

NOTICE OF FILING

Details of Filing

Document Lodged: Expert Report
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 16/02/2024 9:13:21 AM AWST
Date Accepted for Filing: 16/02/2024 9:13:26 AM AWST
File Number: WAD37/2022
File Title: YINDJIBARNDI NGURRA ABORIGINAL CORPORATION RNTBC ICN
8721 AND STATE OF WESTERN AUSTRALIA & ORS
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



THE YINDJIBARNDI PEOPLE'S COMPENSATION CLAIM

WAD 37 of 2022

ANTHROPOLOGIST'S SUPPLEMENTARY EXPERT REPORT

Kingsley Palmer, Appleby Consulting Pty Ltd

Meelon, Western Australia

February 2024

CONTENTS

| | |
|---|-----------|
| CONTENTS | I |
| LIST OF TABLES AND FIGURES..... | III |
| 1 INTRODUCTION..... | 1 |
| Definitional and procedural issues..... | 2 |
| Purpose and outline of this report..... | 3 |
| PART 1: PLACES AND AREAS OF SIGNIFICANCE IN THE SOLOMON HUB MINE SITES | 5 |
| 2. ENUMERATION OF PLACES, AREAS AND SITES | 6 |
| The applicant’s maps..... | 6 |
| Reading the maps; assessing the impacts..... | 7 |
| Conclusion and opinion..... | 9 |
| 3. CLAIMANTS’ RESPONSES TO THE MINE SITE TOUR: SPECIFIC PLACES..... | 11 |
| Introduction | 11 |
| Doing things with words: the language of heritage assessment..... | 12 |
| Site..... | 12 |
| Damaged..... | 13 |
| Destroyed | 13 |
| Salvaged | 13 |
| Preservation..... | 14 |
| Opinion: the vocabulary of evaluating impact..... | 14 |
| Locations 8: a rock shelter..... | 15 |
| The physical context..... | 15 |
| Ability to access own country..... | 16 |
| Cultural significance of the cave | 17 |
| Proper management of country: the Yindjibarndi people acting together..... | 18 |
| Proper management of country: Yindjibarndi law and custom | 19 |
| Location 10: <i>thungari</i> , a burial..... | 21 |
| The physical context..... | 21 |
| Cultural significance of the burial..... | 21 |
| Conclusion and opinion: locations 8 and 10 | 23 |
| Locations 5: a habitation and resource area..... | 25 |
| The physical context..... | 25 |
| Culturally significant artefacts and rules for their management..... | 26 |
| Ganyjingarringunha <i>wurndu</i> (Kangeenarina Creek) | 26 |
| Ganyjingarringunha <i>jinbi</i> (spring)..... | 28 |
| Location 7: Ganyjingarringunha <i>yaayu</i> (Kangeenarina eastern branch)..... | 30 |
| Location 12: <i>thalu</i> and the tailings dam | 31 |
| Conclusion and opinion: locations 5, 7 and 12..... | 31 |
| 4. CLAIMANTS’ RESPONSES TO THE MINE SITE TOUR: GANYJINGARRINGUNHA WURNDU.. | 33 |
| Barrimirndi (mythic being)..... | 33 |
| The <i>jinbi</i> (spring)..... | 35 |

| | |
|---|-----------|
| Burndud and the Barnga (sand goanna)..... | 36 |
| Conclusion and opinion: song lines and damaged country..... | 39 |
| Barrimirndi and <i>jinbi</i> | 39 |
| Burndud..... | 40 |
| 5. CLAIMANTS’ RESPONSES TO THE MINE SITE TOUR: LOSS OF <i>NGURRA</i> (COUNTRY) | 43 |
| Every corner, the heart of us | 43 |
| With broken heart and broken spirits..... | 43 |
| Loss of <i>ngurra</i> : conclusion and opinion..... | 45 |
| 6. THE SOLOMON HUB MINE SITES AND CULTURAL LOSS. ANALYSES AND OPINION..... | 48 |
| Enumeration of culturally significant place | 48 |
| Dominion over <i>ngurra</i> and cultural loss..... | 48 |
| The sentience of Yindjibarndi country and cultural loss | 50 |
| Dominion and the sentience of country: understanding cultural loss | 51 |
| The cultural significance of <i>ngurra</i> | 53 |
| PART 2: LOSS AS DIMINUTION OF CULTURE AND ITS CONSEQUENCE | 55 |
| 7 CULTURAL LOSS AND THE YINDJIBARNDI COMMUNITY | 56 |
| Introduction | 56 |
| Ritual harmony and sustaining person and country | 57 |
| Conclusion and opinion | 60 |
| Saving and losing Yindjibarndi history and culture..... | 61 |
| Conclusion and opinion | 63 |
| Canons of relationships as cultural loss..... | 64 |
| Introduction..... | 64 |
| Cultural loss and social relationships..... | 65 |
| Conclusion and opinion | 72 |
| Canons of relationships | 74 |
| REFERENCES..... | 76 |
| DECLARATION BY THE EXPERT AS REQUIRED BY THE PRACTICE DIRECTION | 77 |
| APPENDIX A. THE SERVICES REQUIRED | 78 |

LIST OF TABLES AND FIGURES

| | |
|---|----|
| Table 2.1: Map E1, overview map enlargement 1. Sites represented and their status. | 8 |
| Table 2.2: Map E2, overview map enlargement 2. Sites represented and their status. | 8 |
| Table 2.3: Map E3, overview map enlargement 3. Sites represented and their status. | 9 |
| Table 2.4: Analyses of sites data. | 9 |
| Table 3.1: location 8. | 23 |
| Table 3.2: location 10. | 25 |

1 INTRODUCTION

1. In August 2022 I prepared an expert report for the Yindjibarndi People's compensation claim (Palmer 2022). The following year (August 2023) I attended court hearings, held in relation to the compensation claim, convened at both Roebourne (north western Western Australia) and at a place called Ganyjingarringunha. Ganyjingarringunha is located in the Hamersley Range, a short distance from the Fortescue Metal Group's mines, known collectively as the Solomon Hub.
2. I have been provided with the transcripts of the trial. I have also been provided with copies of the witness statements, as agreed between the parties.
3. Following the completion of the trial, Appleby Consulting was approached by the solicitor for the Yindjibarndi People with a view to producing a supplementary report, based on the experiences and observations of the trial, and consideration of the associated documents. Appleby Consulting agreed to this commission and directed its anthropologist, Dr Kingsley Palmer, to undertake the necessary research and writing. This report is the response to the brief provided and is authored by Kingsley Palmer.
4. The brief is Appendix A to this report.
5. Consistent with my 2022 report, I provide material in this supplementary report in a manner designed to render it admissible in Federal Court proceedings. Consequently, this report has been written to the best of my abilities to be consistent with the requirements of the Practice Direction which sets out guidelines for expert witnesses in proceedings of the Federal Court of Australia¹.

DETAILS REQUIRED FOR AN EXPERT REPORT

6. I rely in this supplementary report on the statements I made in my 2022 anthropological report relating to the details required by the Practice Direction for an expert report (Palmer 2022, 27-36).
7. My *curriculum vita* is Appendix B to that report and is not replicated here. I draw attention to this *curriculum vita*. During the period of my early career as an anthropologist I carried out extensive field work in the Pilbara region of Western Australia as a Research Officer working for the Western Australian Museum (Palmer 2022, 147). This was in relation to the provisions of the *Aboriginal Heritage Act* (1972). During this time, as well as subsequently, I undertook substantial periods of research undertaking surveys for sites

¹ 'Expert Evidence Practice Notes (GPN-EXPI)' (J L B Allsop, Chief Justice, 25 October 2016) and 'Harmonised Expert Witness Code of Conduct'.

of cultural significance, including some aspects of archaeological research. I was the author of several dozen reports that were a result of these research activities. These are not listed in my *curriculum vitae*. In my opinion I have substantial experience in the research and process of undertaking site surveys of culturally significant places to Indigenous Australians in relation to development activities.

8. The declaration required by the Practice Note is set out at the end of this report.

DEFINITIONAL AND PROCEDURAL ISSUES

9. In my 2022 report I define a number of words used in that report (Palmer 2022, 16-26). To the extent that I also employ these words in this report, I rely on the definitions I there set out.
10. In my 2022 report I explained the orthography that I used in my report (Palmer 2022, 21-23). This orthography was based on the spelling I adopted in my 2014 report (Palmer 2014, v). I cited the relevant passage in this regard (Palmer 2022, 21). The orthography I adopted was designed to best represent the pronunciation of Yindjibarndi words, as I have experienced them, during my field research, and based on my knowledge and experience of the representation of the Yindjibarndi and other Indigenous languages in the region. In this present report I adopt this orthography. In doing so I have amended some words from the Yindjibarndi language as they have been presented in both the transcript of evidence and the witness statements. Generally, I have retained the original spelling when I cite the text verbatim.
11. I was briefed to write this supplementary report in September 2023 and I undertook the necessary research and writing during that month, followed by a second period of writing in October 2023. I provided the report to the solicitor for the Yindjibarndi People on 1st November 2023.
12. On 12 February 2024 I received minor comments on my report identifying some typographical errors. I was asked to finalise my report so it could be filed on or before 16th February 2024. I attended to the typographical errors and provided the finalised report to the solicitor for the Yindjibarndi People on 15th February 2024.
13. I was advised that between the time that I completed my supplementary report (November 2023) and received comment upon it (12 February 2024) that some of the documents upon which I rely had been amended. In this regard I understand that the transcript of lay evidence (see paragraph 16 (b) below) had been corrected in minor ways and some spellings amended. The transcript upon which I reply was the transcript made

available to me in September 2023 when I wrote the major part of my supplementary report.

14. I was also advised on 12th February 2024 that the applicant's maps had been revised. I was provided with an internet link to access the recently finalised applicant's maps for the compensation claim. I was not advised whether the maps had been amended nor given any particulars regarding any changes, deletions or additions. Given the date by which I was asked to finalise the report (16th February 2024) I did not have opportunity to compare the two versions of the applicant's maps. I make further comment in relation to my methodology and the applicant's map in paragraph 23 below.

