (see Jennifer Narrier), it is only in [t]he past 10-15 years I have been told it goes to Dog Rock in Albany.

Myers noted something similar. As he told it:Until 1975 I had been told that one of the Pintupi Dreamings tracks ended at a place called Pinari near Lake Mackay. However, after [some of his informants] visited their long-separated relatives at Balgo, they returned to tell me that 'we thought that story ended, went into the ground, at Pinari. But we found that it goes underground all the way to Balgo'.Myers was of the view that:The example shows that historical change can be integrated, but that it is assimilated to the pre-existing forms: The foundations had always been there, but people had ***not*** known it before ... What appear to be changes do ***not*** challenge the fundamental ontology of all things ordained once-and-for-all. New rituals, songs, or designs – for Westerners the products of human creation – are for the Pintupi clearer sights of what was always there.Such extensions may raise questions for those operating outside the logic of the system, but for claimants and their fellows they seem to go to make sense of 'new' information that has come their way – information their ancestors and they formerly had ***not*** been aware of.

(Citations omitted.) This is the kind of "change" which, I accept, is apparent in the claimant evidence. It is, in that sense, ***not*** a change at all, as non-Aboriginal people would usually understand that concept. It is a filling out of knowledge. Viewed in this way, it is unremarkable that the claim group members, as people giving evidence in the twenty-first century, would be able to fill out the Tjukurrpa with content that would ***not*** have been expressly part of the Tjukurrpa when related by people who had ***not***, for example, travelled much outside the areas in which they lived, nor otherwise been as aware of what existed in the broader world. I accept, and agree with, Dr Sackett's conclusion on this issue:In my experience and opinion, there is clear evidence that some Dreamings, at least some of which are linked with the Tjiwarl Claim area, and others of which are linked to lands far removed from it, move into/out of the Western Desert. There is no suggestion on the part of claimants that they, either as Western Desert people or as claimants to lands through which such Dreamings pass, are able to extend their claims through them. On the contrary, claimants make claims to the lands/places for which they regard themselves as holding responsibilities. As Shirley Wonyabong avers when speaking of the Two Snakes line, "That story of the Tjila and the dragonfly come from Yandal, and from Alice Springs side, from the east. We don't know that side of the story though; we just know when it comes in to our ***country***, near Henry's Well."

(Citations omitted.) The second point made by the State is that:The evidence is also clear that Ngaiawonga people referred to their dreaming stories using the term "miamba", rather than tjukurrpa, and that this was the same term and concept used by the other Murchison tribes to the west. As well as differentiating Ngaiawonga from their

eastern neighbours and aligning them with their western ones, this evidence suggests that either: (1) the Ngaiawonga laws and customs relating to dreaming stories and tracks were substantively different to the WDCB; or (2) if miambaand tjukurrpa are substantively the same thing, then it (and the stories and tracks themselves) extended to other, uncontentiously non-WDCB groups to the west. There was no evidence that tjukurrpa are limited to the WDCB.

(Footnotes omitted.) It is correct that in cross-examination, Dr Sackett accepted that the word “miamba” was, insofar as it is recorded by Ms Bates, used by some of the people she called Ngaiawonga, and it meant “Dreamings”. He also agreed it was a Wajarri word: that is in the language of the people more to the west of the claim area. He was also asked about another word in Ms Bates’ notes – “bimara” (said to relate to waterholes, but in a spiritual way, in the sense of beings located in waterholes) – and it was put to him this was also a Wajarri word. While he agreed that he understood it was, he added that he knew it also to be a Western Desert expression. He said:MR RANSON: And again that’s, can I suggest to you – you may or may ***not*** agree with me – that that’s a Wudjari word that means a waterhole with a spiritual – a belief that there’s a snake in it?---It’s a word I’ve heard from the Western Desert that means something other than you’ve just said.

...

[On then being shown a Wajarri dictionary extract].

... and the description there, a spring pool or waterhole that the kujida, a giant water snake, lives in? ---Yes.

So, that would seem to me to be what these references are to in this Bates document. Does that seem correct to you?---As I said, I – the word is familiar to me from the desert, and I’m sure that I can talk any further about it in open court.

Sorry. It has a different meaning in the desert without - - -?---It has a meaning that might parallel this.

Okay. When you say parallel – and without going into anything that you ***can’t*** go226;128;into – is that – does that mean, perhaps, the concept and the word are shared between Wudjari and Western Desert, in your view?---An important place. An important place. There’s perhaps a distinction there, yes?---***Not*** necessarily – it’s ***not*** necessarily that one precludes the other, if you get my – it could be this – the two could be together. The State then submitted that:Dr Sackett disavowed any suggestion that the course of a tjukurrpa can be used to identify either the extent of the Western Desert or the holders of rights and interests in land. Dr Sackett was asked about the part of his report dealing with Mr Liberman’s theories as to why the claim area was Western Desert ***country*** at several points in his oral evidence. I have referred to his oral evidence on this issue in the section dealing with Mr Liberman’s work (see [437]-[438] above). When being cross-examined by counsel for the State, in the passage on which the State bases this submission above, Dr Sackett clarified what he meant and said:Well, in what I said about dreamings leaving the Western Desert, that would apply, yes.

(Emphasis added.) The “that” in this sentence is his own proposition in his report that he is ***not*** sure “shared Dreaming and shared ritual participation can safely be read as indicating shared culture”. It seems to me that, taken in context, Dr Sackett was (as he said in re-examination) disagreeing with Mr Liberman’s emphasis on shared Dreaming as indicating one society, to use the native title word, or to indicate rights to ***country***. But his clarification that he meant Dreamings coming out of the Western Desert is ***not*** unimportant, in the context of his work in Wiluna. That he was told Dreamings left the ***country*** of the Wiluna determination and travelled west did ***not*** prevent his characterisation of the ***country*** in the Wiluna claim as Western Desert ***country***. The same would seem to apply here. Third, and related to this, the State submits that in Wongatha, Lindgren J made factual findings to the same effect, observing that the evidence did ***not*** establish “a suite of distinctively Western Desert Dreaming tracks” which

could be used to delineate the Western Desert boundary. In my opinion, in common with some of the State's other points, reliance on what Lindgren J said in Wongatha misunderstands how the applicant contends the Tjukurrpa provides a basis (and ***not***, in and of itself the only or sufficient basis) to accept that the claim area is, and always has been, Western Desert ***country***. The applicant does ***not*** rely on a "track" that necessarily must start in Western Desert ***country*** and then end at some kind of geographical boundary which demarcates Western Desert ***country*** from non-Western Desert ***country***. That is, with respect, a Eurocentric kind of understanding of the need for definite geographic boundaries. The link, as the claimant witnesses explained (those whose evidence Dr Sackett refers to at [9] of his supplementary report), is that the very account of how the landscape was made, who inhabits it and the rules for living that those beings have enacted and continue to enforce, is the same account for the claim group members in respect of land in the claim area as it is for people to the east. They are united by that Tjukurrpa, even though each group has responsibility for how the Tjukurrpa appears and is enacted in their own ***country***. This is, in my opinion, the kind of law which unites a group of people of which the High Court spoke in Yorta Yorta at [49], [52] and [89] (Gleeson CJ, Gummow and Hayne JJ) and Mabo (No 2) at 186-188 (Toohey J). It is ***not*** about lines on maps. For those reasons, I consider the applicant is correct in the submissions made at [265] of their written submissions.

Connection: the migration thesis

The applicant's position At [31] of their statement of issues, facts and contentions the applicant contends:Around the late 19th century and/or early 20th century, the persons referred to in paragraph 64 below:

(a) were members of the Western Desert cultural bloc;

(b) were in occupation of areas in the vicinity of the Claimed Area, which areas formed part of the land associated with the Western Desert cultural bloc;

(c) spoke dialects similar to the dialect spoken by the persons in occupation of the Claimed Area at sovereignty;

(d) migrated into the Claimed Area;

(e) knew of, or learned from other members of the Western Desert cultural bloc, the Tjukurrpa for the Claimed Area in substantially the same form as it previously existed at sovereignty. This contention needs to be read with the applicant's principal contention that the claim group members' ancestors obtained their rights to ***country*** in the claim area through birth in, or long association with, the claim area. It was this contention which was the subject of an objection by the State to the way the applicant put their case in final submissions. I have dealt with this at [52]-[60] above. There are two themes running through the applicant's submissions on this critical issue. The first is that the Court should find at least some of the ancestors of the claim group members knew and interacted with the Aboriginal people who were in occupation of the claim area at sovereignty. The second is that the claim group members' ancestors were able to do this because they shared, with the original occupants, traditional laws and customs of the Western Desert. So, for example, at [321]-[322] of their final submissions, the applicant contends:Several of the Aboriginal witnesses were advanced in age; for example, Luxie Hogarth was born around 1941, June Tullock around 1946, and Shirley Wonyabong around 1949. Some of Liberman's informants were said to have lived in the Claimed Area around the time of first European contact. The evidence of many Aboriginal witnesses was based ***not*** only on their own experiences but on what they learned from their parents or grandparents. This evidence extends back to the time of Bates' Ngaiawonga. The oral histories of the claimants thus include references to Koyl, who was one of Bates' main informants, and to Waiya, ***not*** referred to by Bates but who is likely to have been in the Claimed Area around that time. Waiya is associated by the Redmond family with the site called Pii, which was recorded by Bates and is one of the main sites on the Two Carpet Snake Dreaming track which both Dr Sackett and Dr Brunton accepted was traditional to the Claimed Area.

The more rational and likely inference is that as Aboriginal people (the claimants' ancestors) moved into the Claimed Area from the east, they interacted with the original occupants or their descendants in accordance with a shared system of law and custom, including shared belief in the tjukurrpa. Equally, the more likely explanation as to why there is no oral or written record or indication of a non-Western Desert [Ngaiawonga] society having died out or moved away and of Western Desert people having moved in and imposed their own law and tjurkurrpa on the ***country***, is because it did ***not*** happen that way. Thus, although the applicant accepts that most of the ancestors of the current claim group members originated from areas to the east of the claim area, particularly around Wongawol and Darlot, they contend there were, from pre-sovereignty, established links between those people and the persons in occupation of the claim area, including links based on shared belief in Tjukurrpa and shared participation in associated rituals, intermarriage and visitation. The movement of the claim group members' ancestors into the claim area from the 1920s or 1930s onwards involved, the applicant contends, a small number of people, invoking existing relationships and shared laws and customs as a basis for taking up residence, with those people being accepted and recognised by the existing occupants who passed on knowledge to the claim group members' ancestors. There was ***not***, as the applicant's counsel emphasised in oral submissions, any transmission of rights (contrary to the State's characterisation of what needed to be established) because, it was submitted, Western Desert people work on an exchange and sharing of knowledge of ***country***, rather than the handing over of rights. The applicant relies on the following categories of evidence to make good its contentions: the claimant witnesses' own evidence, the evidence about the studies done by Mr Liberman in the 1970s, and Dr Sackett's opinions. I deal with those as necessary in my conclusions.

The State's contentions The State contends people who were living in this area in the early twentieth century come largely from the areas of Lake Carnegie, and areas to the north-east, first into the Darlot area, and then into the eastern parts of the claim area. The State contends the evidence shows the migration of the claim group members' ancestors into the claim area post-dated "at least by a little but most likely by many years, the vacation of the area by the original Ngaiawonga occupants". The State submits the applicant's approach does ***not*** deal with the questions of when, from where, or why the migration of the claimants' ancestors occurred, nor does this approach properly address the identification of the asserted "prior connections" to the claim area. The State's submissions work through the claimant evidence systematically, in order to demonstrate that their evidence is consistent with the State's position that the claim group members' parents (and grandparents) arrived in the claim area mostly in the 1940s to 1960s, with a few visits, passings through or temporary residence periods in the 1930s. The State submits that, as to the purpose for the movement, overwhelmingly where the evidence does establish the claim group members' ancestors moved into the claim area, the evidence shows they moved for work on the pastoral stations, or for other non-traditional reasons (such as escaping violence in the areas in which they had previously lived).

My conclusions It is as well to begin with the authority on which the applicant relies for the proposition that movements of this kind, at least within Western Desert ***country***, are no bar to the recognition of native title rights under the NT Act. That case is De Rose [2003] FCAFC 286; 133 FCR 325. Some time should be spent on this decision.

De Rose De Rose was an appeal from a determination of native title in relation to the land within the boundaries of three pastoral leases comprising the De Rose Hill Station in the far north-west of South Australia. Unlike the present proceeding, there was no dispute at trial or on appeal that the claim area was within the "eastern extremity" of the Western Desert region. What was in issue was described by the trial judge (and by the Full Court on appeal at [36]) as:(i) whether the appellants ever had a connection with the claim area;

(ii) if they did, whether they retained that connection; and

(iii) if they retained their connection, what (if any) rights or interests would be available to the appellants if a determination of native title were to be made in their favour. The name or concept used by the appellants to describe those who had rights in accordance with traditional laws and customs in the claim area in De Rose was Nguraritja. The trial judge found this concept signified someone who belongs to a place, a traditional owner or custodian. At [40], the Full Court outlined the approach of the trial judge:The primary judge accepted (at [99]) the "overwhelming thrust of the claimants' evidence" that it was the Nguraritja who were the traditional owners: they had

the rights and responsibilities in relation to the land. He explained (at [100]) the concept of Nguraritja in relation to particular places as follows:Many Aboriginal witnesses identified themselves as being Nguraritja with respect to named locations. Their evidence leads me to conclude that the correct approach to the concept of "Nguraritja" is to accept that a person is Nguraritja for a particular place or places – ***not*** Nguraritja for a larger area which includes that or those places. Thus Owen Kunmanara said that he was Nguraritja for Yuta [a location on De Rose Hill Station] – notNguraritja for the Station. Mr Whitington [senior counsel for the Fullers] submitted, and in my opinion, correctly so, that the Aboriginal concept of territory is a "constellation" of locations, often along a Dreaming track for which those who are Nguraritja have responsibility. For example, Peter De Rose said that his land extended from Yura to Arapa, along the Malu(kangaroo) Dreaming track. It would ***not***, in my opinion be appropriate to use that passage in his evidence as a basis for asserting that Peter thereby claimed to be Nguraritja for the whole of the land that is represented by De Rose Hill Station. That, however, is ***not*** to say that the role of Nguraritjais limited to isolated locations. For example, a person could be Nguraritjafor a creek, or a part of a creek. An example was the karu-karu(watercourse) at Apu Maru, which was said to be the path that the Malu, Kanyala and Tjurki took as they travelled across the landscape. Although taken in closed session, it was made clear that women and children would know that fact. There was, unfortunately, no evidence led as to how far that watercourse went, but the implication is that it would ***not*** be a short distance and a perusal of the map, Ex A2, suggests that there would be no difficulty in finding a path through the watercourse joining most, if ***not*** all of the Malu sites on De Rose Hill Station. I am prepared to accept that Peter is Nguraritja for the watercourse and that he conceptualised it as more than a mere point. It would probably be an important part of the Tjukurpa to protect. As the Full Court observed at [41], one of the critical issues at trial was the identification of the Aboriginal people whose traditional laws and customs related to the claim area at sovereignty, and at the date of judgment – a "complex" task, as the Full Court described it. The contention put by the respondents was that the only people capable of claiming native title rights and interests in relation to the claim area were descendants of the Antikirinya people. These were the people the respondents contended occupied the claim area, probably at sovereignty but at least until the early part of the twentieth century. They contended the Pitjantjatjara and Yankunytjatjara peoples (those being the groups with whom the appellants identified) were recent migrants from the west of the claim area particularly during the early part of the twentieth century. This, they said, precluded the appellants from claiming native title rights and interests because native title can only be claimed by descendants of the community or group that possessed such rights and interests at sovereignty. The appellants, as predominantly if ***not*** entirely the descendants of migrants, therefore could ***not*** succeed in their native title claim. The trial judge found (and the parties accepted by final submissions) that the claim area had been occupied by Aboriginal people prior to sovereignty. His Honour further found that archaeological remains within the claim area were those of Western Desert Bloc Aboriginals, although it was ***not*** possible from the evidence to tell whether they were Yankunytjatjara, Antikirinya or Pitjantjatjara. The evidence suggested Pitjantjatjara people had come from the west, however there was no evidence that the Yankunytjatjara had come from the west. At [53]-[55], the Full Court then summarised the trial judge's critical conclusion, having found there had been migratory movements of people from the west:Later in the judgment, the primary judge again recorded that migratory movements from the west had occurred at different times for different reasons. He found that on occasions this had led to fighting between the Pitjantjatjara people and the Yankunytjatjara people. He did ***not*** see (at [316]):... why these events should ***not*** be treated as part of the social and cultural history of the Aboriginal people. Since wars (perhaps better described as tribal disputes), droughts and the search for brides were part of their lives, it is permissible, in my opinion, to accept such migratory movements as traditional. There is no need for native title claimants to establish strict biological descent back to the time of sovereignty.The primary judge noted the appellants' submission that they needed only to establish that they were descended from people from the wider Western Desert region and that those people followed traditional laws and customs. His Honour accepted that since (as he found) under traditional law and custom acquisition of land in this region is ***not*** solely the product of transmission through biological descendants, the appellants did ***not*** have to show biological descent from those inhabiting the claim area at sovereignty. He also accepted, in an important finding (at [345]), that the traditional laws and customs that once applied to the claim area "were essentially the same as those of the Western Desert region". But his Honour was ***not*** prepared to make such a "broad-based finding" as that sought by the appellants, apparently a reference to the appellants' contention that they had only to show descent from Western Desert people who followed traditional laws and customs. His Honour considered (at [345]) that:Although it is ***not*** necessary for the claimants to prove biological descent from those who occupied the land at the time of sovereignty, I do feel that there has to be some continuity – even though it might be through migration, marriage or even tribal dispute –

between those who formerly occupied the land at sovereignty and the present claimants.The primary judge found (at [346]) that there was the requisite degree of continuity:The evidence in this case has disclosed that many of the claimants or their parents or grandparents had migrated to the claim area from the west. It would be reasonable to conclude that the archaeological remains within the claim area which were identified by Professor Veth are those of Western Desert Bloc Aboriginals. The next and more difficult question is whether those Anangu followed the same traditional laws and customs as the claimants' ancestors and as the claimants do today? Even though the evidence has ***not*** disclosed a biological connection between the claimants and those who inhabited the area pre-sovereignty, there was evidence that, in my opinion, was sufficient to establish a form of connection between the claimants and those Aboriginal people who occupied the land pre-sovereignty. It was a connection that was achieved through a process of incorporation that reflected the pattern of migratory movements. One particular finding of the trial judge, which resonates with the terms of the applicant's case in this proceeding is reproduced in the Full Court's reasons at [221]:He also found (at [897]) that there would:be nothing offensive or contradictory to there being a substantial degree of ancestral connection if the traditional laws and customs allowed for adoption or allowed for a person to be "incorporated" into the status of Nguraritja because of his or her long association with the land or because of his or her geographical and religious knowledge of the land. Despite accepting this aspect of the appellants' arguments, as the Full Court set out at [5], the trial judge ultimately found that although native title had once existed in respect of the claim area, the appellants, and the other persons for whom they claimed native title in relation to the claim area, had failed to prove that "they have retained a connection to the claim area by traditional laws and customs acknowledged and observed by them sufficient to satisfy s 223(1)(b) [of the NT Act]". His Honour decided that "those claimants who once had a relevant connection with the claim area have all abandoned that prior connection". This aspect of De Rose is ***not*** relevant to the present proceeding: the State does ***not*** suggest there has been any "abandonment". It is worthwhile recounting the nature of the arguments put on appeal by the State (described by the Full Court at [220]-[226]), before turning to the reasoning of the Full Court about the trial judge's findings concerning movement of ancestors of claim group members into the claim area in De Rose. One proposition was that the historical fact of population shifts (at [222]):... did ***not*** lead inexorably to the normative proposition that traditional laws or customs recognised the expanded Nguraritja rules. It was necessary for the appellants to demonstrate that the traditional laws and customs of the Aboriginal people allowed for the transmission of native title rights and interests in accordance with the rules identified by the primary Judge for determining who were to be regarded as Nguraritja for particular ***country*** or sites. The State's submissions in De Rose also emphasised the need for "transmission" of native title rights and interests, given the absence of any biological connection between the claimants and the original inhabitants of the area. The State contended there was no evidence of any such traditional "rules" allowing for such transmission. This was especially so since the "migrants" had arrived at different times, from different places, and had moved for a variety of reasons – searching for food, seeking out missions for sustenance and shelter, and visiting relatives. There was criticism of the trial judge's findings that people could be Nguraritja for particular sites or tracks through rules which were so broad "as to be hardly rules at all". Rather, what was required, the State submitted, was that "appellants were required to be substantially connected by descent with the pre-sovereignty community of the claim area: that is, the community of persons who were Nguraritja for the claim area at the time of acquisition of sovereignty": see the Full Court's reasons at [226] (emphasis added). At [231], the Full Court explained the correct way to approach what the claimants had to prove, an explanation which has some significance for the present proceeding:As Ward (HC) makes clear (at [18]), in any given case it is necessary for the claimants to identify the traditional laws and customs under which native title rights and interests are said to be possessed. The appellants did this by identifying the traditional laws and customs as those of the Western Desert Bloc. They did ***not*** suggest that the traditional laws and customs were those acknowledged and observed by a specific dialect group or clan within the Western Desert society. In particular, their claim was ***not*** founded on traditional laws and customs unique to the Aboriginal people occupying the claim area at sovereignty. Rather, the appellants contended that the original holders of native title rights and interests in relation to the claim area held their interests by virtue of the traditional laws and customs of the Western Desert Bloc and that they (the appellants) were acknowledged by those traditional laws and customs as the successors to the original native title holders by virtue of their status as Nguraritja for sites and tracks in the claim area. The difference between a situation of "usurpation", or "revival", and what was required by s 223(1) was also set out by the Full Court (at [233]):To satisfy s 223(1)(a) of the NTA the appellants had to show that under the traditional laws and customs of the Western Desert Bloc they possessed rights and interests in relation to the claim area. It was ***not*** enough for them to show that they had purported to acknowledge or observe the traditional laws or customs of the Western

Desert Bloc. If, for example, the appellants had been "usurpers" of the claim area, who were ***not*** recognised under the laws and customs of the Western Desert Bloc as capable of possessing native title rights and interests, their claim could ***not*** succeed. This would be so even though they might have genuinely been attempting to act in conformity with their understanding of the traditional laws and customs of the Western Desert Bloc. Just as the Yorta Yorta claimants failed notwithstanding that they had genuinely attempted "to revive the lost culture of their ancestors" (Yorta Yorta (HC) at [69]), the appellants' claim would fail unless they could show that any rights or interests asserted by them were derived from the traditional laws and customs of the Western Desert Bloc and that the Western Desert society had continued since sovereignty. The fallacy in the respondents' submissions about the need for a biological connection was exposed at [236]-[237] of the Full Court's reasons:By the same token, it was ***not*** necessary for the appellants to show that they had biological or other links with the particular group of Aboriginal people who held native title over the claim area at sovereignty, other than those required by traditional laws and customs to establish that a person had acquired the status of Nguraritja for the claim area. There was no suggestion in the present case that the Western Desert Bloc society had ceased to exist at any time between European settlement and the trial. Nor was it suggested that the appellants themselves, whether or ***not*** they constituted a discrete social, communal or political group, were ***not*** members of that society. Moreover, the respondents did ***not*** challenge the primary judge's finding that the traditional laws and customs asserted by the appellants were essentially the same as those that existed throughout the Western Desert region (at [102]).

The critical question was whether the appellants possessed rights and interests in the claim area under the traditional laws acknowledged and customs observed of the Western Desert Bloc. If by those traditional laws and customs the appellants had sufficient links to the original native title holders as to acquire the status of Nguraritja for the claim area, that would be enough, provided that they retained, by those laws and customs, a connection with the claim area. This was ***not*** to discount the significance of the fact of population shifts in the claimants and their ancestors, and its effect on what the claimants had to prove. The Full Court made it very clear that, in circumstances where the evidence disclosed population shifts and movements into a claim area post-sovereignty, certain matters needed to be established by the evidence. It set out what those matters were at [239]:Unless Aboriginal people coming to the claim area from the west could ultimately be recognised under Western Desert traditional laws and customs as Nguraritja for sites or tracks within that area, they could ***not*** succeed in a native title claim (at least ***not*** one founded on their status as Nguraritja). Similarly, their descendants could ***not*** succeed in such a claim in the absence of a traditional law or custom recognising descendants of "migrants" as Nguraritja for ***country*** on which, or near where, they were born. The significance of the approach taken by the traditional laws and customs of the Western Desert Bloc to population shifts, for present purposes, lies in the extent to which those laws and customs recognised "newcomers" or their descendants as Nguraritja for sites or tracks on the claim area. Having then found that the trial judge did ***not*** "explicitly find that the population shifts that occurred in the early to mid twentieth century were recognised by, or were in accordance with, the traditional laws and customs of the Western Desert Bloc, in the sense that newcomers could become Nguraritja for the claim area, depending on the circumstances", the Full Court held that nevertheless a fair reading of the trial judge's reasons suggests he intended to make a finding to that effect. The Full Court held (at [242]) that the evidence supported such a finding. In my opinion, the approach in De Rose is one which is available on the evidence in this case, and the applicant was correct to emphasise this authority. I accept the two key contentions of the applicant in this proceeding to which I have referred. First, that at least some of the ancestors and/or family members of the claim group members (Ada Beaman, Biddy Foley (or Nyuringka), Koyl (or Jinguru), Rosie Jones (or Tjulyitjutu), Waiya, Jumbo Harris (or Tjampula), Mickey Warren and Ruby Shay) interacted with the Aboriginal people who were in occupation of the claim area at sovereignty, and were themselves in and around the claim area at or before 1912. These are some of the people the claimant witnesses identify as their "old people" and who passed knowledge to them about the Tjukurrpa. Second, that the claim group members' ancestors were able to pass on knowledge because they shared, with the original occupants, traditional laws and customs of the Western Desert. Both these characteristics meant, in my opinion, that the claim group members' ancestors were recognised as able to acquire rights and interests in the claim area.

Known violence against, and between, Aboriginal people This is an important historical fact, which assumes some relevance as part of the explanation for some of the claim group members' ancestors moving in from certain areas

to the east of the claim area. Dr Sackett's supplementary report deals in some detail with these matters. A number of claimant witnesses described their understanding of why their ancestors had moved from areas further to the east of the claim area – principally, the Wongawol and Darlot areas – into the claim area. Ms Wonyabong's evidence was:My grandparents were on Wongawol station, but came to Barwidgee, to Mount Vernon, a place on Barwidgee station, because they got frightened. A whitefella named Tommy Mellon was shooting some Aboriginal people on Wongawol station. I think that was my grandparents on my mother's side. A lot of old people was talking about that. Mr James gave similar evidence about what his father (who was born in the early 1920s) and a number of other old people (now deceased) told him:There was a pastoralist there, he was ***not*** a good man. He committed atrocities and shootings, they spoke about a well where babies were thrown down and got killed there.

... Dad used to tell me that his mum would try and run away with him and his sister quite often from Wongawol. On a number of occasions she was dragged back by the pastoralist. In those days during the war era, people couldn't move out of stations if they were designated to a specific station. She is buried in Wiluna.

...

When my father was about eight or nine he ran away from Wongawol station and came to Albion and then spent most of his life until his late 50s/early 60s there. He didn't go straight to Albion, but he went to that particular region. There were a few people from that area, that Wongawol area that he went with.

...

Since I was a kid I heard about the migration aspect of some of the families who came from around Wongawol station to this claim area and the group of people associated with that. Mr Allan Ashwin described how he had been told that this violence was aided and abetted by an Aboriginal man named "Lockie":He was from Wongawol, and he used to go around shooting his own people with the whitefellas. They caught him at Mt Gray [which is to the east of the eastern claim boundary, north of Yandal] he went for a holiday over there and my old tjamu, uncle Marakutju's [Norman Thompson] father, and Jimmy Wongawol they got up and chased him with a spear and he took off. They couldn't catch up to him and he went back to Wongawol and was protected there. They ended up getting him when he got older, they killed him in the 60s. Ms Geraldine Hogarth recounted how one of her nanna's cousins was "branded" with a Wongawol sign, the suggestion being Tommy Mellon was responsible for such practices. As I note below, branding of Aboriginal people was one of the allegations which caused police at the time to investigate Mellon's activities at Wongawol. The evidence from some of these same witnesses about how their ancestors came to move from Wongawol and Darlot is, in my opinion, significant in considering the nature of this movement, and the connection between those people and the land in the claim area. There are historical reports of violence against, and between, Aboriginal people occurring both in the Wongawol area, and in the Darlot area. Violence between Aboriginal people has been documented in what has been called the "Laverton Tribal Wars". The principal source for Dr Sackett's account of these conflicts in his supplementary report is Bates D, The Passing of the Aborigines: A Lifetime Spent Among the Natives of Australia (John Murray, 1944), but he also relies on the more recent work by Petronella Vaarzon-Morel. The extracts of Vaarzon-Morel's work quoted by Dr Sackett rely on reports of the violence (killings and abductions) concentrated around Laverton and Darlot, although a "revenge party" is recorded as going as far as the Barr Smith Ranges (near Lake Way and Wiluna), before turning back. The violence appears to have been ***not*** only between Aboriginal people, but also directed at prospectors and settlers, due to land being taken and occupied. In the Darlot area, Dr Sackett reproduces accounts from the late 1890s of attacks by Aboriginal people on prospectors camping in the area and the spearing of horses. Mr Allan Ashwin gave a similar account about the spearing of cattle, and then retribution occurring by way of Aboriginal people being shot. In the Wongawol area, the principal culprit nominated by claimant witnesses was Tommy Mellon. However, Dr Sackett notes in his supplementary report that contemporaneous evidence of Mellon's activities is ***not*** as strong. He says:In my opinion, if indeed violence, or the threat of violence, caused some claim ancestors to move to the Tjiwarl Claim area, (independent) evidence regarding violence comes across stronger for the Darlot area than it does for the Wongawol area. It is true there were concerns raised, eg by Mount Margaret Missionary Rod Schenk (1934),

about the behaviour of Mellon and his fellows. And a CIB Sergeant travelled from Perth to Wongawol to investigate stories of Mellon and other white stockmen fathering children with Aboriginal and part-Aboriginal women, supplying liquor to Aborigines, branding an Aboriginal man, and shooting Aborigines. In the end, though, Mellon could only be charged with three counts of "supplying intoxicating liquor to aborigines on Wongawol" (Detective Sergeant 1935). The claimant evidence was certainly very clear, and consistent, in terms of what they had been told about the reasons for their ancestors moving further west from areas such as Wongawol and Darlot. Dr Sackett emphasises that the evidence is stronger in relation to Darlot than Wongawol:In my opinion, if indeed violence, or the threat of violence, caused some claim ancestors to move to the Tjiwarl Claim area, (independent) evidence regarding violence comes across stronger for the Darlot area than it does for the Wongawol area. It is true there were concerns raised, eg by Mount Margaret Missionary Rod Schenk (1934), about the behaviour of Mellon and his fellows. And a CIB Sergeant travelled from Perth to Wongawol to investigate stories of Mellon and other white stockmen fathering children with Aboriginal and part-Aboriginal women, supplying liquor to Aborigines, branding an Aboriginal man, and shooting Aborigines. In the end, though, Mellon could only be charged with three counts of "supplying intoxicating liquor to aborigines on Wongawol" (Detective Sergeant 1935). I am prepared to accept the evidence from some of the claimant witnesses that the violence of pastoralists, and in particular Tommy Mellon, was one of the principal explanations given within their families for the movement of their ancestors down from Wongawol and into the claim area. I am also prepared to accept their evidence that experiences and risks of ongoing violence in other areas (such as Darlot, and including between Aboriginal people) were also given as explanations for the movement into the claim area. There is nothing at all implausible in this evidence. It is ***not*** necessary to make findings of fact about the actual levels of violence or whether this was the only reason people moved. It is likely, as I note elsewhere, that people moved for a variety of reasons, and from this historical distance one could never confidently ascribe, or describe, the full nature and extent of those reasons. Nor is it necessary to do so. There remains however, other evidence about presence and movement in the claim area around or before 1912 by claim group members' ancestors, or family members. The historical situation was, in my opinion, fluid and complex, rather than one-dimensional. Some of the historical situation remains unexplained. It is certainly ***not*** as simple as some kind of uniform migration of all apical ancestors into the claim area, at about the same time, and for the same reasons. The State's submissions tended to encourage acceptance of such a uniform historical explanation. In my opinion the evidence does ***not*** bear this out.

Presence and movement into the claim area As I noted in the section of these reasons dealing with the ancestors of each of the claimant witnesses, and the evidence about the apical ancestors, the position about occupation of the claim area in the early twentieth century, and the turn of the twentieth century, is ***not*** as clear cut as either of the parties' respective cases might have at first suggested. In my opinion, ***not*** only were some of the claim group members' ancestors in the claim area at the time of Ms Bates' writings (and some for some time before), but it is also likely that some of them may have been in the claim area closer to sovereignty itself, or certainly during first white settlement of the Goldfields area. This supports my conclusion that the claim area is, on the balance of probabilities, Western Desert ***country***. It is also my finding that some of the claim group members' ancestors moved into the claim area at times where they had the opportunity to acquire knowledge from, and be recognised by, some of the Western Desert people who had occupied the claim area, and lands around the claim area, at sovereignty. Indeed, some of the claim group members had family connections to such people, such as Ms Tullock's connection to Koyl. Ms Tullock's evidence places her "uncle" Koyl in the claim area at the time Ms Bates was conducting research. In the case of Ms Luxie Hogarth, her evidence was that Waiya had responsibility for the site of Pii within the claim area, and that was something well recognised in the 1960s, when Waiya would have been an old man. That is why, in my opinion, the picture about the relationship between the members of the claim group and the "original" occupants of the claim area is ***not*** of the binary nature the State suggests, and the applicant – at least at the outset – also appeared to concede. An example of a variation on this is evidence is where Mr Richard Narrier's grandfather used to walk between Mungkali, Barwidgee, Weebo, Darlot and the claim area. That is a considerable distance of many hundreds of kilometres; however, it demonstrates that for some of the claimant families, their connections were direct, and traditionally based. The movement of people from time to time and the use of multiple pathways to acquire rights in the claim area has resulted in different family groups reporting different time lines, and different histories, although what unites them is their shared laws and customs connecting to the land and waters in the claim area.

Evidence of knowledge and interaction Several claimant witnesses gave evidence about apparent interaction between their ancestors and people occupying land in and around the claim area. I say "around" to refer to area geographically close to the claim boundary, given that three of the four boundaries are artificial, as I have noted elsewhere. Mr Victor Ashwin described his understanding of the interaction between his own ancestors and, in my opinion, other Aboriginal people occupying the claim area in the following way. I note his parallel with Wiluna, which is accurate when one reads this Court's reasons for judgment in the determination of the Wiluna claim:The custodians, when they came in from the desert they been give them the right to Wiluna. It's like giving them the key to a house, those old people that belong here they dying out a bit. Those people coming in from the desert they already knew the songs, so the Traditional Owners from here they say that you can look after it now.

This Tjiwarl area has always been western desert. At North Well [which is, broadly, in between Yakabindie and Albion Downs pastoral stations] there used to be old people staying there and there was a law ground there. It was a stop at North Well between Leonora and Wiluna. From there they would go to Leonora to practice law there. It's the same law and culture as in Leonora and Wiluna, they had a law ground there at North Well. The old people talked about it – they tell you all the old people who used to camp here and live here, where they had the law ceremonies and all that. That's what the old people tell me. In this passage, I consider Mr Victor Ashwin is using "old people" in two senses. When he describes "old people" staying at the law ground and "old people who used to camp there", he is referring to Aboriginal people who occupied the claim area before his ancestors. When he says "the old people talked about it" and "[t]hat's what the old people tell me", he is referring to his ancestors. In other words, it was his ancestors who told him about the law ground, and about other old people who used to camp at that law ground. Dr Sackett referred to the use by the claimant witnesses of the term "old people" in the first sense I have described:HER HONOUR: Yes. And so – and the second part of that question then is:

What connections if any do you see out of the evidence between those two groups?

DR SACKETT: Between the original - - -

HER HONOUR: The native title holders in relation to the claimed area at sovereignty and the ancestors of the Jawal [sic] claimant group. And the answer may be - - -

DR SACKETT: Well, we have statements from claimants and this is ***not*** something that is exclusive to this context because I recorded similar statements elsewhere, Wiluna and so forth, that people say, well, the old people told us. And the assumption is those old people got that information from somebody else, older people. And there's a refrain in the desert about how things come down through the generations. So those people told my parents, my parents told me and I'm telling my kids, that sort of rendering of the way in which information is received and passed on. As I said earlier, the – there's a shallow generation reckoning. There's a real difficulty, at least earlier on, of people mentioning, divulging the words, the names of deceased people. So it would be quite conceivable, in my view, that those people that might have learned from somebody like Jingooroo [ie Koyl] but he would ***not*** have been recalled by today's claimants or even their parents.

So there were people on the ***country*** that taught – and I can explain that, I think we've got another question about that, that explain the ***country*** to the ancestors or the claimants and that knowledge has been passed down to the claimants. Mr James explained in his evidence the longevity and singularity of connection of the claim group members and their ancestors to the land and waters in the claim area:From my living memory the people that were living in this area had always been there; there was always a connection to this ***country***. I don't have any other memories that there was any animosity or clash between different groups as regards to ownership. Nowadays, the nature of native title has meant that there is a bit more fragmentation in regards to boundaries but my memories of growing up in the region were that there was never any of this issue. The family groups like, the Narriers, Tullocks, Harrises and Beamans had always been there and there was no dispute about where they fitted in.

My dad never spoke of anyone who came before him for this ***country*** but he did say that there were families around there at the same time that he moved across to Albion that he knew from Wiluna way. On the State's contentions, when a witness such as Mr James says there has "always" been a connection to this ***country***, he does ***not*** mean "always" in the sense of since well before white settlement, he means only one (or perhaps two) generations before him. That is ***not*** how I understood witnesses such as Mr James to speak about the claim area. The apparent dichotomy the State seeks to erect between this kind of evidence and provable and reasonably permanent settlement in the claim area is a false one. When one looks carefully at evidence such as this from Mr James, he is talking of longevity of connection to ***country***. As I set out elsewhere in these reasons, that connection – through Western Desert laws and customs and in particular through Tjukurrpa – existed long before the claim group members' families came to settle reasonably permanently in the claim area. Mr James also recounted his understanding of previous knowledge of the claim area:As a kid living in the region and what I learnt afterwards from my dad and in conversation with other family members; my understanding is that in the early 1900s there was a migration of people from east of Wiluna, from the Wongawol station area. What the timeframe of that migration was, I'm ***not*** sure, but my understanding is that there was a lot of law business happening over in this claim area anyway, so the migration wasn't such a noticeable thing, because they were often going to that area.The men were doing law business, like the initiated men, the wati's and the women as well doing their women's law in certain areas.

(Emphasis added.) In his evidence, Mr Allan Ashwin said:Over in Barwidgee ***country*** they used to have places over there where they would meet for law time, near Mt Grey or Mt Vernon. They used to have an old meeting ground where people from way out there, Wongawol and Lorna Glen and even people from this way, Albion Downs would go and meet there.

... They used to have a lawground at Albion Downs there somewhere, that was before my time. Like near the old homestead, must have been there in my parents' time because one old fella from Nullagine he came there a long time ago; there's other places like a meeting ground everywhere.

... Jigalong, back when they first come in there that was the main law ground there. It's been that way for generations and generations. All that tjukurr that goes through here, that mob in Jigalong all know it all the way to Warburton side, they know it. Barwidgee and Mount Grey pastoral stations are both to the east of the claim area, Barwidgee being closer to the northern end of the claim boundary and Mount Grey being directly to the east of the middle of the eastern claim boundary. It might be said that this evidence is equivocal whether Mr Allan Ashwin is referring to law grounds that existed early in his own ancestors' time in and around the claim area, after they "came in". However, there was no sense in his oral evidence, when he spoke about these matters, that he was describing law grounds that had been newly created by his own parents, or grandparents. As he notes about Jigalong, the law grounds relate to the Tjukurrpa in the landscape at particular places – the same Tjukurrpa that all those in these areas shared. During cross-examination, Mr Allan Ashwin said the following about law grounds:MR RANSON: You say: "Jigalong, back when they first come in there" – sorry I'll start again "Jigalong, back when they first come in there that was the main law ground there". When you say in there "when they first come in there" what did you mean by that?

ALLAN ASHWIN: Lot of people they're all from the Western Desert.

MR RANSON: Yeah.

ALLAN ASHWIN: And like when I asked Henry about like law grounds and things like that and how come, you know if they're from the Western Desert. Well people from the Western Desert all split up.

MR RANSON: Yeah.

ALLAN ASHWIN: And like some come to Wiluna. It's sort of like that, you know, all split up.

MR RANSON: Yep.

ALLAN ASHWIN: From the – that's why when they went there they started their law ground there when they went in from the desert, you know. Same like when we're at our law ground at claypan and when they come in from like people that came in from out of the desert and joined our group then they turned around at Bondini you know, that was lately, that was afterwards, you know.

MR RANSON: Okay.

ALLAN ASHWIN: And like I say, you know, like they had law grounds everywhere and it's ***not*** – what I'm saying about the main law grounds nowadays, you know, that's all the law grounds that's around nowadays. Cause like you go to - - -

MR RANSON: Jigalong's a big one now isn't it?

ALLAN ASHWIN: - - - you go to Mount Newman there's nothing there.

MR RANSON: Yeah.

ALLAN ASHWIN: Same like Leonora, there's nothing there. Kalgoorlie there's nothing, Laverton there's nothing. Wiluna we got a law ground there. You know, like all the other old law grounds are all closed down we've only got certain places like Warburton Ranges, you know. Out at Warburton they've got a law ground there and we've got a law ground here, you know.

MR RANSON: So - - -

ALLAN ASHWIN: Even Kwinana, you know, people they even go from Wiluna or even from Jigalong to Kwinana.

MR RANSON: Yeah. So is it - - -

ALLAN ASHWIN: Like this last time, you know, like people they send the young fellas right through to across the border, you know.

MR RANSON: Yeah.

ALLAN ASHWIN: South Australian border. Border mob back to Wiluna.

MR RANSON: Can I ask you this: so these days there's ***not*** so many. There's a few big ones these days?

ALLAN ASHWIN: Yeah.

MR RANSON: In the old days there were lots of little ones?

ALLAN ASHWIN: Yeah.

MR RANSON: And that's what's changed?

ALLAN ASHWIN: Yep.

MR RANSON: And those people, those Western Desert people, when you say they came into Jigalong and Wiluna, why was the reason that they were moving – have you ever heard what reason were they coming in for?

ALLAN ASHWIN: Well people were getting them and bringing them into civilisation, you know.

MR RANSON: Yeah.

ALLAN ASHWIN: Like you go out there, like my father-in-law now Freddie Freddie he's the one that bought that last – the last of the nomads you know like even when they bought them back in there.

MR RANSON: Yes I've heard a bit about that.

ALLAN ASHWIN: Like that now – and even like – talk about like – we got – like me and Henry and us now like our grandmother on mum's side, one of her sisters ended up in Balgo, you know. In his witness statement, Mr Brett Lewis said the following about the law grounds at Booylgoo and Depot Springs:The law grounds at Booylgoo and Depot Springs are old. My father said that they were old before his time. It was the same law, but those places told a different story, about what relates to that ***country***, like what's the story behind that creek or that cave. Other laws come down from other places. In my father's day they preferred to do what they had to do and move on. Later on in his witness statement, Mr Lewis explained how he learned about law grounds and other sites.All the sites that I had been shown – rockholes, law grounds, the springs at Pulyku, Depot Springs, Kaluwiri and Calulyu station. I grew up all around that area and it's where my dad travelled up and down. My dad taught me about the sites and places in this area, and he learnt it from his father and fathers before him and so on from there. It was all handed down like that. On the two law grounds around Booylgoo Range, he said the following:There are two law grounds are Booylgoo Ranges.

The first one is north of the homestead from Booylgoo Ranges. That law ground was last used in the early 1950s. My dad went through with a mob from Kaluwiri to take them through the law there. There was a big mustering camp, and there were some young men who needed to go through a certain stage of the law there. My dad would look after that place. He would make sure that it was ready for the ceremonies. I went there a couple of years ago to have a look and I go through there and look after it now. I have a look around but I don't go often as I would like.

I first went to that law ground with my father in the 1960s. There's drinking water there and a camping ground where you can see grinding stones from the old people. Up from the water there is the law ground. It's a fair-size law ground. People came from Leonora, coming through the east heading north-west. It's part of the different areas of their ceremonies. Women ***can't*** go to that law ground.

The second law ground is nearby to the first law ground. It is right in the hills of the Booylgoo Ranges, and is hard to get to. I went through there with a motorbike a long time ago.

Evidence of shared traditional laws and customs: acquisition of rights and interests I have accepted Dr Sackett's opinion that there were multiple pathways through which the claim group members, and their apical ancestors, identified possible ways of acquiring rights to ***country***. In his Tjiwarl Registration Report, he reports accounts that had been given from some of the claim group members' ancestors, who have now died. Although his report does ***not*** make it clear, the form of these accounts appears to come from earlier proceedings. Dr Sackett has made some commentary in square brackets.As regards the Tjiwarl claim area, claimants similarly pressed claims based on Western Desert law and custom. In this regard, after naming places she claimed were in her ***country***,

Tjampula/Jumbo's daughter, Cecily Harris... said:CECILY HARRIS: I say that's always been my ***country***. That's where we roamed.226;128;

MR O'DEA: Where you roamed.226;128;

CECILY HARRIS: When we were little kids and all.

MR O'DEA: Yes. And are there any other reasons?226;128;

CECILY HARRIS: Mostly because we was all born around that area too.226;128;

MR O'DEA: Born; right. And were any of your other relatives born there?

CECILY HARRIS: Oh well, Gary [this undoubtedly should be Gay, as in her sister Gay Harris] was born in Wildara, Les [her brother Les Harris] in Weebo, James [her brother James Harris] in Lawlers.

Cecily... also indicated, "That's my run. I've always been there, and I'll go there, I make it there every year, all the time, you know, the first chance I go, I just go straight there, to them places."Gay Harris... another of Tjampula/Jumbo's daughters, noted:GAY HARRIS: No. My ***country*** is where my brother and sisters are born and we – me and my sister Cecily always live in the area. ...

MR WALKER: Okay. Where is your manta [***country***]?226;128;

GAY HARRIS: My manta I believe it's right in Wildara where I was born.Named apical Nimpurru/Spider Narrier's daughter's daughter, Adeline Narrier, was asked and replied:MR VINER: And why is that your ***country***?226;128;

ADELINE HENNESSEY: Well, we been walking through and they used to carry me right through and we used to walk. We had no motor car, nothing, and when we went to Leinster, we got a cart and horse then. That's how we do our mill runs through that - - -226;128;

MR VINER: Now, did the – did your Mum and Dad or the old people tell you why that's your ***country***? Does anything Aboriginal way tell you what is your ***country***?226;128;

ADELINE HENNESSEY: Yes, Mum would talk about it but we don't talk Dad's because we never been there at his place – Laverton. I go now and again, but I don't go and stop there.226;128;

MR VINER: So, what did your Mum tell you about why this was your ***country***?

ADELINE HENNESSEY: Well, she lived here – living in Mount Sir Samuel when she was younger. She walked to Wiluna, then she walked back, got me [became pregnant with Adeline]. I was born in Wiluna, then she walked back carrying me. And she worked at the mine and the hotel, then she – when they shift – close that mine down, they come to Leinster ... and we lived there then with the Whites [ie a family with the surname of White]. This led Dr Sackett to conclude (at [40] of his Tjiwarl Registration Report):These and other claimants said their ***country*** was where they were found or dreamed, where they had been born, where they roamed around as children, and where they consistently returned. As evident in Adeline's account, however, things did ***not*** stop with these sorts of links. In

addition, many claimants, essentially the many younger claimants, made descent based claims. These claimants did ***not*** themselves have the sorts of personal linkages to the Tjiwarl area noted above; rather they traced their linkages to the claim area through antecedents who were said to have been conceived or born or raised or had long lived in the claim area countryside. He gave as one example of a descent-based claim what he had been told by Mr Bingham, who also gave evidence in this proceeding:Douglas Bingham ... son of named apical Kathleen Bingham, when asked why he was a claimant, responded "Well my mother bin born there". However, Dr Sackett also filled out this part of his report with examples from some of the current claim group members, such as Mr Allan Ashwin, Ms Wonyabong, Mr Lewis and Mr James. All of the accounts given by these people demonstrated, in Dr Sackett's opinion, that birth on ***country***, long association (including through one's parents and grandparents) and spending time on ***country*** learning about laws and customs related to that land were all ways in which rights were acquired. To give one example from Dr Sackett's first report:Dempsey James claimed ***country*** from "Wongawol down towards Lawlers" through his mother's mother's, ie Biddie's, Wongawol associations, his mother's, ie Tjilu/Fannie James', birth north of Agnew/Lawlers, and his own birth, on the Wiluna to Wongawol Road, and his long personal experience on ***country***, principally Albion Downs and Yeelirrie. Dempsey's son, Allan James, indicated his claims to the Tjiwarl area were through "my kaparli (Tjilu) and my father" and "[b]ecause I spent a lot of my childhood there." This, Dr Sackett said, was consistent with the pathways which existed under Western Desert laws and customs, the collection of which was broader in nature and content than methods existing under other laws and customs in other parts of Australia – which may, for example, have been more strictly based on patrilineal descent. These pathways are to be contrasted with simply "roaming" through ***country***, which Dr Sackett explains, in a lengthy section in his first report (and by reference to some individuals who made claims in the Wongatha proceeding), would ***not*** be seen as enough to acquire rights in the ***country*** through which people passed:... I am ***not*** aware of any instances of such movement, such 'roaming', in and of itself,being or becoming a pathway for claiming ***country*** within the Western Desert. Such movement simply was an aspect of life in the harsh environment of the desert.