PURPOSE AND OUTLINE OF THIS REPORT

15. The brief provided to me asked that in my supplementary report I,
- should state any qualification to, development of or change of the opinions set out in your expert report.

Brief, 12 September 2022.

16. I was asked to take into account,

- a) your observations of the Federal Court of Australia hearings conducted in Roebourne on 7-11 August 2023, at the Solomon Hub Project on 14 August 2023 and at Bangkangarra² on 15-17 August 2023;
- b) the transcript of the hearings referred to in paragraph a), which have been provided to you; and
- c) the statements of the witnesses who gave evidence during the hearings referred to in paragraph a) as well as those which are tendered by the consent of the parties.

Brief, 12 September 2023.

17. In this report I do not express the view that I have changed the opinions of my first report. However, given access to additional materials I am able to enlarge upon them and add to them. I have also refined some of my analyses and consequential opinions as a consequence of the materials now to hand. In this regard I have two principal purposes in writing this report. The first is to consider the evidence that was provided to the court during a tour of the mine site. This provided me with an opportunity, not

² Footnote added. Bangkangarra is the name of a small gorge, pool and waterfall at the head of a re-entrant valley that runs into the principal creek known as Ganyjingarringunha. The court sat at this creek junction.

previously available to me, to hear first-hand what the claimants had to say while actually on the mine site about the transformation of their country that was evidently the consequences of mining operations. I present these data and the opinions I have developed from them in Part 1 of this report (chapters 2 to 6).

18. I have also sought to develop my understanding of the cultural losses that have been a consequence of the split in the Yindjibarndi community. For reasons I explain in what follows I am of the opinion that this split is directly attributable to activities that relate to the development of the mine. Additional data, drawn from the transcript and witness statements, relevant to cultural loss suffered as a consequence of the mining activities is presented in Part 2 of this report, which is also chapter 7.

**PART 1: PLACES AND AREAS OF SIGNIFICANCE IN THE
SOLOMON HUB MINE SITES**

2. ENUMERATION OF PLACES, AREAS AND SITES

THE APPLICANT'S MAPS

19. In my 2022 report, I discussed data that identified areas and places of cultural significance to the Yindjibarndi people that had been impacted by the Solomon Hub mine sites (Palmer 2022, 312-320). I gave examples of areas and places of cultural significance approved for destruction over an 18 month period (*ibid.*, 313). I gave a possible indication of the likely incidence of culturally significant places impacted by the mine (*ibid.*, Figure 6.3, page 109). I regarded the data that was available to me through provision of just a few reports to be representative, but was far from exhaustive. Consequently, I stated that it was not my purpose to attempt to document all culturally significant places and areas identified to date (*ibid.*, 319). I suggested that this task would best be accomplished by those with access to all the findings of the many surveys that have been conducted with respect to the Solomon Mines over the last decade or more (*ibid.*).
20. The applicant has prepared a map in the form of an air photo which shows the area of the Solomon Hub mines that lies within the Yindjibarndi #1 determination area (230727 map 1 Overview map (corrected)). This map records the location of 14 enlargement maps, numbered 230727 map 1, E1 through to E14.³ These maps were a subject of the applicant's opening address to the court in Roebourne on 8th and 9th August 2023 (Transcript,⁴ 157-159, Transcript, 192-208).⁵ I refer to these maps collectively in this report as, 'the applicant's maps'. Specific enlargements are identified by the enlargement map number (E1 to E14) and the overview map by the additional word, 'overview'.
21. An additional sub-set of these maps comprises 5 'close up' maps, identified as '230727 map 5a' to '230727 map 5e'. I refer to these 'close up' maps as 'the applicant's maps' with the relevant 'close up' map designation, '5a' through to '5e', as the context requires.
22. Prior to attending the trial in August 2023 I had not viewed these maps. I took no part in their preparation.
23. I noted above (see paragraph 14) that the applicant's maps were revised subsequent to my writing this report. In this supplementary report I rely on the maps made available to

³ MFI 3.

⁴ In this report I refer to the transcript of evidence of the hearing by the single word, 'Transcript' followed by the transcript page number and the name of the speaker, where this is not evident from the context of the citation.

⁵ There were also additional maps discussed at this time.

me during the on-country claimant evidence (August 2023) and identified in the court documents as ‘MFI 3’.

24. Typically the aerial maps show areas and places identified as ‘sites’ or ‘ethnographic sites’, with unique identifying letters and numbers, or in some cases just a number. These locations are superimposed upon the aerial photography. The sources of these data are listed on each enlargement map as,

Yindjibarndi sites data is supplied by and is the property of Yindjibarndi Aboriginal Corporation RNTBC. Salvaged Heritage Places and Solomon Disturbed Area data provided by FMG.⁶

25. I consider it a reasonable inference to draw that the data represented in these maps are derived from the numerous archaeological and ethnographic surveys that have been conducted in relation to the mine.
26. By examining the imagery it is then possible to form an opinion as to the number of these places as well as which ones have been either damaged or destroyed by the mining operations and associated works, and which have not.

READING THE MAPS; ASSESSING THE IMPACTS

27. The package of maps showing places that are of cultural significance to the Yindjibarndi comprises 14 enlargement maps. Together these cover the majority of the areas of the mines that lie within the Yindjibarndi #1 determination area (‘the determination area’). However, some include country outside of the determination area. Approximately one third of Enlargement 12 is relevant to the determination area, and approximately a quarter of Enlargement 9 is relevant to the determination area but the balance is not. Smaller portions of Enlargements 10 and 11 are outside of the determination area. Enlargement 14 lies within the determination area but outside of the mine footprint.
28. For the purposes of the following analyses I will exclude those enlargement maps that mostly represent country outside of the determination area (maps E9, 12) and E14 which is outside of the mine footprint. I will consider maps E1 to E8, E10, E11 and E13. This is a total of 11 maps.
29. In what follows I make the following assumptions. In looking at three maps, I will assume that they are representative both of the incidence of sites and the impact occasioned by the mine on them. I also make the assumption that not all areas of the

⁶Key, map 1 E1 to E14, Yindjibarndi Compensation Claim WAD 37 of 2022. Map prepared by National Native Title Tribunal, 2023. Imagery data (air photo) would appear to date to 2023.

mine site and infrastructure have places of cultural significance recorded since they may not have been surveyed. For example, the area west of the rail loop (shown on map E13) appears to lack data, there being no map of this area prepared. Based on my knowledge and experience of the incidence of culturally significant sites and places in similar areas I am of the opinion that it is probable that all country subject to mining and related activities would have contained such places. Examination of the overview map shows that the area has been subject to substantial clearing and earth works. The same observation is relevant to the areas to the west of Enlargement 8 for which no enlargement map has been produced.

30. In assessing the impact of the mines and associated infrastructure I rely on my interpretation of the air photograph that is the enlarged map. In determining whether a place is either ‘intact’ or ‘damaged/destroyed’ I provide my interpretation of the visual data. I do not imply that a site I judge to be ‘intact’ has not been affected by the mine (through dust, environmental transformation, geographic context, alienation of land). I do not imply that a site I judge to be ‘damaged/destroyed’ is necessarily lost from view.
31. In this analysis I subject maps E1, E2 and E3 to my analysis. I have considered each map in turn and added up the ‘sites’ marked upon them. I have divided the maps into sectors of my own devising to aid the accuracy of counting. Consistent with the assumptions noted above, I have then identified those places which I consider to be ‘intact’ and those that I consider to have been ‘damaged/destroyed’. I present these data in Tables 2.1, 2.2 and 2.3 below.

| Sector | Total locations | Intact | Damaged/destroyed |
|--------|-----------------|--------|-------------------|
| A | 12 | 6 | 6 |
| B | 16 | 15 | 1 |
| C | 11 | 5 | 6 |
| D | 1 | 1 | 0 |
| E | 1 | 1 | 0 |
| | 41 | 28 | 13 |

Table 2.1: Map E1, overview map enlargement 1. Sites represented and their status.

| Sector | Total locations | Intact | Damaged/destroyed |
|--------|-----------------|--------|-------------------|
| A | 27 | 14 | 13 |
| B | 10 | 1 | 9 |
| C | 1 | 0 | 1 |
| | 38 | 15 | 23 |

Table 2.2: Map E2, overview map enlargement 2. Sites represented and their status.

| Sector | Total locations | Intact | Damaged/destroyed |
|--------|-----------------|--------|-------------------|
| A | 26 | 3 | 23 |
| B | 18 | 6 | 12 |
| C | 8 | 2 | 6 |
| | 52 | 11 | 41 |

Table 2.3: Map E3, overview map enlargement 3. Sites represented and their status.

32. These data can be further analysed in terms of totals and percentages, means (averages) and medians. This is demonstrated in Table 2.4 below.

| | Total sites | Intact | % of total | Damaged/destroyed | % of total |
|---------------|-------------|--------|------------|-------------------|------------|
| E1 | 41 | 28 | 68.29% | 13 | 31.71% |
| E2 | 38 | 15 | 39.47% | 23 | 60.53% |
| E3 | 52 | 11 | 21.15% | 41 | 78.85% |
| Total | 131 | 54 | 41.22% | 77 | 58.78% |
| Median | 41.00 | 15.00 | 36.59% | 23.00 | 56.10% |
| Mean | 43.67 | 18.00 | 41.22% | 25.67 | 58.78% |

Table 2.4: Analyses of sites data.

33. The median number of sites per map sheet is 41 (mean or average = 43.67). The median number intact per sheet is 15. The median number damaged or destroyed is 23

34. Assuming these three maps to be broadly representative of the incidence of cultural significant places across the mine area covered by the 11 maps identified for my purposes in paragraph 28 above I extrapolate as follows. There are approximately 451⁷ places of cultural significance that have been recorded. There are approximately 165⁸ that are intact. There are approximately 253⁹ that are damaged or destroyed.