(Emphasis added.) Dr Sackett later described claims based on "roaming" as ***not*** based on Western Desert laws and customs, but as more in the nature of recent, "ambit" claims. As I have noted earlier in these reasons, in the section on Western Desert laws and customs, one description applied to groups with connection to ***country*** is "emergent". I have referred to some of Dr Sackett's explanations of this in the Western Desert section, but it is appropriate to do so again here, because I accept this is the explanation for how the claim group members' apical ancestors (and, it would seem, some of their own ancestors and families) acquired rights in the land and waters in the claim area. Of course, it should be recalled that my view of the evidence is that it is sufficient to make it likely that at least some of the claim group members' ancestors were in and very close to the claim area well prior to the time Ms Bates was working north and west of the claim area. Even if that is the case, the multiple pathways to rights to ***country*** still appear to have been at work. Dr Sackett gave a further description of these pathways in his oral evidence in the concurrent session:DR SACKETT: Well, I look to the pathways available to people in the Western Desert, and those include learning the ***country*** in its physical and metaphysical sense and enacting that. Participating in ritual. And then out of that some people would be born there. There were a couple of ancestors that were born on the plain area nearby. So people move in, learn the ***country***, pass that onto their descendants, kids and grandkids, and that in itself – but I suppose what needs to be understood in my understanding in the Western Desert, groups are ***not*** given but they're emergent. Elsewhere in Aboriginal Australia you have like clan groups. It's a descent model and you're either in it or you're ***not***. In the Western Desert you can join a group through your birth or through being on that for a period of time, learning the ***country***, participating in the ritual activities, as I've said.

So the groups, in a sense, gain – potentially gain members through time. ***Not*** through birth but through – pardon me. ***Not*** through being born into the group but being born of the ***country*** or learning the ***country*** - - - Dr Sackett reaffirmed this opinion in cross-examination. The extract I set out is from the restricted expert session but its subject matter is ***not*** restricted and I see no difficulty in including it in these reasons:MR RANSON: Is it nevertheless the case that for a person in the Western Desert to come to new ***country***, as it were – to migrate to a different part of the Western Desert, there needs to be acceptance of that person's rights by the people that are already there?

DR SACKETT: Certainly, that's the case, I would imagine. Yes. Otherwise they wouldn't tell them anything.

MR RANSON: Yes.

DR SACKETT: Yes. There would be pre-existing links, I would – I can only imagine. And from what the claimants have said, their understanding is that their old people were coming down and already knew some of the people. These were ***not*** new events.226;128;

MR RANSON: Yes.

DR SACKETT: They were just more permanent arrangements. And remember, there's only a few of them. There are ***not*** stacks and stacks of people doing this.

MR RANSON: No

DR SACKETT: It's just a few ancestors

MR RANSON:226;128;But it's ***not*** the case, for example, that a person could come from, let's say, a South Australian part of the Western Desert and travel 500 kilometres west to, let's say, Lake Carnegie, somewhere like that, and perhaps bring their pregnant wife with them and give birth to someone and then just announce that they then own that ***country***. There would have to be acceptance from the people that are there.

DR SACKETT: Well, there – I've mentioned Fred Myers before, and he viewed land tenure in the Western Desert as large-part politics. And it would depend on the circumstances. If that person from South Australia lived there for a number of years, the child was conceived and born there, it might be that that child was recognised as part of that ***country***, because of the commonality in law and custom.

MR RANSON: Yes.

DR SACKETT: Certainly, there's some minor differences, but they couldn't come there and articulate some non-local pathway. For example, it would be unlikely that people from the south of the desert, where umbilical cords – the place where an umbilical cord falls off is significant in locating your ***country*** – if they went up to the top Builgu area and said my son's umbilical cord dropped off, people there would say so what? It wouldn't be something that they recognise as a valid pathway.

MR RANSON: Yes.

DR SACKETT: But if a pathway that was valid was articulated, it could be that a person could gain rights and interest in them. These findings have two particular consequences for the opinions expressed by Dr Brunton in this proceeding, on these issues. First, they mean I do ***not*** accept the premise of his opinion that there were no Aboriginal people left in the claim area who had occupied it at sovereignty, or were descended or otherwise connected to people who had occupied the claim area at sovereignty. To the extent that Dr Brunton's opinions were based on this premise, it is one I have rejected. Accordingly, the appropriate starting point is ***not*** that the claim group members' ancestors moved into "empty" land (in the sense of Aboriginal occupation) and "imposed" Western Desert laws and customs onto the ***country*** in the claim area. Thus, Dr Brunton's opinions in his first report (for example, at [594]) are ***not*** ones I accept, as in my opinion the evidence discloses there must be a different starting

point or premise to the one he adopts. Second, I do ***not*** accept Dr Brunton's view that the absence of evidence of formal transmission of rights to the claim area means there was no such transmission, nor that the absence of such evidence is fatal to the applicant's claim. This is how Dr Brunton put his difficulty, in his first report, with the applicant's thesis:There is no evidence to suggest that the Ngaiuwonga, a non-Western Desert people, transferred rights and interests in estates in the claim area to any Western Desert people before they disappeared through means that would have been regarded as legitimate in terms of the laws and customs that would have traditionally applied to the claim area. The knowledge that the Tjiwarl applicants probably possess about sites and associated stories, etc, in the claim area can be explained in terms of attempts by their Western Desert forebears to legitimise their occupancy of ***country*** into which they had migrated. Such attempts, which do ***not*** have to be thought of as cynical, are likely to have had similarities with interpretative processes that have been described by anthropologists studying Western Desert and other Aboriginal people. He expressed similar opinions at [157] of his supplementary report:If people outside the WDCB could ***not*** take over the ***country*** in the claim area, then, given that it is my strong opinion that the Ngaiuwonga were ***not*** Western Desert people, why should it be thought that the forebears of the claimants were able to say that Ngaiuwonga ***country*** had become theirs? I discussed this question in my earlier report, and I think that the statements from Victor Ashwin about the need for a ceremonial transfer of sacra to incoming people serve to highlight the significance of the apparent absence of any transfer from the Ngaiuwonga to the claimants' forebears. The transfer that Mr Ashwin and Ms Tullock were referring to probably occurred in the 1960s, and involved Scotty Tullock – who was certainly ***not*** a Ngaiuwonga man – and Mudjon Freddie, a Western Desert man from Mungkali.

(References omitted.) As I have noted, the premise in Dr Brunton's opinion is one I do ***not*** accept. Even if that premise is put to one side, I do ***not*** accept the conclusion reached by Dr Brunton about lack of transmission. It is true, as the State submits in its written submissions, that there is some support in the evidence of some of the claimant witnesses for the need for a formal handover of some kind, through ceremony. The clearest statement of this is in the evidence of Mr Victor Ashwin, who said:You can look after someone else's ***country***, in our law. In our law we do it through the law. If the traditional owner of a ***country*** thinks "Oh, all my mob died out, and I'm the last one, I'll give this to these mob coming in". And they have a ceremony, and a law, and they give it like that. I ***can't*** talk about that in this paper. You got to do the ceremony like when the custodian comes in. It is sort of like how whitefellas sign the paper, giving permission for someone to help you. You're giving permission for someone to do something on your land, that's how it is in our culture. Like signing the land over to the custodians to look after it. The old people will think "It's no good me just dying out if I'm the last one" so they will sign it over to someone to take care of and look after the ***country***. The State appears to accept, as does Dr Brunton, that Mr Victor Ashwin is giving an accurate account of his understanding of what would be required under Western Desert laws and customs for ***country*** to be "handed over" in circumstances where there was only one custodian alive, or perhaps a couple of custodians. Ms Tullock also gave some evidence about how her father handed over responsibility for law business in a ceremony at Wiluna, for ***country*** around Wiluna, when he decided to take his family to Port Hedland. Ms Tullock said in cross-examination that she was about 13 or 14 years old at the time. She said:I remember they had a big law meeting at Wiluna, and I think that might have been the last for a long time. But they might have been doing law secretly after my dad left, cause when he left, he handed the law and culture and all the stuff that he was doing over to Mr Freddy [Freddie Freddy]. He told them he had to go, and take his kids. He told Mr Freddy to take over the law for the ***country*** around Wiluna. My dad was very passionate about protecting sacred sites. There was also a discussion about handing over custodianship which took place in the restricted men's session. As I understood it, and without revealing matters which should ***not*** be revealed, the discussion was more about the process, and about some of the terminology used. The examples discussed by both Mr Allan Ashwin and Mr Victor Ashwin were ***not*** examples about any handovers of ***country*** in the claim area. Mr Allan Ashwin in particular was able to discuss the example he did because it occurred in the 1950s, and thus in living memory. Dr Sackett and Dr Brunton also dealt with this issue in the restricted expert evidence session. Dr Brunton gave some examples from his own previous work of ***country*** and people where there had been some kind of ritual handing over of ***country***. On questioning, he accepted that both examples (Jigalong and another place so poorly recorded by the transcript that it is unidentifiable) were examples of Western Desert people moving into non-Western Desert areas. Dr Sackett subsequently pointed out that there remains a dispute about the "handover of title" at Jigalong, and he was cross-examined briefly about the nature of that dispute. There are no doubt many nuances in other examples, which were

not explored in the brief evidence given in this proceeding about those circumstances. In relation to Ms Tullock's evidence about the "handover" she had understood occurred with Mr Scotty Tullock and a man called Mudjon (or Freddie), Dr Sackett provided an explanation in the restricted session of what was likely to have occurred between the two men. I will say no more than that in these reasons, but in my opinion Dr Sackett's explanation was persuasive. Dr Brunton did ***not*** dispute that explanation in relation to Mr Scotty Tullock. In relation to the evidence given by Mr Victor Ashwin, this was also the subject of evidence from Dr Sackett and Dr Brunton during this restricted session. There was evidence given by Mr Victor Ashwin about handing over ***country*** in his witness statement and in open session, but also in the men's restricted session. Dr Brunton took some of Mr Victor Ashwin's answers to questions literally, and said they showed that where it was intended to "hand over" ***country***, there were formal ceremonies. This then contributed to Dr Brunton's view that an absence of evidence about transmission suggested there was no "hand over" in accordance with Western Desert laws and customs. Without making any inappropriate disclosures about the restricted expert evidence, or the restricted men's evidence, it is fair to say that Dr Sackett's explanation for the evidence given by Mr Victor Ashwin was consistent with the view I have taken, and focussed on Mr Ashwin's age at various points in time. Nevertheless, the thrust of Mr Ashwin's evidence in oral testimony and in the restricted men's session was consistent with what is in his witness statement, which I have quoted at [689] above. Dr Sackett's view of these issues is one I accept. He said (in the restricted expert session but again the subject matter is ***not*** in my opinion protected):I don't believe it's [transmission of rights, through ceremony or otherwise] necessary at all. As I said yesterday, it's my opinion that people become part of the ***country*** through active involvement with it. And as part of that, they would learn about the objects, perhaps make some of the objects that would be part of the ***country***, but there wouldn't necessarily be any transfer of what might be construed as title or handover of objects, other than outside the context that I spoke about this ... exchanging objects. That is ***not*** to make a finding on the balance of probabilities that there were no such rituals or ceremonies concerning the claim area. There may have been, although none of the claimant witnesses was old enough to give any direct, or reasonably direct, evidence about such things. The fact that no one gave positive evidence about such rituals or ceremonies is of some weight, but is ***not*** conclusive in proving a negative. In that sense there is no necessary inconsistency between Mr Victor Ashwin's evidence and Dr Sackett's opinion.

Evidence of shared traditional laws and customs: Tjukurrpa I consider that the evidence given by some of the claim group members about the way their ancestors came into the claim area, following Tjukurrpa paths, supports my conclusions. This is another example of how central the claim group members' accounts of Tjukurrpa are to the views I have taken of the evidence and argument in this proceeding. I do ***not*** accept that these accounts are constructed, or "imposed", or whatever description one chooses to apply. As Mr Victor Ashwin said, "the Tjukurrpa is the ***country***": to reject the claimant evidence on this does involve, in my opinion, finding that the claim group members (and their parents and grandparents before them) have made up these dreamtime accounts, or adapted them in some wholly untraditional way. I do ***not*** accept that is the case. There are two aspects to the claim group members' evidence on this matter, both of which are addressed by Dr Sackett in his supplementary report. The first consists of accounts about how some of the claim group members' families moved into the Tjiwarl area by following Tjukurrpa tracks. The second consists of accounts of how the Tjukurrpa travels through and connects areas to the east (and north) with the claim area. Mr Muir also gave some evidence about his mother, Ms Dolly Walker, as a young child moving through ***country*** to the east following Tjukurrpa that come into the claim area:They moved around following ceremonies even my mum was a little girl, walking from Mulga Queen through Croft, north of Darlot, using a yiwarra [a traditional track] that goes through Henry's Well and Townsend Well. That's really the walking journey that people took into this claim. That's the yiwarra, the pathways. Following the dragonfly, the Tjiinkuna dreaming. The two places Mr Muir refers to – Henry's Well and Townsend Well – are both in the eastern part of the claim area, just north of Mount Sir Samuel, and south-east of Yakabindie station homestead. This evidence is also an illustration of how the Tjukurrpa travel into the claim area, connecting the ***country*** with ***country*** further to the east. The way the Tjukurrpa travel and connect ***country*** is further illustrated by the following evidence. Although it might well be said that he was surmising, rather than speaking from direct knowledge, or even from information handed down to him, the way Mr Victor Ashwin described the connection the Tjukurrpa provided for the claim group members' ancestors between the land they came from and the land they settled in, is an apt description. It is apt because it locates the Tjukurrpa centrally as the evidence of shared traditional laws and customs between those Aboriginal people who occupied the claim area and its surrounds at sovereignty, and the claim group members' ancestors:In most of the cases, the old people already know about the tjukurrpa. Even

though they're from the desert, they've still been singing about this tjukurrpa, and they know it already. Some time, when they're coming from the desert and they see the ***country*** for the first time, they think to themself 'oh this is what we were singing about all them years, this water and this hill'.

Most of the tjukurrpa in the Tjiwarl area, people sing about it right through, and they know the songs although they don't know where the ***country*** is. Ms Narrier gave some vivid evidence about how the Tjukurrpa in the landscape linked ***country***. She also explained in clear terms how the translation of the Tjukurrpa into English, and then into a name for a geographic feature, has made the connection less obvious:That Booylgoo Ranges [which are in the south-western corner of the claim area], that's my dreaming right there, my tjukurr. The story for that ***country*** comes from the tjukurrpa; it's in my mind, about this tjukurrpa. It's an old story taught to me by my mother. She taught me this story as I was growing up.

The Booylgoo Ranges are the leg of a kangaroo, lying in the ***country***. The two old people, a woman and a man, were walking along, and they had kangaroo meat and bush potato seeds with them. They were gnawing on the leg of the kangaroo – junta[thigh] they call it. A crow man was following them, wanting the meat. The crow man is the son-in-law for those two people walking, and the woman is ***not*** allowed to talk to the son-in-law, because he's wrong for her skin group way. He's just following them, and he ***can't*** ask for the meat, but they getting sick of him following them.

The people got sick of that crow man, and so they scattered out the seeds and they dropped the meat. They had the seeds in a carrying dish, like a little dish on her head, and they must have got sick of the crow annoying them for that meat, so they scattered those seeds. The Booylgoo Ranges are the leg of the kangaroo, lying down. On the map it is marked Booylgoo Ranges, but really the word is pulyku [sinew] – that means the sinew of the kangaroo.

The two old people are the tjukurrpa, and they traveled from Wongawol, from the north-east of the Tjiwarl area. Because the Booylgoo Ranges come from the tjukurrpa, are made by the tjukurrpa, they are all important. Right up to the Agnew-Sandstone road, it is a special area. Even today, when you go past, you can see the crows eating all the dead meat.

The name for that bush potato is watja. There is a big mob of watja around those ranges, especially on the bottom of that range, on the west side, where the range is going up. The watja grow where they were left by the tjukurrpa, where those seeds were dropped.

(Emphasis added.) Dr Sackett was asked about these issues in cross-examination in the restricted expert evidence session. I consider it is permissible to reproduce the exchange, because it does ***not*** touch on the content of any restricted evidence. Rather, it deals with more general issues between the parties in this proceeding: in particular, the State's thesis that the claim group members' ancestors "imposed" the Tjukurrpa and other laws and customs on the claim area in the 1930s and 1940s. In cross-examination about what could, or could ***not***, be made of the fact that Ms Bates did ***not*** record certain Tjukurrpa in her material, the following exchange occurred:[MR RANSON]: Yes, the same report, supplementary. This is in response to Dr Brunson [sic] making the point that Daisy Bates, although she had recorded quite a number of dreaming stories – we've talked about some of those this morning – she hadn't recorded the ... story amongst the [Ngaiawonga] informants that she met. And you say there's no reason to suspect, given that Liberman recorded it in the 70s and was told it had been there for some time, there's no reason to think it wasn't there when Bates was recording. So your premise there is that it was probably there but she just didn't record it?---Didn't record it.

You would accept that it's equally possible on the evidence that she didn't record it because it wasn't there?---Well, she didn't record it. That's ... it's like some of the other things we're facing with her data. They're - - -

But it's possible?---It's possible, true.

Yes?---I would say it's unlikely, being as it has been around and spoken of for some time and Liberman's informants were saying it has been there for quite a while.

Yes. Liberman's informants were what he said were Dupan [Tjupan] people, effectively, in relation to that issue?---Some were, ***not*** all of them.

Yes?---He described some of them as Dupan [Tjupan], yes.

Those Dupan [Tjupan] people, on your view, are ***not*** – be careful, bearing in mind my conversation with your Honour earlier – that your view about the Dupan [Tjupan] is they're ***not*** locals in the sense that they weren't there at sovereignty, in the claim area?---No. But they learned from people that were, in my view. Yes. There's no direct evidence that they learned. That's your assumption?---But it's an assumption based on the stories that people tell, how their old people learned from older people. And these stories hook up with other stories in some way, shape or form.

Yes?---It's ***not*** like the Jilla Kogara [Tjila Kutjara] are there and only there. It's an extensive dreaming with the same features as it moves through the countryside.

(Emphasis added.)

Other matters material to my reasoning In his further expert report at [224]-[225], Dr Sackett provides a response to some of Dr Brunton's explanations for how the current claimant witnesses can speak of the Tjukurrpa and provide their knowledge about sacred sites in the claim area. Dr Brunton's opinion (at [563] of his first report) was expressed in the following, slightly pejorative, terms:Given this, together with my opinion that the traditional society in the claim area was ***not*** a part of the WDCB, the question of how the claim area has come to be the repository of seemingly Western Desert Dreamings, stories, sites, and perhaps sacred paraphernalia, needs to be addressed. There are a number of ethnographic reports from the Western Desert and other areas which point to what probably occurred, providing accounts of how newcomers to an area have attempted to legitimise their move in terms of the sacred geography of the ***country*** they are taking over. Dr Sackett's response to this (at [225]) was:In saying this, Dr Brunton seems to assume that the Dreamings, stories and the rest are imports. I am ***not*** aware of any evidence that this was/is the case. I accept that what Dr Brunton says about people reading meaning into the landscape. However, if this happened in the way(s) Dr Brunton suggests it might have, it went unrecorded. I accept Dr Sackett's opinion. I am unaware of any plausible justification offered by Dr Brunton, or to be found in the evidence, for the assertion that the people he calls "newcomers" "attempted to legitimise their move in terms of the sacred geography of the ***country*** they are taking over". It was ***not*** suggested to any of the claimant witnesses that they, or their ancestors, had attempted to "legitimise" their presence by adopting the Tjukurrpa for the claim area. Aside from one use of the word "newcomer" in the cross-examination of Mr Muir, but ***not*** put as a direct proposition, there was no suggestion put to any claimant witnesses that this was an accurate description of what their ancestors were. It is tantamount to a suggestion that the Tjukurrpa was invented or fabricated, since it is ***not*** possible, so far as I understand Western Desert traditional laws and customs, to separate the Tjukurrpa from the ***country*** to which it relates.

Connection: using evidence about language to determine the Western Desert society issue As the applicant's submissions acknowledge, the evidence about the language spoken by the people who occupied the claim area at sovereignty is but one piece of the puzzle concerning the characterisation, on the balance of probabilities, of those people as Western Desert, or non-Western Desert people. In its written submissions, the State contends that, in any native title proceeding, expert linguistic evidence is of marginal relevance and probative value in identifying the traditional laws and customs in relation to land and society. The State submits that this is the case in this

proceeding, particularly where the issue is the identity of the society and its laws and customs at sovereignty. In other words, the State submits that there is no necessary connection between language and land ownership. In making this submission, the State points to the applicant's submission that dialects and dialect labels, such as Ngaiawonga, have shifted ephemerally over time and have ***not*** been uniformly used at any one given time. Leaving to one side the State's unduly broad submission that expert linguistic evidence is of marginal relevance in a native title proceeding, the difference between the parties' approaches is one of weight. The State submits Dr Clendon's evidence is of no or marginal weight. The applicant submits it has a role to play, and should be given weight as one factor. I note also that, at least in relation to the word lists he used as the foundation for his opinions on the issues I discuss below, Dr Clendon did ***not*** find any "glaring errors" in Ms Bates' work, although he accepted there were such errors in some of her other reports. He said:They [Daisy Bates' word lists] are all very consistent. Word lists from particular places are clearly Western Desert. Word lists from other places are clearly Wadjari or Badimaya. Word lists from the areas we're looking at show a – a – a mixture, and they're also consistent. It would be highly unlikely to be the result of – of people randomly moving around, and randomly – randomly offering word lists. This is an example of the way the combination of Ms Bates' original work with the opinion of an expert can lead me to be satisfied it is appropriate to accept expert opinion based on Ms Bates' source material, because it is considered reliable and is being used as a basis for opinions drawn from what she has recorded, but no more (that is, ***not*** from what she did ***not*** record). There are still issues of representativeness, which concern me, but at least on the language issues I accept Dr Clendon's opinion that Ms Bates' word lists are a suitable source.

The competing contentions The applicant contends that the conclusion to be drawn from Dr Clendon's evidence is that those Aboriginal people associated with the claim area recorded by Ms Bates were speaking a Western Desert dialect, but were also multilingual in Wadjari and Badimia, which are agreed to be non-Western Desert languages. The applicant says that the linguistic evidence (including the name "Ngaiawonga" itself) supports a finding that the Ngaiawonga spoke a dialect of the Western Desert language, and that this "adds weight" to the proposition that the claim area was occupied by Western Desert people at sovereignty. The applicant rightly recognises, on the basis of Dr Clendon's evidence, that the original occupants may have been multilingual. They also accept that language is ***not*** of itself an indicator of shared laws and customs. On this latter point, it seems to me the applicant may have been a little too ready to make such an absolute concession, and I return to this below. The State contends that if anything, Dr Clendon's evidence supports the State's proposition that the claim area was ***not*** Western Desert ***country***, nor occupied by Western Desert people, at sovereignty. In particular, the State relies on Dr Clendon's evidence about the multilingual nature of people in the claim area at sovereignty, and the need to "decouple" language spoken from rights to ***country***, and laws and customs about rights to ***country***. The State emphasised Dr Clendon's agreement with the propositions, based on Bates' material, that there was considerable linguistic mix in these areas from movement, intermarriage and deaths. The State suggested that Dr Clendon's evidence in the earlier Sir Samuel claim, which covered substantial parts of the claim area suggested that he saw the claim area as occupied by people who principally spoke Wajarri, a non-Western Desert language. The State contends that, if Dr Clendon had changed his views, he had ***not*** adequately explained why he had done so.

The claimant evidence Given the agreed position that the claim group members are Western Desert people, it is ***not*** surprising that the languages many of them gave evidence about hearing, understanding and speaking were mostly Western Desert dialects: namely Tjupan, Martu, Koara, Ngalia, Mantjintjarra, Putijarra and Ngaanyatjarra. The claimant evidence was, unsurprisingly, that they learned language from their ancestors, although several gave evidence that their ancestors spoke more languages than they do. As to knowledge of "Ngaiawonga", a couple of witnesses (Ms Geraldine Hogarth and Mr Victor Ashwin) identified the word as meaning "my talk" or "my language", or "this" and "speak". Mr Victor Ashwin identified Ngaiawonga as a Western Desert language. This kind of knowledge is likely, I find, to have been recently rather than traditionally acquired. Some witnesses said they had never heard of Ngaiawonga: Brett Lewis, Ms Wonyabong, and Mr Bingham are examples. Some witnesses identified ancestors as having spoken Ngaiawonga. Ms Luxie Hogarth's evidence was:All the people speaking Naiawongga, they all pass away. They were coming from the west, back towards Meekatharra and Cue, coming in to the west part there [of Tjiwarl claim area]. They all gone now, and the words gone now too. You don't much hear people saying those words.

All those people that talk Naiawongga, they all pass away now. Like Mr Narrier [Frank Narrier], old Rosie, Alice Redmond. Mr Narrier was with them mob, and he might have spoke the same language too. He might have talked like that because he was all in that area. I think old Rosie was speaking that, and I heard James Redmond, my brother-in-law, saying that word, a long time ago. They joke around and they say them words. No one around to talk like that now.

That old man Waiya, he was living there. He was talking that other language coming in from the west side. Might be, but I never seen him. But they might have been all together, married in the one lot. But I don't really know, because I didn't meet him. He was one of the main elders for the ***country*** before he passed away. To some extent, Ms Hogarth's evidence is consistent with Dr Clendon's opinion, based on Daisy Bates' word lists. That is, that Ms Bates' informants spoke Western Desert and non-Western Desert languages. Ms Harris's evidence reflected the complications of language acquisition and retention. She clearly separated out Badimia as a non-Western Desert language, but her evidence suggests she understands the other languages she identifies to be Western Desert dialects:My parents spoke Martu and Wongai, but more Martu than Wongai because my mum's a Martu lady and she mainly spoke Martu. When my dad passed away, we lost some of that language for Wongai. I know bits and pieces but I ***can't*** speak it in a sentence, but Martu I can.

Martu and Wongai languages are a bit different, but some words and meanings are the same. If someone was speaking Wongai to me, I could understand what they say but I ***can't*** speak it well.

In Wiluna, most people speak Manyjilyjarra, but now some people are adopting Ngaanyatjarra, because Ngaanyatjarra lands mob are married into the Martu tribe too, so they're sort of adopted into the language.

People also used to speak Koara in Wiluna, but that's before my time. I think it stopped after the 1980s, before the 1990s, in Wiluna. In Leinster and this Tjiwarl claim area, they still speak Koara. Koara is the same through law and culture as Martu; it's sharing the same culture.

I can understand Tjupan language, but I don't know how to speak it. That's a really old language. I got told about it by my mum, Aunty Gay [Harris] and other family members in Leonora. The Beamans and the Ashwins, they still speak it a little bit. The old people spoke it mostly.

I've heard about a language called Naiawongga but I never really knew much about it. I was told about it by my mum. I heard people speaking it, a little bit. I think that old Aunty Angeline Narrier and old Frank Narrier, they spoke Naiawongga.

Ngalia language group is from the Goldfields, I think. I've heard of it but I don't have knowledge of that. I've just heard of them through the old people. Mainly my mum and my aunties told me about that.

The old people shared languages. When people marry into families, you pick up other people's languages. That's how it is today, and how it used to be back then in the old days too.

Badimia language, that's from the Yamatji side, near Cue. They have separate law and culture. They're now interacting with our law and culture because they lost some of their culture and law. We're trying to help them to regain, to get up and going again. Mr Patterson's evidence was that he had never heard of Ngaiawonga. He identified the Narriers and the Ashwins as speaking Puruantjiltjarra, a Western Desert language.

The expert evidence Aside from Dr Clendon, Dr Sackett and Dr Brunton also addressed language issues in their evidence. Dr Sackett used Dr Clendon's opinions in his first report, and then also in his further expert report, where he dealt with some of Dr Brunton's criticisms. In his further expert report, Dr Sackett recognises, and I find it is the

case, that based on Ms Bates' word lists, Dr Clendon's opinion suggests that although non-Western Desert languages (Badimaya and Wajarri) were also widely spoken, he considers that the "bottom line is that Dr Clendon spoke of the language materials Bates recorded in the area as having been Tjupan – a way of speaking he took to be a dialect of the Western Desert language". Dr Brunton dealt with Dr Clendon's opinions in his report, while acknowledging he did ***not*** have the experience to make a linguistic assessment of Dr Clendon's report and had very limited familiarity with Aboriginal languages. He nevertheless contends that "it is still possible for me to raise questions about the robustness of his conclusions, and in particular, about the way in which these have been interpreted by Dr Sackett". Dr Brunton focuses on Dr Sackett's use of Dr Clendon's report, rather than Dr Clendon's report itself. I am satisfied Dr Clendon, in his responses to Dr Brunton, dealt adequately with the issues raised and my reliance on Dr Clendon's views is ***not*** affected by anything Dr Brunton had to say. Ultimately, Dr Brunton's view was:... the issue of whether, at the time of European settlement, the Tjiwarl claim area as a whole, or even a significant portion of the claim area, would have been associated or identified with a Western Desert language, rather than a Kartu language, remains open. Acknowledging that each of them did ***not*** profess to trespass into Dr Clendon's area of expertise, I did ***not*** find anything in the opinions of Dr Brunton and Dr Sackett which led me to discount the weight I would otherwise give to what Dr Clendon has said, in the terms I set out below. Dr Clendon's opinion was that Ms Bates' informants, who identified the claim area (amongst other areas) as their ***country***, were multilingual but spoke predominantly a Western Desert language. In my view, Dr Clendon's opinion is reliable and should be preferred, especially given his expertise. There was no dispute about Dr Clendon's expertise, and the State acknowledges his expertise in particular in Western Desert language. It submits that he had less experience with non-Western Desert languages and this might explain what it described as his "difficulty" in differentiating between Western Desert words and non-Western Desert words, such as Badimaya and Wajarri words. I do ***not*** accept that criticism of Dr Clendon's expertise. In my opinion, his expertise with Western Desert language obviously equips him to identify words, dialects and language that do ***not*** share the characteristics of the Western Desert language. Whether or ***not*** he can definitively identify what other dialect or language it might be is ***not*** to the point in terms of the relevance of his opinions to the issues in this proceeding. What is relevant here is his opinion about how much of the language recorded by Ms Bates came from the Western Desert language. For that task, he is particularly well-qualified. Dr Clendon described his particular interest and expertise in the following way:... that my main interests is in the way that language is used by living people and it's – my interest is also in the way that language, especially language shift and linguistic geography, impacts upon historical linguistics. That is our understanding of pre history. Relevantly to this proceeding, he described the Sir Samuel claim as one of the most interesting case studies he had been involved in:... that was interesting because of my work there with the [Sceghi] family of Leonora, who speak a quite distinct and undocumented variety of the Western Desert language which they call Djilbarn [Tjuparn]. Other people call it [Bini]. And the way that the speech correlated extensively with speech recorded by Daisy Bates a hundred years previously, especially in the speech of [Thuradha], who was a man from the Laverton area, from an area a bit north – north west of Laverton. It was extremely interesting to me to see how lots of material in these historical documents that are quite unfamiliar to me became clear and apparent in the speech of the [Sceghi] family of Leonora. I have noted elsewhere Dr Clendon's explanation of why he chose to focus on Ms Bates' word lists provided by Jinguru as opposed to those provided by Jaal. In cross-examination he explained it this way:But it's ***not*** a particularly realistic hypothesis because Jingaroo's word list is so much more complete.

Yes. I accept that?---A much – a much bigger word list. I would ***not*** choose the smaller over the bigger word list. In his report, Dr Clendon noted that a grammatical description of Western Desert language was beyond the scope of his report. Nevertheless, as I have noted elsewhere in these reasons, it is necessary to understand to some extent what is meant when various witnesses, and pieces of evidence, refer to features of "Western Desert" society, culture, laws and traditions. The same applies, in my view, to issues about language. In his oral evidence, Dr Clendon said:Well, the Western Desert language is a vast dialect spread of language varieties that are mutually intelligible to all its members. These language varieties have minor differences from one place to another, pretty much in the same way that dialects of any language have minor differences. If you go to Britain you will find dialectal differences between Devon and Norfolk and Yorkshire and up into the lowlands of Scotland. But this is spread over a much wider area. All varieties in my experience are mutually intelligible, although varieties from either ends of the dialect spread have significant differences. The Western Desert language is called that because there is

no emic or native name for it. The labelling applied to the Western Desert language is extremely tricky for people who aren't used to it because the labels are ephemeral. They – the labels do ***not*** map onto actual linguistic differences and real linguistic differences are ***not*** necessarily labelled and often the labels are ***not*** even linguistic labels. And – and when I say they're ephemeral, they're often made up on the spot and could be used for a little while and then discarded, and I think in my – one of my reports I give an example of that from the Northern Western Desert. There's also an excellent essay by the late anthropologist Ronald Burnt [sic], and I think he wrote it in about 1973, called On the Concept of the Tribe in Western Australia, in which he points out in the Leonora Laverton area there – I think, was something like, if I'm remembering right – something like 80 labels that were applied to essentially what is one language and one dialect of one language. And these labels are coined to describe particular words that some people use that might ***not*** be used by other people, so words for "this" are typically used because the words for "this" vary from place to place. And words in the Western Desert, words for "this" in the Western Desert can be "na" and with a particularising suffix it would be "na" and with another kind of suffix it could be "na tha". And if you had the group-label suffix to that you get "na dhurra" and "na tha dhurra" and, further north, the word is "gnaya" and that group label added to that would give you "gnaya djata". And all these are labels frequently found in the literature. Other – over in the east words for "go" are commonly used as ways of describing the way you speak, so in the north of South Australia, far north of South Australia, the word "verbeyuningee" which has an infinitive stem from "yungcuncha" is used as a verb of motion, and those people refer to their speech "yungcuncha djara" whereas north of them another verb of motion is used with a stem from "pidjunja" and those people refer to themselves are "pidjunja djara" and they use those forms simply to – as, I guess, indexical terms that 5 distinguish to what they see as two separate ways of speaking.

... And, historically, in the 1930s those same people, who now refer to themselves pidjundjara used another verb of motion, "wudjaparkanee" and they refer to themselves as "wudjarapkandjara", and that's documented by the linguist and 10 missionary, JRB Love, who worked there in the nineteen thirties and forties. So labels are very ephemeral. Dr Clendon noted that Badimaya was spoken in a large area to the south-west of the claim area: Lake Moore, Nhingan Station and Paynes Find (all of which are ***not*** far to the south of Mount Magnet). Wajarri was spoken to the west and north-west of the claim area. The latter was used for its own sake and as a proxy for Central Badimaya. Dr Clendon used Western Desert language varieties (Mantjintja) represented by an informant of Ms Bates called Thuradha (Thurratha) from the Cosmo Newberry area, north-east of Laverton. He also used texts provided to him from the Sceghi family of Leonora, who spoke Tjuparn and were the last known surviving speakers of this Western Desert dialect. I note the State did ***not*** contest Dr Clendon's evidence that Tjuparn was a Western Desert dialect. His evidence, which I accept, is that these two dialects showed close similarities to each other. In respect of Ms Bates' transcriptions, Dr Clendon's opinion was that:... transcription is always difficult and it's perhaps quite unfair to comment from a perspective where we have access to modern methods of discovering – of doing ... analysis and discovering a ... of a language. Comparing this to someone who was essentially ***not*** a linguist, and who was working without the benefit of modern understanding of linguistic analysis, I would say her transcriptions are extremely good, in that – in the context of the historical period. Dr Clendon explained the feature of multilingualism which he said was common in the Western Desert and more broadly, in the following terms:Multilingualism in traditional Australia was the norm. It was helped by Australian languages, especially in this area, having an absolutely, or near absolutely uniform phenology. So if you're an English speaker learning French, you have to learn a lot of sounds that English speakers don't use. You have to learn to make nasalised vowels. You have to learn that primary stress in French goes on the final syllable of a word as opposed to where stress is placed in English words. You have to use sounds in combinations that are quite foreign to English, whereas in Australian language the phenology was pretty much uniform so you didn't have to master a distinct set of sounds. You just needed to master – you just needed to know words in a neighbouring language, which made language learning extremely easy – well, I don't – I will say it made language learning – it facilitated language learning, and people were habitually multilingual and took pride on being multilingual. It was a sign for males. It was a sign that you had travelled widely on ceremonial business, that you had travelled widely among different people and that you knew the languages of different people. His analysis of Daisy Bates' word lists given to her by her informant Jinguru led Dr Clendon to the following conclusions about Jinguru's language, recalling he was a man who identified himself with the Lake Way area, just to the immediate north of the claim area. Dr Clendon concluded that Jinguru's natal or most regularly used language was a variety of the Western Desert language; although it was heavily influenced by

Central Badimaya, and possibly also by Wajarri. Jinguru was bilingual, or more likely trilingual in these languages, and moved habitually and easily between all three languages. In his first report, Dr Sackett referred to a 2006 publication of Dr Clendon where he said:A distinct, regional variety (dialect) of the Western Desert Language appears to have been spoken within an area which took in Lakes Nabberu and Carnegie in the north, and Menzies and Laverton in the south. In the west this speech variety was bounded by the Kartu languages Wajarri and Badimaya (or varieties thereof) ... The label 'Tjupan' was probably used in the north of this area, and another label 'Walyiny' may have been used in the far south ... Between these two, the label 'Koara' appears to have been used. Dr Clendon was ***not*** able to identify the position, in the sense of a geographical line, of his phrase "in the west". He did ***not*** say there was any clear geographical demarcation between Western Desert and non-Western Desert languages. However, I accept Dr Clendon's opinion (supported, it seems to me by Dr Sackett's opinion in his supplementary report at [222]) that the drawing of lines and boundaries in this way is an inapposite approach to these issues. One of Dr Clendon's key conclusions is expressed as follows:[T]he northern Goldfields region, including the area of the Tjiwarl Claim, was occupied at sovereignty by people speaking a distinct variety or dialect of the Western Desert Language. This dialect has been referred to by a number of labels by a number of writers, but most consistently by the terms Mantjintja or Mantjintjatjarra. He then noted that Mantjintja in turn had at least two regional sub-varieties: one in the east, also called Mantjintja, as represented by the speech recorded by Thuradha; and one in the west, called Tjuparn (amongst, he said, other names), as represented by the speech recorded by Jinguru (Lake Way), and by that of the Sceghi family (Leonora). He considered Tjuparn seemed more heavily influenced by Wajarri and Badimaya as non-Western Desert languages. Yet, as the State points out in its submissions, Dr Clendon later in his report expressed some opinions, after considering the contents of Dr Brunton's report, which might seem ***not*** entirely consistent with this opinion. In his report at [49]-[50], he said:... in my conclusions to the Sir Samuel & Tjupan no 2 Report I stated that in the northern Goldfields region the Western Desert Language was bounded in the west by Wajarri and Badimaya. I made and do ***not*** make any claims about where exactly this boundary was, except that the boundary must have been fuzzy and highly mobile. Given the nature of the terrain, and its very small carrying capacity for humans, the pre-contact population of the Tjiwarl Claim area must have been small indeed. It would take the movements of only a few people to drastically alter the demography of such a relatively small, relatively infertile region. In such circumstances the location of a putative boundary must have fluctuated wildly as people came and went, as marriages were contracted, and as people died.

... in my understanding, the question of whether or how much of the Tjiwarl Claim was occupied historically by speakers of the Western Desert Language seems to miss the point that comes out of the linguistic investigations I have undertaken so far. The most likely answer to this question is probably that Western Desert speakers occupied all of the claim area, and that Wajarri and/or Badimaya speakers also occupied all of the claim area. In any instance, Western Desert speakers and Wajarri or Badimaya speakers may or may ***not*** have been the same people. In a region with very low population density, and where it was likely that everyone could find a Wajarri speaker, a Badimaya speaker and a Western Desert speaker in their immediate ancestry, disentangling linguistic identity might seem to be a fruitless exercise.

(Footnotes omitted.) In his supplementary report, produced after having access to further Badimaya language resources, Dr Clendon seems firmer in his opinion that the word lists show a "significant amount of mixing" of Badimaya and Western Desert words in the same sentence. He concludes that his further analysis provided "support for the conclusion reached in my primary report, namely that the Western Desert Language and the Kartu languages Badimaya and Wajarri were all spoken at sovereignty over the area of the Tjiwarl Claim." This mixing of language, and dialects, was ***not*** something Dr Clendon believed Ms Bates would have recognised. He gave the following evidence in cross-examination about Ms Bates' methods and what we can reliably accept she did and did ***not*** know:---And I would imagine a situation where there's four men sitting with her, and one of them offers a response in a Western Desert language, another one offers a response in, perhaps, Badimaya, or, perhaps, the same man offers her – gives her three different alternatives.

Okay. So she, in your mind, was actually engaged in a slightly comparative exercise in that sense?---Well, no, she would ***not*** have known that they were different languages.

Okay?---I mean, she was ***not*** a linguist. She appeared – everything I can see – especially, the fact that she wasn't distinguishing between languages – she did ***not*** know that she was being offered two or three different languages. Later in cross-examination, Dr Clendon explained how he considered this mixing, and multilingual developments, could have occurred. He gave the following evidence:[MR RANSON]: So there's an inherent difficulty, isn't there, with drawing lines on the ground, because – this seems to me to be the point you're making: language attaches to people rather than ***country***, in a linguistic sense, and, as those people are moving around, as you say in paragraph 49, that's – that's where the language is?---Yes.

So is that the point you were trying to make, there, effectively?---Partially, because, traditionally, people were – people were ***not*** free-floating. They were anchored to particular places.

Yes?---But that, as people moved between places occupied by various relatives, and as people married, and as people died, over time, that would have altered, I guess, the linguistic mix of any particular area in a boundary zone.

All right?---But I wasn't saying that people were floating completely free of any attachments to particular areas of land. He also appeared, as counsel for the State pointed out to him in cross-examination, to have modified his opinion about where the "transition zone" (as he called it) was between Western Desert dialects and non-Western Desert dialects:... there seemed to me to be a slight shift in opinion, which was, in fact, sort of, what I was getting at, which is – this is at paragraph 24 on page 12 – you set out a series of conclusions, but one of them was:The claim area was just to the east of a wide and fuzzy transition zone –and that seemed to me to be a slight shift from your earlier opinion which was that it was in a fuzzy transition zone?---Yes. Yes, it is. And that shift was based on the more complete analysis I was able to do with the dictionaries available to me.

(Emphasis added.) I am ***not*** confident Dr Clendon's answer here grappled with this issue, because his access to Badimaya dictionaries occurred after the completion of his first report, and it was the contents of his first report to which counsel was here referring. Dr Clendon resisted the idea of boundaries, which in my opinion is why he spoke of "transition zones" and "fuzziness". He explained this in response to a question I asked him:---I don't think it's an emic boundary, from my knowledge of other people who – who have full control over their languages. What Aboriginal people in these places tend to do, in my experience, is indicate a series of places, and these places will be named as belonging to particular families. They never – they characteristically do ***not*** speak in terms of boundaries. They name places that belong to particular families, and those families may speak one language or they may speak two languages. For instance, there's a – a family name in the Great Sandy Desert, Girriwadi. And members of that family speak both the Manjtjiltjara dialect of the Western Desert language and Wanman language as a distinct language, but the sites all belong to them – the places all belong to them. I don't know how you draw a non-fuzzy – I don't know how you draw a boundary there. You would have – simply have to say a zone where on one side of that zone the Manjtjiltjara is spoken, on the other side Wanman is spoken. Dr Clendon was cross-examined also about his opinion concerning the geographical extent of the Tjupan language, which was that it extended from around Lake Carnegie in the north down to Menzies in the south. What was less clear was how far to the west he considered it extended. He accepted in cross-examination that these regions were to the east of the claim area, but agreed he could ***not*** say how far Tjupan may have spread west into the claim area, although he accepted later in his evidence it went as far south as Laverton. Laverton is still in the eastern half of the claim area, if one examines the claim area from an east to west perspective. What Dr Clendon was ***not*** substantially challenged on were those passages in his first report where he seeks to place language spoken by Aboriginal people in its wider context, in terms of how Aboriginal societies functioned under traditional laws and customs. It is appropriate to extract the entirety of these passages:What emerges from Bates' work relating to the northern Goldfields region at sovereignty is a picture of a single society that was multilingual in the Western Desert Language, Wajarri, and Badimaya.

Exogamous marriages and joint ceremonial and exchange activities reinforced the status of individual families and of extended families as units or links within a social and linguistic network spreading over what must have been almost the entire arid zone of Western Australia, and perhaps beyond. This situation is characteristic of societies with low population densities in landscapes with scarce resources and in the absence of geographical barriers. When called upon by Bates or others to nominate affiliation to a group, people in this region appear to have been able to volunteer or evince a number of linguistic identities, without contradiction or inconsistency

I have some difficulty with regard to the notion of a 'Western Desert Cultural Bloc;' I think this construct could only be useful if decoupled from language. In the Goldfields region it is clear that a single, dispersed but interconnected society cut across language boundaries, fuzzy and variable though these boundaries may have been. Similarly, in the north of Western Australia emic accounts of life in the desert before contact...make it clear that, for example, people speaking varieties of the Western Desert Language mixed with people speaking Nyangumarta, Warnman and Mangarla, and interacted socially, matrimonially, religiously and economically, again as family units in a single, dispersed, interconnected society.

Bates, as nearly all other observers among 'primitive' people until recently, was working within a model of society that equated race with culture and with language, which together constituted the bounded ethnic group; this last being a largely theoretical construct coming out of a European political ideology which partitioned landscapes along just these lines.... Australian society in the arid zone, in contrast, appears to have consisted of networks of kin and ceremonial totemic or 'dreaming' relationships that frequently operated over considerable distances and in more than one language. Individuals identified with their places of birth or childhood, and held these places to be their homes, with their extended home ***countries*** radiating thence outwards in a core – fadeout disposition ... Individuals were and are the embodiment of the intersection of the four lineages represented by their grandparents. This understanding of social identity, and of society and sociality more generally, was and is ***not*** confined to speakers of the Western Desert Language.

(Citations omitted.)

My conclusions Considering all of his evidence, and in particular the passages I have just extracted, I do ***not*** see there is any necessary inconsistency in Dr Clendon's various statements. In my opinion, in these passages he is emphasising the multilingual character of the likely occupants of the claim area at sovereignty and at first or early contact. He is also emphasising, at [27] of his report, the extent, in traditional societies, of social, matrimonial, religious, and economic interaction, which is also a feature of some of the information recorded by Daisy Bates. However, what he is also making clear is that there was a point to the west at which the predominant or notable use of Western Desert language gave way, or diminished considerably. He is, correctly, unwilling to draw a line on the map about where that point was. The critical aspect of his evidence is the preponderance of Western Desert language extended throughout this claim area, and came from movements of people from the east of the claim area. How much further west it went is ***not*** a matter which needs to be decided. Finally, Dr Clendon's opinion is that in circumstances of multilingual informants, a claim made by a person's affiliation with a particular dialect or language label could well be part of a claim to inherited rights of affiliation to land or Dreaming, rather than a claim about what language that person actually speaks in mundane day-to-day situations. Whether or ***not*** this was a motivation at work with Ms Bates' informants cannot be stated with any certainty, but it also cannot be discounted entirely. This, it seems, to me, is part of the reason Dr Clendon adhered to his views about the significance of a claim of Western Desert dialect by the words given to Ms Bates by her informants and their self-indication with the pronoun "ngayu" as a speaker of Western Desert dialect. I consider that Dr Clendon's opinions are consistent with, and supportive of, the view I have taken of other aspects of the evidence in this proceeding.

Connection: the relevance of other decisions and determinations close to the claim area The parties made various references to other determinations, and judicial decisions, dealing with land close to the claim area. In this section, I set out how, if at all, I have relied on those other determinations and decisions, and why I have taken the approach I have.

Wiluna and Tarlpa consent determinations In 2013, McKerracher J determined three native title applications by consent. Two were known as the Wiluna and Wiluna #3 applications, and one as the Tarlpa application: see Wiluna [2013] FCA 755. The Tarlpa application covered an area of approximately 2,265.26 square km to the south of the township of Wiluna, and adjacent to the northern boundary of the claim area. There was no evidence any of the claim group members in this proceeding were members of the claim group in that application, but I am ***not*** discounting the possibility. The Wiluna application covered approximately 47,595.90 square km. The Wiluna #3 application covered approximately 3,596.52 square km. The westernmost section of the Wiluna native title determination is to the north of the Tarlpa determination. Included in this is the township of Wiluna, which is only about 35 km north of the northern side of the Tjiwarl claim boundary. The following claimant witnesses are native title holders under the Wiluna determination: Ms Wonyabong, Ms Tullock, Ms Harris, Mr Victor Ashwin, Mr Henry Ashwin, Mr Allan Ashwin, Mr Richard Narrier, Mr Keith Narrier, Ms Narrier, Ms Geraldine Hogarth, and Mr Patterson. At least two apical ancestors in the Wiluna determination are also identified as apical ancestors in the present application: namely, Scotty Tullock and Alfie Ashwin. There was also a considerable amount of evidence in this proceeding about the conduct of law business in Wiluna, and the fact that the claim group members (and their families, where necessary) go to Wiluna for law business, including initiations. One of the consequences of the State's contentions in this case is that there could be nothing in accordance with traditional laws and customs about sending young men from the claim area for initiation at Wiluna. That is because those young men would hold no rights and interests in the claim area in accordance with traditional laws and customs. They would be invaders, usurpers. However, the evidence shows that, in this kind of interaction, other Aboriginal people – Western Desert people – recognise the claim group members' rights to ***country*** and are key participants in the passing down of knowledge about that ***country***, allowing ceremonies on their own ***country*** to be used for that purpose. It seems an obvious inference, and one I am prepared to draw, that the elders in the Wiluna area who permit this to occur do so because those young men are recognised as having rights to ***country*** in the claim area in accordance with traditional laws and customs, and are ***not*** seen as recent arrivals who have imposed Western Desert law on that ***country***. This is consistent with the evidence of Mr Patterson, a senior elder from Wiluna. In his first report at [49], Dr Sackett noted his conclusions about the Wiluna and Tarlpa claims:After reviewing the available evidence, both ethnographic and linguistic, I concluded that:the ethnographic evidence leads me to the to the view that the eastern portion of the Wiluna claim area was/is part of Western Desert Society. Moreover, the combination of the ethnographic evidence and linguistic evidence lead to the view that the western portion, and indeed the entirety, of the Wiluna claim area was/is part of Western Desert Society...