35. Mr Hughston told the court that ‘There are 249 Aboriginal sites in respect of which the FMG respondents sought permission from the relevant State Minister under the *Aboriginal Heritage Act* to damage or destroy those sites, and those applications were granted’ (Transcript, Mr Hughston, 4).

Conclusion and opinion

36. The inferences that I have drawn from these data cannot, in my opinion, be regarded as representing a definitive account of the number of places of cultural significance within the mine sites. I think it likely that not all areas affected have been subject to systematic survey for reasons noted above (see paragraph 29). However, I am of the opinion that

⁷ Computed as the median number of sites per sheet multiplied by 11.

⁸ Computed as the median number of intact sites per sheet multiplied by 11.

⁹ Computed as the median number of damaged/destroyed sites per sheet multiplied by 11.

based on the data reviewed, these analyses provide a reasonable estimate of the damage and destruction to enumerated sites. In this, my figures relating to damage or destruction match very closely the number of applications made by FMG to the State minister under the *Aboriginal Heritage Act*. Such independent triangulation validates the figures I have developed.

37. The places that I have classified as ‘intact’ remain outside the control of the Yindjibarndi native title holders who are unable to access them, as I discuss in greater detail in the next chapter. A catalogue of places and a visual assessment of damage or destruction does not take account of cultural loss. It does not accommodate the metaphysical aspects of a place and the interplay between values related to the spiritual sphere with the context of the mine site, its works and disturbances. It is to these aspects of loss, expressed by the Yindjibarndi men and women during a tour of the mine site on Monday 14th August, that I now turn.

3. CLAIMANTS' RESPONSES TO THE MINE SITE TOUR: SPECIFIC PLACES

INTRODUCTION

38. On Monday 14th August 2023 the court was taken on an excursion through portions of the Solomon Hub mines. Specific places visited are shown on a map, '230808 map of mine view and hearing' (henceforth, 'Map of Mine View'). Places visited were marked on the map by sequential numbers. At some places the court viewed aspects of the mines and no evidence was led ('a view'). At other places the court heard evidence from Yindjibarndi claimants present regarding the location visited. Cross examination of these witnesses was accommodated in the process.
39. In summary the itinerary for the tour was as follows. The court and other parties travelled in escorted convoy from Kangi Camp (accommodation village and no. 2 on the Map of Mine View) to location 3. This afforded a view of the Trinity mine pit. Senior Yindjibarndi men and women performed a short ritual to introduce the visitors (strangers or *mandjangu*) to the country. Mr Stanley Warrie addressed his Honour and detailed his feelings about the extensive transformation of the countryside.
40. The convoy then travelled to locations 4 and 5, situated proximate to Ganyjingarringunha Creek and location 6. Evidence was taken at location 5.
41. The convoy then travelled to location 7, being a view of the Firetail mining areas and associated infrastructure. The area marked the former course of the eastern branch of the Ganyjingarringunha creek. Thence the convey went to location 8, being a cave and proximate to location 9. Here evidence was also taken. Some of the court party then briefly viewed location 9. After a short break for lunch the party travelled to location 10, a gorge and cave, the latter being a burial site. There followed a view from the travelling vehicles of the stockyards and product stockpiles, the train load out and rail loop areas (location 11), followed by the power station. The parties then travelled north west to view the tailings storage facility (location 12). Evidence was heard at this final location including information relating to the destruction of a site which is now buried under the tailings dam.
42. Based on my own observation of and participation in the tour I conclude that the mine tour was subject to the direction and control of FMG who approved the route, escorted the parties and prescribed certain dress requirements. Access to the mine site requires permission from FMG.

43. This visit to those parts of the Solomon Hub mine that lie within the Yindjibarndi no. 1 native title determination area in company with senior native title holders provided me with an opportunity to see the impacts that the mining operations have had on the landscape. It also provided the occasion for me to see and hear the native title holders' response to these activities. In this chapter I rely on the transcript of evidence and, where relevant, the witness statements prepared for the witnesses, in order to provide an expert opinion on the nature and extent of the cultural loss that the mining operations have occasioned.
44. In my consideration of the data developed through the court process, I am mindful of the fact that the mine tour did not permit identification of all places of cultural significance destroyed or effected by the mine that lie within the determination area. Maps, prepared by the applicant ('the applicant's maps'; see paragraph 20 above), present a record of those sites known to the applicant at the time they prepared these maps. In what follows I adopt the view that the evidence provided regarding the sites chosen for the tour described above would be representative of the response to all sites damaged, modified or destroyed. I base this on comments made by a number of claimants in the course of giving their evidence, where the response to the destruction of places and areas of importance was related to the broader extent of Yindjibarndi country, personhood and culture, rather than limited to specific places within it. This is a matter I discuss in paragraphs 150 to 185 below.

DOING THINGS WITH WORDS: THE LANGUAGE OF HERITAGE ASSESSMENT

45. In my experience there has developed a vocabulary that has currency in the language and literature relating to the manner of treatment of Australian Indigenous place and its cultural significance to those who today assert a right therein. Prior to discussing the claimants' responses to the mine site tour and the places we visited, I examine some of these words in order to better understand what may be meant by their use.

Site

46. A significant term in this regard is 'site' which I have discussed elsewhere (Palmer 2018, 12-13) in terms of the assumptions and preconceptions that colour its use. I also discuss the incapability of the term to capture the non-bounded spiritual cultural significance of a locale (see also Palmer 2022, 333-338). In public discourse at least a 'site' is frequently understood to be not only quite exactly defined, but also its value as social or cultural

worth is similarly confined (Palmer 2018, 96; 120-121). I have written that the word might better not be employed at all (*ibid.*, 120). An investigation to locate ‘sites’, generally through field inspection, is commonly termed, a ‘heritage survey’ (see Palmer 2022, 306, fn. 350).

Damaged

47. The term ‘damaged’ used in relation to a place in an Australian Indigenous landscape often carries an ordinary English sense of physical damage. However, the word can also be used in relation to injury to intangible qualities, as the dictionary definition makes clear.¹⁰ I explore below, in relation to the trial evidence, that a place may suffer a diminishment of its original social and cultural value and consequently a loss of its integrity as understood in relation to its original purpose and significance, without there being any physical damage to the actual site (see paragraphs 80 to 87 and 90 below).

Destroyed

48. Ultimately, if something incurs sufficient damage it becomes ‘destroyed’ which I take to mean that the (in this case) place no longer exists as it was and fails to serve the purpose or have the value it once did.¹¹ The degree of damage that renders an object or place ‘destroyed’ marks a point on a continuum of damage and is unlikely to be clear-cut, for reasons I discuss below (see paragraph 52 and 54 below).

Salvaged

49. ‘Salvaged’ has a particular sense in the context of the applicant’s maps and evidence given that related to sites and areas of cultural importance in the FMG mine site. Mr Hughston advised the court that ‘salvaged’ describes a process where artefacts and other remains (including human remains) are collected from the place and removed. ‘So, physically, the site’s destroyed, but the contents are salvaged and stored somewhere.’¹²

¹⁰ As a noun: ‘loss or detriment caused by hurt or injury affecting estate, condition or circumstances. Injury harm.’ *Shorter Oxford English Dictionary*, ‘Damage’. An example of loss or detriment relating to a condition or circumstance would be that suffered by a person’s reputation that might be damaged, reflecting injury or loss relating to a non-physical aspect of a property.

¹¹ ‘Destroy, past participle ‘destroyed’. To destroy: ‘to pull down or undo, as a building; to demolish;. To undo, break up, reduce into a useless form, consume, or dissolve.’ *Shorter Oxford English Dictionary*, ‘Destroy’. The noun derived from ‘destroy’ is ‘destruction’, ‘the action of destroying’ (*ibid.*, ‘Destroy’).

¹² Transcript, 197.

Preservation

50. The phrase ‘preservation site’ is used of places that have not been destroyed and have been conserved within the context of the development of the Solomon Hub mines. The phrase was not much employed during the trial, although Mr Dharmananda, counsel for FMG, drew the court’s attention to the fact that the applicant’s map had identified site YIN10-004 as a ‘salvaged site’, whereas it was, in fact, ‘a preservation site’.¹³ These ‘preservation sites’ were not recorded as such on the applicant’s map and it had been agreed that these were to be added.¹⁴
51. The term, ‘heritage protection site’ was also used with respect to site YIN10-004¹⁵- I do not know how a ‘preservation site’ is distinguished from a ‘heritage protection site’ or what might be the criteria evoke to determine this differentiation. I discuss evidence taken at a ‘heritage protection site’ below (see paragraph 75 to 86).

Opinion: the vocabulary of evaluating impact

52. Of the words and phrases reviewed above both ‘salvaged’ and ‘preservation’ have been employed to describe a particular process. ‘Salvaged’ means that cultural objects have been removed from the place where they had been located and subsequently the place may have been destroyed. ‘Preservation’ carries the sense that a place or location has not suffered physical damage and, by implication, will be protected from such damage in the future. I make the assumption that a ‘preservation site’ is bounded by some sort of a physical protective buffer to ensure that the conservation endures. It seems from the evidence reviewed below that a place could be both ‘preservation’ as well as ‘salvaged’ site, a complexity that caused a point of contention between the parties.¹⁶
53. Evaluation becomes more complex when the additional two words discussed here are introduced into the discourse. While a ‘salvaged’ site may have been destroyed or perhaps only damaged, is a preservation site undamaged given the context of its protected status within a major extractive mine site? Evaluating impact is fraught, since the process is likely to evoke a range of contestable criteria, some at least having moral or ethical reference. In addition, attribution of social value or potential collateral economic benefit may also influence how a matter is to be judged. Consequently, beyond what might be regarded as the simple facts of the matter (location of the place; the observable

¹³ Transcript, 207.

¹⁴ Transcript, 207.

¹⁵ Transcript, 202, 446 and 493.

¹⁶ Transcript, 202, 207, 445, 485.

or reasonably inferred physical changes) an evaluation of impact is potentially a value judgement where differences in the criteria drawn upon will influence the choice of a term to identify the impact of an action through human agency.

54. The tasks I am being asked to undertake in relation to the provision of an expert opinion relate to the cultural loss suffered by the Yindjibarndi people (Palmer 2022, appendix A, page 141). In this regard I have set down an account of my understanding of Yindjibarndi culture, as explained to me by those with whom I worked (*ibid.*, 37-105). Cultural loss is in the context I am asked to consider it, a loss that should properly be determined by reference to the Yindjibarndi ways of thinking and feeling, and the Yindjibarndi moral and ethical order. The evidence given by the claimants during the mine site tour add to my understanding of the nature and extent of loss, as experienced by the Yindjibarndi people.

LOCATIONS 8: A ROCK SHELTER

The physical context

55. During the mine site tour on Monday 14th August 2023 the court was escorted to location 8 which was identified in FMG's documentation as YIN10-111. It was identified on the Map of Mine View as location 8. Counsel for the applicant, Mr Hughston SC, described the place as,

... an ancient rock shelter. It's one of three very old rock shelters in the area here. The others are YIN11-028 and Tri-inpad 11-03, but both of those have been destroyed. The archaeological evidence in the court book shows human occupation of this rock shelter dating back to at least 35,000 years.

Transcript, 482.

56. Applicant's map close up map 5a shows detail of the location with the cave marked by a yellow octagon.¹⁷ The image shows substantial disturbance to the area with a road, tunnel and associated earth works and drainage approximately 60 metres to the north. To the immediate east (approximately 45 metres) is a haulpack road located on an embankment situated immediately above the cliff line wherein the cave is situated. The Map of Mine View indicates this haulpack road is a principal access to the Firetail Crushing Hub. The physical proximity of the site to the substantial infrastructure prompted his Honour to record for the transcript,

¹⁷ The key to the map indicates that this is an, 'FMG salvaged heritage place'. See paragraph 74 below.

I might just, at this point, observe that during the course of the hearing at this site, so far, there has been a constant and audible rumble of vehicles above the location where we are which oscillates in volume, depending on whether there is a truck coming over or not, I assume.

Transcript, 483.

57. Counsel for the applicant asked Mr Woodley about the cave. Counsel pointed out that, ‘this particular rock shelter’ had not been destroyed. However, there was, ‘lots of mining activity and disturbance all around it’.¹⁸ Counsel then asked Mr Woodley how he felt about this and whether the place had been adequately protected.¹⁹

58. Mr Woodley’s response was as follows.

... there’s nothing that you can tell us that the company is doing everything they can to protect this place. ... You don’t put a track over something like this? You know?

Transcript, 484.

59. The interchange continued,

Mr Hughston: You are pointing to above you to the haulage road.

Mr Woodley: Haulage road up here.

Mr Hughston: Yes.

Mr Woodley: As we came in, you can see all the machinery – you still hear it now, as the Judge pointed out. I mean, it is something that is, you know, I think it is very disrespectful to Yindjibarndi. You just don’t – you can’t do this.

Transcript, 485.

Ability to access own country

60. Mr Woodley told the court that he had visited the cave only once before (Transcript, 485). He thought the other senior men (Mr Angus Mack and Mr Stanley Warrie) were in the same position.²⁰ On another occasion²¹ Mr Woodley told the court that he had been, ‘locked out’ and excluded from any cultural dealings (and therefore visits) to the culturally significant areas in the Solomon Hub mine sites. Mr Fabian Cheedy told the court how he could not,

¹⁸ Transcript, 484.

¹⁹ Transcript, 484.

²⁰ See also paragraph 71 below.

²¹ Transcript, 494.

... even just go and visit - you are not doing anything wrong – you only just want to visit your country. Visit the *ngurra*. But you can't. You got a locked gate.

Transcript, 687.

61. Mr Woodley described in his witness statement examples of how he had been prevented from accessing his country which is now within the Solomon Hub area (Mr Michael Woodley witness statement, 12, 42-47, 303 -317). The loss of access and the cultural implications of the loss and the hurt that this loss occasions is a matter I have discussed in detail in my 2022 expert report (Palmer 2022, 215-236).

Cultural significance of the cave

62. Mr Woodley told the court that the rock shelter, known as *yamararra* in the Yindjibarndi language, like others in the region, were used as living area or shelters.²² Their importance today was that they provided a record of past ways of living and so they are considered to be a part of contemporary Yindjibarndi cultural heritage.²³ The caves were also the abode of the spirits of Yindjibarndi ancestors,²⁴ some had been buried in the caves,²⁵ sometimes in walled niches in the caves.²⁶
63. Earlier Ms Lynn Cheedy had told the court, in the context of her discussion of the effects of the FMG mine, that these spirits had, like her,

lost their home. It's not any more. So they searching, they walking around and wondering where - where this used to be, you know, where you know the – this food was here, it's not there; this water that was there, it's not there anymore, where can I go to?

Transcript, 246.²⁷

64. The cave visited by the court was discussed by the claimants as an example of a place whence special spiritual powers could be obtained that gave a man the ability to heal

²² Transcript, 484.

²³ Transcript, 484. Another example of how senior Yindjibarndi people value habitation areas was given by Mr Angus Mack who told the court, 'You look around all these caves, the heritage value of the old people being here many years ago' (Transcript, 566). I discuss other examples of the significance of habitation areas to the Yindjibarndi in my expert report (Palmer 2022, 321-323).

²⁴ Transcript, 484, 491-2.

²⁵ Transcript, 291, 292, 481, 484, 487, 493.

²⁶ Transcript 487.

²⁷ See also Transcript, 328, Ms Estelle Guinness; transcript, 371, Ms Kaye Warrie; transcript, 426, Lorraine Coppin; transcript, 494, Mr Michael Woodley. This list is not exhaustive. Spirits are both displaced because of the mining activities and potentially angry and vengeful because of the owners' failure to exercise their duty to protect the countryside. I discuss these aspects of spiritual displacement and their believed consequences in my 2022 report (Palmer 2022, 286-300).

others.²⁸ A cave has the potential to yield spiritual power to a Yindjibarndi person (but not to a stranger or *mandjangu*²⁹). Caves were also places where sacred objects (usually the exclusive preserve of senior initiated men) were stored.³⁰

65. Each cave also has cultural significance to the Yindjibarndi because it represents an attestation to the ordaining power of the Dreaming through the Burndud song ritual performance. Mr Michael Woodley and Mr Angus Mack told the court in this regard,

Mr Michael Woodley: Every cave on Yindjibarndi we call ...

Mr Angus Mack: There is only one cave here, but it goes for every other cave.

Transcript 488.

66. This is a consequence of it being divinely ordained with its spiritual propensities through the bestowal of the Burndud ritual and song in the creative period. This divine ordination is now celebrated through the performance of the song that ordained the cave in Yindjibarndi cosmological topography. Mr Woodley sang this song for the court.³¹

Proper management of country: the Yindjibarndi people acting together

67. Evidence evinced at location 8 also related to the manner whereby a place having cultural significance might be managed in relation to a mining project. Claimants had spoken to the court about their duty to look after the country in a way that accommodated the unity and commensality of all Yindjibarndi people, together. For example, Ms Lyn Cheedy had told the court,

Wirly-Murra is not Wirly-Murra, it's Yindjibarndi people. They are our family and we have been torn apart. We want to do what's best for all Yindjibarndi people. It makes me sad every time we come to a meeting and we shouting at one another. You know, it's not right accorded with their cultural observances and beliefs.

Transcript, 259.

68. Mr Isaac Guinness stated that, 'we all family, Yindjibarndi, we're one family, one tribe so we all family.'³² Mr Woodley spoke of the responsibility of all Yindjibarndi to look after

²⁸ Transcript, 488-490.

²⁹ Transcript, 489.

³⁰ Transcript, 487. This aspect of use and the associated cultural value was discussed in relation to location 9 (YIN 10-110), which some members of the court visited after the evidence was taken at location 8. See Transcript, 445 (Ms Jowett).

³¹ Transcript, 488.

³² Transcript, 293.

country together.³³ When giving evidence at the cave which was location 8 on the mine site tour, Mr Woodley stated that the Yindjibarndi Aboriginal Corporation was the ‘rightful body’ to speak, ‘for the rights and interests of the Yindjibarndi People, but also to manage all of the discussion and dialogue that goes with mining companies other proponents’ (Transcript, 485). Mr Woodley stated that the Yindjibarndi Aboriginal Corporation had not been consulted or involved in any way in the management or excavation of the cave. He and other senior Yindjibarndi men had not been able to visit the cave prior to the planning for the mine site inspection by the Federal Court.³⁴ FMG, ‘went around us’ and so ‘undermined the structure’ (Transcript, 485). It had been ‘Wiru-Murra people’ who had come to the cave, ‘done the work and the site identification, and so and so forth’ (Transcript, 485).

69. This one-sided action was inconsistent with the customary rules that govern the way in which country is to be managed,

Those people, the people come here, and associate themselves with this mining company. They get – they have to know that this – the Yindjibarndi they are leaving behind and they are disregarding. Our law tells them you better do the right thing. You have to come and consult with us.

... we got contribution as well that we can add to this that would make all Yindjibarndi benefit.

Transcript, 491, Mr Michael Woodley.

70. This unilateral action had caused a split within the Yindjibarndi community. The cave at location 8 was one example of how this split has its immediate origins in the way whereby FMG had chosen to manage the site and the cultural damage that was a consequence of the mining.

Proper management of country: Yindjibarndi law and custom

71. The cave at location 8 was also discussed by the native title holders as an example of a place that had not been treated in a way that accorded with customary practice. This related to evidence elicited that members of the Wiru-Murra group performed a ritual at the cave.

³³ Transcript, 471, 491.

³⁴ Transcript, 485-6. Other examples of the claimants’ inability to access the sites in the Solomon Hub area are found at 494, Mr Michael Woodley; 244, Ms Lyn Cheedy; 687, Mr Fabian Cheedy. Witness statement, Mr Stanley Warrie, 125; Ms Lyn Cheedy, 21; Mr Kevin Guines, 32; Mr Angus Mack, 70; Mr Michael Woodley 44, 45, 312.