(Citations omitted.) Dr Sackett also expressed the following opinion:That the Wiluna and Tarlpa Claim areas fall with the Western Desert means that a number of the places associated with various of the named Tjiwarl apicals and various of their ancestors lie in the Western Desert. This includes: the lands along the Wiluna-Wongawol Road, Carnegie Pastoral Lease, Wongawol Pastoral Lease, Windidda Pastoral Lease and the former Yelma Pastoral Lease. By extension, it also would include the area south of Mangkali, which itself lies to the east of the Wiluna Claim area.

(Emphasis in original.) Dr Sackett's general conclusion was:It is accepted that the places/areas of 'origin' of some named apicals and many of their ancestors lying in and to the east of the Wiluna Claim area are Western Desert places/areas. It is my view, and this is grounded in material I explore below ... that theTjiwarl Claim area, like the Wiluna/Tarlpa Claim area to its north, lies in the Western Desert. It as well is my view that as the Tjiwarl Claim area lies in the Western Desert, so too do those places/areas to the east of it with which some named apicals and some of their ancestors are associated. These conclusions were built on a foundation of fact and opinion arising from the circumstances of the Wiluna and Tarlpa claims, which bear some considerable resemblance to the circumstances of the current claim. They should be referred to in some detail. In his Tjiwarl Registration Report, Dr Sackett described the work he undertook for the Tarlpa and Wiluna claims, each of which eventually resulted in a consent determination. He said:As noted in my brief, I prepared a 2009 report on "the extent of the Western Desert". In this report, which is titled The Wiluna Native Title Claim and Western Desert Society, I focused on "whether or ***not*** the lands embraced by [the Wiluna and Tarlpa Native Title claims] fall (1) outside, (2) partially in, or (3) wholly within the embrace of the Western Desert society." I did this for a number of interrelated reasons.

First, my research showed that most Wiluna claim group ancestors and some senior claimants were ***not*** indigenous to the claim area, but had moved there from ***countries*** to the north, northeast and east of the claim area, specifically from lands of the earlier Martu, Birriliburu and Ngaanyatjarra claims. These latter were areas [where] people made claims to ***country*** through Western Desert law and custom, ie through the laws and customs of the Western Desert society.

As I noted in my report in support of the Birriliburu claim, like others in the Western Desert:the claimants' land tenure system offers a degree of scope for making claims to ***country***. Put another way, it presents people, especially today's more senior claimants, with various avenues along which they might link to ***country*** and ***country*** owning groups. These include, though are ***not*** necessarily limited to, having: been found [in spirit form], ie conceived, in the area,

been born at a site in the area,

grown up in the area,

lived in the area for many years and come to know its physical and mythological landscapes,

been initiated in the area,

had a parent or grandparent from the area, or

had a parent who died and is buried in the area, or ... grandparent who died and is buried in the area ...Second, those ancestors and the Wiluna/Tarlpa claimants themselves likewise made claims to the Wiluna area through Western Desert law and custom. For example, and again as I noted when considering Birriliburu law and custom:At a 24 August 2000 meeting at Wiluna, Wiluna people ... spoke of the situation with respect to people and ***country*** in the Wiluna area. As Mr P/Billy Patch put it, to murmurs of approval: if a person was born in Wiluna and was sent or moved to Perth, they always can come back: "that's [ie Wiluna is] his home."

if such a person had children, these children too can move to Wiluna – to "follow" their mother or father.

"Only one thing, if he is a boy he still gotta go through the Law [ie be initiated into manhood]."

"Long as father's or mother's ***country*** he can walk around free ... He [merely] gotta learn where ***can't*** go [ie what places must be avoided]".Third, this being the case, it was important to ascertain whether the Wiluna claim area itself sat inside or outside of the Western Desert. If the Wiluna claim area lay/lays inside the Western Desert/Western Desert society, Western Desert peoples from elsewhere (such as claimants' ancestors and some senior claimants) could, through Western Desert law and custom, make claims to it. Similarly, their descendants too could make claims to it. However, if the Wiluna claim area stood, in whole or in part, outside the Western Desert/Western Desert society, claimants' ancestors and claimants could ***not*** have made claims to those non-Western Desert lands.

In my 2009 report I relied heavily on the findings of earlier ethnographers: principally the findings of Daisy Bates, along with those of Norman Tindale, Jo Birdsell and Jud Epling, Ron Berndt, and Ken Liberman. I also turned to the findings of linguists Wilf Douglas (with the non-Western Desert Watjarri peoples), Leone Dunn (with the non-Western Desert Badimaia peoples), and Mark Clendon (with former Sir Samuel claimants).

After reviewing the data in some detail, I opined in summation that: the ethnographic evidence leads me to the view that the eastern portion of the Wiluna claim area was/is part of Western Desert Society. Moreover, the combination of the ethnographic evidence and linguistic evidence lead to the view that the western portion, and indeed the entirety, of the Wiluna claim area was/is part of Western Desert Society...

By my reading, that this was/is the case meant that Western Desert people who had and have shifted to the Wiluna and the adjacent Tarlpa claim areas from Western Desert lands to the north, northeast and east of those claims, could and can, by Western Desert law and custom, make claims to the lands of those claim areas.

(Emphasis added; citations omitted.) Dr Sackett then notes that he undertook a "similar exercise in respect to the Tjiwarl claim area and claimants". The first point he makes about this in the very next paragraph is:My research indicates that, as was the case in respect to the Wiluna claim, most – possibly all – Tjiwarl claimant ancestors came to the claim area from places outside it. Specifically, they came from the lands of the Birriliburu, the Wiluna, the Mantjintjarra Ngalia, and the Ngaanyatjarra claims to the north, northeast and east. A couple of examples of named apicals and their descendants follow. In their final submissions, the applicant contended that the fact that many claim group members in the current proceeding are native title holders in the Wiluna determination is ***not*** relevant to a finding whether native title exists in the claim area, nor can it be used to support such a finding. I confess to ***not*** understanding why such an absolute contention is made by the applicant. In circumstances where the key issue in this case is whether the land in the claim area was part of Western Desert ***country*** at sovereignty, the fact that ***country*** immediately to the north, on the same longitude, is – by agreement of the State rather than after any contested determination process – accepted to be Western Desert ***country*** – would seem to me to have some relevance. That is especially so when the opposing thesis – proposed by the State – depends on the proposition that land in the Tjiwarl claim is too far west. It is to be recalled of course that the Wiluna determination is a judgment by this Court of the existence of native title over the determination area, and accepting it is a long way from determinative, there are at least three factors which in my opinion give it real significance. First, the area of the Wiluna determination is a long way west of the so-called "Berndt line", marking out the allegedly westernmost area of Western Desert ***country***. On the map handed up by the State during the hearing (which was taken in to form part of exhibit A3), and in the extracts from Professor Berndt's book tendered in evidence, it can be seen that the "Berndt line" is well to the east of Lake Darlot, and extends in a north-easterly direction through the centre of what was the Mantjintjarra Ngalia claim (part of the unsuccessful Wongatha claim heard by Lindgren J), with the "line" heading to the east of Lake Carnegie. That part of the "line" is broadly on the same latitude as the Wiluna determination area. Second, a very substantial part of the Wiluna determination area is also west of what is identified by the State in opening submissions as the "Menzies-Lake Darlot line", which is a term derived from Lindgren J's judgment in Wongatha at [702]. What Lindgren J found in Wongatha (see [702]) was that at sovereignty the culture of the "Western Desert Cultural Bloc" extended to the "Berndt line", and then "faded out gradually" west of it in a zone that came to an end at the Menzies-Lake Darlot line. As I understand both Lindgren J's reasoning, and the State's submissions in the present proceeding, including the way the "Menzies-Darlot line" is marked on the State's map in evidence, the "Menzies-Darlot line" is said to extend further north and south (or, at least, further north) than its actual marking on the State's map. This must be the case because it is clear from Map 11 in exhibit 3 (which shows the claim boundaries for all the claims which made up theWongatha claim) that the Wongatha claim extended north much further than the upper end of the "Menzies-Darlot line", shown on the State's map. In other words, there is an inconsistency between the proposition that:(a) the "Menzies-Darlot line" (running north–south to the east of the Tjiwarl claim area, but extending north right through virtually the middle of the Wiluna determination area) marks the end of the fading out of Western Desert Cultural Bloc; and

(b) all of the land in the Wiluna determination is Western Desert ***country***. Third, given the findings by this Court in the Wiluna consent determination, the fact that the evidence in this proceeding shows that young men from the claim group go to Wiluna to be put through the law, and that they are being put through the law in respect of their ***country*** in the claim area, suggests that the Western Desert lawmen in Wiluna see the claim area as Western Desert ***country***. Indeed, that was precisely the evidence of Mr Patterson:I am a member of the Gingirana native

title claim group. I am also a native title holder on the Birriliburu determination, the Martu determination and the Wiluna determination.

I am a senior wati and elder. I went through the law in Jigalong when I was about 15 years old at that time. Since going through at Jigalong, I've done a lot of law business at Bondini [Reserve, in Wiluna], at Jigalong, and at many other places in Western Australia and South Australia; even in the Northern Territory. Today, I am one of the leaders of law business in the Wiluna and Jigalong areas.

...

My mum remarried twice: first to Tinker, and then to Paddy Long, who grew me and my sisters up. Paddy was a Putijarra man and his language name was Majunka. His ***country*** was around Beyondie Station, Katjarra and Well No 6 and Well No 7 (Milyiniri) on the Canning Stock Route. Paddy grew me up until I was a man. I called him my father and he called me his son. He did all the things for me that a father normally does for his son. I follow him for ***country***.

...

I ***can't*** talk for the area of the Tjiwarl claim. That's ***not*** my ***country***.

One of the Narrier brothers are good blokes to talk to for that ***country***. The Narriers speak for that ***country***. Their father came from that ***country***. Beasley [Mr Keith Narrier], he's the right one, he's the right people. Beasley lives in Wiluna.

...

Those families would come up to Wiluna for law business, and I saw them at Bondini Reserve. They'd come from the south. The Narriers and Redmonds were the two lots of families I would see at law business in Bondini [Reserve]. Some old people that stopped in Leonora, they were there too. I didn't really know them.

Some of the wati for that [Tjiwarl] ***country*** are in Leonora. If you ask Beasley [Mr Keith] Narrier, he'll tell you who they are. They used to be doing the same law as in Bondini. Some of the young fellas from Leonora still come up to law in Bondini; I don't know any of their names.

The Ashwins, like Victor, Henry and Alan, they're the right lot for that ***country*** too. Victor and his brothers, they can speak. When I was a young boy, Alfie Ashwin grew me and Miparl [Frankie Wongawol] up at Wongawol station. We were working there as stockmen, cattle mustering. He told us his ***country*** was around this [Tjiwarl] area. He didn't talk much about the law because we were just boys, hadn't been through the law yet.

The tjukurrpa is the story – the Law – about the ***country***. It is passed down from the old people. It started in the beginning; in the dreamtime. Tjukurrpa makes special places. From the dreamtime, we pass it on from generation to generation. It is still alive today. Tjukurrpa tells us about ***country***: how to look after it, where the special places are, and how to travel through ***country***. Tjukurrpa is still alive today.

It's the same tjukurrpa in that Tjiwarl claim area as my ***country***. My ***country*** is up north – but it change the language and so we leave it to that lot. It's the same tjukurrpa. But that's for the mob who talk for the area to talk about. Different people have different responsibility for different parts of the tjukurrpa. It's like bumping into someone else on the land; you got to keep to your side. Like I keep to Katjarra, and the Gingirana side.

The desert law goes all the way to South Australia, the tjukurrpa moves east. It comes through this Tjiwarl area now. That Meekatharra way is a different law, I ***can't*** talk their language and they ***can't*** talk my language. The Gascoyne, Mt Augusta and that area, it's different too.

...

Those families [Ashwins, Redmonds, Narriers] have always been there [Tjiwarl claim area], right through. When that mob were there for that Yakabindie mine, they were getting the rations there. It was Beasley's old people, his father and uncles there.

...

Best to get them lot in the group now to talk for their ***country***. You can get Beasley [Mr Keith Narrier] to talk for his ***country***. That's a rule – because he's the right person. All the Narriers and Redmonds, they can talk. You got to talk to them right lot. All decisions about ***country*** have to be made by the right people. Important decisions about ***country*** have to be made by the senior people for the ***country***. Mr Patterson was ***not*** required for cross-examination, and his evidence was otherwise unchallenged and uncontradicted. I accept it. Far from being irrelevant, or of little weight, all of the three matters to which I have referred are consistent with the contents of this Court's reasons for determination in the Wiluna proceedings. Indeed, parts of McKerracher J's reasons are more than consistent: they reflect with considerable precision the opinions of Dr Sackett which I have accepted in this proceeding, and they reflect the very thesis put forward by the applicant in this proceeding, which I have also accepted. At [14] of the reasons for judgment in Wiluna (which included the three applications – Wiluna, Wiluna #3 and Tarlpa), McKerracher J said:The joint submissions in support of the Minute and Dr Sackett's filed report provide the following information regarding the applicants' connection to ***country***:(a) the Wiluna and Wiluna #3 applications take their name from the township of Wiluna and the Tarlpa application takes its name from a significant rockhole known as Tarlpa, in the south of the proposed determination area;

(b) the applicants are members of the broader Western Desert cultural bloc, the relevant 'society' for native title purposes;

(c) being members of the broader Western Desert cultural bloc, the applicants share a body of law and custom with other Western Desert native title holding groups including shared beliefs, rituals and gathering for ceremonial purposes;

(d) the applicants' fundamental belief in the Jukurrpa ('the Dreaming' or 'simply the Law') is the source of Western Desert law and custom to which the applicants adhere, and governs their religious practices, social rules, systems of land tenure and other aspects of their lives;

(e) the applicants are an identifiable subset of the wider Western Desert cultural bloc who have rights and responsibilities to the land in the proposed determination area in accordance with Western Desert law and custom that recognises that certain individuals and family groups are associated with particular areas of ***country*** within the proposed determination area (with a degree of overlap or 'shared ***country***');

(f) many of the applicants live at Kutkububba, Bondini, Windidda or in the township of Wiluna which are all within the proposed determination area and describe themselves, along with people from other parts of the Western Desert, as Martu;

(g) the applicants are also able to trace connection to ***countries*** north, northeast and east of the proposed determination area and some antecedents and/or senior claimants came to the proposed determination area from more remote traditional Western Desert homelands;

(h) traditionally the mechanisms for association with areas of land in the Western Desert included being conceived, born, grown up or initiated on ***country***, or by having acquired knowledge of the ***country*** through long traditional association, or being descended from a person who had those connections. As a result, landholding groups were ***not*** patrilineally-patrilocally structured but rather members of these groups were landholders through their shared associations with and to land, and the groups were open and inclusive so that people had potential access to a number of areas through a variety of means;

(i) in the eastern part of the proposed determination area, the applicants have an ancestral connection to those who occupied the area at or around the acquisition of British sovereignty;

(j) in the western part of the proposed determination area, which it is agreed is within the areas traditionally associated with the Western Desert, there is limited ancestral link between the applicants and those who occupied the area at sovereignty. Rather, during the period of about 1925 to 1975 the applicants and their antecedents migrated into the area, mostly from areas to the north east, and over time rights were acquired in that area consistent with Western Desert traditional law and custom; and

(k) the Western Desert system of law and custom remains vital for the applicants who have an intimate knowledge of the law and custom including an extensive knowledge of Western Desert dreaming tracks and associated sites, stories and songs, and their importance in the context of the broader Western Desert (with associated restrictions on women, young men and children). This includes acceptance by the applicants of responsibility which attaches to acquisition of knowledge both in relation to land and generally and the need to transmit that knowledge to younger generations. This is grounded in a system of kinship under which roles and responsibility are known and acknowledged (including in relation to ritual, marriage, death/burial etc). Appropriate behaviour is expected, and sanctions for breach exist under law and custom. Language is generally spoken by the applicants and traditional names for people and places are widespread and generally known.(Emphasis added.) For those reasons, the conclusion I have reached on the evidence before me in this proceeding is consistent with the Court's findings in the Wiluna determination, and the recognition of the Wiluna claim area as Western Desert ***country*** tends against the hypotheses relied on by the State, and against the findings of Lindgren J in Wongatha.

The Birriliburu determination I propose also to refer here to the Birriliburu determination: Birriliburu [2008] FCA 944. Geographically, the Birriliburu determination area sits to the north and to the east of the Tjiwarl claim area, and north of the Wiluna determination area. I refer to it because that determination area was mentioned by many witnesses in this proceeding as an area from which some of their ancestors came, or had connections through traditional laws and customs. In that context, I consider it relevant to reproduce some of French J's conclusions in that matter. Again, I do ***not*** consider the fact that this was a consent determination to diminish the precedential or other value of what was said: his Honour still needed to be satisfied of the matters required by the NT Act. At [17] of Birriliburu, French J stated:Most of the claimants reside at Wiluna, Jigalong, Patjarr, Warnarn, Warakurna and Parngurr which are close to, but ***not*** inside, the proposed determination area. Together with people from other parts of the Western Desert they describe themselves as Martu. They share a body of laws and customs with other Western Desert groups. They acknowledge shared beliefs and rituals and gather for ceremonial purposes. Some of them are recognised native title holders in neighbouring Western Desert areas. It is agreed between the parties, however, that the claimants are identifiable as a subset of the wider Western Desert society, being members of 17

family groups and other individuals recognised as custodians with rights and responsibilities in relation to the proposed determination area in accordance with Western Desert laws and customs. They recognise, in accordance with their traditional laws and customs, that certain individuals and family groups are associated with particular areas of ***country*** within the proposed determination area. In Birriliburu, the native title holders were to be identified by relationships of descent from certain named apical ancestors: that is, the same method as proposed in this proceeding. That is notwithstanding the multiple pathways finding made by French J, to which I have just referred, which is similar to the multiple pathways argument relied on by the applicant in the present proceeding. At [22] his Honour noted, and (it can be inferred) accepted as appropriate, the parties' agreement that:... the narrowing of pathways to group membership and rights in land does ***not*** represent an interruption in the acknowledgment and observance of traditional laws and customs. It may represent a change or adaptation of those laws and customs, but it is agreed that the change or adaptation is ***not*** of such a kind that the rights or interests now asserted are no longer held under traditional laws and customs. Descent remains the means by which people acquire rights. I note also that, as his Honour observed at [23], Birriliburu was a claim where the claimants no longer lived in the claim area but his Honour did ***not*** see this as an impediment to the determination of native title in their favour because "they continue to assert their rights and carry out their responsibilities in accordance with their laws and customs". I should also make it clear that I do ***not*** accept the State's broad contention that the Wiluna and Birriliburu judgments can be put to one side because they relate to ***country*** the claimants' ancestors migrated from, whereas the Tjiwarl claim relates to ***country*** those ancestors migrated to. While it is true that the claimant evidence does disclose some ancestors came from around Lake Carnegie (which is located in the eastern part of the Wiluna determination area), the evidence does ***not*** support that proposition for the part of the Wiluna determination area immediately to the north of the Tjiwarl claim area, nor for the Tarlpa determination area, also immediately to the north of the Tjiwarl claim area. Nor does the evidence support that proposition for the Birriliburu determination area. Even if it were the case that all land and waters covered by these determinations could broadly be characterised as ***country*** the claim group members' ancestors "came from", in my opinion that would tend to support the claim rather than defeat it, because it would tend to suggest, as the applicant has suggested, migration within ***country*** with shared traditional laws and customs. That is precisely the findings made by McKerracher J in Wiluna at [14(j)].

Badimia The State seeks to rely on Badimia in at least two ways. First, from the perspective of the State's contentions about absence of connection, it was submitted that at sovereignty the relevant society in the claim area was one whose laws and customs were akin to the groups to the west, such as Wajarri and Badimia. For the reasons I have set out elsewhere in this judgment, I reject that proposition. In my opinion it is clear from the evidence, of both the claim group and Dr Sackett, that the Tjiwarl claim area is Western Desert ***country***. However, it may also be the case, based on those sources of evidence, that land and waters covered by the Badimia claim is less likely to be Western Desert ***country***. As Mr Bingham said in his evidence:Yamatji mob are that way, to the west. They used to have law but I think it's gone out now, they lost it all years ago. I don't know that mob over at Sandstone, they all Yamatji's from Cue, Sandstone, Mt Magnet. They all Wajarri mob, Badimia mob. Yamatji mob, they don't talk about what we talk about. They have another way of talking about it too, different language. They've got a different way to say it. We have one way, that we know. Second, the State submits the Court could reach the same kind of findings Barker J reached in Badimiaconcerning the arrival of the apical ancestors of the claim group into the claim area post-sovereignty, and the establishment of a non-traditional connection, through activities such as working on pastoral stations: see Badimia at [473]-[481]. For example, his Honour described the associations of the claim group members in that case with the claim area as "historical" rather than "traditional": see [476]-[478]. Barker J said:In this case, the evidence suggests, and the Court infers, that cultural information obtained by current claimants was ***not*** acquired from people who have been shown, on the evidence, to be engaged in any normative system of law and culture of the Badimia people that has endured from sovereignty. Rather, claimants possess a range of information that they have gained about the extent of Badimia ***country***, places or sites of importance, and cultural practices, otherwise than as a part of a normative system of traditional Badimia law and custom.

The life histories of the claimants who gave evidence – who are the principal members of the core group of Badimia people mentioned by Mr Robinson – tend to reinforce this conclusion. In most instances, they have been born or brought up away from the claim area and without any exposure to the laws and customs traditionally practiced by Badimia people. Their evidence does ***not*** provide any real detail of the laws and customs that their

ancestors followed in the generations before them, save to assert that at least the claim area is within what they understand to be traditional Badimia ***country*** and that they are Badimia because they understand their old people were Badimia people. Some know about some important beings, such as the Bimara, and try to protect and enjoy the land and resources.

While some of the claimants are closely connected as members of immediate families, there is little evidence today, or for many years, of a Badimia "society" or community identified by laws and customs having force. In that sense, the acknowledgement and observance of traditional law and customs has been replaced by some other force which binds the claimants and which is explained mostly by their historical association with the claim area and each other and their recognition of the cultural significance, in Aboriginal terms, of a number of places in the claim area. As my findings elsewhere demonstrate (in both the section dealing with the length of association of the claim group with the claim area and in my acceptance of Dr Sackett's opinions) I do ***not*** consider the claim group members have only a "historical" association with the land and waters of the claim area. In my opinion, they have a connection borne out of traditional laws and customs of the Western Desert.

Wongatha The applicant submits that the factual findings of Lindgren J in Wongatha and Sackville J in Jango cannot be used to support the State's contentions about the appropriate factual findings in this proceeding. The applicant submits the Court must proceed to make findings on the evidence before it, ***not*** adopt findings by another court, on different evidence. The applicant relies on two statements to that effect in Lindgren J's reasons themselves, where his Honour was explaining how he approached the previous decision of the Full Court in De Rose [2003] FCAFC 286; 133 FCR 325: see Wongatha at [305] and [501]. I accept this submission, and indeed Lindgren J took the same approach in Wongatha. The State is correct that there may be "some" overlap in the evidence before Lindgren J and the evidence adduced in this case, but that does ***not*** alter the task of the Court, which is to consider the evidence and the arguments for itself, as they were presented in this proceeding. In answer to the State's reliance on what was said by Lindgren J in Wongatha (at [301]-[303] and [704]) about migration to points of European contact, rather than in accordance with traditional laws and customs, the applicant made alternative submissions. Either his Honour's findings should be confined to the decision in Wongatha on the basis they were made on the evidence before him (a repeat of the more general submissions above); or if they were to be seen as statements of legal principle, they should ***not*** be followed. On this alternative, the applicant contends the Court should adopt the approach taken by the Full Court in De Rose [2003] FCAFC 286; 133 FCR 325, namely: whether the rights asserted are in accordance with traditional laws and customs, including any permissible adaptation post-sovereignty. The applicant submits there should ***not*** be a hypothetical comparison (as they submit Lindgren J undertook) with what might have happened had Europeans never arrived. I agree with the applicant's submission, although in my opinion Lindgren J's observations in Wongatha at [301]-[303] and [704] are concerned with his Honour's fact finding in that case, on the basis of contentions put to him in that case, rather than any broader statement of general legal principle. The State's submission on this matter is that "Lindgren J's statements of legal principle, for example, that migration to points of European contact is ***not*** an adaptation of traditional migration, are correct, apt and should be persuasive in this case." This submission contains a number of assumptions I am ***not*** prepared to make, and also misunderstands the point being made in De Rose. The correct question, as the Full Court in De Rose made clear, is:... whether the appellants possessed rights and interests in the claim area under the traditional laws acknowledged and customs observed of the Western Desert Bloc. If by those traditional laws and customs the appellants had sufficient links to the original native title holders as to acquire the status of Nguraritja for the claim area, that would be enough, provided that they retained, by those laws and customs, a connection with the claim area.

...

Unless Aboriginal people coming to the claim area from the west could ultimately be recognised under Western Desert traditional laws and customs as Nguraritja for sites or tracks within that area, they could ***not*** succeed in a native title claim (at least ***not*** one founded on their status as Nguraritja).

(Emphasis added.) In other words, the movement (or "migration", as the State would have it) need ***not*** be "traditional", whatever that is intended to mean. To impose such a gloss would be effectively to defeat claimants who were ***not*** living completely traditional lifestyles, and would be inconsistent with the recognition in Yorta Yorta that there can be post-sovereignty adaptation, so long as the normative effects of traditional laws and customs continue to be observed. Numerous subsequent cases have cited the relevant passages from Yorta Yorta with approval, or otherwise recognised that post-sovereignty adaptation is permissible within these confines: see, for example: Sampi v Western Australia [2005] FCA 777 at [961], [964]; Rubibi Community (No 5) v Western Australia [2005] FCA 1025 at [266]; Gudjala People #2 v Native Title Registrar [2007] FCA 1167 at [26]; Western Australia v Sebastian [2008] FCAFC 65; 173 FCR 1 at [119]; AB (deceased) on behalf of the Ngarla People [2012] FCA 1268;300 ALR 193 at [739]; Graham on behalf of the Ngadju People v Western Australia [2012] FCA 1455 at [49]; Dempsey (No 2) [2014] FCA 528; 317 ALR 432 at [129], [688]; Croft (on behalf of Barngarla Native Title Claim Group) v South Australia [2015] FCA 9; 325 ALR 213 at [640]; Rrumburriya Borroloola Claim Group v Northern Territory of Australia [2016] FCA 776 at [302]. The reasons that Aboriginal people moved from one area to another may be various. As I note elsewhere, one of the reasons which dominated the evidence in this case is that people moved to escape the violence of white settlers towards them, in particular the pastoralist Tommy Mellon. This could ***not*** be described as "traditional migration" (if there is such a concept) because it only arose after the occupation of Aboriginal land by a white settler. However, the reason for people moving may say little or nothing about whether those people had "sufficient links" with the original inhabitants of the claim area to be recognised as having the same kind of rights and interests in the ***country*** into which they moved, and to have been accepted as having those rights and interests.

CONCLUSION ON CONNECTION My findings depend, ultimately, on the view I have taken about the reliability of different kinds of evidence, and its provenance. I have preferred the evidence of the claim group members, and the opinions of Dr Sackett. In the absence of any challenges to the credibility of the claimant witnesses, or through them to the credibility of what their ancestors have told them, and passed on to them, concerning the nature and extent of their connection to the land and waters in the claim area, I consider it is more likely than ***not*** that:(1) First, the land and waters in the claim area are and always have been Western Desert ***country***.

(2) Second, those Aboriginal people who were in occupation of the claim area at sovereignty were Western Desert people who had rights and interests in the land and waters of the claim area in accordance with Western Desert laws and customs.

(3) Third, that some of those people were still in occupation and/or still alive when the claim group members' ancestors came into the ***country*** more permanently and shared knowledge of the Tjukurrpa with them, recognising the claim group members' ancestors as Western Desert people entitled to possess and exercise rights and interests in the ***country*** of the claim area in accordance with Western Desert laws and customs.

(4) Fourth, a considerable number of the relatives and/or ancestors of the claim group members were associated with, living in, and/or using land within the claim area in the late nineteenth and very early twentieth centuries. They were doing so in accordance with traditional Western Desert laws and customs. Those people included Ada Beaman, Biddy Foley (or Nyuringka), Koyl (or Jinguru), Rosie Jones (or Tjulyitjutu), Waiya, Jumbo Harris (or Tjampula), Mickey Warren and Ruby Shay.

(5) Fifth, the claim group members as a group recognise each other as entitled to those rights and interests and have continued to observe them in accordance with traditional Western Desert laws and customs to the present day. In terms of chronology, practicality and believability the claim group members have satisfied me of their connection to this ***country***. As part of summarising the approach I have taken, I refer to the description given by Selway J in Gumana at [211]:The evidence given by the Yolngu witnesses and the anthropologists in this regard is ***not*** inherently unlikely. It is ***not*** inherently unlikely that a person may have a legal right to exclude, but that others are entitled to assume that they have permission to enter and use the land in the absence of any express exclusion.

(Emphasis added.) I refer to this ***not*** as any substitute for the ordinary application of burden of proof, nor do I consider that is how Selway J was using these phrases. Rather, his Honour was referring to the believability of the Yolngu evidence in that case and why, considered in context, what the Yolngu witnesses said was likely to be the case. That is the approach I have taken here. What the claimant witnesses have said in their evidence about the Tjukurrpa in this ***country***, about the sites, their obligations and responsibilities, the laws which govern how they conduct themselves on ***country*** and relate to it, and how they relate to each other as a group is coherent and persuasive. It is likely that their ancestors learned about this ***country*** from old people, perhaps very few in number, who were still occupying the claim area when those ancestors came in. It is likely that some of the claim group members' ancestors had prior connections with this ***country*** in accordance with Western Desert tradtional laws and customs, and with its original occupants, before they came in more permanently. It is also likely, on the evidence, that some of the claim group members' ancestors had been in the claim area for some time prior to the work done by Daisy Bates to the north of the claim area. That is the conclusion I have reached after consideration of the genealogies. It is ***not*** possible to find on the balance of probabilities any more than these were Western Desert people living traditional lives in the claim area around the turn of the century. Were they the "original" inhabitants in the way the parties, and Dr Sackett, have used that term? Perhaps some were. Certainly, that is how Ms Bates treated Jinguru (Koyl), and the State seemed to accept that position. It is inherently unlikely that between about 1912 and 1930 there was absolutely no Aboriginal person left in or around the claim area who had rights and interests in the land and waters in the claim area which were derived from a pre-sovereignty period. It is inherently unlikely in times where traditional laws and customs were still relatively strong, a group of strangers – with completely different laws and traditions – moved into the claim area and made up Dreamings, sites, stories and imposed foreign law, on ***country*** that was traditionally associated with very different laws and customs, without objection and in a way which only a decade or two later, appeared to those who learned about it to have been going on since before European contact. I do ***not*** accept the State's written submission (at [132]) that the "Court must make positive findings in respect of the membership and geographical extent of the Western Desert Cultural Bloc" both at sovereignty and today (and during each generation in between). Aside from the use of the imperative, this submission is cast too broadly. It is ***not*** the task of the Court in this case to determine "the membership and geographical extent of the Western Desert Cultural Bloc". It is the Court's task to determine whether the applicant has made out their claim to native title, and whether the land and waters in the claim areas were held at sovereignty by persons who had rights and interests in that ***country*** in accordance with Western Desert laws and customs, and whether those interests were passed or transmitted to, or otherwise acquired by, the claim group members' ancestors, again in accordance with Western Desert laws and customs. It should ***not*** be any part of the Court's task to decide where the (in my opinion misnamed) Western Desert Cultural Bloc begins and ends. I say that without accepting such a task is possible, or desirable.

The claim group as a subset of Western Desert society The agreed position is that there is a "society" of people who are united in their observance of, and adherence to, the traditional laws and customs of the Western Desert. It is also agreed that within that broader society there are smaller landholding groups, which can be reliably identified in accordance with the principles in Yorta Yorta, as united in their shared observance of traditional laws and custom in relation to an area of land or waters. In De Rose (No 2), the Full Court (Wilcox, Sackville and Merkel JJ), found that the native title holders were a subset of a society comprising the Western Desert Bloc. The Full Court's consideration of this issue is set out as follows (at [38]-[40], [44]):It is hardly likely that the traditional laws and customs of Aboriginal peoples will themselves classify rights and interests in relation to land as "communal", "group" or "individual". The classification is a statutory construct, deriving from the language used in Mabo (No 2). If it is necessary for the purposes of proceedings under the NTA to distinguish between a claim to communal native title and a claim to group or individual native title rights and interests, the critical point appears to be that communal native title presupposes that the claim is made on behalf of a recognisable community of people, whose traditional laws and customs constitute the normative system under which rights and interests are created and acknowledged. That is, the traditional laws and customs are those of the very community which claims native title rights and interests. By contrast, group and individual native title rights and interests derive from a body of traditional laws and customs observed by a community, but are ***not*** necessarily claimed on behalf of the whole community. Indeed, they may ***not*** be claimed on behalf of any recognisable community at all, but on behalf of individuals who themselves have never constituted a cohesive, functioning community.

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

A person holding individual native title rights and interests, by contrast, may ***not*** necessarily share common characteristics, in relation to land or waters, with other members of that community under the relevant body of traditional laws and customs. Unless the traditional laws and customs provide for the individual rights and interests to be transmitted to other community members, they presumably will terminate upon the death of the holder.

...

If it is necessary to classify the rights and interests claimed by the appellants in the present case, they are best regarded as group rights and interests, rather than individual rights and interests. It is true that the appellants do ***not*** claim to be a discrete or functioning community and that the normative system on which they rely for their rights and interests is that of the wider Western Desert Bloc. But the appellants claim to be Nguraritja for the claim area and, by virtue of that status, they have common rights and responsibilities under the laws and customs of the Western Desert Bloc in relation to the claim area (although ***not*** necessarily in relation to precisely the same sites or tracks). Moreover, the appellants claim on behalf of all people who are Nguraritja for the claim area. The composition of that class will vary from time to time depending upon who can satisfy the rules identified by the primary judge for identifying Nguraritja ... On the appellant's case, native title rights and interests over the claim area will ***not*** cease on the death of the last survivor among them.

(Emphasis added; citations omitted.) In Birriliburu, French J recorded the following at [17]:Most of the claimants reside at Wiluna, Jigalong, Patjarr, Warnarn, Warakurna and Parngurr which are close to, but ***not*** inside, the proposed determination area. Together with people from other parts of the Western Desert they describe themselves as Martu. They share a body of laws and customs with other Western Desert groups. They acknowledge shared beliefs and rituals and gather for ceremonial purposes. Some of them are recognised native title holders in neighbouring Western Desert areas. It is agreed between the parties, however, that the claimants are identifiable as a subset of the wider Western Desert society, being members of 17 family groups and other individuals recognised as custodians with rights and responsibilities in relation to the proposed determination area in accordance with Western Desert laws and customs. They recognise, in accordance with their traditional laws and customs, that certain individuals and family groups are associated with particular areas of ***country*** within the proposed determination area. See also Wongatha at [536]-[537] (Lindgren J) and Bodney at [144]-[146] (Finn, Sundberg and Mansfield JJ). The description by French J is in my opinion particularly apposite here. The members of the claim group form a subset of wider Western Desert society. On the evidence, there is a shared acknowledgment of each other's rights and interests in the land in the claim area, albeit with clearly identified demarcations of which family groups, and which people within those family groups, can speak for different parts of the claim area. However, none of the evidence suggested there was any dissent from the view that all members of the claim group were united in their shared continued observance of traditional Western Desert laws and customs in relation to the way they hold and transmit rights and interests in their ***country***. There was ample evidence from the claimant witnesses about the way in which they recognised each other's rights and interests in the claim area. A summary is set out in the applicant's written submissions at [346]-[366]. As there was no real dispute about this issue, it is sufficient to note some examples of that evidence. Ms Wonyabong gave a comprehensive picture in her evidence of how the various family groups within the claim group fitted together, and which parts of the claim area

they were recognised by others as able to speak for, by reason of it being their ngurra. Much of the evidence I extract below is also relevant in relation to the multiple pathways still recognised by the claim group members in terms of rights and interests in ***country***.I'm connected to this Tjiwarl ***country*** more than Wiluna [recalling Ms Wonyabong is a native title holder in the Wiluna determination] because I grew up there. I was living there and working there. I'd rather claim Yeelirrie, Albion Downs, Yakabindie, and Mount Keith; this is my ngurra.

...

I can talk for Yeelirrie, Yakabindie and Albion Downs. I can talk for Mount Keith, because it is part of Yakabindie and Albion Downs really. I don't speak for Leinster, because I only ever went there on holidays, and I don't speak for the Booylgoo Ranges.

I wouldn't speak for places that aren't my ***country***. If someone asked me to go out to somewhere that wasn't my ***country***, like Booylgoo Ranges, I would say "I don't know that ***country***, it's ***not*** my ***country***". Keith Narrier or Brett Lewis, they could give the okay for that area. I might get growled at if it wasn't my place and I gave the okay.

...

All of the families on the claim can speak for Lake Miranda. That's because that is the tjukurrpa there – the one about the red sandhill and the lake.

Richard and Keith Narrier know the ***country*** of the claim area well. Roslyn and Graham Narrier, Jennifer Narrier, they all know of the stories right through. The story of the carpet snake comes a long way. Roslyn Narrier was told, by her mum Dolly Walker, that she had to look after the stories on the woman's side. Kado and Jennifer's mother, Dolly Walker, she told all her kids the stories. Kado knows all that ***country*** too, with Graham and Keith and Richard [Narrier], and he's been through the law.

My cousin Ted Tullock, he was born out at Jones Creek, where the dreaming for the water snake went through, running from the dragonfly. Ted Tullock's mother was living on Yakabindie and Yeelirrie a long time ago. Ted Tullock was my mother's nephew; his mother and my mother were sisters who came from Barwidgee, Darlot and the Tjiwarl claim area. Scotty Tullock, Bobby Kelly and Harvey [Scadden] were the three brothers, and they had the same mum, called Naringa; Biddy they used to call her. Ted Tullock's children, they can claim for that area.

The Hennesseys, Harrises, Beamans can all claim for Leinster.The Ellisons can too – Creamy and Monty – and I think Geraldine Hogarth, she can talk for Leinster. Creamy and Monty used to live there, and grew up in Leinster Downs. Creamy and Monty's mother was Mavis Narrier, and their father was a non-Aboriginal man.

The Harrises went to Albion Downs schooling their kids. They can say it is their ngurra, because they lived there, went to school there. Cecily Harris [deceased] used to stay there, and school the kids. She used to go up and down to Yakabindie. The Ashwins can say that Albion Downsis their ngurra too, because Alfie Ashwin was working through Albion Downsand Yeelirrie

If a person from Mt Magnet came and went to Albion Downs for school, they couldn't have said it was their ngurra; they're different, and other people will say 'well they're ***not*** from that ***country***'. Their own family will say 'well we ***not*** from there'.

The Beamans were born in Leonora, but they can still claim Yakabindie as their ngurra. Their father and mother was there, and then when they had them they grew up there, and their mother and father had a camp near North

End, an outstation for Yakabindie, near Tjiwarl. They used to go to school from there to Albion Downs. That's Roy Beaman, and Joyce, and they had Maxine, Theo and Edwin.

Brett Lewis' mother and father – old Scotty and Mary Lewis – had a camp near there too, and Brett's mother used to take Brett and all the kids to school.

People in the claim, even young people, they know what they can talk for and what they ***can't*** talk for. People don't talk up when they shouldn't. I ***can't*** think of a time when anyone broke that rule.

Keith Narrier can talk for the whole Tjiwarl claim area. As an example of a younger claimant witness who gave similar evidence, I refer to the evidence of Mr Leroy Beaman:If other families are connected to that ***country*** then it's right, they can claim it. Mostly, I don't know if that Wiluna mob know the area. The Ashwins know Lake Way, Mt Keith and Yeelirrie, the top of that area of the claim. But I don't know if they know further down there at Yakabindie or Leinster and that. The Wonyabongs, Nanna Lizzie and Shirley and Pop Harvey [Scadden], they used to live there at Yakabindie, they on this Tjiwarl claim.

The only family that I used to bump into out there when I was a kid was the Narriers. Nanna Jennifer, Pop Keith and Pop Hounddog. When I say "Pop Hounddog", I mean Graham Narrier, sometimes I call him "Pop Tjupan" as well. Pop Kado and Zabar Muir mob they from this claim too.

Them Elliotts-Clause family. They speak that language now, Tjupan. We used to bump into that mob up this way around Albion Downs and Yakabindie when they used to come for their holidays.

The Harris family is another mob on this claim. I say mum Gay Harris because she helped grown me up. I used to stay with her and go bush with her a lot around Leinster and Yakabindie, she grew up there with my grandmother Joyce.

...

An elder is a leader and they show others the right way to do things when you're out bush. Leadership is the main thing an elder should do. My auntie, Maxine Beaman, she's the eldest in my family; she's one of my elders. My other elders are also Aunty Gay Harris, Nanna Shirley and Lizzie Wonyabong, Jennifer Narrier and the other Narriers. Mr Keith Narrier's evidence was:Some of the other families for this claim are the Beamans, Harris', Wonyabongs, Ashwins, Allisons, Hennesseys, James', Tullocks and Lewis'. They all speak for that area too. The Kellys was on it from old Bob Kelly, but there's no more of them around.

...

The elders have all passed away and we take it over now – me, Richard, Jennifer, Shirley and Lizzy Wonyabong and all them. An elder has to look after everyone; look after the ***country***. Mr Allan Ashwin's evidence was as follows:Some of the others for this ***country*** are Lizzie and Shirley Wonyabong, the Beamans; Harrises, Redmonds, Narriers and Monty and Creamy [Allison], because they stay in those areas and grew up around Leinster and Altona there. Mrs [Doris] Foley and her son Lenny Ashwin and his children and grandchildren, they're from this ***country*** too.

You also have the Hennesseys, but most of them come under the Abdullahs, like that now. The Abdullahs, their father come from down south, a Ngoongar out from Perth and their mother is a step-sister to Monty and Creamy [Allison], she's from this ***country***.

With the Harris's, really their grandfather come from up that way too, Wongawol side. Been coming down this way and living down this way, Leonora way and Darlot and ended up around Yakabindie. Like Gay Harris and her sister [Cecily Harris] was more or less at Yakabindie all their life. When I used to work there I remember seeing Jodi Harris and Murray Harris when they was just kids when we was working around Yakabindie and Mt Keith and that.

The Beamans had a camp at North End near Yakabindie; we used to go there from Albion Downs and visit them, even from Wiluna we would go there and visit them. All the old people used to camp there, Maxine and Eddie [Beaman] mobs' parents and uncles and that.

In the south-western part of the claim, you got to ask the other mob about the tjukurrthere; like Brett Lewis and his mob. Old Scotty Lewis he come from that Tjiwarl ***country*** too, he been right through here that's his ***country*** there. He been right around this area, shearing and that. He grew up through here. He tied in with all our families, we all one family group.

Some other old people used to live there too, like the Hill brothers.

When I worked at Yeelirrie Dion Redmond grandfather used to work there too. Old Wimie Redmond used to work at Yeelirrie, he worked with me. He got to know the ***country*** when he was working there, he been there for a few years. It might also be said that evidence such as this from Mr Ashwin also illustrates the point the State wishes to make – namely, that the movement of some families into the area is recent and associated with working on the pastoral stations. This kind of evidence does illustrate this aspect of the families' history. However as I have attempted to explain in these reasons, that history is neither uniform in timing nor in the character and extent of the movement, and it must be considered together with other evidence about established connections with original occupants in the claim area, with the Tjukurrpa of the claim area, and with the workings of Western Desert laws and customs. Finally, the evidence of Mr Patterson confirmed that, as a Western Desert man from a neighbouring claim area, he recognised the members of the claim group as entitled to speak for the ***country*** of the claim area. I have set out his evidence at [775] above. There is no reason to doubt that when he made these statements Mr Patterson had in mind that their entitlement to do so was in accordance with traditional laws and customs of the Western Desert, and he was ***not*** cross-examined to suggest otherwise. As the applicant also notes in this part of their submissions, there is no evidence of other individuals or groups asserting they have competing rights and interests in the claim area, or disputing the entitlements of any of the claim group members. There was a slight suggestion from Dr Brunton to this effect in relation to a portion of the south-west of the claim area, but as the applicant notes in their submissions, no Badimia person has come forward in the duration of this proceeding (taking into account the function of the notice provisions in the NT Act: see Badimia [2016] FCAFC 67; 240 FCR 466 at [52]; [60]-[61]) to assert any such rights or interests and the Court is able to take the absence of any such assertion as between neighbouring and contemporaneous claimants as reliable evidence that no such claims are made. Further, I do ***not*** consider the situation in the claim area resembles that discussed by the Full Court in Banjima People v Western Australia [2015] FCAFC 84; 231 FCR 456 at [54], which concerned shared rights at sovereignty, but no contemporary assertion by another group of such shared rights. That is ***not*** this case, on the findings I have made. There is insufficient evidence to establish that any other group, and certainly that a non-Western Desert group, held rights and interests in the claim area at sovereignty.

CONTINUITY It is important to recall that what has come to be expressed, by way of shorthand, as a requirement for "continuity" of connection arose in Yorta Yorta through the Court's analysis of the meaning of two particular aspects of the definition of native title in s 223 of the NT Act: first, the meaning of the word "possessed" when it is used in relation to interests in land and waters; and second, the meaning of the word "traditional" when it is used adjectively in relation to laws and customs. It is worth recalling again how Gleeson CJ, Gummow and Hayne JJ

expressed this at [46]-[47]:As the claimants submitted, “traditional” is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the Native Title Act, “traditional” carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are “traditional” laws and customs.

Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has ***not*** existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.

(Emphasis in original.) And at [50], their Honours said:To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And 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. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise. Despite the breadth of the Court’s observations in these passages concerning the need for “continuous existence and vitality” in traditional laws and customs, it is in my respectful opinion important to recall that the definition in s 223 is concerned with rights and interests in land and waters held in accordance with traditional laws and customs. The focus of the definition, and indeed the focus of the NT Act, is on the body of traditional laws and customs observed in relation to the acquisition, possession and exercise of rights and interests in land and waters. The NT Act is ***not***, for example, concerned with traditional laws and customs concerning social structures unless those laws and customs are relevant to the way rights and interests in land and waters are acquired and transmitted, or the content of those rights determined. In assessing continuity (if that shorthand expression might be used) the central question is whether the traditional laws and customs of a claim group which relate to the acquisition, transmission and exercise of rights and interests in land and waters are recognised and observed by claim group members as a living normative system in substantially the same form they had at sovereignty (allowing for permissible adaptation, as I discuss below). So, for example, in terms of weighing and assessing evidence about continuity, the fact that – as in this case – some traditional laws and customs, such as those concerning the skin system, may be seen to have broken down and become somewhat confused is of less weight in the determination of the continuity required under s 223. See, to this effect, observations of the Full Court in De Rose (No 2) [2005] FCAFC 110;145 FCR 290 at [63]. It is also appropriate to recall, as the State submits, that continued recognition and observance is assessed at the level of the group as a whole, rather than each and every individual member of it; and what constitutes sufficient acknowledgement and recognition will be a question of fact and degree in each case: see De Rose (No 2) at [58].

The State’s concession on continuity if the Court finds Western Desert people occupied the claim area at sovereignty The State’s written submissions make some valid points about some of the traditional laws and customs of the claim group which are either “patchy” or confused. The skin system evidence is the key example. Notwithstanding these submissions, the State properly made the following concession:Nevertheless, despite the uneven and often contradictory evidence and the clearly diminished nature of the laws and customs said to be (and to have been) acknowledged and observed by the claimants, the First Respondent accepts there is sufficient evidence for the Court to find that, if native title rights and interests were obtained by the claimants’ ancestors, then at least some of those rights and interests have endured until the present day.

Continuing recognition of traditional laws and customs within the claim group Although I have accepted the force of some of the State's submissions on the continuity of some of the traditional laws and customs, the aspects of the traditional laws and customs which appear to have weakened most amongst members of the claim group are ***not*** the aspects which are most closely associated with the possession and enjoyment of rights and interests in land; rather, they are some of the social aspects of the traditional laws and customs. There was ample evidence about the firm view of the claim group members that the law continued to be observed and practiced in the claim area, and they gave that evidence by comparison with other areas where the law was no longer practiced. An example is the following evidence from Mr Leroy Beaman. What Mr Beaman said about his father in the first paragraph of the below extract also confirms the continuing importance of the practice of the law to a person's position within a group, how the law is enforced and by whom. This evidence also illustrates the clear connection the claim group members see between the law in the claim area and the law in other areas recognised by this Court, by the State, and by the Aboriginal people concerned on all sides, as Western Desert ***country***:If you do the wrong thing as a wati, you might cop a spear through the leg or you get a hiding. The old people will pull up and say "What you doing? Misbehaving!" and then they might hit you. You ***can't*** hit them back because you ***not*** allowed to; you just have to sit there. They will take you somewhere and tell you that you got to face your trouble. My dad isn't a tribal man so he couldn't do nothing, and he would take me down to face my trouble. If he was a tribal man, then he could stick up for me, and say "that's my son" and he could take the punishment or face the trouble with me, side-by-side.

My mother's side, they don't do that. Their culture died out a long time ago when my mother's mother was a little girl. Keith Narrier saw that last ceremony they did there at Nallan Dam. They closed the law down over there but they still speak their language and that. If they wanted to become a lawman then they would have to go to Wiluna or Roebourne.