Mr Hughston: We are aware from the documents produced by FMG that the Wirru-Murra group did come here to this site, and they gave a clearance. Is that your understanding?

Mr Woodley: Yep.

Mr Hughston: And they performed some sort of a ritual here, and they identified it as a spiritual site. Is that your understanding?

Mr Woodley: To my understanding, yes.

Mr Hughston: And you have read about what they did, in terms of the ceremony or the ritual. Was that the right thing to do?

Mr Woodley: No. No, it isn't. And to clarify as well – I just to clarify this just for the Court. The first time since we've been back here since they came here and done this work - - -

Mr Hughston: Yes.

Mr Woodley: Right? Without involvement. We didn't know what was happening. But the – what they've done in terms of how they conducted themselves – you know, leading up to this site, wasn't done in the Yindjibarndi way.

Transcript, 486.

72. According to the account given by FMG, the Wirru-Murra men brought a Nyamal man (who was named) who was also a *mubarn*,³⁵ and he performed, 'some sort of a ritual' at the cave.³⁶ Mr Woodley explained to the court why the action was contrary to Yindjibarndi Law and practice. A Nyamal man is a non-Yindjibarndi person and is consequently a *mandjangu* (stranger)³⁷. A *mandjangu* is not equipped to speak to the spirits of the country. Indeed such action could be potentially dangerous or even fatal to the promulgator.

His security is his language – his tongue. If you're going to *wangka* [speak to] the land can hear him, the spirits here. (Aboriginal Language Spoken). This other man speaking, the Nyamal, they don't understand him. They can't – what you call it – you know, give any – what you call it – security or protection, because straightaway, when he opened his mouth, they can tell *mandjangu* – the stranger is here now in our presence. And what he is doing he is bringing a spiritual activities, *mabarn*, which you can't do anyway. This is our site, Yindjibarndi site, where our people were living. You don't bring a *mabarn* here and *mandjangu* man in – coming in here and doing these things, to open the gate to a pathway for you? What are you – you are the

³⁵ That is, a man with special spiritual powers.

³⁶ Transcript, 486, Mr Hughston.

³⁷ Transcript, 487.

Yindjibarndi. This is your home. You don't have to do that. But they don't know, see. They've never been taught by the old people.

Transcript, 486-7.³⁸

73. By Mr Woodley's account these actions contravened Yindjibarndi Law in two respects.

first thing you don't bring *manjangu* on to country. The second thing is you don't let *manjangu* start bringing those type of spiritual activities here. ...
Yindjibarndi.

Transcript, 486.

74. Counsel for the applicant stated that the FMG documents showed that artefacts had been salvaged from the cave and stored elsewhere. Mr Woodley stated that the artefacts should have stayed in the cave. He added, 'You can't take this and lock it up in a storage somewhere', indicating that he did not know the location where they had been stored.³⁹

LOCATION 10: THUNGARI, A BURIAL

The physical context

75. The court was escorted to the place identified in the FMG database as YIN10-004. This is the location of human remains. The place was identified as location 10 on the Map of Mine View. It is also shown in the applicant's map, 'Close up 5e'. The image that constitutes this map shows a small defile and surrounding country encircled by a yellow line approximately 350 m in diameter.⁴⁰ The location has been designated a 'heritage protection site' by FMG.⁴¹ This I assume to represent the site and its protected environs.

76. The image shows there to be extensive mine workings to the north, west and east of the location. A road, used by the court to access the site, runs immediately to the south of the location. Evidence was taken in the small gorge, close to the location of the human remains (Transcript, 493 ff).

Cultural significance of the burial

77. Mr Woodley gave evidence at this site. He explained to the court that a burial was known in the Yindjibarndi language as *thungari*. He narrated how the site was identified

³⁸ Interpolation in square brackets. Words from the Yindjibarndi language in italics.

³⁹ Transcript, 485. Mr Michael Woodley made a similar point at location 5. 'But from the Yindjibarndi point of view nothing can be taken the country. You know, how it was left for us?' (Transcript, 460).

⁴⁰ The map has no scale. It does however show latitude and longitude. I compute the diameter of the yellow circle by assuming that 30 secs of latitude equals approximately 0.925 kms.

⁴¹ Transcript, 493 ff.

through a heritage survey, ‘conducted by the other Yindjibarndi mob’.⁴² Mr Woodley and other Yindjibarndi elders visited the site and performed rituals at the site. Following a further question from Mr Hughston, Mr Woodley described details of these rituals, how they acknowledged and managed the spirits of the place, their significance and importance in cultural dealings.⁴³ He anticipated that they could enter into negotiations ‘with the miner [FMG]’ to ensure the place was protected.⁴⁴ Mr Hughston then asked whether Mr Woodley had visited the place since the time he had described. Mr Woodley replied that he had not. When asked by counsel for the reason why he had not visited the place again, Mr Woodley first stated, ‘Well. I get locked out of it really’.⁴⁵ Mr Woodley’s further comment would appear to suggest that he had considered that being invited ‘by a third party’ (FMG, from my reading of the evidence) an insult, since the place is located in his own country.⁴⁶ Mr Woodley also stated that FMG would not go through the Prescribed Body Corporate when managing the site, which he found unacceptable.⁴⁷

78. There were no further questions asked of the witness and no cross examination.
79. Mr Hughston advised the court that Mr Woodley had addressed issue relating to the site in paragraph 40 of his witness statement.⁴⁸ In the witness statement Mr Michael Woodley tells us that the events described occurred in 2011 and that he performed a ritual at the site (witness statement, Mr Michael Woodley, 40). He described the ritual as, ‘It’s respecting the dead. And, it’s protecting the living from any illness’ (*ibid.*, 40). Mr Woodley also stated that two members of the Wirlu-Murra group had told him by means of a letter that he and others from YAC present had, ‘no cultural authority to go to the burial site’ (witness statement, Mr Michael Woodley, 40). Mr Woodley further stated that he had not visited the place since that time. This statement is made in the context of his discussion of how he has been denied access to his country (*ibid.*, 42-47). I have noted above (see paragraphs 60 and 61 above) that Mr Woodley describes a number of occasions when he was denied access to his country.

⁴² Transcript, 493.

⁴³ Transcript, 494.

⁴⁴ Transcript, 493.

⁴⁵ Transcript, 494.

⁴⁶ Transcript, 494-5.

⁴⁷ Transcript, 495.

⁴⁸ Transcript, 493

CONCLUSION AND OPINION: LOCATIONS 8 AND 10

80. The evidence given in relation to location 8 demonstrates that the cave has multiple layers of cultural significance to the Yindjibarndi people. The cave itself has not been destroyed. However, based on the data I have reviewed above, I am of the opinion that the bestowal of the term, ‘preservation site’ does not reflect either the physical or spiritual reality for the Yindjibarndi claimants. Nor does the use of the term lessen or ameliorate the losses enumerated by the claimants. The statements made by the claimants support the conclusion that they have borne both spiritual and cultural loss as a consequence of mining and associated works that impinge upon the cave’s environment. Moreover, the manner whereby the cave has subsequently been managed sharply conflicts with Yindjibarndi cultural values.

| Purpose or function | Viability, integrity? | Ref loc 8 |
|--|---|---------------------------|
| Shelter | No: Location hostile; access now forbidden. | 58-59, 60-61, 62, 68, 71. |
| Preserve Yindjibarndi cultural heritage | Artefacts moved to unknown location. Integrity of cave violated since these artefacts should remain in the cave and not be moved. | 74. |
| Place for spirits. | For YIN10-111 unclear; for caves that are destroyed, no. | 62, 64. |
| Burial. | Former burials preserved; however, location hostile; access for ritual maintenance now forbidden. | 60-61, 62, 68, 71. |
| Obtain special powers. | Possibly; however, location hostile; access for necessary ritual now forbidden. | 60-61, 63, 64, 68, 71. |
| Store for sacred objects. ⁴⁹ | Possibly; however, location hostile; access for necessary ritual now forbidden. | 60-61, 63, 64, 68, 71. |
| Testament to ordaining sanctity of Dreaming through Burndud performance. | The relevant Burndud song can be sung but the environment and context of the cave, along with lack of access means it cannot be used as an exemplar of this aspect of creation Law. | 60, 61, 65, 66, 68. |
| A place to manage in relation to mining. | No. Caused division within the Yindjibarndi community. | 67 - 70 |
| A place to manage in relation to Yindjibarndi Law and custom. | No. According to the evidence evinced the place has not been managed according to the tenets of Yindjibarndi Law. | 71 - 74. |

Table 3.1: location 8.

⁴⁹ This aspect of use and the associated cultural value was discussed in relation to location 9 (YIN 10-110), which some members of the court visited after the evidence was taken at location 8. See Transcript, 445, Ms Jowett; 487, Mr Michael Woodley.

81. One way of understanding this variety of cultural loss is by examining whether, based on the accounts reviewed above, the cave can now be considered to serve the cultural purposes that the claimants prescribe as being those that characterise its existence and use, according to customary values and beliefs. Where prescribed purpose and associated cultural values are negated, diminished or weakened, then cultural loss is evident.
82. In Table 3.1 above, column 1, I list the characteristic or purpose of the cave which was location 8, based on the evidence I have reviewed. In the second column I provide my opinion, based on the evidence reviewed, as to whether the claimants now hold that the prescribed purpose and associated cultural values of the location are negated, diminished or weakened. This includes consideration of whether exercise of duties by those with exclusive rights to the cave are viable and have cultural integrity. In column 3 I note the paragraph number in this report where I have discussed the item identified in column 1 as it relates to location 8.
83. The evidence given in relation to location 10 was comparatively brief compared with that elicited at location 8. Only one witness gave evidence. The physical proximity of the locale to the extensive mining operations was not apparent from the site visit because of the route taken to access the burial defile. However, 'applicant's map close up 5e' shows the proximity of the mine workings and indicates that the locale is now a rounded and man-made headland surrounded by extraction pits, roads and waste dumps. One aspect of the cultural value and loss of cultural value was explored with the witness. This related to the inability of the Yindjibarndi who were not aligned with the Wirlu-Murra group to visit the burial. The right of a country owner had been denied by FMG. The duty of a country owner to conduct necessary rituals and honour and celebrate the spirits of their ancestor has similarly been denied.
84. Location 10 is physically somewhat different to location 8 and does not share the same cultural characteristics. For example, it does not appear to have been used for shelter, as a place for the storage of sacred objects or for obtaining special spiritual powers. However, other aspects of cultural significance are, in my opinion and based on the data I have reviewed, relevant to location 10.
85. In Table 3.2 below I list the characteristic or purpose of the cave which was location 10, based on the evidence I have reviewed. In this I am of the opinion that the evidence adduced supports the view that location 10 shares five purposes or functions with

location 8. The viability and or integrity of those cultural purposes or function are again summarised, based on the references above noted in column 3 of Table 3.2.

| Purpose or function | Viability, integrity? | Reference loc 10 |
|--|---|-------------------------|
| Place for spirits. | Yes, but subject to access and the management allowed. | 76-79. |
| Burial. | Former burials preserved; however, location hostile; access for ritual maintenance now forbidden. | 76-79. |
| Testament to ordaining sanctity of Dreaming through Burndud performance. | The relevant Burndud song can be sung but the environment and context of the cave, along with lack of access means it cannot be used as an exemplar of this aspect of creation Law. | 65-66. |
| A place to manage in relation to mining. | No. Caused division within the Yindjibarndi community. | 77, 79. |
| A place to manage in relation to Yindjibarndi Law and custom. | No. The place has not been managed according to the tenets of Yindjibarndi Law. | 79. |

Table 3.2: location 10.

86. To the extent that ‘sites’ can provide a means to understand the social and cultural values that are reflected by the relationship between the Yindjibarndi and place or *ngurra*, I have shown that the cave site (location 8) and the burial site, which was location 10, are significant for a number of cultural reasons. These are embedded in the fabric of what the Yindjibarndi believe to be a divinely ordained and prescribed order. Thus place as exemplified by examination of the constituent parts of *ngurra* (that is, ‘sites’) has shown that there are multiple layers of significance and importance attached to a single location. I have provided my analyses and conclude that the operations of the mines at the Solomon Hub have impacted these places with consequential cultural loss.

87. I am of the opinion that the categories ascribed by others (that is, those who are not Yindjibarndi) to impacted sites in no way serves to mitigate or lessen those impacts and consequential loss.

LOCATIONS 5: A HABITATION AND RESOURCE AREA

The physical context

88. Participants in the mine tour were shown, ‘an archaeological artefact scatter which has been salvaged.’⁵⁰ This was ‘location 5’ on the Map of Mine View. The evidence led at this place was silent on the degree of damage done to the former habitation area. My

⁵⁰ Transcript, 454, Mr Hughston.

own observation during my visit and based on my knowledge and experience of these matters is that the area of flat ground adjacent to the creek was subject to some ground disturbance. The process of ‘salvage’ at the site, by my understanding of the process and its rationale, indicates that there is an expectation that potentially the site will suffer further detrimental incursion.

Culturally significant artefacts and rules for their management

89. Mr Woodley showed the court stone artefacts he found at the site (Transcript, 456 – 457) and he and other senior men described how these were used in time past to produce items of material culture of continuing use and significance to the Yindjibarndi people (Transcript, 457 – 460). Mr Woodley explained to the court that stone artefacts should never be removed from the countryside, according to the tenets of Yindjibarndi Law (Transcript, 460 – 461). Mr Michael Woodley stated,

But from the Yindjibarndi point of view nothing can be taken the country.
You know, how it was left for us?

Transcript, 460.

90. By my understanding, Mr Woodley’s meaning was that the country had been left for the Yindjibarndi people intact and complete and to act in a way that would in any way diminish its integrity would be contrary to Yindjibarndi Law. By this account, then, salvaging the site (that is collecting the artefacts, or at least some of them) and storing them at an undisclosed location has broken Yindjibarndi Law.

Ganyjingarringunha *wurndu* (Kangeenarina Creek)

91. Location 5, an area of prior habitation by Yindjibarndi ancestors, was adjacent to Ganyjingarringunha *wurndu* (creek) that flows (or once flowed) in a southerly direction through what is now the Trinity and Kings pits and the Kings Ore Processing Facility.

92. Mr Hughston stated that Trinity pit, ‘was where the Ganyjingarringunha used to be’ (Transcript, 461). The statement was not challenged. Mr Woodley concurred and four participants had driven down the former river valley and gained an idea of the size, depth and extent of the pit.⁵¹ Counsel then asked Mr Woodley whether the Ganyjingarringunha *wurndu* (creek) was important to the Yindjibarndi people. Mr Woodley responded as follows.

⁵¹ Charlie Cheedy, who has first-hand experience of working in the mines, described the extent of the pits and related infrastructure in his witness statement at paragraphs 23-27.

Well, it's important for couple of reasons, right? The people of this area what we call *ngurrara-ngarli*, Yindjibarndi people, stay and they use this river for their livelihood. It's what gives them, you know, the water, the food, everything that, you know, sustains our survival. The second reason for that is that is also a path for all of the *manjangu*. coming through. *Manjangu* come from that way - you know, Banjima? They used to if they want to get up here to Law camp just up there. Right? So they would travel in the river. Yindjibarndi give them permission to travel in the river, safe passage.

Transcript, 461.

93. In response to further questions Mr Woodley expanded on the rules that governed access by strangers (*manjangu*; Transcript, 461 - 462).
94. In his witness statement Mr Ricky Smith said that he had utilised the resources of Ganyjingarringunha Creek (Mr Ricky Smith, witness statement, 10). Mr Kevin Guinness made a similar statement (witness statement, Mr Kevin Guinness, 12, 47-48). Mr Woodley stated that the creek was also the source of a commodity that he was not prepared to speak about in open court (Transcript, 520).⁵²
95. The *wurndu* was then of economic importance as a food, resource and water source as well as having ritual and social significance, subject to customary rules of access and use. Mr Woodley also explained that the creek had a third significance (Transcript, 462 ff). I return to a consideration of this evidence below (see paragraph 113 ff).
96. The Yindjibarndi witnesses also gave evidence at Ganyjingarringunha in relation to the environmental consequences to the whole creek system, which are a result of the operations of the Solomon Hub mines. Mr Woodley had visited the area that is now the mine sites some time prior to 2009 (Transcript, 470). He had visited the area, 'a few times you know. ... I would say about four or five times' (Transcript, 470). He was asked whether he had noticed over that period of time any change to the vegetation. Mr Woodley responded,

Yeah. ... You can see it drying up,⁵³ all the trees are like that, look see, all dying. [Pointing to dead trees.] And that's - and that's going way up that way into that - to that mine that we just went to, you know, to Trinity. [Pointing south.] When you leave that, you can see it, you know, from - we was driving up actually to - to find the pit. I pointed it out to the guy. That's the first thing caught my eye, you know, me and Kevin. And it wasn't like this when we first come, you know. That's some of the changes.

⁵² Charlie Cheedy also made reference to this resource in his witness statement, paragraph 18.

⁵³ Footnote added. The transcript has 'driving'.

Obviously that's – that's a change and then everything else you see as well, so it's a massive – that's a massive change.

Transcript, 470-1.

97. Other witnesses stated that the dead trees were a consequence of FMG extracting water from the aquifer and expressed other environmental concerns relating to the extraction of water which was being done without their consent.⁵⁴

Ganyjingarringunha *jinbi* (spring)

98. During the taking of evidence adjacent to Ganyjingarringunha creek at location 5 counsel for the applicant, Mr Hughston, asked Mr Stanley Warrie about a *jinbi* that was formerly close by within the Ganyjingarringunha creek (Transcript, 475). Mr Warrie acknowledged that this had been the case and stated that its importance to Yindjibarndi people was due to its cultural significance as a place where Yindjibarndi people had lived for 'thousands of years' (Transcript, 475). Stanley Warrie explained to the court that he had visited the area in 2007 when undertaking a heritage survey. He explained the circumstances as follows.

We were coming along through a track of bulldozer tracks going across the river and that's when I said, you know, when Garliwinjinha tracks I saw the thing, you know, crossing the thing and I know the *jinbi* there coming, you know, on the thing. And I think, told them not to - not to cross that thing in the *jinbi* or do anything to destroy that thing, you know, and that was – that's all where the old pipes what you maybe say took off.

Transcript, Mr Stanley Warrie, 475 – 476.

99. Mr Hughston sought to clarify Mr Warrie's statement, commenting, 'So you saw the bulldozer tracks and they were near that *jinbi* and so you said "make sure you don't damage that *jinbi*"' (Transcript, 476). Mr Warrie agreed with this account. I note that, by my reading of Mr Warrie's evidence, he had knowledge of the existence and location of the *jinbi* prior to his visit there in 2007 since he stated, 'I know the *jinbi* there coming, you know, on [in] the thing [creek].'⁵⁵

⁵⁴ Witness statements, Mr Stanley Warrie, 25, 100, 128; Ms Lyn Cheedy, 19; Mr Middleton Cheedy 9, 24, 37; Mr Kevin Guinness, 26, 28, 51, 59; Mr Angus Mack, 51, 88; Mr Charlie Cheedy, 23-24; Mr Isaac Guinness, 34.

⁵⁵ Mr Hughston had stated that Mr Warrie had had 'come across' the spring during the survey, implying perhaps that he did not know of its existence prior to the survey. This is not consistent with my reading of Mr Warrie's statement to the court.