They never closed the law down for this ***country***. I would have known if they would have closed it down. The law still there because it runs from Wiluna and the other laws around. The Ngaanyatjarra people, and even the South Australia mob, come out and they camp on the side of the road here, in the bush. That's how the law is still running, because they still travelling through, even along the back tracks to Leinster, taking shortcuts to Wiluna.

The desert law in Warburton is similar to here and in Wiluna. It's been there for that many years, it stays there. The law for that place will always be there, it will never change. It won't go nowhere for anyone. People in this ***country***, the Wongai, Tjupan and Ngalia mob, they do law mainly in Wiluna and go east that side. That's towards Warburton. There was ample evidence of continuing observance of transmission of knowledge and responsibility for particular parts of the claim area. For example, Mr James' evidence about Lake Miranda was:For example, the red sand dune on Lake Miranda, Yulkapa, that person who had custodianship of that area, passed away a few years back and so her daughter became responsible for some aspects of the story there, that was their tjukurrpa. I think Aunty Angline and Aunty Adeline Narrier/Hennessey and even Aunty Dolly [Walker] had the custodianship over that part of the Carpet Snake dreaming and it passed on to some of their direct descendants, like Colleen Berry Vicky McCabe and Sally [Abdullah] and to Jennifer and Rosslyn Narrier. Shirley and Lizzie Wonyabong also speak for the ***country*** around there. Other aspects of traditional laws and customs which, on the evidence before me, remained central to the lives of the claim group members and their connection to their ***country*** included their practices concerning the taking of resources from ***country***, including ritual observances about killing and eating of certain animals especially kangaroo. The Court saw evidence of this during the on ***country*** hearing, and it was also apparent in much of the written claimant evidence. Mr Richard Narrier gave some detailed evidence about hunting practices, and said this about preparing kangaroo:Lot's of rules about kangaroo. You got t[o] cook it in the ground; cut him up the right way. You get the legs off and cut it through the middle. You use any sort of wood, mulga or that, for the fire. Mr Henry Ashwin gave the following evidence with respect to killing and cooking kangaroo:This good ***country*** to go hunting, take the kids for school holidays and things like that. When we go hunting in that ***country*** we look for kangaroo, goanna, emu eggs. Too much kangaroo, too much emu, too much turkeys, porcupine and all them things.

We cook kangaroo the same way that them elders used to do it, got to be cut the same way. Put them in the ground to cook and prepare them the same way, we only cut it one way, there's no other way to cut it for desert people. If you cut it another way then you breaking the law and you get sick, might die.

My dad taught me how to cook kangaroo when I was growing up. We did it everyday. These days we hunt with rifles and kangaroo dogs; before white people came we used spears. You would wait at the waterhole or hideaway and then when they come and drink you could spear them.

We trade food with each other. If I got lots of kangaroo and that person got no kangaroo but a couple of goanna, I'll trade him. I'll give him one of my things for a goanna. There's a lot of trading, you got to look after each other. That's the way you can still be a family.

If I got too much kangaroo I might just give it up. Take it to elder peoples and share it up with them too. The bloke that done the most hard work takes the best bits, then he leave the rest for whoever. Further on this topic, Ms Geraldine Hogarth said as follows:I don't own the land; it owns me, and my people. It owns the people who look after it, and harvest it. There's nothing on my ***country*** that I ***can't*** harvest. I can take all the food that is in season, as long as you only take what you need. We kill the kangaroo so it can keep going; we don't kill during breeding times. Like with emu eggs, you got to leave some eggs for the father to sit on, ***not*** take the whole lot.

I can take the kulyu [bush potato] plants from under the ground, and dig for the bush onions, and the goanna from underground.

We don't tend to hunt the jilkamarta [echidna] anymore because other food is plentiful. When you kill one, you do one hit, and sing it a little song; when you kill it you're explaining why. And then you put it on the hot dirt - ***not*** the ashes - to burn off the spikes. When the spikes have burned off, and it's flat, then you put him in the hole. It tastes lovely, very nice! Uncle Brett Lewis he knows that song - all the nannas painted him up and had him sing the song, and they was really happy. He was a really special kid. Ms Hogarth also gave some restricted evidence regarding the teaching of young women about the use of natural resources from the claim area. Mr Victor Ashwin gave the following evidence on hunting and cooking:Lots of people from Wiluna go out there looking for emu eggs. People who aren't on this claim they don't come this far, usually if someone comes from further away they will ask somebody to take them out.

In our culture, we share what we hunt; that's our way. Part of our culture is sharing what we hunt. We give it out to family members, anybody really. Back in Wiluna we share our meat out. We look after the old people first.

Whatever people need they can, and do, take from the ***country***. The old people taught me that you can take enough for your fridge or your freezer, but you ***can't*** just leave it lying around. If you got a bit extra you can maybe give it away. In the bush, you give them meat and share, maybe next time they'll pay you back. Give you meat back or something else. We call that Ngyapagi-ngyapagi, like give and take. I found Mr Allan Ashwin's evidence especially persuasive, bearing in mind my earlier observations about what an impressive witness he was:Through initiation, singing songs and stories; you keep it strong. Each generation you tell them where they allowed to go and where they ***not*** allowed to go. Anyone will tell you. Some of the old ladies they know and they tell the younger ones. Kids, they tell them from a little age, that's how you keep that strong because you tell them from an early age. It's ngurlugka, ***not*** allowed to go there, it's sacred. It's mans business or womens business there.

That's the job of an elder now, where they allowed to go what they allowed to do. They teach them all, take them out hunting and all that. Same with a kangaroo and all that, you don't just get a kangaroo and that you got to cook it properly, the right way. How to take the guts out. You can get in trouble if you break the law, if you don't clean the

kangaroo properly. You got to gut him properly, you got to cook him in the ashes, there's one way you got to do it. Some places they can kill you for that. Out that way, through the centre [Ngaanyatjarra Lands]. You make trouble and you make trouble for your family, you know. You still hear about that, you ***not*** allowed to do that, the elders tell you and they tell all the younger generations. You gotta show them when they young. The young boys, you gotta show them how to clean it, how to cook it.

If I saw someone cooking it the wrong way I'd tell them "No! You don't do that that's the wrong way; you do it like this!" Even before the boys get initiated we tell them how to cook the kangaroo and emu and things like that. How you gotta gut them and cook them. That's handed down from generation to generation.

They'll tell them, "Argh! No. You don't do that. Otherwise you'll get in trouble. Or make a trouble for your family" They stop them before they do it. Anybody will tell them. Even like lady folks, some of the old ladies will tell them off. The claimant evidence showed that death rituals, intimately connected with ***country***, continued. For example, Mr Victor Ashwin's evidence was:I seen my grandmothers making baskets and hairbelts and they put them there for doing the funeral, the second funeral. That's their payment for doing the second funeral now. When a person pass away here, within six months or twelve months, the family cut their hair and make hair belts and sometimes make them baskets things. The brother-in-law of the deceased person, that's their job. In the old days they would leave hairbelts, spears, boomerangs, baskets, whatever you can make from the bush - that was the payment for organizing the sorry camp. Her and her same skin group, like her brothers and sisters, they have to do it, the reburial. As soon as they go back and clean out the gravesite, then they go back and finish everything there, then everything will be laid out for them there. These days people have blankets for the payment.

When it first happen, someone pass away, you ***can't*** eat kangaroo, you have to eat hill kangaroo. After the second funeral you can eat it again. Mr Allan Ashwin's evidence was as follows:When someone dies we ***can't*** say their name so we say 'nyaparu' or you call them 'kumuna'.

When someone dies, like the person got to be a grandson or a jamu or like a brother-in-law that organise the funeral. They bring the family in when you meeting and bury someone. It's got to be done like that. The sons and daughters ***can't*** do that, mothers and father ***can't*** do that. They got to wait. The wife or the husband, they got to do it. The jamu, grandsons and granddaughters got to do that, sister-in law or brother-in law, organise the funeral and things like that.

Sometimes they take the dead persons things and they burn them. Sometimes things like law side are handed down to the sons and grandsons, like that. Same with ladies. You got to give things to the right people, the right family. There was ample evidence about the continued use of Western Desert dialects (Tjupan, Koara and Martu in particular) amongst the claimant witnesses, and that was also evident during the on ***country*** hearings. As I have recognised earlier in these reasons, while language may ***not*** necessarily be a strong indicator of rights and interests in a particular area of land, it is capable, in my opinion, of having some weight in the assessment whether there is a continued, living normative system of laws and customs. Here, the continued use of Western Desert language by claim group members as a core element of the continued observance of their laws and customs is ***not*** without significance. I consider the following passages from Dr Clendon's report and oral evidence respectively bear out the links between continuing tradition and language, while acknowledging it may say less about rights over particular land. In his report, Dr Clendon states:Bates, as nearly all other observers among 'primitive' people until recently, was working within a model of society that equated race with culture and with language, which together constituted the bounded ethnic group; this last being a largely theoretical construct coming out of a European political ideology which partitioned landscapes along just these lines. Australian society in the arid zone, in contrast, appears to have consisted of networks of kin and ceremonial totemic or 'dreaming' relationships that frequently operated over considerable distances and in more than one language. Individuals identified with their places of birth or childhood, and held these places to be their homes, with their extended home ***countries*** radiating thence

outwards in a core – fadeout disposition. Individuals were and are the embodiment of the intersection of the four lineages represented by their grandparents. This understanding of social identity, and of society and sociality more generally, was and is ***not*** confined to speakers of the Western Desert Language.

(Citations omitted.) He also gave the following oral evidence during re-examination:What Aboriginal people in these places tend to do, in my experience, is indicate a series of places, and these places will be named as belonging to particular families. They never – they characteristically do ***not*** speak in terms of boundaries. They name places that belong to particular families, and those families may speak one language or they may speak two languages. For instance, there's a – a family name in the Great Sandy Desert, Girriwadi. And members of that family speak both the Manjtjiltjara dialect of the Western Desert language and Wanman language as a distinct language, but the sites all belong to them – the places all belong to them. I don't know how you draw a non-fuzzy – I don't know how you draw a boundary there. You would have – simply have to say a zone where on one side of that zone the Manjtjiltjara is spoken, on the other side Wanman is spoken.

Yes. All right. And do I take it from that answer then that, in your opinion, the better view is to locate – the location can be place specific rather than drawing lines?---Yes, absolutely.

And what you can say is in that place, you get speakers of this language or that language or both?---Yes. Yes.

And then what inferences you draw from that is a different question?---Yes. Another aspect of traditional laws and customs which on the evidence remains strong amongst the claim group members is the observance of totems. These are connected with a person's birth, but also with their ***country***. A remarkable example is the evidence of Ms Narrier where she said:That watja is important to me and my granddaughter, Irandia. It is like my own tjukurrpa, and Irandia has the same one. My mum was waiting for me, and she used to dig a lot. She was picking them plants, in the middle of a stream in the Booylgoo Ranges. She found a white potato, and that told her that she was pregnant with me. I have a mark on my navel the same shape as those ranges. My mum told me the story of that.

It is the same for my granddaughter Irandia. We were out in that ***country*** when my daughter Amanda dug up a really big watja with a funny shape – it looked like a little person. That is how we knew that Irandia was on her way. Irandia has a little mark on her head near her left ear; that's where the watja got a little mark from the crowbar when we were digging it up...

Because watja is my tjukurrpa, I ***can't*** eat it, because then I'm eating myself! If Irandia have a little taste of it, she'll say 'yuck!' because it is part of her. A photograph of her granddaughter's mark was annexed to Ms Narrier's statement, and indeed Irandia came to the on ***country*** hearings so that her special mark could be seen firsthand. Ms Harris also gave some vivid evidence on this:A jarrin is the sign of a female getting pregnant. The old people didn't know about medical symptoms, but they knew a lady was pregnant if they were getting lots of something when they were hunting. The jarrin is how the old people knew they were going to be parents.

My son, Corban, his jarrin is that big black perentie goanna; we call it tilti. We was hunting it, and it is usually hard to get them big ones, because they'll turn around and attack you right back. My cousin, he shot it in the leg with a stone, and it died instantly. Corban's got a birth mark on his ankle, where my cousin shot the goanna with the stone. That was when I was pregnant with him. You ***can't*** eat your totem, so Corban ***can't*** eat that black goanna and he won't.

A lot of people have those totems, like emu or kangaroo. The jamu is the one that gives you that totem. My mum, Corban's grandmother, gave Corban his totem because she knew, she was there. It's like a mysterious thing; you

can't see it but you just know. For us, we found a big black goanna but it wasn't the season for it, so that's how we knew. Mr James gave the following evidence on totems:For me I have two known totems. My birth totem was the dingo. The other totem is the galah or piyarrku. For me it relates back to situations when my mother was pregnant, when we were camping on ***country***. My galah totem, piyarrku, relate to the creeks behind Albion Downs station. You hear them a lot at certain times of year, when they are birthing. What the totems mean for me is that you must look after it and protect it, so I don't harm them. On the subject of totems, Mr Richard Narrier said:People have a tjarrinpa, a totem. That's the same word all over the desert. I don't know what they call it in Cue, but they got no law there. It all finish up.

My totem is the dingo, my mother told me it. That happen at that place on Kaluwiri, a fella named Andy Fisher, Ngungkupayi, he shot a dingo there coming from Sandstone, my mother was pregnant at the time. It happen like that, a lot of people have it like that.

Dingo is special to me. Lot's of dogs follow me around because they know that I'm one of them.

If you kill a kangaroo when your woman is pregnant and that woman gets birth, then the baby is the kangaroo. Most people's tjarrin is a kangaroo and they ***not*** allowed to eat it. As to the continued observance of, and knowledge about, the Tjukurrpa, I have dealt with this extensively earlier in my reasons and need ***not*** repeat it. However, I emphasise here that the claimant evidence about the Tjukurrpa is some of the most persuasive evidence about the continued vitality of Western Desert traditional laws and customs giving rise to rights and interests in the land and waters in the claim area. The claimant evidence about the skin system is, as the State's submissions contend, somewhat contradictory, especially in relation to the number of sections in the skin systems as described by various witnesses. Other claim group members, such as Ms Wonyabong, frankly admitted they do ***not*** follow the skin system at all. The skin system has no bearing on rights and interests in land, and its breakdown is of no material significance to the Court's assessment whether the rights and interests in land articulated by the claim group members are "traditional", and continue. I accept that there was little if any correlation between the claimant evidence and the records made by Daisy Bates (aside from Ms Geraldine Hogarth's evidence, which the State, and Dr Brunton, accept bears some correlation), but I do ***not*** find the absence of any correlation particularly probative of any of the disputed issues between the parties about the Ngaiawonga and the claim group members' ancestors' acquisition of rights and interests in the land and waters in the claim area. We simply know too little about Ms Bates' methods to use her data to draw any reliable conclusions, or to use it for comparative purposes in relation to the claimant evidence. In my opinion, those exercises take one into the realm of sheer speculation.

Continuing recognition of multiple pathways to rights and interests in ***country*** There was ample evidence that the claim group members continue to recognise and acknowledge multiple pathways to acquiring rights and interests in ***country***. Each of the claimant witnesses gave evidence which reflected this and I propose to set out some examples here. A good example, because it also indicates the links the claim group members see between Tjiwarl ***country*** and ***country*** further to the east, is the evidence of Mr Leroy Beaman about the different (legitimate, in his eyes) paths to claiming ***country*** he and his sister have taken. His evidence also indicates two matters Dr Sackett noted: first, that pathways are often between grandparents and grandchildren, rather than simply parents and children; and second, that knowledge and long familiarity with ***country*** can also be a pathway:I love all my ***country*** there, right through there in this claim area, that's my ngurra. I claim from where my grandfather was up in this area here now. I follow my father. That's where they were born, from that area.

My grandmother wasn't from there so I ***can't*** claim it through her. She's from another tribe but I could claim the Mulga Queen area through her, but I feel strong about this area.

My sister Willamina claims Mulga Queen. She been up and down there, she was out there when she little and she likes going out there to that ***country***. She made that choice and I made my own choice. That way, she can tell stories about my grandmother's ***country*** to her kids and I can tell my grandfather's stories to my kids.

Me and her planned it, when she was about thirteen and I was about ten. She knows that I been up and down there in this claim area with my grandmother now. My grandmother, my father's mother, she used to take me to her husband's ***country*** when I was a kid. We made our own choice about which ***country*** to follow but we didn't have to. Rights to ***country*** through one or other parent were identified as one pathway by many claimant witnesses (for example, Ms Wonyabong, Ms Tullock, Mr Lewis and Mr Bingham). Some witnesses, such as Ms Wonyabong (whose evidence was that she was conceived on Yeelirrie), mentioned conception on ***country*** as one pathway. Birth on ***country*** was also strongly identified (Ms Wonyabong, Ms Narrier, Mr Keith Narrier, Ms Geraldine Hogarth and Mr Allan Ashwin). The adaptation in attitudes to birth because of people being born in hospitals was apparent in the evidence: each witness who spoke about this was clear that birth in a town where the hospital is does ***not*** entitle a person to that ***country***. Correspondingly, birth in a hospital does ***not*** disentitle a person to rights and interests in land with which they, and their ancestors, have long associations. Dr Sackett's evidence (apparently with Dr Brunton's agreement) confirmed this as an adaptation:DR SACKETT: And I look at how that's transformed and there was an opening up of the view that – to a view that there were multiple pathways and these pathways varied from place to place in the desert but were multiple in instance – in most instances. And what I've said is that because a lot of the pathways are no longer ones that are, in a sense, available like birth on ***country***, people are being born in hospitals or in communities, people are ***not*** living on ***country*** – growing up on ***country***, learning the ***country*** that way because they're living in communities. But they're taken out to ***country*** briefly by their – you know, on holidays as a – so the way in which people are articulating claims to ***country*** are along ***not*** patrilines, as Dr Brunton was verballing me, but, rather, a variety of lines, through mother, father, a grandparent and so forth.

While some change has occurred, obviously, those possibilities were present in the past. People could claim ***country*** of the mother or the father or grandparent in the past. It's those avenues that now predominate rather than perhaps, in the past, a birth would have dominated the situation.

DR BRUNTON: I apologise. I did ***not*** present what Dr Sackett had said accurately. Yes, I – it wasn't just patrilines, so, yes. Shared traditional laws and customs could in some circumstances be a pathway, especially where the original custodians were small in number and others needed to step in. Mr Henry Ashwin's evidence was:If all the owners for the ***country*** pass away, other people will have to go in and look after it. You ***can't*** leave ***country*** empty – another lot of family have got to take it on. They got to be tribal. They got to have been through the law, through our law. I don't think we'd let the mob from Cue come in, as they're too far out – they don't speak our language, they ***can't*** take over our thing. They'd get in big trouble. Growing up on ***country***, and familiarity and knowledge about ***country*** through long association with it, were also seen as legitimate pathways. Mr Victor Ashwin said the following:My grandfather Yalpie was staying in Yeelirrie, and he looked after all that ***country***, and he was still practicing law. There is a law ground there in Albion Downs, where that been done, passing the law and the ***country*** on to him, for around Yeelirrie, Albion Downs, Yakabindie, all that area. Some of the old people who are finished now, they told me that. I don't know what year it was, I just heard of it. My grandfather was living in Yeelirrie, he looked after that ***country***. He had them old people who belonged to that ***country***, like Mr Frank Narrier, he was staying there too. Some claimant evidence conveyed the view that something more than working on ***country*** was required, especially if the work was transient. The same is true of marriage. Mr Allan Ashwin made that clear in his evidence:I worked at Lake Mason; it's ***not*** my ***country*** but I worked there. I know a little bit about that ***country*** but ***not*** much. Really, I never been stayed there that long. You might work there for a year or a couple of years but it doesn't make that your ***country***. Like I been around Yeelirre since I was about six months old or something and I've more or less lived there my whole life at Albion Downs, Yeelirrie, Altona, Mt Keith and Windidda.

...

My wife ***can't*** claim this ***country***. She come from that end north-east, she don't come from this area. She only been around this area when she got with me that's all. At least two witnesses did mention marriage as a way to

acquire rights. Mr Keith Narrier referred to it in his witness statement:My parents are dead so they ***can't*** speak for that ***country*** now. My grandparents on my father's side could speak for that ***country*** as well. My mother could speak for that ***country*** too. She was part of it, from living with my father. The applicant's submissions construed this evidence as identifying marriage as a pathway. I am ***not*** certain that is what Mr Narrier meant: it could just as easily refer to residence and long association. The only other person who mentioned marriage as a pathway was Mr Muir. Although he did refer to marriage as a pathway in relation to his grandmother ("Meekathara ... was her ngurra through marriage and living in that ***country***"), again I do ***not*** read his evidence about his mother as necessarily depending on marriage, so much as residence and close familiarity with the claim area:My mother spent her early years out in the desert, through Mulga Queen, Weebo and Melrose. My mum lived in Mantjintjarra Ngalia ***country*** around Mulga Queen and further east and came back to this Tjiwarl ***country*** when she married Mr [Frank] Narrier, the father of Beasley [Keith Narrier] and my Narrier siblings. My mother and Mr Narrier spent a lot of time at Kaluwiri and Albion Downs, which is where a lot of the community were living in those days. My mother had detailed knowledge of ***country*** all through the areas in which she lived. As well as Mr Allan Ashwin's evidence, Ms Luxie Hogarth's evidence made it clear that she could ***not*** claim Tjiwarl ***country*** because of her marriage to her husband Mr Wimmie Redmond, although she knew a great deal about the traditional laws and customs associated with the land and waters of the claim area:My husband was telling me about the tjukurrpa, and I got to listen to him, learn what he told me. But I ***can't*** talk for that ***country***, because that's his parents' ***country***. My husband told me that his great, great grandfather – old Mr Hill – he was looking after that spring Pii at Albion Downs, and then he got old and passed away there. And that snake must still be there. Mr Hill was looking after that tjukurr because he belonged there, he was from there. He must have been taught to look after it. If he hadn't looked after it, the water would go dry and it would be nothing, he'd know no stories for that area.

...

I don't know so much about this Tjiwarl side because I'm just an in-law, but I can help look after it and teach my kids. They got to get the boys to go through the law and the other cousins, and they must get together and look after it. It seems to me from the evidence that the witnesses were indicating there was sometimes a constellation of attributes which led to a person acquiring rights, or being recognised as having rights and interests. Obviously, a shared tradition of laws and customs was essential. Building on the shared tradition of laws and customs, long residence, great familiarity, and recognition from others with the shared tradition might all provide pathways in addition to descent pathways. In my opinion, it is ***not*** insignificant that many witnesses emphasised the need for people to follow "the same law", and were clear that they did follow "the same law" as people from Wiluna, or to the east, making a distinction between those people and people to the west. The connections in law and in particular Tjukurrpa (but ***not*** only Tjukurrpa) were underlying foundations for recognition and acquisition of rights, but ***not*** in themselves sufficient – as Mr Patterson's evidence made clear. The distinction between those who shared Western Desert laws and those who did ***not*** came through in many witnesses' evidence, but the evidence of Mr Patterson (although ***not*** a claim group member) is an example:The desert law goes all the way to South Australia, the tjukurrpa moves east. It comes through this Tjiwarl area now. That Meekatharra way is a different law, I ***can't*** talk their language and they ***can't*** talk my language. The Gascoyne, Mt Augusta and that area, it's different too. In her witness statement, Ms Tullock said:My grandson has been through the law with the Nyamal people, but a lot of the boys in my family have been through the desert law in Parrngurr [Cotton Creek]. One of my sons did law at Parrngurr and one of my sons did law at Punmu. The law there is all the same as the law on my dad's side, but it's different to Roebourne, and Cane River, and all that. All of my sons and grandsons follow the law because of my dad. In terms of the nature of Western Desert society, and the way in which rights and interests in land and waters are determined through multiple pathways in accordance with traditional laws and customs, there is existing authority which deals with this issue, notably the decision of French J (as his Honour then was) in Birriliburu [2008] FCA 944. This was a consent determination, but that fact does ***not*** lessen the authority of what was said by his Honour at [20]:The association of individuals and groups with particular areas of ***country*** comes about through a variety of mechanisms. These include conception, birth, growing up or initiation on the ***country***, acquisition of knowledge through long residence or descent from a person who has had such a connection. Landholding groups are ***not*** patrilineally-patrilocally structured. The members of the groups are landholders through their shared

association with and to the land. The groups are open and inclusive so people have potential access to a number of areas through the mechanisms mentioned above.

Some adaptation, but within existing legal principles There is little doubt on the evidence that many of the younger claim group members do ***not*** say they have acquired rights and interests in the Tjiwarl claim area through being born on ***country***, or living on ***country*** for substantial periods of their lives, as their parents or grandparents were able to do. The realities of changes in land use and ownership in the claim area have made that far less possible than it used to be. Thus, many of the younger claim group members claim their native title rights and interests on the basis of descent, and descent from a parent or grandparent who was born on ***country*** or lived on ***country*** for a long time and came to know the land and its Tjukurrpa. The applicant submits this is a permissible adaptation of traditional law concerning acquisition and transmission of rights and interests in ***country***. I accept that submission. In Wyman [2015] FCAFC 108; 235 FCR 464 at [260]- [261], the Full Court said (albeit dealing with different pathways and different changes to them):In particular, it does ***not*** necessarily mean that, in every circumstance where a presumptively patrilineal or patrifilial “estate” group model of rights in relation to land and waters is shown to have operated pre-sovereignty, a claimant application is bound to fail where the contemporary rule allocates rights and interests by virtue of a person’s membership of a claimant group based on cognatic descent, where all members are recognised as possessing similar or largely similar interests in the whole of the group’s traditional ***country***. Apart from anything else, a question may arise, as the plurality said in Yorta Yorta at [82], about what it is that is said to have changed or been adaptedsince sovereignty. If local groups and environmental clusters, for example, are shown by the evidence to have “coalesced” (as Professor Sutton’s evidence suggested may happen), it may be that a contemporary “tenure rule” can be explained by the exigencies of post-sovereignty depopulation and population movement, and seen as an acceptable adaptation of the pre-sovereignty rule designed to ensure appropriate people spoke for ***country***, protected sites, carried on the Law, and enjoyed the resources of the ***country***, for example. For this reason, reference to the “tenure system” as it operated at sovereignty may be misleading and likely to lead to a false inquiry. The question would remain, in such a case, whether the contemporary “tenure system”, for s 223 purposes, can still be shown to be rooted in pre-sovereignty law and customs.

In each case the evidence before the Court will dictate whether any relevant change in the “tenure system” is an acceptable adaptation of a pre-sovereignty rule, or a new rule reflecting a lack of continuity of the traditional normative system.

(Emphasis in original.) I do ***not*** consider that any “new rule” has been developed for acquisition and transmission of rights to the Tjiwarl claim area that reflects a lack of continuity with the normative system of multiple pathways which I have found operated at sovereignty in the claim area. There is more emphasis on descent, but, on the evidence before me, what goes with descent is affiliation with and interests in ***country***. Recognition by the group continues to be important. For men, initiation remains a pathway. I consider all these matters to be adaptations which are designed, to adopt the language of the Full Court in Wyman, to ensure that appropriate people continue to speak for the Tjiwarl area, to protect sites and to carry on the law.

THE CONTENT OF THE NATIVE TITLE RIGHTS AND INTERESTS As the State’s submissions observed, this part of the Court’s findings is dependent on the findings already made concerning the land and waters in the claim area being Western Desert ***country*** at sovereignty. There was a great deal of claimant evidence about the nature of the rights and interests they have over the claim area, and many examples of how they and their ancestors have exercised them. Properly, subject to its critical objections to the preconditions to native title rights and interests having being met in this application, the State accepts the strength of the evidence on many of the individual rights claimed. That acceptance facilitates findings being made in a briefer way than might otherwise have been the case. The approach I take below is to note the State’s concessions where they are made, and to give some examples from the evidence which support the findings I make.

The right to exclusive possession In areas to which s 47B of the NT Act applies, the applicant claims a right of exclusive possession, occupation, use and enjoyment to the exclusion of all others. Subject to my findings

concerning s 47B, I am satisfied the applicant has proven such a right exists, and has existed since sovereignty in accordance with traditional laws and customs, and has been continuously observed by the claim group members and their ancestors. The Full Court in Griffiths v Northern Territory [2007] FCAFC 178; 165 FCR 391 at [127]- [128] considered the integers of a right to exclusive possession, and the Full Court in Banjima [2015] FCAFC 84; 231 FCR 456endorsed the approach taken in Griffiths. In Banjima, the Full Court said at [34]:What Griffiths discloses is that the source or foundation of that ability is ***not*** necessarily (or even likely to be) an assertion by traditional owners that the ***country*** is "theircountry" but rather the control of access to the ***country*** by other indigenous people by reason of the spiritual sanctions suffered for unauthorised entry. In other words, control of access by traditional owners, who see themselves and act as "gatekeepers for the purpose of preventing ... harm and avoiding injury to the ***country***", was found in Griffiths to be recognised by the common law as a right of exclusive possession. By "ability to exclude others" in the context of traditional law and custom, the Full Court in Griffiths did ***not*** have in mind Western proprietary concepts of barring entry with signs, fences or physical opposition, nor concepts of trespass and eviction, but an ability or capacity embedded in and springing from the spiritual relationship of indigenous people with the land to which they are traditionally connected. In this context, as theprimary judge's conclusions properly recognised, the continuing need of otherindigenous people for Banjima permission to enter Banjima ***country*** to provideprotection from harm for people and ***country*** provided evidence of what the common law will recognise as a right of exclusive possession in the Banjima People. In light of these authorities, the State properly accepts that in the present proceeding (if the connection issues are decided favourably to the applicant) the evidence set out in the applicant's submissions is sufficient to prove that the claim group members are "gatekeepers" for ***country*** in the claim area, in the sense that term was used in Griffiths and Banjima. That concession having been made, and having reviewed the evidence myself, it is ***not*** necessary to set it all out in these reasons. I am satisfied the evidence is ample to prove that the claim group members are "gatekeepers" for ***country*** in the claim area, in the sense that term was used in Griffiths and Banjima. The applicant has set out a detailed summary of all the evidence in their written submissions from [486]-[534], and I accept that evidence. A few examples, focussing on the matters identified in Griffiths, will suffice. Mr Victor Ashwin's evidence was:The tjukurrpa has always been there in the ***country***. It is the same law right through the desert. It has been passed down by songs and ceremonies. It is all connected up, from north to south to east to west. Even when white people came, our people still practiced the law.

...

It's the law from the tjukurrpa which tells people where there ***country*** is and what ***country*** they can speak for. It's your birthright that you can speak for this ***country*** or that ***country***

...

I feel strongest about the ***country*** in Yakabindie, Mt Keith, Albion Downs and Yeelirrie. Right through that area there on the eastern side of the claim and the top western corner part. That's my ngurra.

...

I can go wherever I want to go, there's nobody there to stop me, say "You ***can't*** go there, that's ***not*** your ngurra."

...

People from Meekatharra or Mt Magnet they don't come this way hunting but if they wanted to they would have to ask us for permission. They would have to take some of the mob out with them. We would growl at them, back in the old days they would spear them if they went out without permission.

We don't want them coming this way; they got their own tucker in their ***country***. If they want to come camping in our ***country***, they've got to have someone with them, someone from this ***country***. Otherwise they go into the wrong places, ngurlu[sacred/secret] places. In 2001 my auntie and uncle, they from Ngaanyatjarra Lands and we took them out emu egg hunting. Something out there made them get lost, they lost their sense of direction because they ***not*** from this ***country***. Ms Narrier's evidence was:If I want to go visit my ***country***, I don't need to ask anybody. We do it ourselves. It's my ngurra. It's where I grew up, on that ground on that land, and it's in my heart that I just want to go out there.

...

An Aboriginal person from Mt Magnet could go round Booylgoo Ranges as long as they leave things how it is – people got to clean their mess up! Even when we go to their ***country***, we ask "is it alright if we go this way?" They say "yeah go help yourself", but we got to ask first because we're stepping on their parna [ground] on their sacred things. We do ask.

...

Aboriginal people from other areas should ask us for the okay, because they get frightened of sacred sites. That's the main issue for families and peoples, you know. They frightened for ***country***, now. If someone went out and hurt one of those sites, the spirit might know who they are and will make them sick. And if you see that person sick, you know that that's from that ***country***.

There are mamatjitji living in the Booylgoo Ranges. Some people call them wudarji. They are little men that come from under the ground, that's the story. I've never seen one yet, but lots of other mob have felt them under the ground. We sing about those men, the song you sing to protect yourself. We teach that to the kids too. You need to know the songs to go to that ***country***. Those little men are protecting those ranges. Mr Bingham's evidence was:Going through the law is important for those sorts of decisions. Like when you go through the law you take after the bundu, wati. Anyone who wants to do anything to any sacred things, they got to come to us. We got to talk about it, because we've been through.

...

If someone hurts the ***country***, I'd probably have a yarn with him and say 'What the hell you doing that for?' If it was a really sacred area, with men's business, then they'll do something to him. Something bad. Take his life, I suppose. That still happens. They send featherfoots after them. You got ninjas, the mafia, and we got featherfoots! They is everywhere, right around all over. We call them jinakarrpil – a bloke who will go after you if you break the law. I never seen one and I don't want to! You're mucking around with your life if you see one of them. I ***can't*** talk in this statement about it beyond that. Finally, Mr Henry Ashwin, whom I found to be one of the claimant witnesses who took these matters most seriously in the way he conducted himself during the on ***country*** hearings, gave the following evidence:Other people could go to this area for hunting, if you know this ***country*** you can go for as long as you don't get lost. If they want to come here, still someone got to ask us. In the right way, otherwise they'll get themselves in shit. They'll feel the same way if I go there and muck around, they got to ask and have someone who know the ***country***.

If people want to do any work on ***country*** you've got to ask us. We don't like people sneaking through the backdoor. If they want to come here, still someone got to ask us.

Ngurra means we almost got a separate place, all us mens, we got a strong story coming through there. In the Mt. Keith area at Palm Spring we got some tjukurrpathere, the father and son snake in the spring down there, it's flat like a pan. You get killed if you go there without permission, some people they go in and they find out for themselves. I tell them: "Don't dig there! It's ***not*** safe to dig there." That's why we look after that area now so the mining company don't go near that area.

...

If a person hurts a sacred site, they'll die – they'll lose their life. If he goes and helps the mining company hurt that site, he'll lose his life. It will happen to him.

There are spooky things that happen. You'll get sick, get skinny, and it will take your spirit. You'll die slow, getting skinnier and skinnier, and the doctor will never find a problem. But the spirit from that area will be making you sick. There are some spooky areas, you ***can't*** go next to them.

There are places like this in that Tjiwarl ***country***. I don't go next to them, I stay next to them. There's one like that at Palm Well; it's a bit of a spooky area. We want to fence them off, that way people will know that they ***can't*** go in there. That way they won't get sick or lose their life.

Non-exclusive rights In relation to some of the non-exclusive rights, the State submits that the manner in which these rights are expressed in the Wiluna determination is an appropriate manner for them to be expressed in any determination in this proceeding. That formulation is:Subject to Orders 6 to 9, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 4 [being areas where the native title right of possession, occupation, use and enjoyment is ***not*** available at law including by reason of partial extinguishment] are the following rights or interests:

(a) the right to access, to remain in and to use that part;

(b) the right to take and use resources in that part; and

(c) the right to have access to, maintain and protect places, and areas and objects of importance on or in that part. I consider the precise formulation of the terms of a determination is a matter the parties should attempt to agree upon, in accordance with the Court's reasons. It may well be that the Wiluna formulation is, in respect of the rights identified, appropriate, but that is a matter the parties should attempt to agree on before the Court forms any final view. Accordingly, I deal with each of the rights which may or may ***not*** form part of the formulation on an individual basis.

The right to access, remain in and use the claim area The applicant submits at [537]-[538]:The evidence referred to above in relation to the right to possession, occupation, use and enjoyment to the exclusion of all others also demonstrates the existence of a right to access, remain and use the Claimed Area, even if the right to control access by others is incapable of recognition because of 'extinguishment' (See Western Australia v Ward[2002] HCA 28; (2002) 213 CLR 1 at [21], [26], [95]).

Furthermore, to the extent it is necessary (cf paragraph 114 above), the evidence referred to below concerning 'occupation' for the purposes of s.47B of the NTA demonstrates the ongoing exercise of this claimed rights [sic]. I accept that submission. The State did ***not*** contest these propositions.

The right to take resources for any purpose The content of this right is actively contested by the State. The dispute between the parties is whether the content of the right includes a right to exploit commercially resources taken from

the land and waters in the claim area, rather than a right which is limited to the taking and protection of resources for personal, domestic and non-commercial communal use. The parties' submissions in this matter were filed before the decision of the Full Court in Pilki was available. That decision considered both the correct approach to determining whether a right to trade commercially in resources can be established and also the nature of the evidence which may be sufficient to support such a finding. It is binding on me as a single judge and is the most recent consideration by this Court of the matters in dispute between the parties on this issue. In Pilki, Dowsett J said (at [37]):The remaining question is whether the primary judge correctly inferred that, according to traditional law and custom, the claim group was entitled to take resources from the claim area for commercial purposes, notwithstanding the absence of any direct evidence of such pre-first contact usage and of subsequent usage. As I understand the law, it is ***not*** a sufficient basis for such an inference that the claim group claims to "own" the claim area, and that which is on or under it. On the other hand, the claim group need ***not*** prove a specific canon of traditional law and custom, dealing expressly with taking resources for commercial purposes. In effect the claim group must show that had the question of taking for commercial purposes arisen at any relevant time, traditional law and custom would have permitted the claim group to act in the relevant way. His Honour noted that an absence of positive evidence of trading for commercial purposes in resources in the claim area at sovereignty did ***not*** answer the question whether there was any limit on the right to take and use resources of the kind for which the State contended (that is, for non-commercial purposes). His Honour continued, at [41] and [44]:The resolution of the case should start with acceptance of the concessions made by the State as to the pre-first contact society. At that time there was a society, having a system of laws and customs which regulated the relationship between it and the claim area. Members of that society exercised a wide range of rights over, and interests in the claim area, including the right to take resources. One wonders why those rights should have been limited to taking resources for non-commercial purposes. However one need ***not*** speculate. Rather one may look to the detailed evidence given by Dr Cane concerning the wider society which occupied the Western Desert, or at least parts of it adjoining or near to the claim area. The Court might also take account of human nature. Commerce emerges where there is a need, and a tangible reward for satisfying that need.

...

Given the history of trade in the wider Western Desert area, one must ask why the resources of the claim area, such as they were and are, would ***not*** have been used for trade or commercial purposes. There is no obvious answer to that question. It is more likely that the absence of evidence of trade in resources from this area is attributable to the lack of resources than to any limitation upon the general right to take and use them. The claim to be entitled to take resources from the claim area should ***not*** be seen as a claim to lesser rights and interests than those exercised in other parts of the Western Desert by the larger group of which the claim group is part. In my view the primary judge's conclusion was correct. In her reasons, Jagot J made it clear that mere assertion of a right to trade in resources for commercial purposes would ***not*** be enough, but her Honour concluded the trial judge had ***not*** acted on any mere assertion. Rather, her Honour said (at [99]):The only dispute was whether those traditional laws and customs extended to exploitation of the land for any purpose. In this context, his Honour's proposition that if such laws and customs giving a right to access and take resources from land for any purpose had been proved then proof of actual trading activity in the exercise of that right is ***not*** a necessary pre-condition to a finding of the right, is consistent with authority (Yorta Yorta at [84]). The fact that their Honours were dealing with the issue of the continuity of rights at [84] in Yorta Yorta may be accepted. But as the primary judge recognised the passage is authority for the proposition that lack of evidence of the exercise of a right otherwise proven to exist under a traditional law or custom that has also been proven does ***not*** necessarily preclude a finding that the right exists and has continued. Her Honour explained why the distinction the State sought to draw between use of resources for personal and domestic purposes, and use for commercial purposes, could ***not*** withstand scrutiny (at [112]-[113]):Sixth, the submissions in support of the appeal seek to draw what, in the specific context of this case, is an arbitrary distinction between the use of land for some purposes (domestic, communal, spiritual, ceremonial and exchange) and use for another purpose (commercial). The distinction is arbitrary because virtually all of the pleaded facts about the Pilki People were accepted (as summarised above) including their right to exploit land for, apparently, any purpose other than a purpose described as commercial. Yet nothing in the evidence supported any distinction in traditional law or custom, or any difference in activity that was or could properly be inferred to have

been carried out in accordance with traditional law and custom, between use of land for purposes other than commercial purposes and use for commercial purposes. This lack of distinction, in common with the lack of any prohibition to which the primary judge referred at [124], is to be understood in the context of the evidence that was available – being evidence about the continued observance and meaning of the Tjukurrpa and its significance to the relationship of the Pilki People to their land, the opportunistic nature of these societies in terms of resource exploitation, the location of the claim area and its context in a larger overall system of desert societies, the relationship between the claim area and the two vast and ancient trade routes, and the limited resources, being the hardwoods, of the claim area and the likelihood of them being exploited for trade.

As the primary judge concluded about the lack of any prohibition on commercial exploitation in traditional law or custom, if that alone was the extent of the evidence then the State's arguments about impermissible reasoning may have force. But given the evidence that was available in this case, the lack of a prohibition or any relevant distinction in traditional law and custom about the use of land for one or other purposes become material. The State and Commonwealth could ***not*** explain how it was that the evidence supported a finding that the Pilki People had a right under traditional law and custom to use their land for all purposes other than commercial purposes. Traditional law and custom, as Dr Cane said, protected sacred matters but otherwise the Pilki People, like all desert peoples, were opportunistic exploiters of what was available them. As a consequence, the evidence provided no proper foundation for the distinction the State sought to draw between commercial purposes and all other purposes. The approach in Pilki is different from that taken in Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135; 145 FCR 442 (Alyawarr). In Alyawarr, the Full Court upheld the proposition that a right to trade in resources is a right relating to land for the purposes of s 223(1) of the NT Act, but found that the evidence was ***not*** capable of supporting such a right to trade and the determination should be accordingly varied. Here, as in Pilki, the right identified by the applicant is a right to take and use resources from the claim area "for any purpose". The content of the right is posited to be without limit as to the purpose for which resources are taken. That does ***not*** mean, as Dowsett J and Jagot J both observed, the evidence needs to show an exercise of such a right for the purpose asserted. However, if the evidence shows that at sovereignty the ancestors of the claim group were entitled to take and use whatever resources were available from the land and waters of the claim area for any purpose they chose, then this is the content of the right which should be expressed in a determination, without an excision for "commercial" purposes. Barker J took, it seems to me, a different approach to Dowsett J and Jagot J. At [183], his Honour said that evidence by Aboriginal claimants of "ownership" or of land "belong[ing]" to them is insufficient to identify the rights and interests which are said to inhere in such ownership. Nor, his Honour said, would such general statements support a finding of a right to take resources for any purpose. So much may be accepted. His Honour said (at [169]-[170]):When it comes to proof by claimants of a right they claim to possess under traditional laws and customs, such as that contended for in this case, to access and take for any purpose resources in their ***country***, ordinarily one would expect that activity evidence, that is to say, evidence of the exercise of such a right during the period between sovereignty and the present, would be led to ensure the Court is satisfied, to the requisite civil standard of proof, ***not*** only that such a right was possessed at sovereignty but that it has continued to be possessed by the acknowledgement and observance, generation by generation since, of the sovereignty laws and customs giving rise to the claimed right. It should be noted, however, that this is a different proof question from that which may arise where there is no dispute that, at sovereignty, such a right was possessed and the only question is whether the right has, in effect, been "lost" or "abandoned" through lack of acknowledgement or observance of the traditional law or custom giving rise to the right since sovereignty. As to this latter question, see Banjima People at [775].

While it might, at least in theory, be possible for a court to be satisfied that the particular right contended for is proved without any such activity evidence, it must be said that, without any evidence of the exercise of a right, a court would ordinarily be reluctant to find that the right exists. It is one thing for claimants to say that, under their laws and customs, they own everything on, under and above their traditional ***country***, and that their "ownership" rights include the right to take any resources and use them as they wish, and another thing to support what might otherwise be at risk of being treated as a mere assertion with corroborating evidence. While it may be said that the failure to adduce activity evidence in many, if ***not*** most cases, is likely to prove fatal to claimants' contentions that

they possess certain rights, it should also be said that each case will ultimately depend on the nature and quality – relevance and probative value – of the evidence led. His Honour's approach does, it seems to me, come close to requiring evidence of exercise of rights, which imposes a qualitatively different forensic task on claimants than the approach taken by Dowsett J and Jagot J. With respect, I prefer the approach of Dowsett J and Jagot J. In Pilki at [212], Barker J described the anthropological evidence in that case at trial concerning "post contact opportunistic resource use by Western Desert people and Pilki people (sales of artefacts) during the 20th century", as well as evidence from claimant witnesses about more recent activities of the same kind, as capable of corroborating a traditional right to use resources within Pilki ***country*** opportunistically. It is ***not*** necessary for me to express a concluded view on Barker J's approach in this paragraph, since I have found the evidence in this case supports the existence of a right to take and use resources for any purpose and have, consistently with the approach taken by Dowsett J and Jagot J, found that to be sufficient to support the inclusion in a s 225 determination of a right as expressed by the applicant, without excision or exclusion as to commercial purposes or use. At [48] of their written submissions, the applicant fairly put both the nature of the right asserted (and what must be excluded from it) and the State's position, which I understand is supported by other third party respondents (namely, MPI Nickel Pty Ltd and the Nickel West respondents (comprising BHP Billiton Nickel West Pty Ltd, BHP Billiton Yakabindie Nickel Pty Ltd, Albion Downs Pty Ltd and Weebo Pastoral Co Pty Ltd)):In Applicants SIFC [66(b)] the Applicants also claim the right to access resources and to take for any purpose resources in the Claimed Area. This is also denied by the State. The Applicants accept that the reference to resources does ***not*** (as a matter of law, because of extinguishment) include minerals or petroleum. The Applicants understand that more specifically, the matters in issue are:

(a) whether there is any limitation (apart from that conceded above) on the resources that can be taken i.e. must they be 'traditional' resources; and

(b) whether resources can be taken for commercial purposes (i.e. for the purposes of trading them), or whether the native title right to take resources is limited to particular purposes (e.g. for subsistence, ceremonial and/or non-commercial communal purposes). That approach is reflected in the following three paragraphs of the State's final submissions, each of which in its own way seeks to impose a requirement of evidence of pre-sovereignty rights to commercial use and exploitation, or activity of that kind:The First Respondent submits that the evidence in these proceedings demonstrates that the pre-sovereignty law and custom with respect to exchange of resources, such as ochre and pearl-shell for spears and other goods, was rooted in personal, non-commercial communal needs, including social, ceremonial and cultural needs.

The evidence of Dr Sackett that a spear was given to receive something in return is of the same nature as the "thank you or pay him off" relationship considered in Alyawarr(FC), and the claimants' evidence of the old people exchanging spears for ochre is in the context of subsistence; that is, for personal use.

Similarly, the evidence of contemporary use of emu eggs to carve and sell to tourists, and the sale of seeds to mining companies, is similar to the evidence of the collection of beans to make beads for purchase by tourists in Alyawarr (FC). The basis for the exchange of resources remains, as demonstrated by the evidence of Henry Ashwin and Kado Muir, an exchange based upon a relationship for personal, domestic or communal needs, ***not*** for commercial exploitation, which has its basis in the pre-sovereignty law and custom of the sharing and exchange of subsistence goods.

(Footnotes omitted.) The State's approach is ***not*** consistent with the Full Court's approach in Pilki, and it pays insufficient regard to the way the native title right is identified by the applicant. The native title right is to access and take resources for any purpose. As Dowsett J and Jagot J in particular made clear in Pilki, evidence may establish a right to take resources for any purpose without specific evidence of an exercise of that right for a commercial purpose, or even without specific association of the right with commercial purposes. The task in the present proceeding is to assess the evidence to determine whether it establishes that at sovereignty, and continuing to the

present day, the claim group members and their ancestors have been and are entitled to use and take resources from the claim area for any purpose. I turn now to that task. The applicant's written submissions contained many examples from a range of claimant witnesses, and I do ***not*** reproduce them all, although I accept all the evidence referred to in those submissions is probative of the existence of a right to take and use resources for any purpose, and without any limits as to commercial or non-commercial use. Some of the claimant evidence I have already referred to in related contexts, such as that of Mr Victor Ashwin – see [835] above. In terms of other evidence which describes the claim group members' understanding of traditional laws and customs, some examples include the following. In her witness statement, Ms Wonyabong said the following with respect to the use of sandalwood as bush medicine:There's sandalwood around there too, for bush medicine. Aunt Angeline would collect the sandalwood, cook it in the ashes, grind it and make into a soft cream, and she would rub it on herself when she got a sore. There's sandalwood all over that ***country*** – Yakabindie, Yeelirrie, Mount Keith. These days Kado is collecting and selling sandalwood. Nothing in our Aboriginal law says we ***can't*** do that but you got to get a whitefella license. In his witness statement, Mr Richard Narrier spoke of hunting and gathering in the following terms:If you want to start selling meat you probably need a permit or something, so I don't think I'd get into that; selling my kangaroo. You might get charged for it. But there's no rule against it under Aboriginal law.

Ochre was the main one traded. Main one at Wilgie Mia. That's that Watjari mob, Mullewa side. They got different laws to us.

The womens make baskets out of spinifex stalks. They can sell it if they want, nothing wrong with that. They do it in Warburton too, make them baskets and sell to tourists.

People can make artifacts like spears and boomerangs. They make the spears themselves. You can get that wood anywhere, you get it from a gum tree or a mulga tree, but you mainly use gum trees. They used to trade them things early days when they meet up they just say "You have this" and that other mob say "You have that". There's no Aboriginal law that says I ***can't*** sell it. ***Not*** as far as I know. Mr Lewis gave evidence about a "law trail" his father followed, and taught him about, running through the west of the claim area, and around Booylgoo Range. Included on this trail was a quarry. This was his on ***country*** evidence about what the old people used the quarry for:BRETT LEWIS: This is where they'd come and get their rocks, stones, for them to make a knife or tools, yeah, the quarry. There are quarries right through the ***country*** but this is a big one, you know. They come, sit down and get the best ones, chip away and make the best ones, put on the woomera or – or the (kawidjin).