100. Mr Warrie described how he had subsequently learnt that the spring had been damaged and FMG had apologised for this damage in a letter.⁵⁶ Mr Warrie stated that there may have been other negotiations relating to the damaged spring, but he could not now recall them due to his impaired health (Transcript, 476). Mr Kevin Guinness told the court how he used to visit the spring when he was a child and before the mining commenced (Transcript, 476-477). He described the location as being very beautiful and rich with wild life and resources. ‘But yeah, all this was beautiful and full of water, *milanja*. *Milanja* is fish. And the bird’. (Transcript, 477). Now, however,

all this destroyed, the *ngurra*, and all this - all the - stuffing up all the *ngurra*, all this all dry, no bird no life, you know it really - *wirrard*, makes your *wirrard* feel no good, you know.

Transcript, 477, Mr Kevin Guinness.

101. In his witness statement Mr Stanley Warrie explained that he had warned FMG workers to avoid the spring, following his observation during a heritage survey that ‘bulldozer tracks [were] going across the Ganyjingarringunha *jinbi* (spring)’ (Witness statement, Mr Stanley Warrie, 20). Mr Warrie then stated,

Not long after I asked the FMG workers to go around the *jinbi*, FMG destroyed the site with a bulldozer. After a letter was sent from Andrew Forrest apologising for destroying the Ganyjingarringunha *jinbi*, we were really upset because we had told them about the important site, and they then destroyed it. I felt like it was my fault. I thought to myself ‘did I cause its destruction because I told FMG about it?’. I felt really upset and angry and I still am.

Witness statement, Mr Stanley Warrie, 21.⁵⁷

102. Mr Warrie also spoke of the *jinbi* when he gave evidence to the court at Banggangarra (Transcript, 596 ff). Mr Warrie explained that the *jinbi* was of spiritual significance.

... And that’s very - and it’s spiritual in the water that thing you know and that’s a law thing.

Transcript, 596, Mr Stanley Warrie.

⁵⁶ The letter is reproduced in part in my 2022 report (Palmer 2022, 312).

⁵⁷ Mr Warrie provided a fuller account of his feeling, emotions and sense of cultural loss when he gave evidence at Banggangarra. See Transcript, 598.

103. Mr Warrie also stated that he did not know whether FMG had damaged the site, but though, ‘in a way they did’ (Transcript, 597).⁵⁸ In his witness statement Mr Warrie said that, ‘the *jinbi* is gone forever’ (witness statement, Mr Stanley Warrie, 21).
104. I consider the spiritual aspects of the cultural significance of this *jinbi* in a subsequent section of this report (see paragraphs 121 to 126).

LOCATION 7: GANYJINGARRINGUNHA YAAYU (KANGEENARINA EASTERN BRANCH)

105. The eastern branch of the Ganyjingarringunha creek (referred to as Ganyjingarringunha *yaayu*) formerly flowed westward to join the main creek in the vicinity of the Kings Ore Processing Facility (Transcript, 474). This was viewed from ‘location 7’ on the tour (Transcript, 481 ff). During the visit to the mine, Mr Hughston asked Mr Woodley whether the valley was still there. Mr Woodley responded in the negative (Transcript, 474). In response to a further question, Mr Woodley described the activities that had obliterated the natural features of the valley, including the creek.

They got a big track and road and mine site there as well. That’s the Firetail is somewhere there, you know. The Firetail Mine is somewhere there I think. But all that stuff is gone now. And the infrastructure and I think ... [expresses some uncertainty] ... that’s where the conveyor belts run too - right down to the very end of there. Then that’s where they log [load] their trains up.

Right, so all of this stuff now, that *yaayu* Ganyjingarringunha all gone.

Transcript, 475, Mr Michael Woodley.

106. I discussed aspects of the significance of country to the Yindjibarndi people in terms of providing a history of their Law and culture in my expert report (Palmer 2022, 321-332). In that account I set out data provided to me by Charlie Cheedy relating to the Ganyjingarringunha creek, including its branches, that were formerly used as through routes by those who occupied the country or traversed it (*ibid.*, 326-332).⁵⁹

⁵⁸ The *jinbi* is not marked on the applicant’s map E2. The *jinbi* is marked on Map of Mine View where it is (I infer, based on the evidence and my observations during the mine tour) identified by a small red circle with associated numeral ‘6’. On the applicant’s map E2 a bulldozed track can be seen crossing the creek and it is this track which I infer is the one discussed in the evidence reviewed here relating to the *jinbi*.

⁵⁹ See also Transcript, 461, Mr Michael Woodley; 681, Mr Fabian Cheedy.

LOCATION 12: *THALU* AND THE TAILINGS DAM

107. The final stop during the mine site tour was the tailings dam, identified for the parties as ‘location 12’ (Transcript, 495 ff). Counsel for the applicant, Mr Hughston, explained to the court that there was a *thalu* site, ‘now drowned in that tailings dam’ (Transcript, 495). Ms Lyn Cheedy had explained to the court, in response to questions asked of her by Mr Ranson, the cultural significance of a *thalu* site.

So in Yindjibarndi laws and customs, when you talk about *thalu* sites, they are a specific site and it’s called – it’s an increase site and so if we were running out of flour, we’d go to the *jirra* and the men and the women would do it and the ladies would dance and it would increase the flour so that there’ll be more flour when the times come and we would pick that and when it dries put it into a grinding, make flour and make damper out of it.

Transcript, 255.

108. *Thalu* were mentioned a number of times by the witnesses when giving evidence. They were also mentioned multiple times in the witness statements.⁶⁰ Mr Angus Mack discussed some of the *thalu* he knew of in his witness statement and described the impact of the destruction of *thalu* for the Yindjibarndi who holds responsibility for it (witness statement, 89-96). It is his belief that his own father died because he was unable to prevent the flooding by the Harding River dam of a rain *thalu*. Because the site was destroyed he was unable to hand down his knowledge of the place to his sons (Transcript, 95). Mr Angus Mack stated that when a *thalu* is destroyed it is no longer possible to explain to others its significance,

because it is no longer part of the country and no longer part of you. It is missing. So, when you’re singing about the site, you can see the place in your mind, but it is actually no longer there. It is a heartbreaking experience.

Witness statement, Mr Angus Mack, 96.

109. I have discussed the purpose and significance of *thalu* to the Yindjibarndi in my expert report (Palmer 2022, 67-69).

CONCLUSION AND OPINION: LOCATIONS 5, 7 AND 12

110. Based on my review of the evidence given by the Yindjibarndi during the tour of the mine sites, I have identified the sites we visited and conclude that all have been either

⁶⁰ I find 37 instances in my combined witness statements.

damaged or destroyed. The lost cultural significance of these locations as expressed in the evidence included their attesting to past use and occupation and the rules for social engagement with others who did not have rights to Yindjibarndi country. There was also evidence adduced that supported the conclusion that mining had damaged the environment, particularly as a consequence of what is assumed to be the lowering of the water table.

111. It is further evident from the materials considered above that both the main course of the Ganyjingarringunha creek has been destroyed while one of its eastern branches has also been materially impacted and parts destroyed by the mine and associated infrastructure. Finally, the claimants gave evidence that a *thalu* site had been destroyed, having been buried or drowned under the tailings dam.

112. Based on these data, including the responses given by the claimants to their emotions and feelings about the damage and destruction I consider that it is evident that in each case the Yindjibarndi consider the impact of the mine to have diminished their cultural heritage and to have caused them emotional and spiritual distress. I am further of the opinion that the sites that were chosen for the mine site tour represent but a small sample of the many sites that have been destroyed by the mine. I base this opinion on the data I have considered in chapter 2 above. The fact of cultural loss expressed through an analysis of specific places and the adverse feelings such loss evidently occasions is amplified by the quantum of loss, evidenced by the enormity of the Solomon Hub excavations.

4. CLAIMANTS' RESPONSES TO THE MINE SITE TOUR: GANYJINGARRINGUNHA *WURNDU*

BARRIMIRNDI (MYTHIC BEING)

113. In my expert report I describe some of the characteristics of what the Yindjibarndi often refer to as a song line (Palmer 2022, 342). A song line is a performative medium consisting of a series of verses which are sung, sometimes within a ritual setting. The subjects of each song follow sequentially across the geographic landscape (*ibid.*). Based on my knowledge and experience working with the Yindjibarndi and neighbouring groups I know that they provide a means to narrate, with contextual exegesis, the events of the creative period, the Ngurra Nyujunggamu. Performance is understood to evoke the spirituality of the foundational era and its creative and ordaining characters.

114. I discuss 'song line' and its significance to Yindjibarndi culture a number of times in my expert report.⁶¹

115. Mr Michael Woodley told the court that Ganyjingarringunha *wurndu* held significance for the Yindjibarndi people because it was created by the mythic being of the Ngurra Nyujunggamu.⁶² According to this belief, the creative being Barrimirndi, 'travelled through this area and came down this river' (Transcript, 462). Barrimirndi travelled from the sea in a southerly direction, traversing Hooley Creek, which is north of the Solomon Hub area, and then up Hamersley Gorge, which is to the east of the Hub (Transcript, 463, Mr Michael Woodley). He then turned to the west before travelling down the Ganyjingarringunha creek in a generally northerly direction and across what is now the Trinity mine and other infrastructure and so passed the location of Banggangarra. Mr Woodley stated that the being,

travel right down here [location 5, adjacent to Ganyjingarringunha Creek] and then come down here to Ganyjingarringunha. Then he kept going that way then, following the Hamersley Range.

Transcript, 463, Mr Michael Woodley.

116. Mr Woodley identified the Barrimirndi as a *warlu* (mythic serpent or snake) (Transcript, 465) who created, as he travelled, the Ganyjingarringunha Creek (Transcript, 466). Mr Woodley told his Honour that,

⁶¹ For example, Palmer 2022, 298, 344, 346-355, 358-362, 365, 366.

⁶² Transcript, 462 ff.

The Barrimirndi is the Sea Serpent, your Honour. And that's the one that we talk about in our Native Title case as well, who created the Fortescue River, you know?

Transcript, 466, Mr Michael Woodley.