MR WRIGHT: Okay, what's a woomera?

BRETT LEWIS: A woomera is the thing that they throw the spear with.

MR WRIGHT: Okay,

BRETT LEWIS: Put it on the end of the spear and throw the spear.

MR WRIGHT: Yes. So they use rock as part of that, do they?

BRETT LEWIS: On the end, yeah. It's the - they'd make other wooden artifacts or cutting kangaroo, cutting meat up, yes.

MR WRIGHT: And what else would they use rocks from around here for?

BRETT LEWIS: They'd use it for their ceremonial stuff, initiation and all that, yeah. They had back then no knife, nothing, so they had the rock, use the rocks.

MR WRIGHT: All right. And we've been saying "they"; what's your understanding of who "they" are?

BRETT LEWIS: Well, the people that went through here, my father's people and people that walked through here, yes.

MR WRIGHT: Yes, and what sort of timeframe are we talking about when this was happening?

BRETT LEWIS: Oh, going back a long time, back in the 30s when people were walking around, 40s I suppose, mid-50s. The 40s backwards, yeah, 30s, 20s, right back, yeah, further.

MR WRIGHT: And where did you learn this from?

BRETT LEWIS: I learned all that from my father. He told me and showed me all this. Mr Lewis went on to give quite detailed evidence about the different kind of rocks found at the quarry and what they were used for. He also gave the following evidence:MR WRIGHT: Yes. And did you ever hear anything from your father about what the people who say came here and made the objects out of stone? What would they do with them? You've talked about them using them themselves; was there anything else that they'd do?

BRETT LEWIS: Yes, they'd take it to where they go, to ceremonies, big ceremonies. They can use it for trade if they want it or give it if they see their relation or people from the other side come or whatever, give them a stone and trade, yeah, for something that the other mob might have had that they need.

MR WRIGHT: So do you know where they would trade or who they would trade with?

BRETT LEWIS: They'd trade with the mobs coming for the big ceremonies, you know, if they go to that law ground over there or the mob coming from the- - -

MR WRIGHT: From the west?

BRETT LEWIS: Yes, and people coming from the north, same like back this way, you know. They might trade with the Laverton mob coming from that way or going over here and trade with the Wiluna mob. His evidence continued:MR WRIGHT: And you said they would trade; would they get things in return?

BRETT LEWIS: Yeah, they might get things, whatever the mob got over that side. They might get a bit of oak or something, you know. Back in them days someone may have got something like a shell from further up. The word "oak" here is clearly a mistaken transcription for ochre, as Mr Lewis's subsequent evidence makes clear. This evidence gives specific examples of what occurred in past times, and I am satisfied that this evidence provides a sufficient basis to infer that these activities, and the rights which they are based on, existed at sovereignty in the claim area and were part of the traditional laws of the people who occupied the claim area. They were, I find, no more than examples of the broader right identified by the applicant. The claim group members' ancestors took and used, I find, whatever they needed from the claim area by way of natural resources, and used them for whatever purposes they saw fit. There were no restrictions. There is also sufficient evidence that in more recent times claim group members have taken and used natural resources from the claim area for commercial purposes, and have ***not*** considered that by doing so they are acting otherwise than in accordance with traditional laws and customs. In his witness statement, Mr Victor Ashwin described hunting and gathering in the claim area as follows:I seen elders making spears, boomerangs, shields. People used to sell them to tourists, when they come through town, just on the street. Like Norman Thompson, Ululla Boss and Miparr. They sometimes make hairbelts and sell them. I never hear any one say there was anything wrong with that.

I seen people carving emu eggs and selling them in Wiluna. My mother and father used to do it. Mum was talking about doing some soon.

The Department of Agriculture set up Emu Farm in the 1960s. I think Ngaanganawili community bought it in the late 70s. I worked there. We used to go out and catch emus and sell them to the farm. Me and my siblings, cousins and aunties and uncles. Catch them all and then bring them back and sell them to the farm. We catch some around the north of the claim, when we see the father and the chick we go and chase.

The old people been collecting seeds. They been collecting anywhere. That's no problem, we can sell them to mining companies if we want.

They used to go to trade with them at Wilgie Mia. They trade spears and boomerangs and things to get that ochre. People from around Wiluna area. People use that ochre for everything, like ceremony.

A lot of steel axes made it's way right into the desert. Before the old people came into contact with whitepeople, they had the axe part. It got traded and traded way out into the desert. My grandmother used to talk about it, even my mother used to talk about it, they call it Kartju, or Yillibie. That was the stone axe, but they still called the steel one by the same name.

When you younger, you ***can't*** do any woodcraft. ***Can't*** make anything until you go through the law. Ms Narrier said the following in her witness statement:There was a whitefella who wanted to try growing watja. He took them to Albany to try growing them out there. He tried to grow some in Albany, but it didn't work. He had to go through us for permission to take the plant. If a whitefella comes out with us, they got to wait for permission, or we just say 'do you wanna taste?' or something like that.

There's nothing to stop me selling watja if I wanted to. I could take other bush tuckers too, grass berries or something, to the shop and sell them. Me and Kado, [w]e want to start that at the shed at the Katampul Village in Leonora; trying to plant some bush foods to try and sell it. Mr Henry Ashwin gave some evidence which made clear the proprietary attitude which claim group members had, and considered they were entitled to have in accordance with traditional laws and customs, towards natural resources:We got knowledge about bush medicine. Men and women know it, but mainly ladies do it. Men, they go out hunting and all the ladies for gathering and things.

We got a lot of bush medicine, but people don't wanna show them. I won't show doctors and that, they will take it away and make a big plantation of it and then they'll make money and the people of the ***country*** will miss out on our share.

When I was young, before doctors and hospitals then it was a bit hard to look after your health. If you got a cut you can use sandalwood seed, cut it up and chuck it on the sore. You can use some parts of the lake too, the salt, and rub it on your sore leg. As the State's submissions note, Mr Henry Ashwin also gave some evidence that concerned gift giving, as part of keeping and maintaining relationships, and involved such objects as spears made from resources on ***country***. Far from this being a limit on the use of natural resources (as the State submits), in my opinion, it was just a further example of the way, in accordance with traditional laws and customs, people used what was available in the claim area to suit their current needs – including in facilitating relationships with other groups. This was Mr Ashwin's evidence on that point:Slim Williams, from Parnngurr he rang me up. Him and his father made a lot of boomerang, shield, everything; he's going to bring it down for me from Parnngurr, but I've got nothing to trade him. I've got to figure out something to give him, because he ***can't*** give it to me for free. We still do that trade today, so when he brings it down for me, I've got some time to figure out what to give him – he ***can't*** go back empty handed, you got to give him something, that's the law, now. He made a big mob of those things; he does that

all the time. Dr Sackett gave evidence, with which Dr Brunton agreed, about the existence of trade, including in objects made from natural resources which then might become sacred objects:DR SACKETT: Well, people in the desert, there's some evidence – there's ***not*** heaps of evidence but there's certainly evidence of people engaging in trade in the desert and who crossed the desert into non-Western Desert areas and Daisy Bates herself talks about some spears coming down from the northern parts like the Ashburton area I recall and she also talks about some sacred objects, particular sacred objects coming down from – ultimately from the coast. And in – when I was at Wiluna in the 70s an anthropologist ... by the name of Kim Ackerman visited and recorded the same sort of trade objects coming down to Wiluna as the sacred objects Ms Bates has recorded and in fact, some of the claimant's ancestors were there for that. I can say – Ackerman doesn't mention that but I happened to be there when it was happening, so I observed it, so yes, there's a precedent of trade.

HER HONOUR: All right. And would you describe those as natural resources because they're made from - - -

DR SACKETT: Well, they're made from things in nature, but then they take on another meaning obviously, particularly the sacred objects, they have new meaning altogether, but even the spears, they can take a meaning – it's a relationship that people have with that. It wasn't we just got a spear. You could be in a trade relationship with another person so you – they might give you a spear and sometime later you would give them something else in return.

HER HONOUR: Yes, I see. Dr Brunton, anything you want to say about that?

DR BRUNTON: I've got nothing to add to that.

HER HONOUR: All right.

DR BRUNTON: I agree with what Dr Sackett said. Dr Sackett and Dr Brunton were expressly asked, as part of the concurrent evidence session, whether they considered that under the traditional laws and customs of the occupants of the claim area at sovereignty there was any limitation placed upon the types of natural resources that could be exploited, and both said there were none, aside from restrictions in the exchange or trade of sacred objects which may arise from age, gender or other characteristics of the recipient of a sacred object. In summary, the evidence (both of the claimant witnesses and the experts) demonstrates that at sovereignty and in accordance with traditional laws and customs, the Western Desert people whom I have found occupied the claim area had rights to take and use natural resources from the claim area for any purpose they saw fit. Their traditional laws and customs placed no limits on what they might choose to do with those resources. The evidence shows they tended to use those resources in ways which assisted production or harvesting of food, hunting, exchanges with other groups, gift giving, and participation in sacred and ceremonial aspects of their lives. The evidence also shows that the members of the claim group and their ancestors have continued to see themselves as entitled to take such resources from the claim area as they need, or want, for such purposes as they see fit. As they have seen various opportunities to use what grows or lives in the claim area, they have done so, and that has continued to the present day. They continue to recognise a right to turn the resources of the claim area to other uses as they see fit.

The right to engage in spiritual and cultural activities The State accepts the claimant evidence has established this right. I am satisfied there is ample evidence of the existence of this right. Some examples from the evidence suffice. Mr Muir gave the following evidence:Two law grounds that I know of in the east of the claim area are called Tjampuwa, also known as Townsend Well, and Ngalpirri, also known as Henry's Well. They are both traditional water places which now have windmills put on them and they are part of a route that mum used to travel as a young girl when she participated in ceremonies. She would walk west from Mulga Queen towards Darlot and then through to these waters and through to Kalyuwintal [Calowindie Well].

Those two waterholes are different stages of the initiation cycle. Tjampuwa is getting scars on your chest, and the other one, Ngalpirri, is getting scars cut onto your back.

Mt Sir Samuel was a place where a lot of old people would camp and would have a lot of ceremonies there. That's one of the reasons why our original native title claim was called 'Sir Samuel'; it was named after that place. That was an important gathering ground and an important cultural feature because it was basically the point at which people travelling from the east would stop and then start travelling north. So the journey from there was up to Wiluna, which in those days was called Mulyi Well which is somewhere between Bondini Aboriginal Reserve, Millibillie Station and the old village. They went there because that's where ceremonies would be conducted in Wiluna, after Sir Samuel.

Near Black Tank near Logan Springs is a law ground. The last person to go through the law there was tjamu Wawi [Roy] Beaman when he was a young man. Mr Lewis's evidence, both in his statement and orally, dealt quite extensively with spiritual and ceremonial activities:The first one is north of the homestead from Booylgoo Ranges. That law ground was last used in the early 1950s. My dad went through with a mob from Kaluwiri to take them through the law there. There was a big mustering camp, and there were some young men who needed to go through a certain stage of the law there. My dad would look after that place. He would make sure that it was ready for the ceremonies. I went there a couple of years ago to have a look and I go through there and look after it now. I have a look around but I don't go often as I would like.

I first went to that law ground with my father in the 1960s. There's drinking water there and a camping ground where you can see grinding stones from the old people. Up from the water there is the law ground. It's a fair-size law ground. People came from Leonora, coming through from the east heading north-west. It's part of the different areas of their ceremonies. Women ***can't*** go to that law ground.

The second law ground is nearby to the first law ground. It is right in the hills of the Booylgoo Ranges, and is hard to get to. I went through there with a motorbike a long time ago.

Booylgoo is really pulyku, which means 'sinew'. I couldn't tell the story for that place but it has something to do with the man there and the kangaroo sinew. I know the part of the story where they cut the sinew. You can see the gap in the ranges wherethe sinew has been chopped. In oral evidence, he described what he could say of his father's initiation and the law grounds where this occurred:MR WRIGHT: And if I or Mr Ranson ask you questions that you don't feel comfortable to answer, then just feel free to say. But, I just wanted to ask you about your father. So, you've told us that he was initiated?

BRETT LEWIS: Yes.

MR WRIGHT: And do you understand what law was he initiated in?

BRETT LEWIS: Meaning? What do you mean?

MR WRIGHT: Is it – is there a particular name for the law that he was initiated in? You may ***not*** know.

BRETT LEWIS: Okay. I don't know what you're really getting at or - - -

MR WRIGHT: Okay. Were there other places that you know of where that law was practised?

BRETT LEWIS: Yes, the – well, the law that I know he was initiated in is practised in Warburton and Wiluna and through this area. Yes, so, it's a pretty common sort of law, yes.

MR WRIGHT: And were there different stages to your understanding of that law?

BRETT LEWIS: Yes, there is.

MR WRIGHT: Do you know whether he'd been through different stages?

BRETT LEWIS: Yes.

MR WRIGHT: And can you just explain that to the extent you can?

BRETT LEWIS: The extent that yes, he's been through different stages. I ***can't*** go through – he's been marked front and back and yes, that's it.

MR WRIGHT: Right. And there were some lawgrounds that you've mentioned?

BRETT LEWIS: Yes.

MR WRIGHT: Can you just explain what's a lawground?

BRETT LEWIS: That's a very sacred site for Aboriginal people and that's where the initiations are and the songs and dances of the area and what they're going through happens, yes.

MR WRIGHT: Yes. And there are some lawgrounds around here I understand?

BRETT LEWIS: Yes.

MR WRIGHT: Can you point out where they are?

BRETT LEWIS: To the north of us, and there's two lawgrounds to the north, yes.

MR WRIGHT: Okay. And do they have a particular name?

BRETT LEWIS: No, ***not*** that I know of, yes.

MR WRIGHT: Now, when – on our site map we've got one in F8 [in the north-east part of the claim area and to the north of Booylgoo] called Pulyku lawground?

BRETT LEWIS: Yes.

MR WRIGHT: And that's Pulyku just to identify it as being in this general area?

BRETT LEWIS: Yes, yes, correct.

MR WRIGHT: So, that's one of the ones you're referring to?

BRETT LEWIS: Yes, and one is just a bit further away in the same area, yes, over there, yes.

MR WRIGHT: So, you've just pointed on F8 but just south, sort of halfway between the purple dot and the bottom of F8 - - -

BRETT LEWIS: Yes. Yes.

MR WRIGHT: - - - on our site map? And your father – or how did you learn about those lawgrounds?

BRETT LEWIS: He told me about those and the vicinity they were in and went to the rockhole. He showed me the rockholes where the ladies and stuff used to all camp down and get water from, yes. Mr Lewis was asked in cross-examination whether the law grounds were used in his lifetime, but I do ***not*** consider that his answer gave a clear indication one way or the other. My impression was that he did ***not*** wish to speak publicly about such matters, as he then said. The following exchange then occurred:MR RANSON: Are you the main person that speaks for those lawgrounds and knows about them? You've been put - - -

BRETT LEWIS: I know about them but yes, because I'm ***not*** initiated I ***can't*** publicly speak about them, yes.

MR RANSON: Yes. Yes.

BRETT LEWIS: But I know about them and I look after them, you know, and I'd go in there and do things, but yes - - -

MR RANSON: Okay.

BRETT LEWIS: - - - just make sure they don't get damaged.

The right to maintain and protect places of significance The State accepts the evidence had also established the existence of this right. I am satisfied there is ample evidence of the existence of this right, and of its exercise. For example, in his witness statement, Mr Lewis said the following with respect to protecting rockholes:The little rockholes are mainly covered up with sticks or rocks and you don't need to clean them out. The main reason for covering them up this is to stop animals from drinking as there will be no water left. If there are sticks or animals in there, you clean them out, but if there's just dirt in there you leave it because it stops it evaporating. It keeps the water underneath by making it harder for the sun to penetrate the water. My father taught me how to cover up the little rockholes.

In the old days, people were moving around, making sure they were close to water. People made sure to look after the big rockholes and the big soaks. That's one of the reasons we are one big family, but with little different groups; so you don't have a big impact on the ***country*** by having lots of people in the same place. People were always moving around, looking after the ***country*** – burning it, and then letting it regrow, constantly moving around and fixing it up. Then, in oral evidence, he said the following:BRETT LEWIS: Yes, just – they clean out rockholes or sometime they'd leave the sand in there to stop the water from evaporating. So, you know, water would be under the sand and if you come along and you're thirsty, you just dig, and I think if you'll – if it's clean water there all the birds and animals will just drink it if they can see it, but kangaroos and dingoes will come and dig or goanna, yes.

HER HONOUR: Okay. So that helps preserve it does it?

BRETT LEWIS: Yes.

HER HONOUR: Right.

BRETT LEWIS: It keeps the water there longer. Either they clean them out and they can come them over with sticks or stuff so they know water is there.

MR WRIGHT: And how did you learn about that rockhole there?

BRETT LEWIS: My father.

MR WRIGHT: Did he explain to you - - -

BRETT LEWIS: Yes.

MR WRIGHT: - - - that that rockhole had any particular purpose?

BRETT LEWIS: Yes, that's one of the water sources on the trail walking, yes. You can walk through there and get water at certain time when it's raining, yes. In her evidence, Ms Narrier said the following on cleaning rockholes:You look after rockholes by cleaning them all out – for the animals, like the kangaroos. Those rangers, if they seek a rockhole they clean it out. That's the main thing, cleaning those rockholes. They clean it out with a shovel, or they dig it out with their hands. We leave a stick in there, in the hole, if it is a little rockhole, for the birds to perch on. If it is a big rockhole, we cover it up because when you come back you might want a drink of water and you don't want to see a dead carcass in there, like kangaroos. Mr Allan Ashwin also gave evidence on the process of cleaning rockholes:At Community Bore, that ***country*** there is all sort of spinifex ***country*** on there in some places you can bump into like a little gnamma hole like a rockhole. You clean them out with your hands, take all the dirt out if there's ***not*** water in them. Or if you got a mug or something you can use that to clean it out, if they full of sand. If you don't do it then it's going to be full of sand and there will be no water in there. You got to clean it out to keep it clean so there will be more water there. In his witness statement and in oral evidence, Mr Victor Ashwin recalled cleaning out rockholes in the Barr Smith Ranges when he was a child. Ms Hogarth gave evidence of men cleaning out rockholes, as follows:When the men were doing the mustering for the shearing, they would go and visit places. They would visit Mica Well on Yeelirrie. There's men's business at that place, and we're ***not*** supposed to go there so we don't go there. The men would go to sacred places over there, and we go one other side to come into the station. We never ever go there. When we were going from Altona, the shearing shed, all the way back to Yeelirrie, the men would point 'don't go that way', so we don't ever go.

When the men were mustering, they would go to the rockholes and clean them out for the next rain to come and fill it up. Mr Muir gave evidence of rockholes being cleaned at Mount Keith, as follows:At Mt Keith, before the mine was there we travelled out there to clear out the rockholes. It was the end of a long hot summer and it was all covered up. You could smell it from quite a way because all the animals had come and died there because of the drought. We cleared everything out and burned it all on the side and got the water clean and flowing again. Some of the oldies had done a ceremony on it and then when we went away that year there was a plague of emus! This is part of releasing the power, the pimarr, which brings the emus out. Ms Wonyabong said in her oral evidence that it is the job of the "old people", such as Mr Keith Narrier or Mr Richard Narrier, to clean out rockholes. In her oral evidence, Ms Geraldine Hogarth explained the process of protecting rockholes in the following way:... when we dig the water we can – in rockholes and soak you can put branches in there to stop it evaporating or if animals might fall in there. But after the quartz will cover it over because after the couple of rains we had the last couple of days there's water plentiful for the animals out. Ms Hogarth also said that the location of rockholes and soaks are signalled through the use of rocks placed on the ground or in trees. A number of witnesses gave evidence with respect to controlling access to the claim area by others. In particular, Mr James said that non-Aboriginal people should seek permission to access the Tjiwarl area. He said that as a result of community consultation, a sign had

been erected at Tjiwarl to prevent non-Aboriginal people entering the site. Mr Leroy Beaman said in his evidence that non-Aboriginal people should ***not*** access Lake Miranda as it is a place "for our black fellas and this is our story, you know, dreaming about this place". Mr Beaman also expressed the concern that non-Aboriginal people accessing protected sites might wake up the "dreaming Snake". In his evidence, Mr Muir said that members of the claim group had controlled the access of non-Aboriginal people by ensuring that a mining camp was ***not*** built at Logan Spring. He said they also controlled access by managing the impacts of power transmission lines and managing the relocation of roads to avoid ceremonial grounds. Mr Muir also said that a fence had been erected around the site at Pii in order to protect the site from any impact of grazing.

A right to protect the environment? The applicant also advanced a separate right, described as a "right to protect resources and the habitat of living resources" in the claim area. They seemed to nominate this as a separate right out of an abundance of caution, lest the content of the right to "maintain and protect places" was ***not*** seen as extending to a positive right to "do things necessary to ensure the preservation and propagation of the resources of the Claimed Area". In Alyawarr at [136]-[140], the appellant challenged a determination of native title on a large number of grounds, but the Full Court grouped the grounds into three main issues. The second of the three issues was the nature of the native title rights defined in the determination. One of the formulations in the determination which was challenged by the Northern Territory was para 3(d), which defined a right of access to the land and to protect sites on the land in the following way: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. The debate before the Full Court was over the content and scope of the word "protect" and whether it necessarily involved a right to control access and to exclude others from the land. The Full Court held (at [140]) that the non-exclusive nature of the right meant it would ***not*** confer a right to control access to sites or resources. The Full Court endorsed what had been said by a previous Full Court in Attorney-General (NT) v Ward [2003] FCAFC 283; 134 FCR 16 at [25] about a right of that kind: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. In their submissions, the applicant accepts that even if identified as a separate right to "protect resources" such a right "would ***not*** give rise to an enforceable right to preventing others from taking resources or doing things that would damage the habitat of living resources". Instead, the applicant submits such a right would involve a "positive right to do things necessary to ensure the preservation and propagation of the resources of the Claimed Area, which may ***not*** fall within the scope of maintaining and protecting places and objects of significance". It seemed from some of the evidence relied upon (such as that from Mr Muir, Mr Lewis and Mr Allan Ashwin about burning off ***country***) that the focus was ***not*** on sites and places, as might be thought to be the focus of the right accepted by the State, but a right which has more active content in relation to the natural environment. I am ***not*** satisfied such a right has been made out on the evidence. The evidence about traditional burning practices was sparse to say the least. In contrast, the evidence about cleaning rockholes as part of protecting sites of significance was ample, but this falls well within the right in the form accepted by the State. The right has some positive content, which includes the protection of natural resources – that is, it contemplates activities designed to protect and preserve the quality of and access to waterholes. I do ***not*** consider any different right of general protection of the environment has been proven. Even if it had, I would have doubts whether it could properly be seen as a non-exclusive right, because the only activity identified as falling within it (burning ***country***) would seem to involve, of its nature, a right to control access and exclude others, which would seem to be inconsistent with a non-exclusive right.

The right to receive a portion of any traditional resources (***not*** including minerals and petroleum) taken from land or waters by Aboriginal people The State conceded that a right of this kind can be recognised in a determination of native title. I am satisfied on the evidence that such a right has from sovereignty been part of the traditional laws and customs of Aboriginal people in occupation of the claim area. I give three examples from the evidence. First, Mr Edwin Beaman's evidence was:Marlu, it's there for us, for Aboriginal people. I ***can't*** say "Don't kill that" to another blackfella because that's for him to feed his family. No one else can tell me ***not*** to hunt kangaroo either, no way. But if they're hunting on Yakabindie, it would be mine. That's my kuka [meat]. They might kill it, but they gotta share it out to us if we pull up. Second, Mr Richard Narrier's evidence was:My father and them old peoples taught me how to hunt. All that thing with spears gone a long time ago, we use rifles now. We get a vehicle and a rifle and that's all.

When we go get a feed from hunting we share things out to every people from different towns. We have close knitted families.

You follow goanna around and knock them in the head, or dig them out. You use whatever you got, a stick or a stone to knock 'em out. You roast it in the fire and clean them out; get the skin off them. Tie the back legs and front legs up and put a stick through it. Most people go for the tail but I like the liver! People can take their pick.

Lot's of rules about kangaroo. You got t[o] cook it in the ground; cut him up the right way. You get the legs off and cut it through the middle. You use any sort of wood, mulga or that, for the fire.

There's a rule from the old people, the man go out and catch a kangaroo with the spear and they cook it and cut it up and then they give it out to people, they share it out. To the older people first and then to whatever is left over. The one who gone out and killed it, cooked it gave out the best bits to the old people and then took his pick. That's the traditional rule I got from stories from the old people. I think that law is gone now; it's finished. I should make it clear that what I understood Mr Narrier to be saying was "gone" by way of the law was that the person who caught kangaroo had to give the best bits to the old people, then took his pick. I understood him to mean that was ***not*** a steadfast rule applicable at all times, given how men hunted in current times. However, for example, during the on ***country*** hearings when a kangaroo was caught and cooked, it was apparent that those elders present were offered pieces before others. The third and final example is from the evidence of Ms Harris:If you're going into another person's ***country***, you light a fire, waru, to let people know you're coming, like a greeting. You'll light a fire or smoke them, at a boundary. I never seen it happen, I was small, but I heard the stories, and heard of people asking permission to come into my father's area. They'd go off and talk, the tribal men together. They'll ask permission to go out there and hunt on the other side of the boundary, and then they'll come back and share out the feed. I heard of this happening around Leinster Downs, Lawlers and Mount Keith too. My dad told me about that. In contrast to the next asserted right, the evidence about the content of this right was sufficiently consistent for me to be satisfied of its existence and continued acknowledgment.

The right to make decisions about the use and enjoyment of land and waters in the claim area by Western Desert people This right is claimed by the applicant on the basis that the claim group is a "subset" of Western Desert society, and a right of this kind should be recognised as enforceable against other members of Western Desert society. The State disputes this claim, mostly on the basis that the recognition of such a right would be inconsistent with the partial extinguishment of the exclusive right to possession, use and occupation. Although the dispute between the parties is in one sense a dispute about the nature and extent of extinguishment, I consider it is best dealt with in this section of my reasons. I deal first with the evidence, then with the law, and then set out my conclusion on this issue. I have set out in various places in these reasons evidence from the claimant witnesses, and anthropological evidence from Dr Sackett, about the way in times past Aboriginal people whose ***country*** is close to the claim area, or is situated further to the east, traversed and used the ***country***, and interacted with Aboriginal people occupying the claim area. The claimant evidence is that such interaction continues to occur, especially with areas to the north around Wiluna. I have found the claimant evidence somewhat equivocal in relation to interactions in the claim area, and use of the claim area, by other Western Desert people or non-Western Desert Aboriginal people. It is less clear than their evidence about how they treat people who are total strangers to the claim area. There is some evidence of the need to seek permission, but some evidence of no such need. There was no evidence suggesting the circumstances in which permission could be refused, suggesting perhaps that if permission were required, it was more a kind of "notice" rather than real permission. There is also some overlap with the right to receive a portion of any traditional resources taken from land and waters by Aboriginal people. Some of the evidence includes the following. Mr Bingham's evidence was:If someone another Aboriginal person, ***not*** from that area, they wanted to take emu eggs from Yeelirrie or somewhere, it would be okay, as long as we're with them. As long as they go back where they from, they ***can't*** make a ngurra there if they ***not*** from there, just visiting is okay. Mr Henry Ashwin gave the following evidence, which does ***not*** expressly relate to other Western Desert people, but it seems to me this is implicit in the way he expresses the need for permission, and his reference to the ***country*** of such other people:Other people could go to this area for hunting, if you know this ***country*** you can go for as long as you don't get lost. If they want to come here, still someone got to ask us. In the right way,

otherwise they'll get themselves in shit. They'll feel the same way if I go there and muck around, they got to ask and have someone who know the ***country***. Mr Ashwin also gave this evidence about Aboriginal people who were closely associated with the claim area:I learned about the stories for ***country*** from Mr P [Billy Patch, deceased] and F.J. [Friday Jones]. They taught me what my father taught them; he taught them about the ***country***, and then they passed it on to me. You got to pass it on otherwise everything fade away and you'll have nothing. They taught me about the Two Mans [Wati Kutjarra], the Snakes [Tjila Kutjarra], and some other stories I ***can't*** say in front of women. Mr P was always invited to that ***country***, because we share the same law and the same language – we ***can't*** tell them to go along and leave, why ***can't*** they stay? It's a home for any tribal people. Mr Billy Patch was, I note, the lead applicant on the Birriliburu determination. Mr Keith Narrier's evidence was as follows:Other blackfellas; they can hunt on this ***country***. We go to their ***country*** and hunt around there and they let us. We let them the same way. They might ***not*** ask me; they go there and hunt and I do the same over there.

If I went out to ***country*** a long way away from here then I would ask the elders for that place where to go before I went hunting. There might be some sacred sites, mens places, womens places. Like that. Otherwise you might go to the wrong place. You would get punished I suppose, you do. You get punished by the guardians from that place, Warburton Ranges, those people there.

[Warburton] Ranges people, they know where to go. They been here before. Ms Wonyabong said in her evidence:Lately people from Wiluna just go out on Yakabindie and Albion Downs, collecting emu eggs. They don't ask. I don't think they really have to ask. We just hear people talking about going out there; they just go where the emus are laying. The clearest evidence on the issue came ***not*** from one of the claim group members, but from Mr Patterson, who said:If I wanted to go hunting in that Tjiwarl area then I would have to ask someone, like the Redmonds, the Ashwins or the Narriers and ask if it was okay.

Best to get them lot in the group now to talk for their ***country***. You can get Beasley [Keith Narrier] to talk for his ***country***. That's a rule – because he's the right person. All the Narriers and Redmonds, they can talk. You got to talk to them right lot. All decisions about ***country*** have to be made by the right people. Important decisions about ***country*** have to be made by the senior people for the ***country***.

I don't know much about that Tjiwarl ***country***, but I know about the rules. I ***can't*** say nothing much about that ***country***. We still respect that Law. I ask permission to go onto other people's ***country*** – their ngurra – and other people ask permission to go onto my ***country***. If outside people want to come onto ***country***, they should speak to the right people first. While this evidence is clear and reliable on several aspects of the content of the native title rights and interests also identified by the claim group members, it is somewhat at odds with the claim group members' own evidence about whether permission is required for other Western Desert people. Despite the applicant's reliance on it in their written submissions, I do ***not*** consider those portions of Dr Brunton's report to which the applicant referred can be used to support the applicant's claim for a right of this kind. What Dr Brunton said appeared in a section of his first report where he set out his opinions about what kind of laws and customs may have existed in the claim area occupied, as he considered it was, by Ngaiawonga people who were ***not*** members of Western Desert society. I do ***not*** see how that evidence can assist a claim which is based, as the applicant's submissions recognise and the authorities below make clear, on a group being a "subset" of a larger society. On the evidence, I am ***not*** satisfied the applicant has established a right of the kind claimed existed at sovereignty, nor have they established that, even if it did, the members of the claim group have continued to observe such a right. The evidence suggests a more flexible attitude to the way in which other Western Desert people can come into, enjoy, and take resources from, the claim area. That finding makes it unnecessary for me to determine the legal issues which divide the parties about how, if at all, a native title right of this kind survives the extinguishment of a native title right to exclusive possession, and in what circumstances such a right exists in any event. However, since the matter has been the subject of detailed submissions, I will make some observations to indicate what my position would have been, had I needed to decide the question. The determination of a right of this kind appears to have its

origins in the Full Court decision in Ward [2003] FCAFC 283; 134 FCR 16 at [27]. That formulation was set out at [5(e)] as follows: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. A right of this kind was recognised in De Rose (No 2) [2005] FCAFC 110; 145 FCR 290 at [168]-[170], although the issue raised on appeal was whether such a right was inconsistent with the rights of access granted to Aboriginal people by s 47 of the Pastoral Land Management and Conservation Act 1989 (SA), which the Full Court held it was ***not***. The applicant also relied on Selway J's decision in Gumana. It seems to me the rights as expressed in Gumana were of a different kind. Both the rationale for, and the difficulty with, the recognition of such a right was explained by the Full Court in Alyawarr at [151]:Although para 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. The Full Court in Alyawarr recognised the kind of right for which the applicant contends could exist where (as here) a claim group is "a subset of a wider society incorporating other groups bound by the same traditional laws and customs". The reference to De Rose (No 2) confirms this. The next sentence (concerning intramural allocation) is, in my opinion, a separate point being made by the Full Court and ***not*** one which would be appropriate had this kind of right been made out on the evidence. It would ***not*** be an issue of intramural allocation, because it concerns relationships between members of the native title holding group and people outside that group, albeit other Aboriginal people who form part of the same "wider society". The State's essential contention is that:... the claimed non-exclusive right to make decisions is ***not*** a right or interest which would have existed prior to the acquisition of sovereignty but is rather an incident of a right [that is, the right of exclusive possession] which has been extinguished by inconsistent grant, if it ever existed. I do ***not*** consider the State's submission is correct. To commence, as its submission as developed does, with the concept of extinguishment and what this entails, is to commence at the wrong point. The correct starting point is to consider whether the applicant has established on the evidence there was a right of this nature existing in relation to the land and waters of the claim area at sovereignty, then to see whether it has continued, and finally whether it is inconsistent with the non-native title rights and interests which have subsequently been granted over the claim area. Although I have found the applicant has ***not*** established the right existed at sovereignty, and even if it did they have ***not*** established that it has continued to be observed in substantially the same form to the present time, I consider had I been satisfied of those matters I would have found the right to make decisions about the use and enjoyment of land and waters in the claim area by other Aboriginal people was a right, on the authority of Western Australia v Ward [2000] FCA 191; 99 FCR 316 (Ward (FC)), Alyawarr,Gumana and Jango (see [571]), which was capable of being recognised in a determination of native title. However, there would then have been a factual question to be decided: namely, whether the continued existence of that right would be inconsistent with all or any of the non-native title interests which have been granted over the claim area. This, it seems to me, would be a factual question of no small measure, and some of the State's contentions about the dilemmas the continued existence of such a right might throw up have some force. I do ***not*** propose to decide this factual question because it is too far removed from, and hypothetical to, the findings I have made. It should await a case where the issue is squarely raised.

EXTINGUISHMENT There are limited, but substantial areas of disagreement between the parties on extinguishment issues. Where the matters are agreed, I deal with them in summary form, relying substantially on the amended parties' agreed statement of issues regarding extinguishment and other interests.

Matters that are agreed During the course of the trial, the applicant and participating respondents, to whom I will refer as "the parties", filed an agreed statement of issues regarding extinguishment and other interests. The agreed statement was amended in November 2015 in order to correct errors in the Schedule. The agreed statement also contained the four issues that are in dispute in this proceeding, but before those issues are considered, it is convenient to record below the extinguishment matters that are agreed between the parties. At the outset, the parties agreed on a number of preliminary matters. First, the parties agreed that native title, if it exists, has been

partially extinguished by executive acts over the whole of the claim area. The parties agreed that, on that basis, it would ***not*** be necessary for the Court to determine the validity of certain acts and whether those acts had the effect of partially extinguishing native title. Second, the parties agreed that native title, if it existed at the relevant time, has been wholly extinguished by the acts identified as agreed in the statement, namely: the granting of freehold titles specified in the Schedule to the statement; the vesting of specified reserves; the granting of specified leases of reserves under s 41A of the Land Act 1898 (WA) and s 32 of the Land Act 1933 (WA); and the granting of specified special leases. Third, the parties reached agreement that any determination of native title should recognise "other interests" as identified in the agreed statement. Fourth, it was agreed by the parties that the issues to be determined by the Court in respect of extinguishment and "other interests" are those identified in the agreed statement. Fifth, the parties reached consensus that the agreed statement should prevail to the extent of any inconsistency between the agreed statement and the parties' respective statements of issues, facts and contentions on extinguishment. Sixth and on the issue of partial extinguishment, the parties reached agreement on the existence of partial extinguishment over the claim area, and flowing from that, reached agreement on two sub-issues. First (and overlapping with some of the earlier propositions in the agreed statement), any right to control access to the land and waters has been extinguished, and as a result, any native title does ***not*** confer possession, occupation, use and enjoyment of the land and waters to the exclusion of all others. Second, the parties agreed that if a native title right existed in relation to the ability to make decisions about the use and enjoyment of the lands and waters (despite the participating respondents denying that such a right ever existed), a native title right to receive a portion of any traditional resources, excluding minerals or petroleum, taken from the land and waters in the claim area would have survived any partial extinguishment. Seventh, the parties conveniently summarised the agreed relationship between any native title rights and interests and "other interests" in the following terms:(c) any determination of native title does ***not*** affect the validity of those other interests;

(d) to the extent of any inconsistency between the other interests and the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the other interests to the extent of the inconsistency during the currency of the other interests; and

(e) otherwise the other interests co-exist with the native title rights and interests and, for the avoidance of doubt, the doing of an activity required or permitted under those interests prevails over the native title rights and interests and their exercise, but does ***not*** extinguish them. On the issue of freehold titles, the parties agreed that freehold titles set out in the agreed statement wholly extinguished native title, and as such, those areas are to be excluded from any determination of native title. There are 132 freehold titles in this category. They are set out in Table 1 to the amended parties' agreed statement and need ***not*** be set out here. In respect of vested reserves, the parties agreed that native title was wholly extinguished by the vesting of the reserves set out in the amended parties' agreed statement and accordingly, those areas are to be excluded from any determination of native title. Those vested reserves are as follows: RES 5505, RES 8400, RES 10378, RES 17675, RES 30897, RES 39075, RES 41816, RES 41817, RES 41818, RES 42277, RES 42315, RES 42831 and RES 42934. The parties then agreed that the unvested reserves set out in the amended parties' agreed statement should be included in any determination of native title as "other interests". Those unvested reserves are as follows: RES 4004, RES 6405, RES 6913, RES 7003, RES 7553, RES 7724, RES 9016, RES 9288, RES 9416, RES 9417, RES 9418, RES 9699, RES 10037, RES 10247, RES 10293, RES 12207, RES 12833, RES 12834, RES 12835, RES 12836, RES 13093, RES 13094, RES 13095, RES 13711, RES 13871, RES 15441, RES 15889, RES 16611, RES 18137, RES 18760, RES 19403 and RES 46801. In respect of leases of reserves, the parties agreed that native title was wholly extinguished by the granting of leases under s 41A of the Land Act 1898 and s 32 of the Land Act 1933. Those leases of reserves are as follows: L332/767, L332/783, L332/1085, L332/1177, L332/1178, L332/1986 and L954/41A. Further, the parties agreed that reserve lease J711475 is valid as an "other interest" which excludes it from any determination of native title. The parties submit that particular reserve lease should be included as an "other interest" on the basis that native title was previously wholly extinguished over the area of the lease. The parties reached agreement in respect of special leases. Specifically, the parties agreed that native title was wholly extinguished by the granting of special leases 3116/6675 and 3116/6676 and that those areas will be excluded from any determination of native title. Further, the parties agreed that leases H586770 and I123689 will be excluded from

any determination as “other interests” for the reason that native title was previously wholly extinguished over the area of the leases. As to roads, the parties agreed that specific roads should be included as “other interests” in any determination of native title but those roads have ***not*** extinguished native title. Those roads are as follows: Road 2, Road 5, Road 6, Road 7, Road 8, Road 11 and Road M069 (Mount Magnet – Leinster Road). The parties then agreed that the following roads are to be excluded from the claim area: Road 10, Road 13, Road 14, Road 15, Road 16, Closed Roads 20-23. On the issues of water bores and gravel pits, the parties agreed that the water bores and gravel pits referred to in the affidavits of Mr Shane Power, Ms Mia Dohnt and Ms Andrea Nunan should be included as “other interests” in any determination of native title. In respect of easements, the parties agreed that specific easements should be included as “other interests” in any determination of native title but have ***not*** had any extinguishing effect on native title. Those easements are as follows: EASMT 1, EASMT 2(a), EASMT 2(b), EASMT 3 and EASMT 4. In respect of mining tenements in the claim area, the parties agreed that the mining tenements set out in the amended parties’ agreed statement should be included in any determination of native title as “other interests”. There are 541 mining tenements listed in this category. They are set out in Table 5 to the amended parties’ agreed statement and need ***not*** be set out here. As to petroleum tenements in the claim area, the parties agreed that specific petroleum pipeline licences should be included as “other interests” in any determination of native title but those licences have ***not*** had any extinguishing effect on native title. Those petroleum pipeline licences are as follows: PL 24; PL 25 and PL 26. The parties reached agreement in respect of some issues relating to ownership of minerals and petroleum. Specifically, they agreed that any determination of native title should provide that there are no native title rights and interests in the claim area in or in relation to:(a) minerals as defined in the Mining Act 1904 (WA) and the Mining Act 1978 (WA); or

(b) petroleum as defined in the Petroleum Act 1936 (WA) and in thePetroleum and Geothermal Resources Energy Act 1967 (WA); or

(c) geothermal energy resources and geothermal energy as defined in thePetroleum and Geothermal Energy Resources Act. In respect of groundwater areas, the parties reached consensus that the groundwater areas under the Rights in Water and Irrigation Act 1914 (WA) should be included in any determination of native title as “other interests”. The parties identified two groundwater areas to be included, namely the East Murchison Groundwater Area and the Goldfields Groundwater Area. Finally, the parties reached agreement with respect to the rights and interests of Telstra Corporation Limited (Telstra). The parties agreed that any determination of native title should include those rights and interests as “other interests”, as follows:(a) as the owner or operator of telecommunications facilities within the determination area;

(b) created pursuant to the Post and Telegraph Act 1901 (Cth), theTelecommunications Act 1975 (Cth), the Australian Telecommunications Corporation Act 1989 (Cth), the Telecommunications Act 1991 (Cth) and the Telecommunications Act 1997 (Cth) including rights:(i) to inspect land;

(ii) to install and operate telecommunications facilities; and

(iii) to alter, remove, replace, maintain, repair and ensure the proper functioning of its telecommunication facilities;(c) for its employees, agents or contractors to access its telecommunications facilities in and in the vicinity of the determination area in performance of their duties; and

(d) under any lease, licence, access agreement or easement relating to its telecommunications facilities in the determination area. One of the matters identified as ***not*** agreed was whether any determination should contain an “any other public works” clause with liberty to apply to the Court to identify such works. Subsequently, the State indicated it did ***not*** press for the inclusion of such a clause and, as no public works have been identified, a clause of this kind may ***not*** be necessary. Accordingly, that leaves four issues in dispute. They are:(1) whether the renewals of the pastoral leases that fall wholly or partially within the claim area on 1 July 2015 are valid future acts;

(2) whether miscellaneous licences L53/161 and L53/177 were validly granted;

(3) whether seven specified miscellaneous licences are invalid future acts; and

(4) whether s 47B of the NT Act applies to disregard extinguishment in specified areas of the claim area.

The consequences of non-compliance with the future act procedural provisions I propose to deal with this issue at a general level since the resolution of this debate is capable of affecting the pastoral leases and all of the miscellaneous licences which are still in issue. The issue turns on the effect and application of the Full Court's decision in The Lardil Peoples v Queensland [2001] FCA 414; 108 FCR 453, and two single judge decisions which have applied it consistently with the contentions of the respondents. It appears to be common ground that the grant of miscellaneous licences such as those in issue here passes the freehold test under section 24MD of the NT Act. Acts which pass this test are future acts (whether legislative, executive or administrative) that apply in the same way to native title holders or native title claimants as they do to other people who hold a fee simple freehold in land. There then do appear to be various concessions (at least, from some of the licence holders) about which of the provisions in Pt 2 Div 3 would have applied to each licence: see, for example, the submissions filed on behalf of BHP Billiton Nickel West Pty Ltd, BHP Billiton Yakabindie Nickel Pty Ltd, Albion Downs Pty Ltd and Weebo Pastoral Co Pty Ltd at [17] and [28]-[29]. Although the State relied on Lardil in its submissions about the validity of the renewals of the pastoral leases, in its submissions about the miscellaneous licences it does ***not*** refer to Lardil. Nor does it do so in its reply. However, the licence holders then make submissions about the effect of the Full Court's decision in Lardil. The basic contention is that Lardil is authority for the proposition that compliance with the procedural requirements in Div 3 (other than those in Subdiv P) of Pt 2 of the NT Act does ***not*** condition the validity of the future act. The licence holders therefore submit that any procedural non-compliance established by the applicant will ***not*** affect the validity of the grant or renewal of the miscellaneous licences as future acts. In its submissions on pastoral leases, the State relied on the reasons of French J in Lardil at [58]:As appears from the provisions of each of the subdivisions referred to in Div 3 of Pt 2, the acts which they validate must be future acts. Their validation by a particular subdivision is conditional upon their characterisation as a future act to which that subdivision or section within it applies. The subdivisions which provide for prior notification to registered native title claimants and others do ***not*** appear to condition the validity of the future acts to which they apply upon compliance with that requirement. The State also relied on the reasons of Dowsett J at [117]:[It is a] relatively surprising assertion that Parliament intended to invalidate acts because of failure to give notice to registered claimants pursuant to the relevant validating subdivision ... [T]he express wording of each of the validating provisions suggests otherwise. Section 24HA(3) validates a future act without any suggestion that such validation is dependent on any other aspect of the section or subdivision. Native title rights are ***not*** extinguished by the act in question, but enjoyment of them may be suspended. Compensation is payable, but there is no suggestion that payment is a condition of validity. There is also nothing to suggest that compliance with s 24HA(7) is a condition precedent to validity. Similarly, s 24MD(1) validates a future act with no suggestion that validity is dependent upon observation of procedural rights. The licence holders also rely on two single judge decisions which they submit have applied Lardil to the same effect. Those decisions are Daniel v Western Australia [2004] FCA 1388; 212 ALR 51 and Banjima People v Western Australia (No 2) [2013] FCA 868; 305 ALR 1. As I understand the position, the State relied on Lardil to defeat the consequence of the applicant's second argument about pastoral leases. That is, the argument that there had been, in the renewals, an extension to the term of the pastoral leases so as to trigger the application of s 24MD of the NT Act. If, contrary to the State's submissions, there had been such an extension, then the State relied on Lardil to submit that non-compliance with the terms of s 24MD did ***not*** affect the validity of the renewals as a future act. Given that I have accepted the State's submissions on the applicant's second argument, there is no need to decide how Lardil might operate in relation to the application of s 24MD(1) to the pastoral leases. I do however need to decide, on the submissions of some of the licence holders, how Lardil affects the validity of the grant of any of the miscellaneous licences as future acts. Lardil came before a single judge, and then a Full Court, on an application in the Court's original jurisdiction for declaratory and final injunctive relief to prevent the establishment of a buoy mooring in the Gulf of Carpentaria, in an area of waters over which the applicant had a registered native title claim, which was yet to be determined. The buoy mooring was to be used by a ship, the MV Wunma, designated to transfer zinc concentrate from Pasminco's mine near Mount Isa to bulk

carriers moored further out in the Gulf of Carpentaria. Pasminco, the third respondent, had applied for and been granted an authority under Queensland regulations to establish the mooring, the grant having occurred sometime after the native title claim had been transferred to the Federal Court. There had been, it was common ground, no compliance with the procedural requirements of Pt 2 Div 3 of the NT Act. At first instance, the applicant was unsuccessful, broadly on the basis that, given their status as claimants and without a final determination of native title, they could ***not*** make out a claim for the final relief they sought. The applicant was also unsuccessful on arguments challenging the validity of the authority under the state regime pursuant to which it was granted. The applicant had ***not*** sought interlocutory relief. It is pertinent to set out how French J (as his Honour then was) described (at [44]) what he called "the federal question" (the validity of the authority under state law also being in issue, as I have noted):... whether the appellants, as registered claimants, have on that basis alone a right to require compliance with procedures under Div 3 of the NTA as though the grant of the Authority were a future act with respect to the asserted native title rights. Absent any such right and absent any evidence of, or reliance upon, native title rights and interests affected by the grant of the Authority, there is a real question whether the State question is encompassed by the federal matter. His Honour went on to characterise Pt 2 Div 3 of the NT Act as providing for the protection of native title, such protection being said to exist through the "broad procedural framework" established by that Division for the doing of future acts. There were two real difficulties in the way the applicant in Lardil put their case, which affected the reasoning of the Full Court. The first was, as Merkel J observed at [70] (see also French J at [59] and [61]) that the applicant sought to rely on their status as a registered native title claimant as sufficient to establish an entitlement to the relief it sought. They did ***not*** seek to establish that the future act "affected" native title rights and interests. It was that step which the Full Court held was the critical one in securing any relief. The second difficulty was that, as Dowsett J pointed out at [105], the applicant contended non-compliance with the Div 3 procedural requirements resulted in a future act being invalid, whether or ***not*** the underlying native title claim was ultimately successful. This was the aspect of the applicant's reasoning which Dowsett J found so problematic. It can be seen that the second difficulty is linked to the first, because both give little or no work to the requirement in the definition of a future act that the act "affects" native title rights and interests. The definition assumes that there are underlying native title rights and interests to be protected, but does so in a precautionary and protective way so that Div 3 will cover circumstances where there is a registered claim but no final determination concerning the existence of native title. The difficulties which troubled the Full Court in Lardil – namely that the argument for injunctive and declaratory relief against Pasminco was founded only on an assertion of the existence of native title rights and interests – are ***not*** difficulties present in this proceeding. I have found that native title rights and interests have continued to exist in the claim area and they should be recognised by a determination. On this finding, native title rights and interests existed at the time the miscellaneous licences were granted. There is no doubt the grants "affected" those native title rights and interests because the grants were at least partially inconsistent with the enjoyment and exercise of those native title rights and interests: seeWestern Australia v Ward [2002] HCA 28; 213 CLR 1 at [22]- [23] (Ward (HC)); s 227 of the NT Act. In those circumstances, the relevance and applicability of the observations of the Full Court in Lardil arises for consideration. French J made it expressly clear his remarks were obiter dicta: see [59]. Dowsett J's observations fall into the same category. Merkel J described the matters raised by French and Dowsett JJ as "substantial and cogent", but then said (at [72]):In my view, however, it is preferable to determine this issue, which is one of considerable importance, in a context where the existence of native title, and the question of how a future act affects it, have been determined. I do ***not*** consider I am bound by Lardil to conclude that in the circumstances of this proceeding the non-compliance with Div 3 means that each of the miscellaneous licences should be given full force and effect as against the applicant's native title rights and interests which have been found to exist. That is because, first, their Honours made it clear their observations were obiter, but also, second, and more importantly, Lardilwas ***not*** a case dealing with native title rights and interests which had been recognised as existing. The reasoning of French J in particular is resonant of the distinctions between unlawfulness and invalidity made by the High Court in Project Blue Sky Inc v Australian Broadcasting Corporation [1998] HCA 28; 194 CLR 355, decided some three years prior to Lardil. Rejecting the traditional dichotomy between mandatory and directory provisions, the plurality in Project Blue Sky entrenched a different approach based on ascertaining legislative intention whether non-compliance was intended to render an act or decision invalid. At [91], the plurality (McHugh, Gummow, Kirby and Hayne JJ) said:An act done in breach of a condition regulating the exercise of a statutory power is ***not*** necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute,

its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is ***not*** even a ranking of relevant factors or categories to give guidance on the issue.

(Footnotes omitted.) The erection of this distinction then led the plurality at the end of its judgment to clarify that non-compliance with statutory requirements may nevertheless have legal consequences (at [100]):In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance on the conduct of, the ABA. Although an act done in contravention of s 160 is ***not*** invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision "may in particular cases be punishable". That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action. Merkel J made a similar point at [73] in Lardil, where his Honour said:I would add that even if non-compliance with the statutory procedural requirements does ***not*** invalidate a future act, it does ***not*** follow that the procedural rights conferred under the relevant statutory provisions are illusory or ineffective. The procedural rights are important entitlements conferred, for an obvious purpose, on native title claimants or holders in certain circumstances. Although the NTA may ***not***, in all cases, provide an effective or adequate statutory remedy for the failure to afford those rights, equity can intervene to protect or give effect to them: see Fejo v Northern Territory of Australia[1998] HCA 58; (1998) 195 CLR 96 at 123 and 139; Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd [2000] HCA 11; (2000) 74 ALJR 604 at 621; and Carpentaria Land Council Aboriginal Corporation v Queensland (1998) 83 FCR 483 at 508. As the appellants have failed to establish that the grant of the Authority is a future act the issue of equitable intervention or relief does ***not*** arise for consideration. The context in which the High Court in Project Blue Sky considered "validity" was an administrative law context, for the purposes of exercising the Court's supervisory powers over an administrative decision, and determining the consequences of non-compliance with statutory requirements for the validity of that decision, in the face of statutory provisions which on their face suggested the imposition of inconsistent obligations on a decision-maker. As the High Court made clear, the key issue is the ascertainment of legislative intention through the text, context and purpose of the particular statute concerned. In the present case, the context of the NT Act, and Pt 2 Div 3 in particular, should be recalled. By s 10 the NT Act declares that "[n]ative title is recognised, and protected (emphasis added)", in accordance with the NT Act. The need for "protection" arises where acts inconsistent with the existence or establishment of native title may affect it, because the underlying priorities recognised in Mabo (No 2) and then in the NT Act are that grant of property rights over land and waters which are inconsistent with native title continuing will prevail and will extinguish native title. The important point to take from s 10 is that, as a fundamental premise and within the legislative compromises evident in the scheme, the NT Act contemplates a need to protect native title rights and interests, both when they are claimed but ***not*** yet established, and once they are established. Inherent to the "protection" offered by the legislative scheme is s 11, which provides that "native title" cannot be extinguished contrary to the NT Act. However, as the High Court said in the Native Title Act Case [1995] HCA 47; 183 CLR 373 at 469 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ):... a law protecting native title from extinguishment must either exclude the application of State and Territory laws or prescribe the areas within which those laws may operate. The Commonwealth has chosen to prescribe the areas available to control by other laws by prescribing what State and Territory laws are "valid" or "invalid" and, if valid, the conditions of validity. Hence the central concepts in the legislative scheme are the "validity" and "invalidity" of acts affecting native title. And those terms are, as the plurality in Ward (HC) made clear, used with particular meaning in the NT Act. In the Native Title Act Case at 469, the Court explained what those terms mean in the context of the NT Act:The use of the term "valid" raises the question whether the Native Title Act is attempting to prescribe conditions relating to the power to make or the making of a State law, even though the validity of a State law cannot be affected by a law of the Commonwealth. But the term "valid" (or its derivatives), which appears in more than one of the impugned provisions, has more than one meaning and it is defined in the Native Title Act to include "having full force and effect". In accordance with s 15A of the Acts Interpretation Act 1901 (Cth), that term must be construed to have a meaning which is supported by Commonwealth legislative power; it must ***not*** be construed to have a meaning

which, in its context, would carry the Act outside Commonwealth legislative power. Therefore the use of the term, its derivatives or its opposite in the impugned provisions, so far as those respective terms relate to a State law, must be taken to mean having, or ***not*** having, (as the case may be) full force and effect upon the regime of protection of native title otherwise prescribed by the Act. In other words, those terms are ***not*** used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s 11(1). In using the terms "valid" and "invalid", the Act marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime. The definition to which the High Court referred in Ward (HC) is contained in s 253 of the NT Act. It is an inclusive rather than an exhaustive definition, and provides that "valid includes having full force and effect". Although Div 3 of Pt 2 was ***not*** considered in Ward (HC) (and did ***not*** exist at the time of the Native Title ActCase) it seems to me the same analysis must be applied to the use of the concepts of "valid" and "invalid" inPt 2 Div 3 of the NT Act. The concepts are ***not*** being used in the sense they were used by the High Court inProject Blue Sky, with the attendant baggage of acts or decisions being void, and ***not*** recognised by law in any sense. Rather, they mean capable of having full force and effect upon the regime of protection of native title, or ***not***, as the case may be. A further aspect of the context and purpose of the NT Act which is critical to this analysis is the continued application and effect of the RDA on the terms of the NT Act, and conduct pursuant to it. As the High Court in Ward (HC) explained at [99]:One effect of [s 7 of the NTA] is that, contrary to what otherwise might follow from the fact that the NTA is a later Act of the federal Parliament, the NTA is ***not*** to be taken as repealing the RDA to any extent. The significance of s 7(3) is to make it clear that, notwithstanding the continued paramountcy of the RDA stated in the earlier sub-sections, the effect of the validation achieved by the NTA is to displace the invalidity which otherwise flowed from the operation of the RDA. Again, it can be seen the High Court is using the concepts of "validity" and "invalidity", in terms of s 10 of the RDA, as meaning having full force and effect on the regime protecting native title. I turn then to the provisions in Pt 2 Div 3. The terms of the "Overview" in s 24AA, and especially s 24AA(2) and (4), describe the effect of the ensuing Subdivisions as making a future act valid to the extent it is "covered" by the provisions. That word suggests the exercise required by the provisions is to ascertain if the kind of future act in issue fits within or is comprehended by one of the Subdivisions. Section 24AA(2) is clear in its terms that acts ***not*** so comprehended will be invalid – that is, they will be without force and effect on native title. Indigenous Land Use Agreements (Subdivs B, C and D) are based on consent arrangements between native title holders, or those claiming native title, and others with property interests in the relevant lands and waters. For those Subdivisions, consent of native title holders, claimants, or their representatives, is a condition of conferring validity on future acts covered by an ILUA. However, the terms of s 24AA(4), and the use of the language of "covered", especially when read with s 24AA(6) ("The Division also deals with procedural rights and compensation for the acts"), do ***not*** expressly link compliance with procedural provisions and validity. Rather, s 24AA(4) suggests that validity derives from an act being "covered" by a particular section. Section 24AA(6) strengthens this construction, because it identifies procedural rights as something separate from the validity of future acts. In contrast, the description in s 24AA(5) of acts covered by s 24IC or s 24MD links compliance with a procedure (the right to negotiate) with validity, because it states:... for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P ... The "also" serves to indicate a separate requirement for validity is added to those set out in s 24AA(4). Section 24AA does ***not*** refer to s 24OA, a provision I consider is of importance in the constructional choice to be made about the effect of the procedural requirements in Div 3. On one view, the textual indications in s 24AA can be seen as supporting the approach taken by the Full Court in Lardil. On another view, what they indicate is that in relation to future acts "covered by" certain Subdivisions (for example, ss 24IC and 24MD, which pick up Subdiv P), strict compliance with those provisions is required for validity: that, in my opinion, is one way to read s 24AA(5) and the Subdivision to which it refers. Alternatively, it could be performing the function of a signpost and no more, given that ss 24IC and 24MD contain cross-references to Subdiv P. It is necessary to consider each of the Subdivisions separately, to understand how the scheme is structured. Putting to one side the ILUA provisions, and Subdiv F (which deals with non-claimant applications), the first relevant Subdivision is Subdiv G – primary production activities. The category of acts "covered" by this Subdivision are set out in s 24GB. The notification provisions in s 24GB(9) apply to some, but ***not*** all, of the activities covered by s 24GB. The terms of the provision are that, for those activities covered by subs (9) "before the future act is done" certain notifications must be given, including relevantly to either the native title holders (through their body corporate) or native title claimants. There must be notification and an "opportunity to comment on the act or class of acts": see s 24GB(9)(d). Section 24GC has no notification provisions because, instead, in relation to non-exclusive

agricultural leases (see s 247B) and non-exclusive pastoral leases (see s 248B) granted before 23 December 1996, those future acts are deemed to prevail over (but ***not*** extinguish) native title rights and interests and any exercise of native title rights and interests: see s 24GC(2), and there is no right to compensation. However, s 24GD (off-farm activities directly connected to primary production) does have notification requirements (see s 24GD(6)) and it is in relevantly the same terms as s 24GB(9). The same is true of s 24GE. The second category of acts "covered" are those in Subdiv H – management of water and airspace. The notification and comment provisions are in the same terms as s 24GB. The third category of acts "covered" are those in Subdiv I – renewals and extensions of pre-existing rights and leases. The notification requirements, in s 24ID(3), are in the same terms as previous provisions to which I have referred. However, subs (4), headed "Other procedural rights" applies the regime set out in s 24MD(6B) to some renewals as if they were compulsory acquisitions. The terms of s 24MD(6B) provide for an objection process after notification, and offer the possibility of an objection by native title holders or claimants being upheld in a way which could affect the renewal of the lease, subject to overriding discretions exercisable by state or territory ministers: see s 24MD(6B)(d)-(g). The fourth category of acts "covered" are those in Subdiv JA – public housing. Section 24JAA(10) imposes both notification and consultation requirements, the latter arising if a registered native title claimant, or a registered native title body corporate, requests consultation. The subject matter of such consultation is "ways of minimising the act's impact on registered native title rights and interests" and, if relevant, access to land and waters: see s 24JAA(14). A report of any such consultations and their outcomes must be given, and may be published: see s 24JAA(16). This is an elaborate procedural provision, but it does ***not*** contain any text expressly conditioning validity in relation to native title rights and interests on compliance with its terms. The fifth category of acts "covered" are those in Subdiv J – various reservations and leases (including public works). Section 24JB(6) contains a similar notification provision to that in s 24GB. Section 24JB(7) then contains a further and separate notification obligation relating to the creation of plans of management for state, territory or national parks. This obligation is a good example of the importance of the timing of the imposition of the obligation. Like the other notification provisions, this requirement arises before the future act is done. In this example, the future act is the creation of a management plan for (to take one situation) a national park. If there are (to take one situation) persons who have been finally determined by this Court to hold native title in land and waters covered by the proposed plan of management, then on its face s 24JB(7) imposes an obligation (in a way determined by a legislative instrument – as to which, see below) – beforethe creation of a management plan – to give those native title holders an opportunity to comment on the plan. The intention of the provision is that the native title holders should be able to have substantive input into the contents of the management plan before those contents are finalised, even if they are ***not*** permitted to dictate or insist upon any particular outcomes, priorities, management strategies or initiatives. The sixth category of acts "covered" are those in Subdiv K – facilities for services to the public, such as roads, railways, bridges, wharves, street lighting, drainage, pipelines, cables and antennae and electricity transmission lines etc. This Subdivision treats native title claimants and holders in a different way. By s 24KA(7), it deems them to be in the same position as either certain kinds of lessees or holders of "ordinary title", in terms of the consultation which must occur with landholders before such facilities are installed. Subsections (8) and (9) deal with how notification can occur if there are no registered native title bodies corporate. This would appear to give native title holders and claimants potentially robust notification and consultation rights, but there is nothing in the text of s 24KA which suggests that, if those parallel procedures are ***not*** complied with, there is any effect on the "validity" of the future act. The seventh category of acts "covered" are those in Subdiv L – "low impact" acts, covering conduct such as tree lopping, clearing of land and environmental assessment activities. There are no notification provisions at all for these kinds of future acts. That would seem to indicate a legislative judgement that the capacity of such acts to affect native title is sufficiently low that native title claimants or holders need ***not*** receive prior notice that such future acts are to occur. It should be noted that one consequence of the approach taken in Lardil is, in substance, that future acts undertaken without compliance with applicable notification provisions such as those (for example) in s 24HA(7) are placed in the same position as future acts the Parliament has determined should ***not*** be subject to notification and comment provisions at all. That is because non-compliance has no effective consequence, and the future act can have full force and effect against native title interests in the same way as a "low impact" future act. Subdivision M concerns future acts which pass the freehold test. Principally, the kind of future act with which the Subdivision deals is compulsory acquisition. The rationale for creating the freehold test in relation to some future acts was set out by the High Court in Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20; 235 CLR 232 at [43] (Gummow, Hayne and Heydon JJ):What is apparent from these Parliamentary materials is a legislative proposal to proceed on the basis provided by the previous s 23, permitting

future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible [post Wik], native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights. Section 24MD(1) provides:Validation of act

(1) If this Subdivision applies to a future act, then, subject to Subdivision P (which deals with the right to negotiate), the act is valid. It is this provision to which French J referred in Lardil. There can be no doubt on the language of this provision ("subject to") that where a future act was done which required but did ***not*** involve compliance with Subdiv P, it would ***not*** have full force and effect against native title rights and interests. However, one possible construction of a provision such as this is to require strict adherence to all of the requirements in Subdiv P as preconditions to validity: for example, to make time limits such as that in s 28(1)(a) essential preconditions. In detailed legislative schemes dealing with notification, distinctions are regularly made between substantial and strict compliance with notification provisions: see for example Minister for Immigration and Citizenship v SZIZO [2009] HCA 37; 238 CLR 627 at [34]- [35] (French CJ, Gummow, Hayne, Crennan and Bell JJ). The language of s 28 itself would support such a distinction, and would support construing Subdiv P as requiring strict compliance for validity. In other words, the terms of s 24MD(1) are construed to require strict adherence to all procedural requirements in Subdiv P and the presence of s 24MD(1) does ***not*** necessarily tend against a construction of less strictly worded procedural requirements which would see them having an effect on validity, where there is non-compliance. That is especially so when the terms of s 24OA are considered, which I discuss below. This approach is supported by other parts of Subdiv M. Aside from s 24MD(1), other procedural requirements are imposed for future acts to which Subdiv P does ***not*** apply: see ss 24MD(6), (6A) and (6B). These are the provisions (s 24MD(6B) in particular) which are also picked up and applied by earlier Subdiv I. The procedure they set out reaches well beyond notification and comment, to provision for consultation about minimising impact, and then for native title claimants and holders to make objections which are to be heard and determined by an independent body. That determination must be complied with, unless (to express it in shorthand) it is decided that it is "in the interests of the Commonwealth, the State or the Territory ***not*** to comply with the determination". Presumably, provisions of this kind were seen by the Parliament as strong and detailed accountability mechanisms, even if ultimately their implementation depends on a residual executive discretion. Section 24MD(6B) (which contains the more detailed procedural prescriptions, in comparison to s 24MD(6A)) is ***not*** expressed in language that resembles s 24MD(1). Rather, its language resembles the other Subdivisions to which I have referred: that is, it is silent on any link between compliance with its terms and the validity of a future act to which it applies. Yet, if the construction favoured by the Court in Lardil is correct, then the whole objection and determination process set out in s 24MD(6B) could be ignored and a future act could still have full force and effect against native title interests, including ones which have been recognised in a determination by this Court. Subdivision N concerns future acts done in offshore places. By s 24NA(8), native title holders and claimants are placed in the same procedural position as non-native title holders over lands and waters affected by acts of the kind dealt with in this Subdivision. So, again, as in some of the procedural provisions I have already considered, if there is, outside the NT Act, an elaborate process of consultation and notice, and if Lardil is correct, non-compliance with such a process (including deliberate disregard) will ***not*** deprive a future act under Subdiv N of its full force and effect against native title interests, including ones which have been recognised in a determination by this Court. I have dealt with Subdiv P above, and need ***not*** repeat what I have said. Subdivision O consists of a single provision, which in my opinion assists in resolving the construction issue. It provides:24OA Future acts invalid unless otherwise providedUnless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title. The provision contemplates that other parts of Pt 2 Div 3 will "provide" for a future act to be valid, which each Subdivision does. And each Subdivision so provides by prescribing procedural requirements, in detail, and of varying levels of stringency; or, by ***not*** prescribing any procedural requirements. The starting point of s 24OA – the legislative choice made – is the invalidity of future acts in relation to native title. That is, the legislative choice made is that future acts will ***not*** have full force and effect on, at least (taking into account the definition of native title in s 223) those native title rights and interests which have been recognised by this Court in a determination, unless the NT Act "provides" that they will. The scheme then sets out, in great detail, the manner in which each kind of future act may have full force and effect on native title. In my opinion, s 24OA compels attendance to the detailed terms on which each kind of future act is to be given force and effect against native title interests. It discloses a legislative intention that compliance with the requirements set out in each Subdivision

(including procedural requirements) is a precondition to a future act having force and effect against native title interests. That is the "protection" which is achieved, in combination with the general prohibition contained in s 24OA. Accordingly, in my opinion, s 24OA provides sufficient statutory indication of a legislative intention that compliance with procedural requirements is a precondition to a future act having force and effect against native title; at least native title in the sense defined in s 223. Whether the same is true in relation to claims for native title which never result in a positive determination is ***not*** something I need decide in the present proceeding. It seems to me, however, the answer to that issue may lie in what the Full Court said in Lardil: namely, if native title claimants are aware of a future act which has ***not*** complied with Div 3, they are able to seek injunctive relief pending the determination of their claim to native title. If there is no native title, the injunction will be discharged and the future act can be undertaken (assuming there has still been no procedural compliance). If native title is recognised, then before the future act can be undertaken, compliance will need to occur. In situations such as those presented by the miscellaneous licences, such a process is ***not*** possible. Those licences were granted without compliance with Div 3 and have been in use. The only outcome in such circumstances is to give effect to the legislative intention in s 24OA: namely that on determination of native title those future acts which have ***not*** complied at all with the relevant part of Div 3 have no force and effect on the native title interests as declared by the Court. In each of the provisions to which I have referred, the notification is required to be made "in the way determined, by legislative instrument": see, for example, the Native Title (Notices) Determination 2011 (No. 1) (Cth). If the procedural provisions are construed as ***not*** conditioning the validity of the future acts, then that construction extends to the effect of the legislative instruments prescribing the way notification is to be undertaken. In that sense, the legislative instrument is also given no real force or effect. As I explain below, falling back on remedies of injunctions (or declarations) would be wholly unsatisfactory. Also, in each of these provisions the language used is imperative and, subject to any contrary intention, is ***not*** to be construed as affording the repository of the obligations only a discretion whether to comply with the notification procedure set out in the provision: see Acts Interpretation Act 1901 (Cth) s 33(2A). See also SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24; 228 CLR 294 at[206] (Hayne J). Imperative language is only one factor, but Parliament is taken to understand the difference between the use of "may" and the use of "must". In the present context, that imperative language is combined with the terms of s 24OA. All of the provisions have been drafted on the legislative assumption that it is appropriate for those whose native title interests are, or may be, affected by a future act to be given notice in advance of the future act occurring and to have an opportunity to comment on the future act. The purposes of extending such an opportunity manifestly include an opportunity to express a view whether the future act should occur at all, the manner in which it should occur, whether there should be any further consultation prior to it occurring, and what the consequences of the future act might be for native title in the area. Most of these purposes will be rendered nugatory if there is no notice and opportunity to comment until after the future act has occurred. It is true that, because the notification provisions cover registered native title claimants as well as native title holders, the obligations may need to be performed in circumstances where, ultimately, no native title will be found to exist. That is the scheme. That feature of the scheme is in my opinion an insufficient reason to downgrade the protection given to those found to be native title holders so that their native title interests can be affected by future acts without any effective or meaningful notice or consultation. The giving of notice prior to conduct or decisions affecting (generally adversely) a person's interests (especially proprietary interests) is a cornerstone of the content of procedural fairness. It has been described as a "cardinal principle" (R v Small Claims Tribunal and Homeward; Ex Parte Cameron [1976] VicRp 41; [1976] VR 427 at 432) and, in the United Kingdom, of "constitutional importance" (Re Hamilton[1981] AC 1038 at 1047). Similarly, in Ruatita v Minister for Immigration and Citizenship [2013] FCA 542; 212 FCR 364, Flick J said (at [55]) that: "[n]otice, put more simply, is ***not*** a mere formal requirement; it is a matter of substance going to the very heart of procedural fairness." Notice is intended to have the substantive effect of informing a person how her or his interests may be affected, and of giving her or him the opportunity to be heard about why they should ***not*** be so affected, or why they should be differently affected. The concern is with fair decision-making processes that pay sufficient regard to interests affected: see Re Refugee Review Tribunal; Ex Parte Aala [2000] HCA 57; 204 CLR 82 at [59] (Gaudron and Gummow JJ). That is particularly so in a legislative scheme which expressly seeks to "protect" native title interests, and does so in large measure ***not*** by making those interests immune from the effects of future acts, but rather by requiring those who seek to undertake future acts to consult and take account of what those with native title say will be the impact of future acts on their proprietary interests. In SAAP at [208], Hayne J reached the following conclusion in relation to procedural steps in the Migration Act 1958 (Cth):Where the Act prescribes steps that the Tribunal must take in conducting its review and

those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of the Act and its scope and objects point inexorably to the conclusion that want of compliance with s 424A renders the decision invalid. Whether those steps would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is ***not*** to the point. The Act prescribes what is to be done in every case.

(Emphasis in original.) While conclusions reached on other statutory schemes cannot be imported into the NT Act, my purpose in referring to Hayne J's conclusion is to demonstrate how the combination of imperative language, detailed prescriptions of steps to be undertaken, and the nature of interests affected can lead to emphatic conclusions about the validity of a decision (or conduct) undertaken without compliance with the statute. Notice is also imperative to access the remedies that both French and Merkel JJ recognised as available in Lardil. Injunctive relief will only be effective if there is notice of a future act and proceedings can be taken to prevent the future act occurring. Most kinds of future acts do ***not*** involve ongoing conduct. Rather, they involve "once off" conduct – the grant of leases, licences, permissions, the making of decisions to undertake certain works. Once the future acts have occurred, injunctive relief to enforce a right to be given notice and to comment is hardly likely to be effective in the majority of future acts covered by Pt 2 Div 3. It does ***not*** "protect" native title; rather it facilitates its defeat. For those reasons, although the matter is ***not*** free from difficulty, the better construction in my opinion is that non-compliance with express procedural requirements of a given Subdivision in Div 3 of Pt 2 has the result that the future act has no force and effect against native title interests as determined by this Court. I accept that this approach differs from that taken by Barker J in Banjima (No 2) [2013] FCA 868; 305 ALR 1 at[986]- [990] and from RD Nicholson J in Daniel. In Banjima (No 2), Barker J said (at [986]-[990]):Failure to comply with s 24MD(6B) issue: The respondents place particular emphasis on the fact that in Lardil Peoples v Queensland (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 (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.

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.

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.

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.

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. With the greatest respect to both Barker J and RD Nicholson J, I must reach a different conclusion on construction. For the reasons I have set out, in my opinion there are consequences for the capacity to affect native title of a future act which does ***not*** comply with the procedural requirements set out in one of the Subdivisions of Pt 2 Div 3. It appears to me both judges proceeded on the basis of the obiter observations in Lardil, taking this as authority. I have taken a different course, and have reached a different conclusion. If, contrary to my principal opinion (that non-compliance with the procedural

provisions deprives a future act of validity in the sense of full force and effect against native title interests when those interests are determined by this Court), what remains available is some kind of declaratory or injunctive relief, I do ***not*** accept such relief provides any kind of workable solution in these circumstances. The exercise and enjoyment of the native title rights I have found should be recognised, including over the land and waters covered by the current pastoral leases, cannot be regulated in an ongoing way by any declaratory or injunctive relief issued by the Court. There will be a myriad of different factual and practical situations in which an exercise of those rights (at its most basic level, for example, to enter onto the land at the Tjiwarl site for purposes connected with looking after the site) will come up against the assertion of rights under a pastoral lease and I do ***not*** consider the appropriate way to address that is to have some ongoing general moderation through declaratory or injunctive relief. Non-compliance with other forms of order is contempt of court and individuals should ***not*** be exposed to that risk in circumstances lacking clarity and particularity. For those reasons, had I reached a view that it was appropriate to apply the obiter statements in Lardil, I would ***not*** as a matter of discretion have made any orders of the kind sought by the applicant. If the ultimate outcome of the conclusions I have reached is that there must be a compulsory acquisition of the native title interests through a right to negotiate process or ILUA then, as the applicant submits, that is ***not*** inconsistent with the protective purposes of the NT Act in respect of native title.

Pastoral leases renewed on 1 July 2015 In issue are the 11 pastoral leases which are either wholly or partially within the claim area. The easiest way to set out the information about the leases is to use the Table agreed by the parties (with non-material changes identified by the applicant italicised): Previous Lease Current Lease Original term Original commencement Renewed term Commencement New Terms LA 3114/737 Albion Downs: N049530 46 years 4 months 18 days 10 February 1969 46 years 4 months 18 days 1 July 2015 Incorporates previous terms of LA3114/737 LA3114/790 Booylgoo Springs: N050557 48 years 10 months 3 days 29 August 1966 48 years 10 months 2 days 1 July 2015 Incorporates previous terms of LA3114/790 LA3114/585 Depot Springs: N049967 49 years 24 days 7 June 1966 49 years 24 days 1 July 2015 Incorporates previous terms of LA3114/585 LA3114/849 Gidgee: N049747 47 years 11 months 22 days 10 July 1967 47 years 11 months 21 days 1 July 2015 Incorporates previous terms of LA3114/849 LA3114/1164 Lake Way: N050051 33 years 10 months 14 days 18 August 1981 33 years 10 months 13 days 1 July 2015 Incorporates previous terms of LA3114/1164 LA3114/899 Leinster Downs: N049438 47 years 11 months 29 days 3 July 1967 47 years 11 months 28 days 1 July 2015 Incorporates previous terms of LA3114/899 LA3114/549 Mount Keith: N049448 49 years 11 days 30 June 1966 49 years 11 days 1 July 2015 Incorporates previous terms of LA3114/549 LA3114/775 Pinnacles: N049812 48 years 1 month 10 days 22 May 1967 48 years 1 months 9 days 1 July 2015 Incorporates previous terms of LA3114/775 LA3114/649 Yakabindle [sic – Yakabindie]: N049476 48 years 1 month 24 days 8 May 1967 48 years 1 month 23 days 1 July 2015 Incorporates previous terms of LA3114/649 LA3114/620 Yeelirrie: N049508 48 years 11 months 7 days 25 July 1966 48 years 11 months 6 days 1 Juy [sic] 2015 Incorporates previous terms of LA3114/620 LA3114/1177 Youno Downs: N049934 26 years 8 months 10 days 21 October 1988 26 years 8 months 10 days 1 July 2015 Incorporates terms of LA3114/1177

(Footnotes omitted.) The current pastoral leases for these properties all commenced on 1 July 2015. Each of the properties had previously been the subject of a pastoral lease. The same persons (natural or corporate) who were parties to the previous leases as they stood on 30 June 2015 are parties to the renewed leases. The term of the current leases is the same as the term of the previous leases (save for one day). Those terms vary between 26 years, 8 months and 10 days (for Yuono Downs) and 49 years and 24 days (Depot Springs). All except two (Yuono Downs and Lake Way) are for more than 40 years. The NT Act contains a definition of pastoral lease in s 248:A pastoral lease is a lease that:

(a) permits the lessee to use the land or waters covered by the lease solely or primarily for:(i) maintaining or breeding sheep, cattle or other animals; or

(ii) any other pastoral purpose; or(b) contains a statement to the effect that it is solely or primarily a pastoral lease or that it is granted solely or primarily for pastoral purposes. There is no dispute between the parties (subject to the

applicant's submissions about s 24IC(1)(c)(iv)) that both the previous and the current leases fall within that definition.

The applicant's contentions in summary The applicant puts forward two alternative bases on which the pastoral leases are invalid in terms of their effect on native title. They are:(a) s.24IC(1)(c)(iv) NTA is ***not*** satisfied; or alternatively

(b) the State failed to renew or re-grant the pastoral leases in accordance with s.24ID(4), which is enlivened by s.24IC(4)(b). The applicant submits the grant of the pastoral leases was clearly a future act within the meaning of that phrase in s 233 of the NT Act, in the sense that the grant of each lease "affects" the native title of the claim group. They referred to evidence given by the claim group members in their submissions:Brett Lewis explained that he feels a determination of native title will assist in dealing with a station owner in the Claimed Area, as this relationship "causes a bit of problems ..." Allan Ashwin, a pastoralist himself, gave evidence about the need to seek permission from station owners to shoot on their property. Edwin Beaman similarly described having to deal with a pastoralist seeking to restrain the exercise of his right to hunt ... Kado Muir gave evidence as to having to assert his right to camp at Logan Springs against station owners in the 1990s ...

Other witnesses attested to the impact that pastoral activities have upon their ***country***. Douglas Bingham gave evidence about the damage done by cattle, including to rockholes ... Luxie Hogarth gave evidence as to pastoral infrastructure being installed at a sacred site in the Claimed Area ... Kado Muir gave evidence about the efforts made by Claimants to manage impacts from pastoral activities on the site of Pii and the surrounding ***country*** ...

(References omitted.) On their assumption that the grant of the current pastoral leases was within the definition of future act, the applicant contends the grant of the current pastoral leases was within the terms of s 24IC(1) of the NT Act. That section provides:(1) A future act is a permissible lease etc. renewal if:(a) it is:(i) the renewal; or

(ii) the re-grant or re-making; or

(iii) the extension of the term;

of a lease, licence, permit or authority (the original lease etc.) that is valid (including because of Division 2 or 2A); and(b) any of the following subparagraphs applies:(i) the original lease etc. was granted on or before 23 December 1996;

(ii) the grant of the original lease etc. was a permissible lease etc. renewal or a pre-existing right-based act;

(iii) the original lease etc. was created by an act covered by section 24GB, 24GD, 24GE or 24HA (which deal with certain acts in relation to primary production activities or involving management or regulation of water and airspace); and(c) the future act does ***not***:(i) confer a right of exclusive possession over any of the land or waters covered by the original lease etc.; or

(ii) otherwise create a larger proprietary interest in the land or waters than was created by the original lease etc.; or

(iii) create a proprietary interest over any of the land or waters covered by the original lease etc., where the original lease etc. created only a non-proprietary interest; or

(iv) if the original lease etc. was a non-exclusive pastoral lease covering an area greater than 5,000 hectares and the majority of the area covered was ***not*** required or permitted to be used for purposes other than pastoral

purposes–have the effect that the majority of the area covered by the renewed, re-granted, re-made or extended lease is required or permitted to be used for purposes other than pastoral purposes; and(d) if the original lease etc. contains, or is subject to, a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders–the renewed, re-granted, re-made or extended lease, licence, permit or authority contains, or is subject to, the same reservation or condition; and

(e) if the original lease etc. did ***not*** permit mining—the renewed, re-granted, re-made or extended lease, licence, permit or authority does ***not*** permit mining. In substance, the applicant accepts that the grant of these pastoral leases was within paras (1)(a) and (b) but was ***not*** within subpara (1)(c)(iv), although the remainder of para (c) was ***not*** put in issue by the applicant. It can be seen that the prohibition in para (c) applies to each of subparas (i)-(iv) – that is, the future act must ***not*** have any of the effects in those subpararaphs. As to subpara (1)(c)(iv), the applicant's contention is that the terms and conditions on which the grant of the current pastoral leases was made required or permitted the majority of the area to be used for purposes other than pastoral purposes. This contention in turn rests on the construction of a provision in each of the current leases, to the following effect (this form is, on the evidence, common to all the impugned pastoral leases – see exhibit PTG7 to exhibit R10):... on the terms and conditions set out in pastoral lease number [being the historical pastoral lease], also registered as Crown lease number [as relevant] under the Transfer of Land Act 1893, INCLUDING the reservations referred to in the Pastoral Lease, BUT ONLY to the extent that any of those terms or conditions, or reservations are ***not*** inconsistent with the LA Act [being the Land Administration Act 1997 (WA)].

(Emphasis added.) The applicant's argument focusses on the operation of the Land Administration Act 1997 (WA) (LAA). They say the LAA permits the use of the majority of land on a pastoral lease for non-pastoral purposes, and that this permission "expands and departs from" the previous leases, which require that the majority of land on a pastoral lease be used for pastoral purposes. Thus, contrary to s 24IC(1)(c)(iv), the current pastoral leases, through the importation of the LAA into them (on the applicant's argument) do "require or permit" – and permission is what the applicant focuses on – a majority of the land under the lease to be used for non-pastoral purposes. The applicant submitted that the consequence of the current pastoral leases falling outside the terms of s 24IC(1)(c)(iv) is that they are deprived of the validating effect of s 24ID(1). The applicant's second and alternative argument is that even if the current pastoral leases are future acts ***not*** prohibited by s 24IC(1)(c), the applicant submits the current pastoral leases were renewed (or re-granted) for a "term" longer than that for which the previous pastoral leases were granted. The change in the "term" of the pastoral lease enlivens, so the applicant submits, the procedural rights in s 24MD(6B), which were ***not*** complied with.

The State's response in summary The State accepts that the historic grant of pastoral leases did ***not*** extinguish native title over the land and waters within each lease, and that non-exclusive native title rights and interests could continue to exist in that land and those waters. The State contends that the grant of the current pastoral leases cannot be a future act "affecting" native title because their grant is ***not*** wholly or partially inconsistent with the continued existence, enjoyment or exercise of the claim group members' native title rights. Without such inconsistency, the State reasons, the grant of the current pastoral leases cannot be said to "affect" native title. If this submission is ***not*** accepted, the State contends that the grant of the leases does ***not*** fall foul of s 24IC(1)(c)(iv), because if the previous pastoral leases are accepted (as appears to be the case) to have been "pastoral leases" within the meaning of that phrase in s 248, and the current leases were made on the same terms, the current leases must also be pastoral leases – the definition of which itself requires that the land or waters be used "solely or primarily" for pastoral purposes. The State also submits the LAA does ***not*** have the effect for which the applicant contends. Even if it did, the LAA would have had the same effect on the previous pastoral leases because the LAA came into effect in 1997 and by its transitional provisions continued the previous pastoral leases in force, as if granted under the LAA. This would mean, the State submits, there was no change of the kind which s 24IC(1)(c)(iv) is designed to address. Finally, the State contests the manner in which the applicant submits the LAA is picked up and introduced into the current pastoral leases. As to s 24IC(4)(b), the State submits the applicant's construction of the word "term" in this paragraph is incorrect because this provision is ***not*** concerned with the date on which a lease came into effect, but the length of the period of the lease.

The responses of any other parties, where different to the State Cameco submits that the grant of pastoral lease 3114/620 (Yeelirrie Station Pastoral Lease) is a previous non-exclusive possession act that is attributable to the State and the effect on native title of the grant is set out in s 12M of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA). It submits that the principles about the extinguishing effect of pastoral leases on native title that are set out at [123]-[131] of Ward (HC) apply. It submits that the grant of pastoral lease 3114/620 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. Finally, it submits that, to the extent pastoral lease 3114/620 has been the subject of renewals in accordance with the terms of the Land Act 1933, those renewals are valid, and where relevant, are permissible lease renewals for the purposes of s 24IC of the NT Act. BHP Billiton makes the same submissions as Cameco, outlined in the paragraph directly above, in respect of the following pastoral leases:(f) 3114/899 (Leinster Downs Pastoral Lease)

(g) 3114/549 (Mount Keith Pastoral Lease)

(h) 3114/649 (Yakabindie Pastoral Lease)

(i) 3114/737 (Albion Downs Pastoral Lease) In other words, none of these submissions from the lessees grappled with the detail of the applicant's arguments.

My conclusions

Future acts The grant of the pastoral leases on 1 July 2015 were future acts within the meaning of s 233 of the NT Act. I am satisfied on the evidence the grants of those leases "affected" the native title of the claim group members. The State submits that evidence such as that to which I have referred above is ***not*** evidence about the effects of the grant of the current leases on 1 July 2015; rather it is evidence which relates to the previous leases as well. That may be so, in the sense that the previous leases "affected" native title just as the current ones do. The legal difference is that the previous leases were ***not*** future acts and therefore there was no legal consequence imposed by the NT Act for such an effect. That did ***not*** mean the effect was ***not*** real. However, without the re-grant or renewal of the pastoral leases, those effects would have ceased on 30 June 2015. The re-grant or renewal meant the effects continued. That is sufficient in my opinion for the re-grant or renewal of the pastoral leases to meet the definition of future act. I accept the evidence to which the applicant refers, and I find that it does demonstrate, if actual proof were needed (which in my opinion it is ***not*** under Pt 2 Div 3) that the exercise and enjoyment of the claim group members' native title rights is impaired (through difficulties with access) and diminished (through having to ask permission and perhaps be refused) by reason of the exercise of rights by lessees under the pastoral leases. I accept also that this evidence proves how activities consequential upon the grant of pastoral leases (such as cattle grazing) can have an adverse physical impact on the claim group members' ***country*** and therefore on their obligations to care for and protect it. These are, in any events, the kind of consequences which might be expected to follow from the grant of a pastoral lease over land and waters in which native title subsists: they are the kinds of consequences which would ordinarily be comprehended by the concept of an act "affecting" native title, in the sense I have discussed it at [1001] above. In my opinion the State's submissions conflate the concept of inconsistency for the purposes of extinguishment with the concept of acts "affecting" native title, when the two perform very different functions. The State carries forward into its contentions about future acts the concept of "inconsistency", when the statutory concept of acts affecting native title is much broader than that. Contrary to the State's submissions, that statutory concept does ***not*** require that an act be "inconsistent" with the exercise or enjoyment of native title rights. It simply requires that it "affect" the exercise or enjoyment of those rights, and carries with it the notion that the "effect" is unlikely to be a beneficial one (although beneficial effects are ***not*** expressly excluded and this issue can be left for another day). The concept of "affecting" connotes an impact, perhaps an impairment, but it is much broader than inconsistency. Where a witness such as Mr Allan Ashwin relates the need to negotiate with the holder of a pastoral lease to secure permission to go hunting on his ***country***, and the source of the need is the authority conferred by the pastoral lease to exclude persons from the land, this is in my opinion a typical example of how the grant of a lease has an impact on the native title right to take food resources from ***country***. The native title holder must seek the permission of a person who is a stranger to his ***country*** (from his perspective) and runs the risk of

having permission refused; or having terms and conditions imposed on his access to his ***country*** to exercise his native title right.

Section 24IC(1)(c) The parties appear to agree that the act of granting the current pastoral leases on 1 July 2015 was within the terms of s 24IC(1)(a) as either a "renewal" (subpara (i)) or a "re-grant or re-making" (subpara (ii)). Both parties rely on various observations in Trade Practices Commission (Cth) v Tooth & Co Limited [1979] HCA 47; 142 CLR 397 about the difficulties of drawing any real distinction between a renewal and a re-grant. In Tooth, Gibbs J said (at 406-407):The distinction drawn between the grant and the renewal of a lease suggests that "grant" is intended to refer to a case in which no lease is in existence and "renew" to the case in which there is an existing lease which the lessee seeks to have extended for a further period. Technically, the word "grant" would have covered both cases, since a renewal will involve a new grant ... Although, as I have indicated, if there has been a refusal to grant a lease, there is in truth no party to the lease, what in my opinion is meant is a person who would have been a party to the lease had it been granted. But even if this construction were wrong, I could ***not*** accept the view that the expression "grant or renew" was intended to distinguish between the re-grant of an existing lease on new terms and the re-grant of an existing lease on the same terms as before.

The word "renew" can of course signify the grant of a new lease for the same period and on the same terms as those of the old lease. However, that is ***not*** its invariable, or even its natural meaning; a lease can be renewed, in the ordinary sense of the word, for a different period, and at a different rent, from those provided in the original lease. Despite the difficulties in language to which Gibbs J refers, in the context of the NT Act, I see no particular construction issues as between the use of the term "renewal" and the use of the terms "re-grant and re-making". I consider it is likely that the term "renewal" is used in the sense described by Gibbs J: that is, the grant of a new lease for the same period and on the same terms. I consider it is likely that s 24IC uses the terms "re-grant" and "re-making" to signify the grant of a new lease to replace an expired lease, on different terms yet still with sufficient connection to the expired lease that it can be said the lease is being granted again. To "remake" a lease may be something quite different, and may well be used in relation to leases whose terms have ***not*** expired but where a new contractual arrangement, still with sufficient connection to the old lease, needs to be made. Turning to s 24IC(1)(c) itself, it is apparent that the purpose of the subsection is to ensure that the validating effects of the future act provisions concerning permissible leases are ***not*** conferred on leases renewed or re-granted where there are fundamental changes to the nature of the proprietary interests given by the new lease, or to the activities permitted by the lease. The provision recognises that the use of land principally for mining purposes is a substantial change from the use of land principally for pastoral purposes, and is capable of quite differently affecting native title rights and interests. That is why it is important that the applicant is able to demonstrate, for their s 24IC(1)(c)(iv) argument, that there has been a material change between the terms and conditions of the previous pastoral leases and the terms and conditions of the current pastoral leases. The identified change – said to be that, by reason of the provision in the current pastoral leases, the LAA will permit use of a majority of the land and waters for non-pastoral purposes – is ***not*** in my opinion apparent from the terms of the current pastoral leases. To explain why that is so it is necessary to examine one of the 11 pastoral leases in more detail. What was identified as being the current pastoral leases were exhibited to the affidavit of Mr Paul Terrence Godden affirmed 20 October 2015. Prior to this, the State's tenure evidence did ***not*** include the current pastoral leases – unsurprisingly, since they were ***not*** granted until 1 July 2015, only a few weeks before the on ***country*** connection hearing in this proceeding. I take the current pastoral lease for Yakabindie station (N049476) as an example. The land is described as Lot 57 on Deposited Plan 220403 and Lot 568 on Deposited Plan 73751, subject to any exclusion or inclusions shown on "the Second Schedule" which I assume to be a schedule to the deposited plans, but which is ***not*** reproduced in the evidence. The parties are the State of Western Australia as lessor and BHP Billiton Yakabindie Nickel Pty Ltd as lessee. Several encumbrances and easements are noted on the lease which need ***not*** be referred to in detail. The term of the lease is expressed to be 48 years, 1 month and 23 days, commencing on 1 July 2015. The annual rental is expressed to be $2,169.00 plus GST payable in advance, with various payment dates listed. The grant is expressed in the following language:Pursuant to section 143 of the LA Act, the MINISTER FOR LANDS, for and on behalf of the STATE OF WESTERN AUSTRALIA, HEREBY GRANTS to the Lessee above (at Note 3), a lease of the land described above (at Note 1), for the term specified above (at Note 4) and at the Rent specified above (at Note 5):

(a) subject to the provisions of the LA Act, as amended from time to time; and

(b) subject to the laws of the State of Western Australia as may apply from time to time BUT ONLY to the extent any such laws are ***not*** inconsistent with the LA Act; and

(c) on the terms and conditions set out in the pastoral lease number LA3114/649 ("Pastoral Lease"), also registered as Crown lease number CL315/1967 under the Transfer of Land Act 1893, INCLUDING the reservations referred to in the Pastoral Lease, BUT ONLY to the extent that any of those terms or conditions, or reservations are ***not*** inconsistent with the LA Act. The lease was executed on behalf of the State by the Minister for Lands, and executed by Cameco Australia Pty Ltd as lessee. The date of execution is expressed as 27 November 2014. On one view, this would be the date of the future act (because that is when the grant is made, although it does ***not*** take effect until 1 July 2015), although the applicant made no submissions that this would have any invalidating effect. The disconformity between the lessee as stated in the lease document and the lessee executing the lease is ***not*** explained on the evidence. Pastoral Lease LA3114/649 is in evidence. It is expressed to be made pursuant to the Land Act 1933 and for pastoral purposes. The grant from the Yakabindie lease which I have just extracted operates on the terms and conditions imposed by Pastoral Lease LA3114/649. It is those terms and conditions (and reservations under the pastoral lease) which must ***not*** be inconsistent with anything contained in the LAA. The use of the words "but only" signifies that, to the extent the terms and conditions contained in Pastoral Lease LA3114/649 are inconsistent with any provision of the LAA, they will have no force and effect as between the parties. It is ***not*** correct to say, as the applicant's submissions do, that the effect of this is that the provisions of the LAA "have primacy and can override any of the terms and conditions in the lease instrument". That is ***not*** the effect of the grant. The effect of the grant is to nullify any existing terms and conditions in Pastoral Lease LA3114/649 that are inconsistent with a provision in the LAA. The applicant does ***not*** point to any such provision in the LAA, and similarly does ***not*** link any provision of the LAA with a term or condition in Pastoral Lease LA3114/649 which they submit is affected by the LAA provision. ***Not*** only does the applicant ***not*** undertake this exercise at all, but of course it would need to be undertaken in relation to the term or condition in Pastoral Lease LA3114/649 (assuming there is such a term) which required the land and waters within the lease to be used predominantly or principally for pastoral purposes. Rather, what the applicant points to are those provisions in the LAA (ss 118, 119, 120, 121 and 122) that the applicant submits allow for non-pastoral activities on pastoral leases. I do ***not*** accept that is an accurate characterisation of all these provisions. For example, s 121 (tourism) refers to "pastoral-based tourist activities". However, s 120 does provide an example of the applicant's argument. It provides:(1) The Board may, on an application in writing from a pastoral lessee, issue a permit for the lessee to use specified land under the lease for crop, fodder, horticultural or other specified kind of agricultural production if it is satisfied that the proposed use is reasonably related to the pastoral use of the land.

(2) An application must specify the non-pastoral activity proposed and the areas of land proposed to be used for the activity.

(3) A permit under this section –(a) may include a permit for the sale of any produce arising from an activity permitted; and

(b) may be issued for any period and subject to any conditions the Board thinks fit. It can be seen that s 120 requires a written application and a permit, issued at the discretion of the Board. It is correct that on its face s 120 may authorise a permit for the activities which it sets out that covers a majority of the land of the pastoral lease and so arguably then permits a majority of the land or waters to be used for a non-pastoral purpose. A permit is necessary for such activities because there is otherwise a prohibition in s 106 of the LAA from land on pastoral leases being used for non-pastoral purposes. Section 106 provides:(1) A pastoral lessee must ***not*** use land under

the pastoral lease for purposes other than pastoral purposes except in accordance with a permit issued under Division 5.

Penalty: $10,000.

(2) A pastoral lessee must ***not*** sell any product of a non-pastoral use of the land except in accordance with a permit issued under section 119, 120, 122 or 122A.

Penalty: $10,000.

(3) An offence is ***not*** committed under subsection (1) by a pastoral lessee in respect of purposes referred to in paragraph (b) or (c) of the definition of pastoral purposes referred to in section 93 (an ancilliary purpose) if –(a) a permit would otherwise be required in respect of that ancilliary purpose; and

(b) a permit has been issued under Division 5; and

(c) the pastoral lessee has acted in accordance with that permit. One indication given by s 106 is that the clear intention of the LAA is to maintain the requirement for pastoral leases to be used for predominantly pastoral purposes. There is, by operation of the LAA on the current pastoral leases, no automatic displacement of the requirement to use the land for pastoral purposes. Nor is any permission given by operation of the LAA itself. The permission comes through a discretionary permit regime, if at all. Although the applicant did ***not*** advance this argument, it might otherwise have been the case that the grant of the current pastoral leases "subject to the provisions of the LA Act" could have had the effect which s 24IC(1)(c)(iv) of the NT Act prohibits if, by operation of the LAA itself, some statutory permission was granted to use the majority of land under a pastoral lease for non-pastoral purposes. However, that is ***not*** the case, given the presence of s 106, read with the permit provisions such as s 120. In those circumstances, it seems to me that the future act in such a case (if the definition of future act were met) would be the grant of the permit under the LAA, just as it would have been if the pastoral lessee had sought to undertake such an activity in 2014, under the terms of the previous pastoral lease (which was, because of s 143 of the LAA, also governed by the LAA). That is ***not*** to say the grant of such a permit fits obviously into any of the Subdivisions in Div 3 of Pt 2. If it does ***not***, it may be affected by s 24OA of the NT Act. That is ***not*** a matter which I need to decide in this proceeding, as there is no evidence any such permits under s 120 of the LAA have been issued in respect of pastoral leases within the claim area.

Section 24IC(4)(b) and the "term" of the lease This alternative argument arises if, as I have found, there was no prohibition in s 24IC(1)(c) to the renewal of the leases falling within the validation provision. The applicant submits that the renewal of the pastoral leases was an act "covered by" s 24IC(4)(b) for the purposes of the protective provisions in s 24ID(4), which in turn led to the need for the State to follow the consultation procedures set out in s 24MD(6B). It is common ground those procedures were ***not*** followed. The State submits it was ***not*** obliged to do so and, even if it was, Lardil is authority for the proposition that non-compliance with those procedures does ***not*** deprive the grant of the current pastoral leases of their full force and effect against native title. Despite accepting, as the State submits, that each of the current pastoral leases was granted for the same length of time as the previous pastoral leases (or in some cases, minus one day) the applicant's argument turns on giving a different meaning to the word "term" in s 24IC(4)(b) to the one which might ordinarily be applied to the word in the context of leases: namely, the period of the lease between grant and expiry. The purposive matters raised by the applicant have some force. First, that it would be incompatible with the protective purposes of the NT Act for the procedural rights expressly conferred by the Act to be avoided by repeated renewals in the manner suggested by the State, especially where s 24IC(4)(c) makes it clear that the grant of a perpetual lease triggers the procedural provisions in s 24MD(6B). The applicant is correct that, for all practical purposes, the State's approach and the manner in which these pastoral leases were renewed, is capable of creating leases which are in substance perpetual, especially given the very long periods for which most of them are in effect – in excess of 40 years. The period of the previous

leases and the periods of the current leases will operate over more than the average lifetime of any individual native title holder in the claim area, and these leases cover almost all of the claim area. Second, the applicant is correct that their construction is more consistent with the general structure and operation of the future act provisions in Pt 2 Div 3, in the sense that acts which have a greater impact on native title generally attract a greater level of protection through procedural rights. The impact of the renewal of the pastoral leases for such long periods of time and covering as they do the majority of the claim area will have a significant impact on the continued enjoyment and exercise of native title rights and interests by the claim group members. Although there is no evidence concerning why most of the renewed leases were granted on terms that were one day less than the previous lease, it is a clearly available inference that avoidance of triggering of the procedural rights in s 24MD(6B) may well have been a factor, especially given these renewals were occurring while this proceeding was in its most active stage. The difficulty for the applicant is that their construction contorts the language of s 24IC(4)(b) too much. To read the phrase "the term of the old authority" as meaning the date on which the old authority comes to an end will result in any renewal (putting to one side the applicant's somewhat creative arguments about re-grant or re-making) of a lease, licence or permit being caught by the procedural protections in s 24MD(6B) through s 24ID(4)(b). Whereas the structure of s 24IC suggests that subss (3) and (4) are dealing with specific subsets of circumstances in which leases are renewed, the applicant's argument gives them an operation ***not*** on a subset of renewals, but on all renewals. The applicant's argument also requires different meanings to be given to the word "terms" within the same provision. The starting point in statutory construction, especially within a single provision, is that Parliament intends the same words to be given the same meaning: see Craig, Williamson Pty Ltd v Barrowcliff [1915] VicLawRp 66; [1915] VLR 450 at 452; Registrar of Titles (WA) v Franzon [1975] HCA 41; 132 CLR 611 at 618; Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW [2005] FCAFC 154;145 FCR 523 at [14], [16]; Parmar v Minister for Immigration and Citizenship [2011] FCA 760; 195 FCR 186 at[18]. In s 24IC(1)(a), one of the categories of future acts which is expressly covered by s 24IC is "the extension of the term" of a lease, licence, permit or authority: see subpara (iii). In this provision, it is plain that the "term" which is being extended is the period (in days, months, years) over which the lease or licence has been granted: that is, from the commencement date to the expiry date. To give it the kind of meaning for which the applicant contends would render subpara (iii) unworkable, or without real effect. Despite the force of the purposive arguments made by the applicant, the text and context of s 24IC(4)(b) does ***not*** accommodate the meaning they seek to attribute to the word "term". The High Court has cautioned against giving too much weight to the general purpose of legislation in the construction of particular provisions within a scheme. In Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue[2009] HCA 41; 239 CLR 27 at [51], Hayne, Heydon, Crennan and Kiefel JJ said:Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did ***not*** receive the attention it deserves. This danger was adverted to by Gleeson CJ in Carr v Western Australia when he said:"[I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling." Accordingly, I do ***not*** accept the applicant's contentions about the need for the renewal of the current pastoral leases to comply with the procedural provisions in s 24MD(6B) of the NT Act. Both of the applicant's arguments concerning the pastoral leases are rejected. Each of the leases can therefore be given the full force and effect which can be attributed to pastoral leases against the native title I have found to exist.

Miscellaneous licences L53/161 and L53/177 Licence L53/161 is held by Cameco Australia Pty Ltd and is a licence to search for groundwater. The licence commenced on 9 May 2013. It is located around the area of North Bore, which is near Yeelirrie in the claim area. Licence L53/177 appears to be held by GWR Group Limited and is a licence to search for groundwater. It commenced on 16 October 2014. It is located in the northern part of the claim area, around the area of Tony Bore, which is near Community Bore. Both licences were granted under s 91 of the Mining Act 1978 (WA) and the applicant submits they are invalid future acts because they were granted without compliance with the relevant parts of the NT Act. The applicant accepts the grant of the licences complied with s 24HA of the NT Act (for example, in relation to the notification requirements in s 24HA(7)), but submits that is ***not***

the applicable part of Pt 2 Div 3 of the NT Act which needed to be complied with. Rather, they submit the licences create a “right to mine”, so that the State should have complied with the “right to negotiate” provisions in Subdiv P of Pt 2 Div 3 of the NT Act. Section 91 of the Mining Act relevantly provides:(1) Subject to this Act, and in the case of a miscellaneous licence for water to the Rights in Water and Irrigation Act 1914, or any Act amending or replacing the relevant provisions of that Act, the mining registrar or the warden, in accordance with section 42 (as read with section 92), may, on the application of any person, grant in respect of any land a licence, to be known as a miscellaneous licence, for any one or more of the purposes prescribed.

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

(3) A miscellaneous licence shall –(a) be in the prescribed form; and

(b) authorise the holder to do such matters and things as are specified in the licence.[(4), (5) deleted]

(6) A miscellaneous licence shall ***not*** be granted unless the purpose for which it is granted is directly connected with mining. Subsections 24HA(1), (2) and (3) of the NT Act relevantly provide:Legislative acts

(1) This section applies to a future act consisting of the making, amendment or repeal of legislation in relation to the management or regulation of:(a) surface and subterranean water; or

(b) living aquatic resources; or

(c) airspace.

In this subsection, water means water in all its forms and management or regulation of water includes granting access to water, or taking water.Leases, licences etc.

(2) This section also applies to a future act consisting of the grant of a lease, licence, permit or authority under legislation that:(a) is valid (including because of this Act); and

(b) relates to the management or regulation of:(i) surface and subterranean water; or

(ii) living aquatic resources; or

(iii) airspace.

In this paragraph, water means water in all its forms andmanagement or regulation of water includes granting access to water, or taking water.Validity of act

(3) The act is valid. Given it is agreed these licences were granted “under” the Mining Act, the question for determination is whether the Mining Act is, relevantly, legislation that “relates to the management or regulation of ... surface and subterranean water” within s 24HA(2)(b)(i). There are three subject matters of s 24HA: “airspace”, “living aquatic resources” and “surface and subterranean water”. None of these are defined Div 3 of Pt 2, nor in Pt 2 generally, nor in s 253. However an extended meaning is given to the phrase “management or regulation” in both subs (1) and subs (2) by including in that phrase granting access to water and taking water. Thus, if the legislation under which a licence is granted “relates to” granting access to water, or “relates to” taking water, it will fall within s 24HA. The parties’ submissions, and in particular those of the applicant, spent some time addressing the question whether what these miscellaneous licences do is to create a “right to mine.” With respect, I do ***not*** consider that is

the correct question. The State and Cameco rely on the terms of s 24HA to render the future acts comprising the grant of these licences valid. The sole question is whether s 24HA applied so as to have that effect. The words "relating to", when used in a statute and like similar connecting phrases such as "with respect to" or "in relation to", are generally construed as words of wide import, denoting simply a relationship between one subject matter and another: see Nordland Papier AG v Anti-Dumping Authority [1999] FCA 10; 93 FCR 454 at [25] (Lehane J, dealing with the phrase "in respect of", but the authorities are clear that generally the phrases are given similar meanings). That said (and unsurprisingly), the authorities emphasise that the nature of the relationship required by the statute between the two subject matters will always depend on the statutory context: Travelex Ltd v Commissioner of Taxation [2010] HCA 33; 241 CLR 510 at [25] (French CJ and Hayne J). The present statutory context is one in which the Parliament is setting out, in a series of provisions in Pt 2Div 3, what are the prerequisites for future acts affecting native title to be valid. Division 3 introduces a binary classification, as the "Overview" in s 24AA makes clear. Section 24AA(2) provides:Validity of future acts

(2) Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if ***not***. Some future acts require more for validity than others. In Harris v Great Barrier Reef Marine Park Authority [2000] FCA 603; 98 FCR 60 at [27], the scheme was described in the following way:There is, in our opinion, a discernible legislative intent in these provisions of Div 3, to some of which we will refer in a little more detail later, that shows that, depending upon who is to do the future act and depending on the impact the act will have on established native title rights or on native title rights that may possibly exist in the lands or waters affected by the act, persons with determined or possible native title interests in the land are to have carefully graded rights to be notified beforehand and are also to have carefully graded rights to have attention given by the decision-maker to their views about the doing of the act. These deliberately structured differences between the various entitlements to be notified of and to respond to proposals to do future acts are, to adopt words used in New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 at 551, more than mere semantic differences. In Harris, the Full Court described the right in s 24HA in the following terms (at [38]):The opportunity "to comment" on a proposed act provided for by s 24HA(7)(b) in terms suggests that those with that right have only an entitlement to explain why, in their opinion, the act should ***not*** be done at all or only on conditions and to draw to the attention of the decision-maker information which they possess and which they consider the decision-maker should know about before doing the act. The right under s 24HA(7)(b) is, we think, a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate. The sub-section does ***not*** confer any greater right on the native title interests. It is ***not*** a right to participate in the decision whether to issue the permit or a right that entitles the recipients to seek information from the decision-maker necessary to satisfy those interests about matters of concern to them. That this is the narrow scope of the right conferred by s 24HA(7)(b) is, we think, confirmed by comparing this right with the rights conferred on native title interests by some of the other provisions of Div 3. The Full Court went on to contrast the scope of the right with that contained in Subdiv M, which is the Subdivision the applicant submits is applicable to the grant of these two miscellaneous licences. Section 24HA applies to both legislative and executive acts and a connecting phrase is used in both subs (1) ("in relation to") and subs (2) ("relates to"). Each of those connecting phrases should be given a consistent construction within the one provision, there being no reasons of text or context to do otherwise. Section 24HA(1) has a more straightforward application. There must be a relationship or connection between:(1) on the one hand, the making, amendment or repeal of legislation; and

(2) on the other hand, the management/regulation of (relevantly) surface or subterranean water, recalling the extended meaning of "management" and "regulation". Taking the statutory words pertinent to the current issue in this proceeding, the textual question arising from the structure of s 24HA(2) is whether the requisite connection must be between the legislation under which the licence is granted and the management/regulation of surface and subterranean water; or between the licence and the management/regulation of surface and subterranean water. If it is the former, the applicant's contentions may gain some support; if it is the latter, the State's contentions may be more persuasive. That is because, on their face, these are licences to search for groundwater. There is an obvious connection between the licence and surface and subterranean water. Although the constructional choice is ***not*** straightforward, in my opinion the construction which is most consistent with the text and context of s 24HA is that

the requisite connection must be between the legislation and the management/regulation of surface or subterranean water. I take that view because this makes the most sense out of s 24HA(2)(a): the "that" at the end of the covering clause refers to legislation and connects the legislation with the requirements in paras (a) and (b). In other words, on the construction I prefer it is the legislation that must be valid, ***not*** the licence. In my opinion, this construction better links subs (1) with subs (2), because subs (1) concerns legislation. This in turn links with the bracketed words in subs 24HA(2)(a) – that is, the words "(including because of this Act)". In my opinion that is a reference to legislation which is valid because of the operation of s 24HA(1). The difference between subs (1) and subs (2) is therefore that subs (1) is concerned with the legislative act of making, amendment or repeal of legislation itself; and subs (2) is concerned with the executive or administrative act of granting a licence under such legislation. In both cases, it is the legislation that must "relate to" (relevantly) surface or subterranean water. Is the Mining Act legislation which "relates to" surface or subterranean water? That question should be answered in the negative. That answer is supported by the plain text of s 91(6) of the Mining Act. Sections 91(1) and 92 – the authorising provisions for the grant of a miscellaneous licence – are ***not*** concerned with surface or subterranean water at all. They are concerned with the grant of licences for purposes which are prescribed. That is their subject matter. By s 91(6) the purpose of the grant of the licence must be "directly connected" with mining. This provision reinforces the proposition that the subject matter of s 91 and s 92 is prescribed purposes directly connected with mining. It is true that as the regulations stood at the relevant time (accepting the State's submissions are accurate on that issue), one of the prescribed purposes was "a search for groundwater"; and there were other prescribed purposes which referred to water, such as a bore, or "taking water". This enabled the authorisation of conduct for purposes directly connected with mining under the Mining Act, but in the same way that any other purposes directly connected with mining could also have been authorised, and which would have had nothing to do with the taking of water. To the extent that the construction I have reached differs from that reached by the Native Title Tribunal in FMG Pilbara Pty Ltd/NC (deceased) on behalf of the Yindjibarndi People/Western Australia [2012] NNTTA 103, I respectfully disagree with the Tribunal's construction. If the State's construction were correct, the character of the Mining Act would alter depending on the content of the regulations: if the regulations did ***not*** prescribe, for the purposes of s 91, a miscellaneous licence for the purpose of "taking water", then the character of the Mining Act would ***not*** fall within s 24HA. For so long as the executive decided to prescribe such a purpose, the Mining Act would fall within s 24HA. I do ***not*** accept that s 24HA is intended to operate in such an ambulatory way, at the instigation of the executive. Section 24HA is concerned with legislation (and administrative or executive acts authorised by legislation) having a connection with water (in its usual sense, as the State submits). It is ***not*** concerned with legislation (and administrative or executive acts authorised by legislation) having a connection with mining. Whether or ***not*** this locates the only validation provisions for these two miscellaneous licences in s 26(1)(c)(i) or s 24MD(6B) (or elsewhere in Pt 2 Div 3) is ***not*** necessary to decide. For the reasons I have given at [1144] below I doubt these licences fall within s 26(1)(c)(i), but they may well fall within s 24MD(6B). Section 24HA was the only provision relied upon by the State and Cameco to validate what was accepted to be a future act. I have found that provision does ***not*** apply. Accordingly, the grants of licences L53/161 and L53/177 were invalid in the sense of having no force or effect in relation to the applicant's native title.

Various mining tenements as invalid future acts There remain seven miscellaneous licences whose effect on native title was ***not*** agreed at the time of trial. They are set out in Table 6 to the Schedule to the amended parties' agreed statement. In each case, the applicant contends the respondents have ***not*** discharged the onus of establishing that these licences were validly granted in accordance with the NT Act, so as to avoid the characterisation of invalid future acts. Most are now the subject of concessions about non-compliance and the real debate between the parties (including third parties) is the consequence of non-compliance with the future act provisions. Licence L36/129 requires a decision between competing arguments to be made. Some are now also subject to further concessions removing the dispute between the parties. Nevertheless, I have retained them in this section. A further licence (L36/110) is listed in the amended parties' agreed statement as "in issue", but no party makes submissions about it. The parties have agreed there are only seven miscellaneous licences in issue and the Court proceeds on that basis. I do ***not*** consider L36/110 any further.

L36/122 and L36/123 The State accepts that these two licences should ***not*** be listed on any determination as "other interests". Mr David Crabtree, who is a deponent to an affidavit filed on behalf of the State in relation to extinguishment, deposed that between 15 and 16 October 2015, for each tenement listed in Table 6, he examined

relevant files held by the WA Department of Mines and Petroleum and identified documents relating to processes connected with the future act regime under the NT Act. He then made a handwritten note against each tenement on Table 6, summarising what he had found for that tenement. His notes against these two licences read "withdrawn 13/06/2003" and "withdrawn 25/09/2000" respectively. The State conceded that neither tenement is "live", because it was withdrawn on the date Mr Crabtree has recorded. Therefore, the State accepts neither tenement is an "other interest" for the purposes of any determination.

L36/129 This licence was held by BHP Billiton Nickel West Pty Ltd and was granted on 15 January 1999, for the purposes of a "powerline". I note that, while at the time of the hearing of this proceeding, that licence was valid, it was surrendered on 4 April 2016 and accordingly is now a "dead" licence. That may render the parties' arguments moot, as it has for L36/122 and L36/123. However, in an abundance of caution, I will determine the issue in any event. BHP and the State submit the licence was granted to BHP Billiton Nickel West Pty Ltd, with the intention of "formalising" the tenure of a powerline which was constructed some 20 years prior to its grant, in accordance with approved proposals under the Nickel (Agnew) Agreement Act 1974 (WA). BHP described the function of the powerline as transmitting electrical energy from the Leinster 33kv switch yard, situated within Mineral Lease 255SA, to the Leinster airport and town site. The source in the evidence for these submissions is an exhibit to Mr Crabtree's affidavit consisting of a memorandum from the Director-General of the Department of Mines to the Western Australian Minister for Mines, dated 13 November 1998. That memorandum describes the licence application and the author's views about which provisions of the NT Act might be attracted by the application, as well as recording the legal views expressed by the WA Crown Solicitors office. The State has accepted that the statements of legal opinion in the memorandum are ***not*** admissible to prove the correctness of those opinions. The State and BHP submit that otherwise the contents of the memorandum are probative of the purpose of the grant of the licence, and its relationship to the Nickel (Agnew) Agreement Act. If that is so, they submit there is sufficient evidence for the Court to find that s 24IB of the NT Act applied to the grant of the licence in 1999. Mr Crabtree's handwritten notation about this licence states "Granted under sec 24IB". However, the State conceded Mr Crabtree's note could ***not*** be admitted to prove the truth of that statement. Section 24IB of the NT Act provides: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. There are two single judge decisions which deal with the meaning of the term "legally enforceable right", although ***not*** necessarily in exactly the same context. In Daniel, RD Nicholson J considered the phrase's meaning in the context of s 228(3)(b)(i) of the NT Act. At [44] his Honour dealt with the question of the time at which the legally enforceable right had to arise, which does ***not*** seem to be in dispute between the parties to this proceeding, but is nevertheless worth making clear. His Honour's reasoning applies, in my opinion, to s 24IB:Again it is the terms of the NT Act in its relevant section which must determine this issue. Section 228(3) draws a distinction between the "act" which takes place on or after 1 January 1994 (which may become the past act if it satisfies the statutory criteria) and the "legally enforceable right" in exercise of which the "act" takes place. The accommodation lease is ***not*** the "legally enforceable right;" rather it is the "act" resulting (if it does) from the "legally enforceable right" created in accordance with the section. It follows from the provisions of the section that it will be sufficient if the enactment sets out a mechanism providing a legally enforceable right which results in the application of the mechanism there provided on a later occasion to produce an act. At [48], his Honour set out the terms of the agreement in issue to explain why he concluded that there was no relevant discretion reposed in the Minister whether or ***not*** to grant the licence:It necessary to go to the terms of the Agreement. Clause 19(1) is expressed in mandatory terms. It requires the State to grant leases in accordance with the Joint Venturers' approved proposals. It should be read with cl 8. That also is expressed in mandatory terms, namely that the Minister shall approve of the said proposals either wholly or in part without qualification or reservation. The Minister's powers to intervene derives from his power to approve the proposals only in part; from his power to defer consideration until other submissions are received; and from his power to require conditions

precedent: cl 8(1)(a), (b) and (c). If the Minister's decision is considered by the Joint Venturers to be unreasonable, they may elect to refer the decision to arbitration: cl 8(4). Clause 8 applies to proposals to modify, expand or vary activities substantially as a consequence of the application of cl 9. Clause 9 excludes cl 8(5) and cl 8(7) from application to proposals for approval, so that those subclauses cannot be taken into account in determining the width of the Minister's discretion. It is ***not*** the case that the Minister may refuse a proposal or only grant it on very different terms and conditions. In Banjima (No 2) [2013] FCA 868; 305 ALR 1, Barker J (especially at [972]) made similar findings in relation to another State agreement, again focussing on whether, under the terms of the relevant agreement, the Minister had a discretion or an obligation to grant the licence proposed. The Nickel (Agnew) Agreement is a schedule to the Nickel (Agnew) Agreement Act. The applicant conceded the Agreement is "in relevantly similar terms to the agreements in Daniel and Banjima". The relevant obligation is set out in cl 17(2):The State shall in accordance with the Joint Venturers' approved proposals grant to the Joint Venturers or arrange to have the appropriate authority or other interested instrumentality of the State grant for such periods and on such terms and conditions (including renewal rights) as shall be reasonable having regard to the requirements of the Joint Venturers, leases and where applicable licences easements and rights of way for all or any of the purposes of the Joint Venturers' operations hereunder including any of the following namely — townsites, private roads, railway sidings and spur lines, tailing areas, water pipelines, pumping installations and reservoirs, airport, power transmission lines, stockpile areas and plant site areas (including concentrator areas and smelter areas).

(Emphasis added.) In other words, the applicant does ***not*** contend the Minister merely had a discretion whether to grant the licence in question. What is missing, the applicant contends, is admissible evidence about the proposals submitted by BHP to the Minister, and without those the Court cannot ascertain if the licence granted fell within the terms of the proposals – if it did ***not***, so the argument appears to go, there would be no legally enforceable right. The applicant contends the memorandum is insufficient to prove these facts. The State submits the record in the memorandum that the powerline was constructed in accordance with "approved proposals that formed part of the Nickel (Agnew) Agreement Act" is sufficient. I agree. In my opinion, the memorandum, as the State submits, formed part of the business records of the Department of Mines so that the hearsay character of what is said in it does ***not*** preclude the memorandum being probative of the truth of its contents. Where the Director-General informs the Minister the powerline was, 20 years ago, constructed in accordance with the proposals forming part of the Nickel (Agnew) Agreement Act, in my opinion that statement is sufficient to prove on the balance of probabilities that is what occurred. That being the case, BHP had a legally enforceable right under cl 17(2) of the Nickel (Agnew) Agreement to have the licence granted. This satisfies s 24IB(a). Even if that conclusion is wrong, I am satisfied that the grant of licence took place "in good faith" in giving effect to the arrangements in the Nickel (Agnew) Agreement, which was made before 23 December 1996, and the Agreement which is the schedule to the Act is "written evidence" of that arrangement. This satisfies s 24IB(b). Whichever subsection of s 24IB is satisfied, none of the notification or procedural rights contained in s 24ID(3) or (4) apply to a future act under s 24IB. Accordingly, the grant of licence L36/129 had full force and effect in respect of the applicant's native title, although it is subject, as the parties agree, to the non-extinguishment principle.

L36/144, L36/148 and L36/152 Licence L36/144 is held by TEC Desert Pty Ltd and TEC Desert No. 2 Pty Ltd. This licence is located in the southern part of the claim area, around the area of Agnew. Licence L36/148 is held by Australian Nickel Investments Pty Ltd. It is located in the eastern part of the claim area, around the area of Sir Samuel. Licence L36/152 is held by TEC Desert Pty Ltd and TEC Desert No. 2 Pty Ltd. This licence is located in the southern part of the claim area, approximately around the area of Agnew. Mr Crabtree also made some notes against these three mining tenements. The notes against each read "Granted under Ward policy see attached". What is attached are pieces of correspondence that deal with what the State described as the "Ward policy" following the decision of a Full Court of this Court in Ward (FC) [2000] FCA 191; 99 FCR 316. The effect of that policy was, in accordance with the Full Court's decision, that certain mining tenements were granted without reference to the future act provisions of the NT Act, on the basis that the grants had extinguished native title rights and interests: see Ward (FC) at [329]. The Full Court's finding on which the "Ward policy" was based was reversed by the High Court: see Ward (HC) at [181]-[186], [191]-[195]. Accordingly, the State appears to accept that each of the grants of these three tenements was non-compliant with the future act provisions of the NT Act. The applicant submits that, on the basis of the State's tenure DVD, L36/144 was granted on 4 October 2000 for the purpose of a

"Powerline"; L36/148 was granted on 23 November 2000 for the purpose of a "Powerline Road" and L36/152 was granted on 15 November 2000 for the purpose of a "Pipeline Road". The applicant further contends this means each of the licences was the creation of a "right to mine" for the sole purpose of an infrastructure facility of the kind referred to in paras (a) and/or (d) and/or (g) of the definition of infrastructure facility in s 253 of the NT Act. Accordingly, the terms of s 24MD(6B) are said to have been applicable, but were ***not*** followed. The State has ***not*** made submissions about the nature of these licences or the applicable provisions of Pt 2 Div 3, given the incorrectness of its "Ward policy". Further, unlike the submissions it made with respect to the pastoral leases, the State did ***not*** submit that the Full Court's decision in Lardil has any application. However, even if that submission had been made, I would have rejected it for the reasons I have set out at [989]-[1048] above. As I apprehend it, the applicant's submission about this licence creating a "right to mine" may have been made in an attempt to bring the grant of the licences within a provision that, on the obiter statements inLardil, created procedural rights capable of affecting the validity of the grant of a future act. That may explain, with respect, the contortions which have been undertaken to characterise the grant of a licence to erect a powerline, or to make a pipeline, as the grant of a "right to mine" within s 26(1)(c)(i) of the NT Act, attracting Subdiv P and the right to negotiate. I accept the State's submissions that, although "right to mine" is ***not*** a defined term in the NT Act, the verb "mine" is defined in s 253 (inclusively) as:mine includes:

(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or

(b) extract petroleum or gas from land or from the bed or subsoil under waters; or

(c) quarry;

but does ***not*** include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:

(d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or

(e) processing the sand, gravel, rocks or soil by non-mechanical means. I do ***not*** consider that the construction of a powerline or a pipeline, even if directly connected to mining activity, falls within the verb "mine" as defined in s 253, nor within any extended meaning that might exist given the statutory definition is ***not*** exhaustive. A "right" to "mine" is, primarily, a lease, licence or other legal right granted to do one or more of the activities set out in the inclusive definition in s 253. Construction of powerlines and pipelines does ***not*** fall within that. An alternative submission was that the grant of these licences was a future act within s 24MD(6B) as the creation of a "right to mine for the sole purpose of the construction of an infrastructure facility associated with mining". The phrase "infrastructure facility" is defined in s 253:infrastructure facility includes any of the following:

(a) a road, railway, bridge or other transport facility;

(b) a jetty or port;

(c) an airport or landing strip;

(d) an electricity generation, transmission or distribution facility;

(e) a storage, distribution or gathering or other transmission facility for;(i) oil or gas; or

(ii) derivatives of oil or gas;(f) a storage or transportation facility for coal, any other mineral or any mineral concentrate;

(g) a dam, pipeline, channel or other water management, distribution or reticulation facility;

(h) a cable, antenna, tower or other communication facility;

(i) any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph. Given what is expressly excluded from the inclusive definition of "mine", it may be that the phrase in s 24MD(6B) is an example covering activities broader than those in the inclusive definition. So much may be gleaned from the definition of infrastructure facility. Thus, if, for the sole purpose of mining operations, a dam needed to be constructed, then a licence granting permission for that to occur might well fall within s 24MD(6B). It is possible that a licence to construct a pipeline could fall within s 24MD(6B), pipelines being one kind of infrastructure expressly mentioned in the definition of infrastructure facility in s 253. Powerlines are ***not*** expressly mentioned and it is more doubtful whether they are intended to be brought within an "electricity ... transmission ... facility", but it is possible. If s 24MD(6B) did ***not*** apply, then s 24MD(6A) will have applied. On the evidence before me, there has been no apparent compliance with that provision either. Given the views I have expressed about non-compliance with any of the procedural requirements in these Subdivisions, it is ***not*** as critical whether the future act falls within (6A) or (6B): on the evidence, neither provision was complied with. Therefore, these three licences are invalid in the sense of having no force or effect in relation to the applicant's native title.

L53/109 This licence is held by BHP Billiton Nickel West Pty Ltd. It was granted under Div 5 of Pt IV of the Mining Acton 18 November 1999, for the purpose of a "road". It is located near North Deep Bore in the north-eastern part of the claim area. Again, this tenement is the subject of a concession, properly made, by the State. The State's submissions explain that it had been understood, again on the basis of the "Ward policy", that the establishment of Road Number 10439 had fully extinguished any native title rights and interests over that piece of land, and that explains the non-compliance with the future act provisions. I accept the applicant's submissions that this is an act to which s 24MD(6B) would apply, as the definition of an "infrastructure facility" includes "a road, railway, bridge or other transport facility". The State appears to accept the establishment of this road was an invalid future act because it was granted without reference to Pt 2 Div 3. Accordingly, this licence is invalid in the sense of having no force or effect in relation to the applicant's native title.

Should the invalid future acts be recorded in the Determination? I accept the respondents' submissions that the licences in issue are ***not*** impugned under the general law or as being invalid in the sense of having no legal effect at all. Although I note there are different views on the question, in my opinion it may be prudent to have these invalid future acts recorded in the Determination. That is a matter I will, in the first instance, leave for the parties to attempt to reach agreement about, based on these reasons for judgment.

SECTION 47B Section 47B of the NT Act provides:Vacant Crown land covered by claimant applications

When section applies

(1) This section applies if:(a) a claimant application is made in relation to an area; and

(b) when the application is made, the area is ***not***:(i) covered by a freehold estate or a lease; or

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

(iii) subject to a resumption process (see paragraph (5)(b)); and(c) when the application is made, one or more members of the native title claim group occupy the area.Prior extinguishment to be disregarded

(2) For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.Effect of determination

(3) If the determination on the application is that the native title claim group hold the native title rights and interests claimed:(a) the determination does ***not*** affect:(i) the validity of the creation of any prior interest in relation to the area; or

(ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and(b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.Renewals and extensions of leases

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

Defined expressions

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

(b) an area is subject to a resumption process at a particular time (the test time) if:(i) all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and

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

(iii) the Crown still had a bona fide intention of that kind in relation to the area at the test time. Section 47B directs attention to the current connection of claim group members with their ***country***. The general approach to s 47B, and the operation of the exclusions contained in s 47B(1)(b) (and subpara (ii) in particular), was set out by the Full Court in Banjima [2015] FCAFC 84; 231 FCR 456 at [88], [91] and [97]-[98]:The construction of s 47B should be approached having regard to the Preamble to the NTA, which forms part of that Act (see s 13(2)(b) of the Acts Interpretation Act 1901(Cth)) which stated:where appropriate, the native title should ***not*** be extinguished but revive after a validated act ceases to have effect....

As Wilcox, French and Weinberg JJ held in Alyawarr at [187], the purpose of s 47B is beneficial. They explained the reason for a narrow construction of s 47B(1)(b)(ii) of the identified purpose of an affectation to which the provision applied as follows:The purpose of s 47B is beneficial. The qualification on its application in s 47B(1)(b)(ii) is no doubt intended to minimise the impact of native title determination applications on areas set aside by proclamation or otherwise under statutory authority for public or particular purposes. That limitation should ***not*** be

construed more widely than is necessary to achieve its purpose. A proclamation for a broadly expressed purpose which encompasses a variety of potential but unascertained uses is ***not*** a proclamation for a particular purpose. The term “public purposes” may arguably encompass a land use planning purpose which is met by establishing a framework or condition for the allocation of private rights such as the grant of residential or commercial leases in a township. Alternatively, it may be construed as referring to purposes of a public nature such as the creation of reserves for public works or recreation or environmental protection. A narrower construction accords with a comprehensible policy that, in the public interest, prior extinguishment which might obviate public exposure to compensation claims or a future act process should be continued in force. It is ***not*** necessary in aid of the narrower construction to define its outer limits here. It is sufficient to say that the mere proclamation of a townsite, which might comprise largely private property holdings by lease or otherwise, does ***not*** define public purposes or a particular purpose within the meaning of s 47B(1)(b)(ii).(Emphasis added.)

...

The definition of a claimant application, which incorporates by reference the definition of native title determination application under s 61(1) of the NTA, itself requires that it be made “in relation to an area”, so the additional words repeating that expression in s 47B(1)(a) must be used to narrow the focus of each paragraph in s 47B(1)(b), and of s 47B(1)(c), to each particular parcel of land and waters individually covered by the claimant application and to which s 47B is alleged to apply. And, the use of the expression “the whole or a part of the land or waters in the area” in s 47B(1)(b)(ii) reinforces the narrowing effect of “in relation to an area” in s 47B(1)(a).

In other words, the exclusion from the beneficial operation of s 47B(2) effected by each paragraph in s 47B(1)(b) should be given a narrow reading so that the exclusion will apply only in respect of each particular parcel of land or waters that falls within the express words. Thus, native title will be treated, for the purposes of s 47B, as having been extinguished only in respect of each freehold or leasehold estate, and each particular part of land or waters subject to an affectation referred to in s 47B(1)(b)(ii), and each set of interests referred to in s 47B(1)(b)(iii) and (5)(b), and s 47B(2) will ***not*** operate to affect that status. The structure of s 47B is such that it is appropriate to consider first whether any of the disapplying provisions in s 47B(1)(b) affect the parcels of land identified by the applicant. Having reached a conclusion on whether s 47B is applicable to each of the parcels of land identified, I will then turn to consider the question of occupation for the purposes of s 47B(1)(c).

Areas affected and the parties’ contentions There are eight areas in the claim area to which claims under s 47B attach. Most are relatively small, and occur broadly in a north–south line in the eastern part of the claim area. The most southerly is UCL 240, a small area south-west of Leinster. The most northerly in this eastern part of the claim area are UCL 14 and UCL 15, at Tjiwarl/Logan Spring. In the north-west of the claim area, in the region of Lake Mason, are three parcels of land to which s 47B is said to apply, and together these cover a substantial area. They are UCL 239, UCL 245 and UCL 246. The two relevant dates for the purposes of s 47B are 17 June 2011 (the lodgement of Tjiwarl #1) and 22 June 2015 (the lodgement of Tjiwarl #2). In respect of UCL 239, UCL 245 and UCL 246 (formerly H91295 and 3114/551), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are agreed that this area was the subject of the following mining tenements:(a) UCL 239: E36/742 and E57/849

(b) UCL 245: E53/1273, E53/1564 and E57/676

(c) UCL 246: E53/1446, E53/1564, E57/608, E57/609, E57/739, E57/813, MC53/3927, MC53/3929, MC53/3931, L53/160 and TR70/6899 The applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of UCL 14 and UCL 15 (Tjiwarl/Logan Spring), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are agreed that this area was the subject of the following mining tenements: L36/120 and L36/60. Again, the applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of part of UCL 11 (Yakabindie), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are

agreed that this area was the subject of the following mining tenements: E36/717, L36/96 and L36/191. The applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of parts of UCL 4, UCL 5, UCL 6 and UCL 10 (Sir Samuel), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are agreed that this area was the subject of the following mining tenements:(a) UCL 4: E36/535, E36/752, E36/753 and L36/96

(b) UCL 6: E36/535, E36/717, E36/752, E36/753, L36/96, L36/159, L36/191 and L36/175

(c) UCL 10: L36/175 and L36/96 The applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of UCL 240 (Vivien), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are agreed that this area was the subject of the following mining tenements: E36/617 and L36/49. The applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of Road 13, the applicant contends that this area was unallocated Crown land as at 22 June 2015 and that one or more claim group members occupied this area on 22 June 2015. It further contends that "any prior extinguishment in this area by reason of its status as Road 13 was because of the taking of native title rights under the Public Works Act 1902 (WA) and Road Districts Act 1919 (WA) and there is no evidence of extinguishment by construction of a public work". The parties are agreed that this area was the subject of the following mining tenements: E57/577-I and L36/137. The applicant contends that those mining tenements do ***not*** render s 47B inapplicable. In respect of UCL 247 (south of Mail Change Well) and UCL 8 (corner Leinster Downs and Booylgoo Spring), the applicant contends that one or more claim group members occupied this area on 17 June 2011 and/or 22 June 2015. The parties are agreed that these areas are ***not*** subject to any mining tenements. Thus, if occupation is proved, s 47B will apply to these areas. In respect of parts of Closed Roads 21 and 23, the applicant originally contended that this area was unallocated Crown land on 17 June 2011 and that one or more claim group members occupied this area on that date. It further contended that any prior extinguishment in this area should be disregarded under s 47B of the NT Act. The respondents contended that the area was subject to the following mining tenements: E36/545, E36/617, E36/622 and E36/713. The applicant contended that those mining tenements do ***not*** render s 47B inapplicable.

Does the statutory dedication of a public road fall within s 47B(1)(b)(ii)? The only road left in issue between the parties in relation to s 47B is Road 13. In their final written submissions, the applicant stated they no longer contend that s 47B applies to disregard extinguishment in Closed Roads 21 and 23. Road 13 is situated in the south-west corner of the claim area, and is shown on the tenure evidence as running through Depot Springs pastoral station. The parties are agreed that it was designated as a road as at 2011, but that it was a UCL area as at 22 June 2015 when Tjiwarl #2 was lodged. As I have mentioned above, the applicant identifies the possible extinguishing act in relation to Road 13 as the resumption of the road for the purposes of public works, as defined in s 253 of the NT Act. By reason of ss 12I and 12J of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA), read with s 23E of the NT Act, if an activity or the performance of a function falls within the definition of a public work, it will be a previous exclusive possession act and will have extinguished native title. Neither the applicant nor the State submit there is any part of s 47B(1)(b) that might be said to disapply the operation of s 47B(2). Rather, the State submits s 47B(2) cannot revive native title in the area comprising the Road 13 because the establishment of a road is ***not*** the "creation of any prior interest" within the terms of s 47B(2). It relies on the Full Court decision in Erubam Le (Darnley Islanders) #1 v Queensland [2003] FCAFC 227; 134 FCR 155. At [90] of Erubam Le, the Full Court said:... it cannot be said that the construction or establishment of the public works is properly to be characterised as "the creation of a prior interest" in the land. It follows that s 47A(2)(b) does ***not*** apply so as to compel the disregarding of the extinguishment brought about by the acts of constructing or establishing the public works.

(Emphasis in original.) Mansfield J applied that finding in Griffiths v Northern Territory of Australia [2014] FCA 256 at [80]. The applicant does ***not*** contend Erubam Le was wrongly decided, but even if they did I would, as a single judge, be bound to follow it, as Mansfield J did in Griffiths. Rather, the applicant contends the decision is distinguishable, because of the different kind of extinguishment involved in Erubam Le from the act of

extinguishment in relation to Road 13. The applicant submits there was, for the purposes of s 47B, extinguishment by the creation of a "prior interest" within the terms of s 47B(2) in relation to Road 13. I do ***not*** accept the applicant's submission, and I turn to explain why. The definition of "public work" in s 253 is:public work means:

(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. Erubam Le was a s 47A case, but it is ***not*** suggested that difference is material. It concerned a claim for native title over the island of Erub, in the Torres Strait. The matter came before a Full Court on a referral for the answers to separate questions stated by Drummond J. There were essentially two questions: first, whether the construction or establishment of specified public works on the island would have extinguished native title rights and interests; second, if they did, whether for the purposes of s 47A of the NT Act such extinguishment would be disregarded. The specified works were carried out at various times between 1977 and 2002 to build the following structures on the island: a windmill, a windmill-driven pump, an earth dam storage, a fibreglass reservoir, reticulation pipes, a school, two residential houses, a sewerage system and a stadium. The parties were agreed these activities constituted "public works" for the purposes of the NT Act and the Queensland validating legislation. Whether the acts extinguished native title was answered differently in relation to one group of acts (the pump, windmill, dam, reservoir, pipes, school and first residential house) from the other group (the second residential house, sewerage system and stadium); the former were held to have extinguished native title, while the latter were ***not***. As to the former, the Court held (at [32]) they were ***not*** within the exception to what constitutes an act of exclusive possession set out in s 23B(9) because (and this is the point of relevance) in their building and construction, there was no "grant or vesting" of title:Section 23B(9) provides, in terms, that an act is ***not*** a previous exclusive possession act if it "is" the grant or vesting of any thing. It is straining language to say that the beneficial impact (assuming the impact to be beneficial) upon the physical characteristics, value or utility of the land consequent upon the construction or establishment of public works and the simultaneous operation of principles relating to fixtures, results in some unspecified way in the construction or establishment of the work being a grant or vesting. [Emphasis in original.] The public work is neither "granted" nor "vested." In truth, there is no change at all in the fee simple interest as such, even if the land becomes, as a practical matter, more valuable or more useful.The correctness of this approach is confirmed when reference is made to other provisions within the same legislative framework, including other parts of the same section, where a clear distinction is drawn between acts that are or "consist of a grant or vesting" (which are dealt with by s 23B(2), (9), (9A) and (9C)) and acts that "consist of the construction of [sic] establishment of any public work" (within s 23B(7)). [Emphasis added.] The Court returned to this analysis when it came to look at s 47A. Although the text of s 47A(2) differs from the text of s 47B(2), s 47A(2)(b) nevertheless contains the words "the creation of any other prior interest in relation to the area". At [83]-[84], the Full Court emphasised the need to identify, with particularity, the extinguishing act:The disagreement between the parties is about the application of s 47A(2) to the construction or establishment of the public works. The applicants contend, and the respondents deny, that the section operates to save from extinguishment any native title rights and interests that might otherwise have been extinguished.

It is important to note at the outset that s 47A(2) is concerned with the characterisation of "acts" that are to be disregarded. In doing so, it characterises the act to be disregarded as a "grant or vesting", or a "doing of the thing

that resulted in the holding or reservation" or a "creation of any other prior interest". The provision is tightly worded; it would, for example, have had a much broader potential application if the paragraphs were expressed to apply to extinguishing acts that "involved" a grant, a vesting or a creation of a prior interest. The provision requires, however, that in the consideration of its application to any extinguishment otherwise effected by (relevantly here) the construction or establishment of the public works, it must first be determined what, as a matter of characterisation for the purposes of s 47A(2), the act by which native title is extinguished actually is.

(Emphasis in original.) At [85], the Court decided the appropriate characterisation, consistently with the earlier parts of their reasons, was "the construction or establishment of [a] public work". The Court noted the breadth of the definition of "interest" in s 253 of the NT Act, a matter to which the applicant in this proceeding also points. "Interest" is defined for the purposes of the Act in s 253. The definition is very broad and reads as follows:interest, in relation to land or waters, means:(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. It was at this point that the Court expressed the opinion I have extracted at [1176] above, on which the State relies, that the construction of a public work is ***not*** the creation of a "prior interest". The applicant contends this analysis in Erubam Le has no application to Road 13, because Road 13 was never constructed. I interpolate here that another distinguishing feature is that a road, when constructed, is imprinted upon or occupies the land itself, rather than being in the nature of a fixture or structure upon it. Instead, the applicant relies, as the Full Court in Erubam Le emphasised was the correct approach, on the nature of the extinguishing act. In relation to Road 13, the parties are agreed that Road 13 was resumed pursuant to s 17 of the Public Works Act 1902 (WA). The effect of such a resumption was, at the relevant time, set out in s 18 of that Act: WHENEVER any land is required for any public work, the Governor may, by notice published in the Government Gazette, declare that the land has been set apart, taken, or resumed under this Act for the public purpose therein expressed, ... 18. UPON the publication of such notice in the Government Gazette –(1) the land referred to in such notice shall, by force of this Act, be vested in His Majesty, or the local authority, as the Governor may direct and the case require, for an estate in fee simple in possession for the public work expressed in such notice, freed and discharged from all trusts, mortgages, charges, obligations, estates, interests, rights-of-way, or other easements whatsoever; ... The applicant submits in substance that a resumption of this kind in favour of the Crown can constitute the creation of a "prior interest" for the purposes of s 47B, bearing in mind the wide definition of "interest" in s 253. I do ***not*** accept that argument. It is inconsistent with the approach taken by the Full Court in Fourmile v Selpam Pty Ltd [1998] FCA 67; 80 FCR 151. Fourmile concerned a road that had been marked out on a survey plan but never constructed, and was described as a "road reserve". At 186-187 Cooper J said:The establishment of a public road does ***not*** create an easement in favour of a member of the public thereby investing that member with an estate or interest in the land which constitutes the road: Re Innes (1891) 12 LR (NSW) L 180 at 183.

Ownership of land dedicated as a road does ***not*** pass at common law and the grantor retains all rights of ownership ***not*** inconsistent with public user: City of Keilor v O'Donohue at 369. Therefore, subject to any relevant statutory enactment to the contrary, dedication of a road by the Crown does ***not*** disturb the Crown's ownership of the land constituting the grant.

...

The common law rights which are held by the owner of adjoining property [which Cooper J had described but I have omitted] may ***not*** be taken away or interfered with, without express statutory authority: Bartzios v Leichhardt

Municipal Council [1978] 1 NSWLR 7 at 11; D'Arcy v Municipal Council of Inverell [1925] NSWStRp 3; (1925) 25 SR (NSW) 102 at 107-108.

...

The creation by the Crown of public rights of user through dedication of the road as an extension of Roberts Road to provide for public access to the lands abutting the road and to provide access to the lands west of Portion 25V, together with the creation of private rights in the owners from time to time of the adjoining lands, is consistent with the Crown having exercised its sovereign power to appropriate to itself a plenary title to the land in order to use it for a public purpose, namely to create public roads with their attendant public and private common law rights. Appropriation by the Crown of the land constituting the road and the creation of the rights of user are inconsistent with the common law rights of native title claimed by Mr Fourmile and set out earlier in these reasons. Any native title rights which previously existed in the roadway, including the roadway the subject of the road closure application by Selpam, have been extinguished: Wik Peoples v Queensland (1996) 187 CLR 1 at 91-92. At 169-170, Drummond J (with whom Burchett J agreed) reached a similar conclusion:The setting apart by the Crown, under legislative authority, of the land in question for immediate use as a public road is, in my opinion, something quite different, even if no carriageway is constructed on that land, so far as its impact on any native title that may have existed in respect of that land is concerned, from what occurs where the Crown, acting under powers contained in provisions such as s 95 of the Crown Lands Act and s 334 of the 1962 Act, reserves from future sale or lease unalienated Crown land which may be required for road purposes in the future. If the Crown merely reserves Crown land from further sale or lease for road purposes, it does ***not***, as I have explained, create rights in third parties. Nor is the Crown's radical title to the land converted by such an act of reservation into full beneficial ownership: Wik Peoples, per Brennan CJ at 86. Although a little later on, Drummond J does describe what occurs with a road reservation as the creation of an "enforceable right" of free passage in the members of the public, it is clear neither his Honour nor Cooper J saw this as an interest in land in any sense. I do ***not*** consider it is the kind of "interest" with which s 47B(2) is concerned either. Accordingly, I reject the applicant's submissions that there was, by the resumption of Road 13, a prior interest in that land created for the purposes of s 47B(2). Based on the language of the definition of "public work", the applicant also submits that the word "established" in the phrase "constructed or established" should be taken to refer only to stock routes. Despite the applicant's reference to some extrinsic material, the text and context of s 253 do ***not*** support any construction which gives the word "established" a more restricted application than the word "constructed". Further, as the State submitted in reply, Sundberg J's decision in Neowarra v Western Australia [2003] FCA 1402 makes it clear that a road which has been dedicated is within the terms of "public work" in s 253: see Neowarra at [621]. I agree, with respect, with Barker J in Banjima (No 2) [2013] FCA 868;305 ALR 1 at [1417], where his Honour reached the same conclusion.

Do the identified exploration licences render s 47B inapplicable: the meaning of "lease" In its reply submissions, given the findings of the Full Court in Banjima People v Western Australia (No 2)[2015] FCAFC 171; 328 ALR 637, the State did ***not*** press its alternative submission under s 47B(1)(b)(ii) about the exploration licences. That leaves its submissions that these licences fall within the meaning of "lease" in s 47B(1)(b)(i). The State submits that the definition of "lease" in s 242 of the NT Act includes licences and authorities to mine. Relying then on the definition of "mine" in s 253 of the NT Act, the State submits that a mining exploration licence is a "lease" for the purposes of the NT Act, and therefore within s 47B(1)(b)(i). Section 242 provides an inclusive but ***not*** exhaustive definition of the term "lease":Lease

(1) The expression lease includes:(a) a lease enforceable in equity; or

(b) a contract that contains a statement to the effect that it is a lease; or

(c) anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.References to mining lease

(2) In the case only of references to a mining lease, the expression lease also includes a licence issued, or an authority given, by or under a law of the Commonwealth, a State or a Territory. The State relied on the effect of s 242(2). Its submissions describe the addition of subs (2) to the original draft of the Native Title Bill 1993 (Cth) and refer to the Supplementary Explanatory Memorandum and to the explanatory material which related to the corresponding expansion of the definition of "lessee" in s 243(2). There is nothing in this explanatory material which assists the State's argument, as it simply repeats (as extrinsic material is wont to do) the terms of s 242(2). The real source of the State's submission is the definition of "mine" in s 253, which provides:mine includes:

(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or

(b) extract petroleum or gas from land or from the bed or subsoil under waters; or

(c) quarry;

but does ***not*** include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:

(d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or

(e) processing the sand, gravel, rocks or soil by non-mechanical means. The terms of (a) indicate, the State submits, that if a "licence" falls within the definition of "lease" then a licence to "mine", as defined in s 253, must include an exploration licence. By this route, the State reaches the exclusion in s 47B(1)(b)(i). I do ***not*** accept the State's submission, as it distorts the exclusion in s 47B(1)(b)(i), and does ***not*** give effect to the text of s 242(2). Section 242(1) contains a general definition of "lease" for the purpose of the NT Act. As I have noted, it is inclusive, ***not*** exhaustive. However, the remainder of Div 3 of Pt 15 then goes on to identify, and make specific provision about, a number of common lease types which might coexist on land over which native title is claimed. Unsurprisingly, one of the kinds of leases for which specific provision is made is a mining lease. Section 245(1) provides: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. Agricultural, pastoral and residential leases all have their own definitions: see ss 247, 248 and 249. Division 3 of Pt 15 is, as s 241 states, a definitional division. The purpose of s 242(1) is to indicate what kinds of transactions are to be comprehended by the term "lease", and this will inform the meaning of the word in the more specific definitions which follow. So that, for example, a residential lease under s 249 will include a lease that is enforceable in equity. The purpose of s 242(2) is to give an extended operation to the term "lease" only in the case of mining leases. The effect is that wherever the NT Act uses the term "mining lease", that is to be taken as including a "mining authority" or a "mining licence" issued or given under a law of the Commonwealth or a State or Territory. Whatever kind of authority or permission is given must still meet the definition of a "mining lease" in s 245, and whether it meets that definition will be determined by the activities it authorises. To fall within the extended definition of a mining "lease", there must be permission for the lessee to "use the land or waters ... solely or primarily for mining". Despite the definition given to the verb "mine" in s 253, in my opinion the NT Act defines a mining lease more narrowly, even taking into account s 242(2). It looks to the use of the land, and requires that the land be used "solely" or "primarily" for mining. There is no evidence that the exploration licences in question permitted the licensee to use the land or waters they covered "solely" or "primarily" for mining. Accordingly, I reject the State's submissions that the identified exploration licences which cover all or parts of the parcels said by the applicant to be subject to s 47B fall within s 47B(1)(b)(i). The existence of the exploration licences does ***not*** render s 47B(2) inapplicable. In Banjima (No 2) [2013] FCA 868; 305 ALR 1, the submissions put to Barker J by the State were that mining exploration licences fell within s 47B(1)(b)(ii) and for that reason s 47B(2) could ***not*** apply to areas covered by such exploration licences. After an examination of the authorities and, with respect, detailed consideration, Barker J rejected that

argument: see [1208]. I infer the State did ***not*** press the same argument in this case because of Barker J's finding in Banjima (No 2), which was affirmed on appeal: see Banjima [2015] FCAFC 84; 231 FCR 456 at [115]- [118].

Other arguments by the applicant The applicant also made submissions about the extent of any exclusion if the terms of s 47B(1)(b)(i)-(iii) were made out. I deal with this argument at [1215]-[1218] below.

Occupation for the purposes of s 47B(1)(c): applicable principles There are two matters which should be addressed. The first is the meaning of the word "area" in the phrase "occupy the area" in s 47B(1)(c). The second is what is meant by "occupy" in the same phrase. On the first matter, the word "area" must be given a meaning which is consistent with the text, context and purpose of s 47B. To construe the word as meaning the whole claim area would be inconsistent with those matters. In my opinion, in each instance the word "area" is used in s 47B, it refers to the area over which the claim of occupation is made. This is the interpretation which best advances the purposes of the provision, which is to permit the revival of native title in vacant Crown land, subject to the exclusions in s 47B(1)(b)(i)-(iii). In Neowarra at [686], Sundberg J described the meaning of the word "area" in s 47A(1)(c) (and, at [721], his Honour applied it to s 47B(1)(c)). His Honour held the word had a more precise meaning than the entire claim area, but recognised its ambulatory characteristics, depending on the content of the occupation claim:What is "the area" of which s 47A(1)(c) speaks? The applicants submit it is the area the subject of the application – the claim area. A reading of s 47A(1)(c) as a whole and in the context of the Act shows this submission to be unsound. When the legislature means to refer to the claim area it uses one of the descriptions "the area covered by the application" and "land and waters covered by the application". See for example s 62. In s 47A(1)(c) "an area" is ***not*** used in that sense. Rather it contemplates a particular area. That is made clear by par (b)(i) which refers to a freehold estate existing over the area, or a lease existing over the area, or an area being vested in a person. The area in question may be the whole of the claim area, where for example the claim area consists of a freehold estate granted under legislation of the kind in par (b)(i). Then one would ask whether, when the application was made, one or more members of the claim group occupied the claim area. That would be "the area" under consideration for s 47A purposes. Similarly where the claim area is held on trust expressly for the benefit of Aboriginal people. But where, as in a case such as the present, it is sought to apply s 47A to particular reserves and pastoral leases, it is the area of the particular reserve or lease that must be assessed for occupancy. This was the approach taken by Merkel J in Rubibi Community v Western Australia (No 7) [2006] FCA 459 at[69]- [72], and also by the Full Court in Moses v Western Australia [2007] FCAFC 78; 160 FCR 148 at [214]. More recently, the Full Court in Banjima took the same approach: [2015] FCAFC 84; 231 FCR 456 at [93]- [99]. The applicant accepts this construction, although they made an additional submission that the operation of s 47B will only be "disapplied" by the conduct referred to in s 47B(1)(b)(ii) in respect of the land or waters in fact affected by that conduct. Thus, if occupation is claimed over an "area" and only part of that area is affected by an exclusion in s 47B(1)(b)(ii) (or, it would seem, (i) or (iii) as well), then the remainder of the area over which occupation is claimed should be subject to the beneficial effect of s 47B, even if within the same "parcel" of land. Therefore, the applicant's submissions continued, the relevant "area" for the purposes of s 47B is so much of each individual UCL parcel in respect of which both:(a) the disapplying conditions in s 47B(1)(b) are ***not*** satisfied; and

(b) the occupation condition in s 47B(1)(c) is satisfied. The applicant submits, in substance, it is unnecessary to adhere to European cadastral boundaries in deciding s 47B claims. On the evidence, I have ***not*** made any findings which render it necessary to engage with this additional submission. It is one of some general significance for the operation of s 47B and should await an appropriate case – where the issue is squarely raised on the evidence – to be decided. However, a mirror of this contention arises in relation to Yakabindie and claim group occupation of the homestead block: see [1270] below. On the second matter, the principles concerning the meaning of "occupy" are well-established, although that does ***not*** mean they are easy to apply to the evidence in any given circumstance. The principles were set out in Moses at [215]:In considering the respective contentions, and in the light of the authorities which have been discussed, we propose to apply the following general approach. It is largely a matter of common sense, but is founded upon the words of ss 47A and 47B in their context and as considered in the authorities:(1) to "occupy" an area for the purposes of ss 47A and 47B of the NTA involves the exercise of some physical activity or activities in relation to the area;

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

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

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

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

(6) the fact of occupation does ***not*** necessarily entail a frequent physical presence in the area; for example, the storage of sacred objects on the area or the holding, from time to time, of traditional ceremonies on the area may constitute occupation for the purposes of the NTA: see, eg Rubibi Community v Western Australia [2001] FCA 607; (2001) 112 FCR 409at [182];

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

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

(9) whether occupation has been made out in a particular case is always a question of fact and degree. In their submissions, the respondents identify other statements of principle of relevance to the determination of occupation claims in this proceeding. They arise from Western Australia v Sebastian[2008] FCAFC 65; 173 FCR 1. In Sebastian at [282], the Full Court referred to Hayes v Northern Territory [1999] FCA 1248; 97 FCR 32 at [162] with approval to observe that the requirement of occupation should be understood in the sense that Indigenous people had traditionally occupied the land, rather than in the sense of occupation according to common law principles. Also drawing from Hayes, their Honours said that use of ***country*** by claim group members in accordance with the way of life, habits, customs and usages of the group is sufficient to indicate occupation. Their Honours contrasted this with what they described as "random" or "coincidental" use. Another way to contrast the kind of use and presence which is sufficient for occupation is described by the Full Court in Moses at [216]:The word "occupy" is ***not*** defined in the NTA. It has a common meaning of being established in a place. In contemporary society, a person may occupy all of a house even though that person does ***not*** regularly enter every room and may never have entered a particular room or a particular part of a room; a pastoralist may occupy all of the area of a pastoral lease even though that person does ***not*** regularly visit every part of the area of the pastoral lease and may never have visited parts of it or have used parts of it for pastoral purposes: see eg per Lord Denning in Newcastle City Council v Royal Newcastle Hospital (1959) 100 CLR 1 at 4. In ss 47A and 47B, as the authorities point out, the context requires 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 over the area were exclusive, so there was a right to control access to the area, the exercise of the right to exclude strangers from the area would indicate its occupation. To occupy an area under the NTA, given its purposes and context, involves the exercise of possessory rights over the area, but the exercise of those rights does ***not*** require their continuous exercise, or their

exercise at the precise time of the application because the occupation of which ss 47A and 47B speak is a state of affairs which must exist rather than the precise activity which illustrates the existence of the state of affairs. The concept of "being established in a place" can be a useful approach. The Full Court in Sebastian also emphasised at [282] that it was wrong to equate occupation with connection, while accepting that evidence given in relation to connection may be relevant, and that traditional use may be more likely to amount to occupation than random or coincidental use. The State relies on a statement by the Full Court in Sebastian at [296] to the effect that walking across an area will ***not*** establish occupation. I infer the State relies on statements of that kind in relation to the evidence in the current proceeding about the claim group members going to the s 47B areas for hunting, gathering emu eggs, visiting sites and the like. The Full Court's statement in Sebastian must be seen in the context of the evidence on the appeal in that case. It is instructive to look at the way the Full Court applied that observation, and the general principles concerning occupation, to the evidence before it. At [296] of Sebastian, the Full Court applied the statement on which the State relies to six areas. It then went on to say that the evidence was "more substantial" in relation to another two areas (without saying in what way), but did ***not*** disturb the trial judge's findings about those areas. The Court then moved on (at [298]) to another area, Kennedy Hill. The Court, adopting some of the findings of the trial judge, described the area in the following way (at [298]-[299]):The remaining areas are described by the Yawuru claimants as small areas at Kennedy Hill. At [117], the primary judge described this land as 14 areas of walkways and drains in and around Broome. His Honour concluded that occupation had ***not*** been established:... The sparse evidence of usage relates to usage as a walkway by claim group members. It is ***not*** a traditional usage and, more importantly, is ***not*** distinguishable from a likely similar usage by the public. Accordingly, the requisite occupation has ***not*** been established.The Yawuru claimants argued that three of the fourteen areas did ***not*** appear to be walkways or drains and that, although there was evidence that the claim group walked across them, this did ***not*** reflect all of the evidence of occupation. They contended that these three areas are part of the Kennedy Hill area, which is used by them because it is of particular significance. The Full Court then referred to the evidence of four witnesses, the substance of which was that: Kennedy Hill was an important area for the Yawuru people; Yawuru people had been going there for "as long as [one witness could] remember"; people camped in the area; and claim group members took tourists to Kennedy Hill, "[took] care" of the place, walked though it and came "whenever they please[d]". There was evidence that one witness's grandmother had lived at Kennedy Hill at some stage; that people went to the area to fish at the adjacent beach; that people may "nap" in the dunes behind; and that on at least one occasion in the late 1980s or early 1990s, claim group members opposed the construction of a building in the area. The Full Court then summarised the State's submission (at [304]):The State agreed that the evidence showed that the areas are considered important, that people drive and walk through them, that people camp in them and that development of them was opposed but the State contended that this evidence was relevant to the issue of connection but did ***not*** establish occupation. The State argued that the primary judge took all the relevant facts into account and determined the issue in accordance with the relevant principles. The Full Court (at [305]) then rejected the State's submission and disagreed with the trial judge's finding:In our view, contrary to the view of the primary judge, the evidence established that the Yawuru claimants occupy the areas 2735, 2736 and 2738 within the meaning of s 47B(1)(c). In accordance with the reasoning of the primary judge at [121], we infer that they occupied the areas at the time of the application for a determination of native title in the same way as they presently occupy the areas. In Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group [2005] FCAFC 135; 145 FCR 442 at [193], the Full Court endorsed the following statement from the Full Court in Ward (FC):The requirement of occupation in s 47A of the NT Act, which is the same as that in s 47B, was considered by Beaumont and von Doussa JJ in Ward FC 1. Their Honours considered that a broad view should be taken of the word (at [449]):We think this requirement is met where a claimant member is one of many people who share occupancy, and that the land may be relevantly occupied even though the person is rarely present on the lands so long as the person makes use of the land for the reserved purpose as and when that person wishes to do so. As will be apparent from my findings below, I do ***not*** accept the State's submission that observations such as that from Sebastian at [296] inevitably mean the rejection of the applicant's occupation claims in this proceeding. As the authorities to which I have referred demonstrate, what will constitute, in any given factual situation, claim group members "being established in a place" may include activities such as visiting, walking over the area, and using the area. Activities of this kind may or may ***not*** be sufficient, depending on the facts. The sense of the authorities requires the Court to look at the evidence and decide whether, by their presence and use of it, claim group members treated the land in question as their own. Moreover, there is no reason in principle why use of the land for traditional activities cannot constitute occupation for the purposes of s 47B. In Banjima [2015] FCAFC

84; 231 FCR 456 the Full Court said at [100]:Moore, North and Mansfield JJ in Moses at [207]-[208] approved Olney J's observation in Hayes v Northern Territory [1999] FCA 1248; (1999) 97 FCR 32 at [162] that the word "occupy", as used in ss 47A and 47B, "should be understood in the sense that the indigenous people have traditionally occupied land", that is in accordance with their traditional way of life, habits, customs and usages. At [102], the Full Court emphasised the beneficial approach to be taken to s47B in the light of historical realities for Aboriginal people:Often, indigenous people sought to maintain their connection to their ***country*** by working for pastoralists or others who had come to hold the land and waters under land tenures granted pursuant to acts of the Crown after British sovereignty. In a real sense, the presence of those indigenous people and their families was capable of being seen as occupation by them of their ***country*** or a part of it even though their presence, while licensed by, say, the pastoralist, fell short of possession. In other cases, as history has demonstrated, pastoralists and others were prepared to allow, or involuntarily experienced, indigenous people passing over the land tenure area in their traditional ways. The historical activities of indigenous peoples maintaining their connection to their ***country*** have been varied and often necessarily adapted to sometimes hostile or difficult circumstances following European settlement that restricted, or sought to restrict, both their access and their ability to access their ***country***.

UCL 239, UCL 245 and UCL 246 (north-west corner, formerly H91295 and 3114/551) These parcels constitute what was previously Lake Mason station, held under pastoral leases H91295 and 3114/551. The pastoral leases were surrendered between 2000 and 2003. UCL 245 includes the Mount Townsend and Mount Marion areas, and UCL 246 includes Granite Rock and Bungarra Rockhole. The on ***country*** hearing on Sunday, 2 August 2015 was held in parts of UCL 246. The most southern parcel of the three is UCL 239, which includes Lake Mason and several other sites, including Snake Well. The only witness to give evidence about UCL 239 was Mr Lewis. He is acknowledged by the claim group members as one of the people who can speak for the ***country*** in this area. It was he who was responsible during the on ***country*** hearings for taking the Court to see the rock feature known as "The Lady", and the area around it. That area is approximately 40 km south-east from UCL 239, on the Booylgoo Spring pastoral lease. There was ample evidence from Mr Lewis about being in the area of The Lady, both for reasons related to looking after that area of ***country***, and for hunting. None of those activities occurred in UCL 239 however. He did give specific evidence about a trip to Snake Well, which is on UCL 239, on approximately 25 April 2015, with his eldest son and two of his grandchildren. His evidence was he took them there camping and hunting. Two photographs were in evidence showing his family hunting in the area of UCL 239 in 1988 and 1989. Mr Lewis also gave evidence that in June or July 2015, ***not*** long before the on ***country*** hearing, he went hunting kangaroo in the area south-east of UCL 239:A couple of weeks ago I came hunting because when we was running around here I seen all the everlastings out, so I thought I'd come and get some fat kangaroos from there, yes. This, it seemed, was something of an opportunistic visit, in the way Mr Lewis described it. The State submits that the highest Mr Lewis's evidence gets in relation to occupation at or around the relevant times (that is, either 17 June 2011 or 22 June 2015) is that, on 25 April 2015, he camped and hunted on the area with his son and grandchildren. The State describes this as "mere use or visitation", relying on Sebastian. The State also compares this evidence to the evidence before Barker J in Banjima (No 2) [2013] FCA 868; 305 ALR 1 (at [1272]) which the State submits his Honour described as "passing trips, visits and activities ... no doubt meaningful" to the claim group members but insufficient for "being established" over the area. I note that, at [1272], before the passage on which the State relies, Barker J made this finding: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. The State appears to concede, in my opinion correctly, that Mr Lewis demonstrated that, as a younger man, he spent time in and around the area of UCL 239. The State also correctly submits that Mr Lewis's evidence was ***not*** very clear on how frequent his historical use (in the 1960s, 1970s and 1980s) was, and what use was made of UCL 239 in mid-2011 or mid-2015. The State's submissions have force. There is insufficient evidence to be satisfied that Mr Lewis's activities in UCL 239 meant that he was, as a claim group member, "established" in that area. I accept that when his father was alive, and he was a boy and a young man, the situation may have been different. Then, it seemed to me, the evidence was capable of demonstrating much more regular and extended presence in the area. But that was ***not*** the case in or around June 2011, nor June 2015. There was more evidence from the claim group members about UCL 245 and UCL 246 (the two more northern parcels) than there was about UCL 239. However, as the State's submissions identified, for the most part

that evidence amounted to a small number of visits, on a small number of occasions and, at least in some circumstances, apparently in connection with this proceeding. The evidence which fell into this category was the evidence of Mr Keith Narrier and Mr Bingham. Mr Keith Narrier visited the areas of UCL 245 and UCL 246 on 5 June 2015 with his nephew Mr Richard Narrier, Jr. He described seeing emu tracks but did ***not*** go hunting. They did look at the bush tucker around the area. He said:[W]e sat down and had a yarn about bush tucker and lit a fire and then we come back home. I told Richard where to light the fire, on a good bit of spinifex.

...

We looked at the seeds from the grass where you grind him up and make a damper out of it. We looked at the trees where you can get witchety grub, and where you dig them out from the ground; if you haven't got a crowbar then you use a stick; that was the main thing they used in the old days. As the State submits, Mr Narrier identified this occasion as one on which "we were getting ready for the Judge", which was clearly a reference to preparation for the on ***country*** hearing in this proceeding. That does ***not*** make his evidence irrelevant, but it does indicate that the purpose he had to be in the area was a special one, rather than it being an ordinary visit to an area he was accustomed to going to. Mr Bingham's evidence was that he had camped in the area at the Montague Mine. He recalled the "black boy" trees, and he said that this area was the "the only place in this ***country*** that you see them". However, as the State submits, he also said that this was on one occasion when he was at school, which most likely would have placed his camping in the 1970s. Mr Muir described three visits since approximately 2011. The earliest one involved what he described as taking a "bus trip" of people to the area in 2011 or 2012. In October 2014, he was in the area on his way to visit family in Wiluna and Sandstone. He also described being in the area on 21 June 2015 with his son, Karthi Muir, to visit Bungarra Rockhole, a site in UCL 246. Photos taken on that trip were in evidence. Mr Muir's evidence conveyed the impression of more regular presence by two pieces of evidence: first, that he did the trip down the Sandstone Wiluna Road approximately twice a year; and second, in the same vein, his comment: "[m]y family and I visit that ***country*** out near Montague Range quite regularly. It is one of the back roads to Meekatharra and Sandstone so we travel through there". It is correct that the Sandstone Wiluna Road forms part of the western boundary of UCL 246, and the Meekatharra Yeelirrie road intersects that road to the north of the claim area, so that one way to get to Meekatharra would be to travel up the Sandstone Wiluna Road to the north of the claim area, and then head west. The State is correct to emphasise in its submissions that this evidence, together with Mr Muir's evidence about the bus trip, revealed that he travelled through the area. Accepting (as his evidence suggested) he may have stopped from time to time to do some bush food collection, however, he was travelling on public roads, and was doing so in order to reach other destinations. I do ***not*** consider this constitutes any kind of real use of, or presence in, the area of the kind of which s 47B speaks. As the authorities have noted, frequency of presence on land claimed under s 47B is only one factor. If the evidence reveals that people go when they want to, then even if the presence is infrequent, that still may be enough for occupation, because it is the sense of possession and the assertion of it by presence when it suits people, or as they consider it necessary or appropriate, which differentiates that situation from the situation of random or coincidental visits, without a sense of purpose or entitlement. This leaves the evidence of Mr Allan Ashwin and Mr Victor Ashwin. I focus on Mr Allan Ashwin's evidence, which in my opinion was more relevant. I consider the evidence that his son Mr Victor Ashwin gave was ***not*** inconsistent with his father's evidence, but it lacked sufficient detail to be especially probative of occupation for the purposes of s 47B. Mr Allan Ashwin's evidence was, in my opinion, in a different category. Mr Allan Ashwin worked all over the claim area, including at Lake Mason station. He described Lake Mason in general terms as "***not*** my ***country***" and, indeed, most of it is outside the claim area. It is clear Yeelirrie was one of the main places he identified with inside the claim area. Mr Ashwin spoke about the Emu Tjukurrpa back towards Meekatharra, and out near Youno Downs. He said: "[t]hat thing from there goes right through inland ... right through this northern part of the area". The major activity Mr Ashwin associated with UCL 245 and UCL 246 was the gathering of emu eggs. At [58] of his witness statement, he said:When I was young and I was camping we would go out looking for emu eggs on weekends; out bush camping and that. In them days, old Aunty Doris Foley used to have a horse and cart and we would go out and look around. We would go anywhere, towards Altona or out towards Midnight bore or to Wiluna on the horse and cart, go along slowly looking for emu eggs. Heading to Altona or Midnight Bore would ***not*** have taken the family through UCL 245 or UCL 246, but heading to Wiluna may well have, depending on the route taken. As the State submits, at [64] of his witness

statement, Mr Ashwin describes looking for emu eggs in areas that do ***not*** go much west of Yeelirrie station. However, the Yeelirrie pastoral lease area borders UCL 246 (and UCL 239 below it), so it depends on how much "around" Yeelirrie Mr Ashwin was hunting. Mr Ashwin spoke about visiting the north-west of the claim area, where these UCL parcels are, for another purpose as well:You get sandalwood out there, in some parts of the ***country***. On 22 April 2015, I went to the north-west part of the Tjiwarl claim with my son Victor. We checked on some sandalwood there. The nuts you can use for sores, put them in the fire and crack them open and grind them into a paste. Or you can eat them, it's like a nut. The dry wood, you can burn it and it keeps the mosquitos away. In his oral evidence during the on ***country*** hearing held on UCL 246 – with Mount Townsend and Mount Marion in the distance – Mr Ashwin was asked the following questions and gave the following answers:ALLAN ASHWIN: This is good ***country*** for emu eggs.

...

MR WRIGHT: So, is this – how do you get emu eggs in this sort of ***country***?

ALLAN ASHWIN: Track – you follow the track and you know it's – you know, you track them and they've got to go – either they'll go and feed and go to water and they've always got to go back to the nest.

...

MR WRIGHT: And what time of the year is a good time of year to get emu eggs?

ALLAN ASHWIN: From – well, it depends, from March, April, it depends on the season, right up to about June, July, you know June, July, even late – late in August you can – the late ones are still laying. As the State submits, Mr Ashwin gave some evidence about looking for emu eggs around Yeelirrie, Albion Downs and Ullulla (the latter being outside the claim area to the north), with none of these areas being within UCL 245 or UCL 246. However, he was specifically asked about these UCL parcels:MR WRIGHT: So, say in the last five years has this – how often would you have done that, or have you done that sort of thing in the last five years?

ALLAN ASHWIN: Yes, I still do. Well, just last – I think it was last year I found down – from the crossroad down - further from down the crossroad we found the - ***not*** far off the road found the nest of emu egg. This was, you know – that was last year.

MR WRIGHT: And how often do you think you've come out in the last say, five years around this area, but where we're sitting now?

ALLAN ASHWIN: Well, we always come out, you know, and come out – well, it must be in the last five years I don't know, plenty of times. It's nearly – nearly every – like every season, you know, like when the emu egg season we'll sort of go out in different ways, you know, and sometime come out here and check it all out, then go somewhere else too, you know, to – like that.

MR WRIGHT: Yes.

ALLAN ASHWIN: Yes, every year you go out – I go out and check out all the – you know, like where we – where we always used to get emu eggs and that.

MR WRIGHT: Yes.

ALLAN ASHWIN: And go – every year go and check it all out, you know, check it out and see if we can find them. It is true, as the State submits, that it is unclear what might be the "crossroad" to which Mr Ashwin referred. As I have noted, just outside the claim area to north, close to Ullulla station and Ullulla community, there is a crossroad of the Sandstone Wiluna Road and the Meekatharra Yeelirrie Road. It seems probable, and I am prepared to infer, this was the crossroad Mr Ashwin was referring to. When he says he found the emu eggs "further down" from the crossroad, I am prepared to infer he meant to the south, which is heading towards the claim area and UCL 245 and UCL 246. As he said in his witness statement, and I have extracted elsewhere in these reasons, Mr Ashwin does ***not*** speak by reference to (European) boundaries when he talks about his ***country***, nor should he be expected to. His evidence should also be considered in light of his written evidence that:At Yeelirrie they got a caretaker out there, living at the homestead. Cameco Australia Pty Ltd owns it now. Most times you got to talk to them and give them a ring or something like that if you want to go out. If you just stay on the main road then you don't worry about it, but if you're going off the main road then you should let them know about it; that you there.

That's our ***country***; we can go and do what we like there. We don't need to ask any other family groups. They won't stop us, they know that it's right; that it's our ***country***. He also described, both in his written and oral evidence, how emu eggs are used and how, after eating the eggs, the shells are carved. In my opinion, Mr Ashwin's evidence shows that he has always considered – including in June 2011 and June 2015, being the applicable dates for s 47B – that he was entitled to go onto the areas in UCL 245 and UCL 246 to look for emu eggs. His evidence was strong and clear about how regularly he went out looking for eggs in the season, which stretched out over almost half the year. The way he used that area was related to traditional activities, and was seasonal in nature. It is traditional occupation in the sense identified inBanjima [2015] FCAFC 84; 231 FCR 456 at [100]: see [1231] above. I am satisfied that, even if Mr Ashwin and his family had full possessory rights over UCL 245 and UCL 246 and had never lost them, they are likely to have used the land in the very same way as the evidence discloses. Those activities were by no means restricted to these UCL parcels, but in my opinion the authorities do ***not*** suggest they need have been. They were also undertaken over the land covered by the Yeelirrie pastoral lease, which abuts these UCL parcels. UCL 245 and UCL 246 are also close to, and associated with, the Emu Tjukurrpa that Mr Ashwin spoke of. I am satisfied that he felt entitled to go into these areas as and when he pleased, that he considered them ***country*** he could go into, bearing in mind that it is only since 2000 when the Lake Mason station closed that he would ***not*** have had to seek permission from those particular station owners. Having had the benefit of seeing Mr Ashwin and other claim group members in this area and how they used it, including for the catching of kangaroos (as occurred during the on ***country*** hearing), it is my opinion that the claim group members do convey a sense of being established in this area. I also had the benefit of seeing how the senior men behaved in this area during the restricted men's session. To this, I would add the evidence of the other witnesses which, although it suffers from the weaknesses identified by the State in its submissions, confirms the importance of the area as an area for hunting and bush tucker (especially emu eggs), which claim group members consider they are entitled to access as and when they wish to. Viewed as a whole, in my opinion there is sufficient evidence for me to be satisfied that the claim group members, and especially Mr Allan Ashwin and his family, occupied the areas of UCL 245 and UCL 246 on 17 June 2011 and 22 June 2015, when the Tjiwarl #1 and #2 applications were respectively lodged.

UCL 14 and UCL 15 (Tjiwarl/Logan Spring) These two UCL parcels cover the place of which this application bears the same name: Tjiwarl. The European name for this place is Logan Spring. This area also featured in the on ***country*** hearing, on 28 July 2015. The evidence relied on by the applicant for occupation of these two UCL parcels comes from Mr Muir, Mr Bingham, Ms Wonyabong and Mr James. Three of those witnesses gave evidence of visits to the area, sometimes on more than one occasion. Mr Muir's evidence was of a different nature and I consider it separately. Mr Bingham described in his evidence how, although he had been to the location as a child and young person, it was ***not*** until 24 April 2015 that he went there again. He recalled being shown the place by "old blokes" he had been hunting with, and also by his sister. He described the area as being good for black goannas. In my opinion, his evidence is of little probative value, being a single visit shortly before this proceeding. The same can be said for Ms Wonyabong's evidence: although she described much more regular visits with the station owner of Yakabindie, Mr Adamson, in the 1970s and 1980s, it is clear there was a long gap before she came back. I say that ***not*** to suggest any diminution, for her or any other claim group members, in the significance of the site, but rather to

observe that she had ***not*** been able to physically return to the area for a long time. When she came in May and June 2015 it was with CDNTS for the purposes of this proceeding. Visits of that kind cannot indicate occupation within the terms of s 47B. Nor do I consider Mr James' evidence sufficient to establish occupation by him, although the sincerity and depth of his connection to Tjiwarl was plain from his evidence. He described going to Tjiwarl frequently around June 2011, when he was working for BHP Billiton. He worked for the company between 2009 and 2012, and the nature of his role meant he was often out and about all over the claim area. This was his evidence:When I was working with BHP Nickel West I was on a roster and I was fully based at Mt Keith and my role meant that I could go anywhere in this claim, wherever I needed to. Between 2009 and 2012, by reason of my position at Nickel West as a social responsibility manager, I was actually one of the directors of a number of the pastoral holdings in the claim area, including Albion, Yakabindie, Leinster Downs, Mt Keith and Weebo. When they did surveys out on BHP Nickel West tenements, I would assist and support the coordination with the group and sometimes have the opportunity to go out on ***country*** with them as work allowed. It was a great opportunity to stay in touch with everybody.

I left BHP Billiton at the end of 2012, I was permanently based there at that time and part of my role was in the community relations sphere, so I often went out to Albion Downs to deal with the pastoralist at the time. I would try and go out to Logan Springs at least every day and sit on the granite rock and just relax there. That particular spot for me is one of the most peaceful places I've been to. I was working twelve hour days at that time and if I wanted to have my lunch or something I would jump in the car and drive there because it was only a fifteen minute drive from the mine site and go out there and sit on the rock for about thirty minutes. With modern technology, I could even bring my laptop there and answer my emails with my lunch while gazing off into the flats. It was the best working environment on the planet! Mr James also described a plant found near Tjiwarl, which he would use:There are karkula's there near Logan Springs, which I would have been eating in June 2011. There is also a particular plant there that has a lemongrass smell and when I was growing up we would use it to crush it up and smell it, it was like a natural deodorant and it can also be used for sores and other medical reasons. I would have been using that when I went to Logan Springs on my lunch breaks in June 2011. I used to take it back on the plane for my family, when I had to return to Perth. Mr James then described a sign that had been erected at Tjiwarl by BHP Billiton, and his attitude towards it:There's a sign there at Logan Springs that says, "Do ***not*** enter" but I just ignore that. People wouldn't stop me from visiting those places in the [Tjiwarl] claim. If they tried to, I would just ignore them, but it just never happened. I don't feel threatened or challenged by anyone because I have as much right to be there as anyone, it's where I spent my childhood and where my father is from. This evidence demonstrates that for a period of time coinciding with the lodgement of Tjiwarl #1, Mr James was a regular visitor to Tjiwarl, and that the area meant a great deal to him. However, he was ***not*** going there for any reason that had to do with asserting or exercising any possessory rights over the area, and I contrast this with the evidence from Mr Allan Ashwin about UCL 245 and UCL 246 in particular. Rather, Mr James was revisiting a favourite place on his ***country*** to have his lunch, and get some peace and quiet. His evidence about the BHP sign made it clear he considered it did ***not*** apply to him, and that is some evidence of entitlement, I accept. Overall, I consider this kind of activity had an opportunistic character to it, which is insufficiently consistent with the concept of occupation under s 47B. There was some evidence and submissions about the "[d]o ***not*** enter" sign erected at Tjiwarl by BHP Billiton, and to whom it was directed: that is, whether to claim group members as well as to tourists or other locals. I consider that issue to be marginal on the question of occupation for the purpose of s 47B. The evidence did ***not*** rise to the level of any action taken by BHP to keep people out and I do ***not*** consider, in the context of a native title claim, that the erection of a sign by a mining company is probative one way or the other of entitlements to land. That leaves the evidence of Mr Muir, who described living in a caravan at Tjiwarl for eight months in the early 1990s. His evidence was that he also went to Logan Spring on 20 May 2015 with an anthropologist and then again on 3 June 2015. While evidence of a claim group member having lived on the Tjiwarl site for a period of eight months may well have been evidence of the kind to satisfy s 47B(1)(c), the timing of Mr Muir's residence there is ***not*** consistent with the requirements of the provision. If, since that time, he had maintained a regular presence or regularly gone to camp there, or something of that nature, then in combination it may well have been enough. However, isolated to a period in the 1990s with only two subsequent visits for quite different purposes, it is insufficient for the applicant to discharge their burden in relation to Tjiwarl under s 47B.

UCL 247 (south of Mail Change Well) This area is just south of what is known as Mail Change Well, which itself is north of Yakabindie station in the east of the claim area. Evidence in support of the occupation claim for this small area comes from Mr Bingham and Mr Muir. Each gives evidence of a single visit in April and May 2015 respectively. This evidence is plainly insufficient for the purposes of s 47B.

Part of UCL 11 (Yakabindie) UCL 11 is the parcel of land on which the homestead of Yakabindie station is situated. The Court held part of the on ***country*** hearing on this site on 29 July 2015. How the homestead block came to be unallocated Crown land and ***not*** part of the pastoral lease was ***not*** explained in the evidence. There are two key pieces of evidence about the occupation of this UCL. The first comes from Ms Wonyabong, who moved to a house at Yakabindie in 1976 or 1977. The Court saw her house, which is perhaps 50 m to one side of the main homestead. Although she described the house as "too old" and full of white ants and so ***not*** really habitable, in her oral evidence she claimed an ongoing entitlement to live in it nevertheless:Dominion wrote a letter, said I can stay here long as I like. Other witnesses, such as Mr Edwin Beaman, described going to visit Ms Wonyabong there. Ms Wonyabong moved out in the 1980s or 1990s. However, she gave evidence that, at the time of the on ***country*** hearing, another claim group member, Creamy Allison, lived on another house at Yakabindie station and had done so for 20 years. Ms Narrier and Mr Muir confirmed this. Mr Allison's house, which is about 70 m away from the main homestead, on the other side of the homestead driveway, was pointed out to the Court during the on ***country*** hearing. The State relies on the findings of Merkel J in Rubibi (No 7) at [98], where his Honour rejected a claim for occupation of an area under s 47A, finding that residence in one of two houses on an area by a claim group member was ***not*** sufficient to establish occupation of the whole area. This finding was made in relation to an area in Broome called Walcott Street and identified as "Area 354". It was a freehold block held by the Mamabulanjin Aboriginal Corporation, and there were two houses on it, only one of which was occupied by a claim group member. Merkel J found that occupation for the purposes of s 47A(2) had to apply to the whole area, and since only one of the two houses was occupied by a claim group member, that was insufficient. There is no doubt that Mr Allison, a claim group member, occupied part of UCL 11 at 17 June 2011 but whether also at 22 June 2015 is unclear. Ms Narrier's evidence about him having to go to Geraldton and Meekatharra for "his eyes" was, as the State submits, somewhat hard to follow, and it was second-hand hearsay, coming from one Malcolm Shay whom Ms Narrier told the Court was currently living in the house. There is no evidence whether Mr Shay is a claim group member. Mr Muir also gave evidence about Mr Allison living in the house. On balance, I am prepared to find, in the applicant's favour, that Mr Allison still "occupied" the house in June 2015, even if from time to time for medical reasons he was absent, perhaps for long periods. There is no doubt Ms Wonyabong had occupied another part of UCL 11 for a significant period of time until the 1980s or 1990s, and it may be the case (the State did ***not*** dispute her evidence) that she could, theoretically, move back into her house there if it were habitable, on the basis that the lessee of the Yakabindie pastoral lease had no objection (although, if the land is Crown land, it is difficult to see what role, other than a practical one, there was for the opinion of the pastoral lessee). The difficulty is that the main Yakabindie homestead is very much occupied by those responsible for managing Yakabindie station. Their tenure was also ***not*** explained in the evidence. It was clear from the on ***country*** hearing that the station managers use all the sheds and other buildings in this UCL parcel. They do ***not*** appear to use Ms Wonyabong's house, but it is agreed to be basically unusable. They clearly give Mr Allison his space and privacy. Mr Allison's tenure was ***not*** explained in the evidence either. Therefore, the evidence is that, over what is a fairly small parcel of land, being essentially the homestead block for Yakabindie station, there were two claim group members who considered they had, and whom others accepted had, possessory rights to part of that area. On the evidence neither asserted, or was recognised as having, possessory rights over the whole of the homestead block. The State submits this is the determinative factor. There have been long-term non-Aboriginal occupants of this area of land: on the agreed facts, Yakabindie was established by 1928 and I infer the homestead has been in existence for many decades. If members of the native title claim group need to be "established" over the whole area of a UCL parcel, rather than part of it, then the occupation by Ms Wonyabong and Mr Allison – essentially coexisting with those non-Aboriginal people who have occupied the Yakabindie homestead block – would be insufficient for the purposes of s 47B. However, the applicant appears to advance an argument that s 47B could apply to such parts of a UCL parcel. As I noted at [1216] above, in the context of the disapplying provisions in s 47B(1)(b), the applicant made a submission to the effect that if the Court found one of the permissions or authorities relied on by the State disapplied s 47B(2), then the disapplying effect should only extend to so much of the land as the permission or authority covered. I noted that it was ***not*** necessary for me to determine this argument because I had ***not*** accepted the State's arguments that

any of the disapplying provisions in s 47B(1)(b) applied to the UCL parcels in contention under s 47B. What I have described as the 'mirror' of this point does arise for consideration in the context of the facts as I have found them in relation to the occupation of UCL 11, the Yakabindie homestead block. The applicant touched on this briefly in their extinguishment submissions:The Applicants submit that occupation has been established over the whole of each individual 47B Area. However if the Court finds in respect of any individual 47B Area that occupation is established over part but ***not*** the whole of that 47B Area, then the Applicants submit that s.47B(2) applies to disregard prior extinguishment over that part of the individual 47B Area in respect of which occupation has been established. On the other hand, what was said in previous cases, and referred to in Banjima FFC at [103], should ***not*** be taken as meaning that s.47B(2) does ***not*** apply to disregard extinguishment in respect of any part of an individual 47B Area in circumstances where occupation has been established over some but ***not*** all of the 47B Area. Such an interpretation would be inconsistent with the beneficial interpretation that should be given to s.47B (as referred to in Banjima FFC [88]-[92]), and with the fact that occupation by Aboriginal persons is unlikely to correspond to the precise cadastral boundaries of the various non-native title interests that have been granted in the Claimed Area and which have resulted in the boundaries of the individual 47B Areas. In my opinion, there is force in the applicant's submission. The use of the term "area" in s 47B is ***not*** suggestive of a meaning which ties the word rigidly to cadastral boundaries. That is re-enforced by the use of the verb "covered", which suggests there need ***not*** be complete overlap between the "area" over which any reservation etc is made and the "area" that is occupied by members of a native title claim group. Clearly there must be some overlap, for the disapplying effect of s 47B(1)(b) to have work to do. However, as the terms of s 47B(1)(b)(ii) itself make clear, the reservation etc may apply to only part of the land. This point was also made by the Full Court in Banjima [2015] FCAFC 84; 231 FCR 456 at [99]:And, in the case of a parcel that is affected only in part, as contemplated in s 47B(1)(b)(ii), the exclusion affects only the part meeting the criterion, so that the balance of the land or waters in the area or parcel ***not*** within the satisfied criterion, is still subject to the application of s 47B(2). One can readily see how this argument could be applied to a parcel of land under one title which was of a considerable size. One can also readily see how it might apply to land used for pastoral purposes where there has been a claim group member living on a small part of that land. Here, the circumstances are rather different. Two members of the native title claim group – separately, on different parts of the homestead block – have been coexisting. One has continued to do so (Mr Allison) and one (Ms Wonyabong) gave unchallenged evidence she had been recognised as entitled to continue to live there. Nevertheless, to apply s 47B(2), accepting it should be applied beneficially, appears to produce a result that is inconsistent with the Court's approach in Rubibi (No 7). Since the matter was only briefly addressed by the parties, and ***not*** expressly in relation to the Yakabindie homestead block, I propose to give the parties an opportunity to make further submissions on this issue, in accordance with the findings of fact I have made.

Parts of UCL 4, UCL 5, UCL 6 and UCL 10 (Sir Samuel) As the State submits, these parcels of land are physically separated from UCL 11, being a short distance south of the Yakabindie homestead, and to the west of the Goldfields Highway. The town of Sir Samuel, now gone, was where these parcels of land are found and the State submits, and I accept, that these parcels formed part of the common surrounding the Sir Samuel town site. The Reserve (number 8210) was cancelled in 1991. Aside from the evidence in relation to UCL 11, which the applicant relies on, Mr Muir gave evidence that he visited this land with an anthropologist on 20 May 2015. I do ***not*** consider that the evidence about UCL 11 demonstrates any establishment over these other UCL parcels. Mr Muir's evidence does ***not*** advance the applicant's case. The applicant has ***not*** made out occupation of these parcels.

UCL 8 (Corner Leinster Downs and Booylgoo Spring) This small area of land lies between three pastoral station boundaries (Yakabindie, Booylgoo Spring and Leinster Downs), to the west of Lake Miranda. Lake Miranda is itself south of Yakabindie and Sir Samuel. The only evidence relied upon for this area is the same evidence relied upon for UCL 11 (Yakabindie) and UCL 4, UCL 5, UCL 6 and UCL 10 (the former Sir Samuel townsite). There being no specific evidence at all about occupation of "the area" for the purposes of s 47B (***not*** even as part of a larger area), this claim cannot succeed. Ms Wonyabong gave no specific evidence about this area, despite having lived very close to it for a long period of time. Those witnesses who gave more general evidence about UCL 11 (such as Mr Edwin Beaman) gave no evidence about areas to the west of Yakabindie, but rather about areas to the east, such as Wanjarri Reserve, where Mr Beaman said he went emu egg collecting.

UCL 240 (Vivien) Vivien is an area very close to the southern boundary of the claim area, south-west of the mining town of Leinster. There is a site known as "Worrunga" which is close to this UCL. "Worrunga" (which is how it is spelt on the applicant's site map) is also spelt as "Waranga" in the claim group members' evidence. The Lewis family and the Hogarth family both lived for some considerable period of time at camps at Waranga and Vivien respectively, which I understand the State does ***not*** dispute are on UCL 240, or at least include UCL 240. This was Mr Lewis's evidence:I also lived at Waranga camp, near the Vivien mine. In the 1980s, I lived there at an old camp. My parents would camp around through there. I grew two kids up there, Leigth and Tara in the early 1980s, before moving to town. We stopped out there while I was working shearing, until we got housing in town. I was about 23 or 24 years old at the time. There was no water there in those days, so we spent a lot of time carting water. There was no running water, no electricity; it was like the stone age. My dad was there with us, at the time. My mum and dad were old but they went bush all the time. We got lots of bush tucker, goanna and that. Mr Lewis stated that there were other people at another camp close by, but the only person he named was ***not*** from this ***country*** but from around Mullewa. Mr Lewis gave evidence about taking his son and grandchildren back to the camp in April 2015 and making another trip there in June 2015, but otherwise he gave no evidence of having been back there since he left in the 1980s. Ms Narrier gave some evidence about visiting the Vivien camp in June 2015, and identified it as "the old camp for Mr and Mrs Lewis, Brett's mum and dad". Ms Geraldine Hogarth's family also had a camp at Vivien:I might have been about 15 or 16 years old when we were going out with Scotty Lewis around Agnew. That's when he took me to show where they were going to put the Leinster town. He showed me the two rockholes there on that trip. We went everywhere around Agnew with pop Scotty Lewis. We'd go south coming back towards Leonora. Or we'd take a road through Poison Creek to cut through to get to Darlot.

Jamu Scotty also showed me Daisy Pool, ***not*** far from Vivien. We had a camp at Vivien. That's where Scotty lived; he made a camp there. I used to go there on holidays and weekends, and my mum stayed there too. It was a big water place at Daisy Pool, and people around there because there was water. He was taking me and other members of my family around places in the ***country*** there right up until I was in my twenties.

When we were camping around in that ***country*** at Vivien, like from the 1980s, it was me, mum, my sisters, and the kids – my daughter and Leanne's children. We'd go there on the weekends, or when I had time off from work. But mum stayed out there a lot, on and off. One time, Aunty Gladys Bingham was with us, and uncle Eddie Redmond would pull in from time to time. Aunty Gay Harris and Aunty Cecily Harris [deceased] they would pull in and visit that camp too.

We still go out to that Tjiwarl claim area. We go out and check the ***country***. We go to Vivien to check our camp. When we go to funerals in Wiluna, we also go to Pii. We show the kids that place. We want to show them the water place because we want to show them how the water can still be found. We like to show the kids the rockholes and gnamma holes. I last went to Pii in 2014. I have quoted this extract from Ms Hogarth's evidence at some length because the parties' submissions did ***not*** do it justice. Ms Hogarth's evidence made it clear that people from several family groups within the claim group used to camp at Vivien. Her evidence does ***not*** descend into detail about when people stopped living (whether full-time or from time to time) at the camp, but I infer it was the late 1980s. Ms Hogarth's evidence was that she and her family still went and "check[ed]" the camp, but she gave no detail about how often this occurred, or when they last visited. There is insufficient contemporary evidence of any member of the claim group "being established" at Vivien, despite its obvious historical importance as a place where several claim group families used to camp and live. The visits which have occurred in more recent times did ***not*** have any possessory characteristics to them; rather they were opportunities to show younger people where and how their elders had lived, or to "check" on the place, as Ms Hogarth put it, in the same way she described the responsibility to look after, and keep an eye on, other places in the claim area which were of importance to claim group members. However, discharging those care responsibilities is ***not*** the same thing as occupation for the purposes of s 47B. This occupation claim is ***not*** made out.

Road 13 This road is in the south-west corner of the claim area. It runs from a place called O'Hara's Well in a south-westerly direction towards the claim boundary and a place called Willow Well, very close to the southern claim boundary. It appears to run through Depot Springs. I have found at [1192] above that there was no prior interest created in this UCL area, in a way which triggers the operation of s 47B(2), and I have rejected the applicant's claim under s 47B on that basis. Even if, contrary to my conclusion, the applicant were able to make a claim under s 47B for this parcel of land, I do ***not*** consider the applicant has proven that a claim group member or members occupied the land in either 2011 or 2015. It is correct, as the applicant submits, that Mr Lewis gave some evidence about going hunting in July 2015 in this region, which he described as "back between O'Hara's and Langford's back where we just came from and further up here, Belleview and Quartz where we're going". However, so far as the evidence discloses, I am unable to be satisfied (in contrast to my satisfaction about UCL 245 and UCL 246) that the area he was talking about included the UCL Road 13, nor what use was made of the UCL area in times more approximate to the native title application, aside from one hunting trip. The applicant relies on evidence from Ms Narrier about a place called Gums Well, which is on Road 13, being the location for the story for the white cockatoo. Mr Muir gave similar evidence, although his evidence appeared to place the story further to the west. I do ***not*** consider this evidence assists in proving occupation of Road 13: rather, it indicates some knowledge of the area, but no more than that.

Findings on s 47B for each UCL area

UCL 239, UCL 245 and UCL 246 (north-west corner) I have found that none of the miscellaneous or exploration licences which cover these areas disapply the terms of s 47B. I have found the applicant has proved occupation of UCL 245 and UCL 246, but ***not*** of UCL 239.

UCL 14 and UCL 15 (Tjiwarl/Logan Spring) I have found that none of the miscellaneous or exploration licences which cover these areas disapply the terms of s 47B. I have found the applicant has ***not*** proved occupation of UCL 14 and UCL 15.

UCL 247 (south of Mail Change Well) I have found that none of the miscellaneous or exploration licences which cover this area disapply the terms of s 47B. I have found the applicant has ***not*** proved occupation of UCL 247.

Part of UCL 11 (Yakabindie) I have found that none of the miscellaneous or exploration licences which cover this area disapply the terms of s 47B. I have allowed the parties a further opportunity for submissions on the application of s 47B(2) to the relevant part of UCL 11.

Parts of UCL 4, UCL 5, UCL 6 and UCL 10 (Sir Samuel) I have found that none of the miscellaneous or exploration licences which cover these areas disapply the terms of s 47B. I have found the applicant has ***not*** proved occupation of parts of UCL 4, UCL 5, UCL 6 and UCL 10.

UCL 8 (Corner Leinster Downs and Booylgoo Spring) I have found that none of the miscellaneous or exploration licences which cover this area disapply the terms of s 47B. I have found the applicant has ***not*** proved occupation of UCL 8.

UCL 240 (Vivien) I have found that none of the miscellaneous or exploration licences which cover this area disapply the terms of s 47B. I have found the applicant has ***not*** proved occupation of UCL 240.

Road 13 I have found that s 47B(2) is ***not*** applicable to Road 13. If, contrary to my opinion, s 47B(2) is applicable, then I have found that the applicant has ***not*** proved occupation of Road 13.

OVERALL CONCLUSION AND APPROPRIATE ORDERS The matter raised by the applicant in its addendum to its written submissions on the existence of native title contends that the form of any determination made should take into account the multiple pathways through which Western Desert people may acquire rights and interests in land and waters. As I understand this contention, its effect would be ***not*** to limit the native title holding group to those people who are descended from one or more of the named apical ancestors. This is a matter the parties should have some time to consider and see if they can reach agreement, in light of the Court's reasons for judgment. As I have noted at [1285] above, I consider it appropriate to allow the parties a further opportunity for submissions on the application of s 47B(2) to the Yakabindie homestead block, UCL 11, in light of my findings concerning

occupation. There will be directions to the effect that the parties confer and draw up proposed minutes of orders and a determination in accordance with the Court's reasons.

I certify that the preceding one thousand, three hundred and twelve (1312) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

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