117. I discussed the Barrimirndi and its creative powers in my expert report (Palmer 2022, 66, 339) and I documented its travels (*ibid.*, 374 - 375). The account I recorded is consistent with that outlined above. Senior Yindjibarndi claimants drew these travels on a large map which I reproduced as Figure 6.5 in my report (*ibid.*, page 124). This map was subsequently shown to Mr Woodley when he was giving evidence at Banggangarra (Transcript, 620 – 621). Mr Woodley confirmed that the map showed the travels of the mythological beings, which he called ‘the song lines’. The account I set down in my 2022 report described how Barrimirndi headed west out of Ganyjingarringunha creek approximately 5 kms south of the locked gate which is located on the track that runs from the mine site down the valley and passes Banggangarra (Palmer 2022, 375). My account is based on the ethnographic data I collected during my period of field work and is documented and discussed in the 2022 expert report (Palmer 2022, 375 and 376, Figure 6.5 page 124).

118. The creative activities of the Barrimirndi are narrated, celebrated and rehearsed through the performance of a song line known in Yindjibarndi as a *jawi*. The *jawi* is believed to have originated from the spiritual realm through the agency of a person, in this instance, a man now long deceased who was called Old Blind Billy or Bambardu. It is a series of songs that relate creative ordaining beings directly with the topography of the landscape. A singer is transported metaphysically into the countryside which is the subject of the song.⁶³ Barrimirndi is one in a pantheon of mythic beings the Yindjibarndi espouse, attested today by the landscape it formed and spiritually evoked through the ritualised performance of the *jawi*. I have discussed this *jawi*, its spiritual foundations and representation in my 2022 report (Palmer 2022, 375 – 376). In his evidence Mr Woodley attest to the representation of the Barrimirndi through the performance of the *jawi* transposed upon the topographic features it is believed to have created (Transcript, 462 – 464). Mr Woodley offered to sing one of the songs from the *jawi* that related to Ganyjingarringunha (Transcript, 464) which the Barrimirndi also created (Transcript, 466).⁶⁴

⁶³ Witness statement, Mr Michael Woodley, 50. See also witness statement, Mr Angus Mack, 50.

⁶⁴ As things turned out, other evidence intervened and the *jawi* song was not performed.

119. During the tour of the mine site it was evident that a central portion of Ganyjingarringunha Creek had been destroyed, while the Trinity Pit appears to have obliterated the creek altogether. From the tailing dam wall (location 12) on the mine site tour Mr Woodley pointed out the creek course in relation to the Trinity Pit. Both were clearly visible from the elevated location. Mr Woodley stated,

as you follow the creek line and you get to that, where that sort of a hollow part there, you can see over there there's a, there's a pit, that's the Trinity Pit where we came this morning and that's where the Ganyjingarringunha Creek stops now because it's now been taken away.

Transcript, 497, Mr Michael Woodley.

120. Mr Fabian Cheedy, who was working in the mines at the time, also gave evidence that Ganyjingarringunha creek had been destroyed (Transcript, 680-1). Mr Kevin Guinness stated that the works associated with the mining have altered the course of Ganyjingarringunha Creek so it no longer flows through the mine area (witness statement, Mr Kevin Guinness, 28). Mr Kevin Guinness had urged FMG employees not to build a haul road through the creek (*ibid.*, 56). At the time he prepared his witness statement he thought the road had been built (*ibid.*). By my observation, made possible by the mine tour, the road traversed a large central portion of the creek, thus obliterating it.

THE *JINBI* (SPRING)

121. In paragraphs 98 to 104 above I discussed some aspects of the cultural significance of the *jinbi* or spring which was located in or adjacent to the Ganyjingarringunha creek. The spring has either been destroyed or damaged by the mining activities. I noted that Mr Warrie had informed the court that the *jinbi* was, 'spiritual in the water that thing you know and that's a Law thing' (paragraph 102).

122. In my expert report I discuss the Barrimirndi (Palmer 2022, 66), citing materials sourced from the Juluwarlu website that show that according to Yindjibarndi belief, this mythic being made the pools and other natural features of the Fortescue River. Mr Woodley, when giving evidence to the court at Banggangarra, also made reference to this creative action (Transcript, 466). Barrimirndi is now associated, 'with our significant, you know, river and watercourses' (Transcript, 507). In his witness statement, Mr Woodley explained in detail the relationship between Ganyjingarringunha *wurndu* and the Barrimirndi.

Ganyjingarringunha *wurndu* (watercourse) is particularly significant for Yindjibarndi People. Barrimirndi is always present there. Barrimirndi is the Marga who, in the form of a great *warlu* (serpent), created all the *wurndu* in Yindjibarndi *ngurra* during the Ngurra Nyujunggamu. Ngurra Nyujunggamu means “when the world was soft” and it is the Yindjibarndi creation time.

Witness statement, Mr Michael Woodley, 10.

123. In my view and based on these statements, the creative powers of the Barrimirndi are believed to have been responsible for the *jinbi* which are a part of the Ganyjingarringunha creek system.

124. Mr Warrie understood the spirituality of the *jinbi* (and other places) to be correlate with his own inner spirit (*wirrard*). The destruction or damage to the Ganyjingarringunha creek and the *jinbi* has had a corresponding effect on his himself and his *wirrard*.

you feel saddened for country, you know, looking at, you know how destruction of the *jinbi*, would impact on country, in a lot of thing as well, it's a spiritual thing but a lot of animals, plants and animals, you know, depend on this thing as well too, you know.

Transcript, 598, Mr Stanley Warrie.

125. Mr Warrie continued,

I think you look at it from a Yindjibarndi's point of view. When *jinbi* in a spiritual thing, is a spiritual thing because if you see that thing - if you see that thing drying up then your *wirrard* will go dry and sort of a (birr) on it we say drying up the land normally we would say, looking at the land. Now (birr) on it that it's, it's trying to tell them, you know, this is what's gonna happen if you're gonna keep interfering with it.

Transcript, 598, Mr Stanley Warrie.

126. Mr Woodley now feels a responsibility to look after such places that are associated with this mythic being. He believes that should he fail in his duty, ‘not fulfilling our obligations and protecting the things, we get harmed. So that's how it makes me feel.’ (Transcript, 510, Mr Michael Woodley).

BURNDUD AND THE BARNGA (SAND GOANNA)

127. I discussed evidence Mr Woodley gave at Banggangarra in relation to a map of the travels of the Burndud and other mythic beings in the area of the Solomon Hub mines (paragraph 117 above). After Mr Woodley had answered questions put to him by

Mr Hughston about the map (Transcript, 620-621; Palmer 2022, Figure 6.5, page 124) his Honour asked Mr Woodley to explain the coloured lines marked on the map. Mr Woodley responded by describing the song line that related to the Burndud (Transcript, 621). The song line is understood to have travelled across the countryside, creating and celebrating various aspects of Yindjibarndi culture, belief and natural objects and features of the landscape (Transcript, 621-623). The performance of the song line and associated rituals follows the path of the travel of the Burndud. The particular portion of the song line drawn on the map relates to the activities of the Barnga, the sand goanna. It is represented by a pink line on the map (Transcript, 621-622). Mr Woodley traced the travels of the Burndud as represented by the pink line on the map (Transcript, 621-2). He identified locations on the journey, along with the cultural references that are the subject of constituent songs. These can be summarised as follows:

- (i) Roy Parsons Gorge (Wanduwarranha), song of the place;
- (ii) Travelling from Wanduwarranha, song of the clouds ‘coming in’;
- (iii) Travelling south and then in a semi-circle to the north east, song of the boomerang,⁶⁵
- (iv) Travelling west up the lower gorge of Ganyjingarringunha *wurndu* to Banggangarra,⁶⁶ song of the sand goanna *barnga*;
- (v) Travelling south into Gurama country, song of the spear thrower.

Transcript, 621-622, Mr Michael Woodley.

128. Based on this account, the portion of the Burndud song line considered here, traverses southern and eastern parts of what is now the Solomon mine complex, as well as areas to the west of or adjacent to Ganyjingarringunha Creek.
129. Mr Hughston asked Mr Woodley whether Gamburdayinha (the Hamersley Range) and Ganyjingarringunha featured in creation stories and Burndud songs (Transcript, 510). Mr Woodley answered in the affirmative, confirming that both areas played, ‘a significant role’ in the Burndud songs (*ibid.*). Earlier Mr Woodley had described Ganyjingarringunha as ‘sitting in the Hamersley Ranges’ (Gamburdayinha; Transcript, 506). With respect to Ganyjingarringunha creek Mr Woodley stated that, ‘it’s part of the song cycle as well that we sing’ (Transcript, 506) and that it was associated with the Barrimirndi (Transcript, 507). Mr Hughston, making reference to the Birdarra

⁶⁵ In my understanding the path of travel equates to the path of travel of a thrown boomerang.

⁶⁶ The transcript has ‘(Bunagmarina)’ with parenthesis in the original, indicating that the transcriber was unable to identify the name used. It is evident from the data available to me that this segment of the Burndud rehearses the exploits of the sand goanna who was responsible for the creation of the gorge, waterfall and pool now found at Banggangarra (Palmer 2023, 348 – 352, 361).

law (the ritual practice during which the Burndud songs are sung), asked if there were songs for Gamburdayinha or for Ganyjingarringunha. Mr Woodley replied in the affirmative, stating,

you can't have a Burndud that doesn't have those things in there. ... They the thing that connects the song lines together and it, again, teaches the young kids how, you know, about what the Burndud is, what it's singing about and how you connected to that, you know, song line and the culture.

Transcript, 512, Mr Michael Woodley.

130. Mr Woodley was then asked how mining had affected both the Hamersley Range and Ganyjingarringunha creek.

Well, when we singing now, when we – how we taught – how we are taught about these songs, the elders would be leading the Burndud and we would – young people would – we got to – if you want to know, you got to ask the elder. When he finish the song, young people in the Burndud will say to the elder, (Aboriginal language spoken). That mean "What's that? What's the song you just sung?" And the elder have to explain it. So when we sing about this place now in the song line and the young, you know, the young men sing out (Aboriginal language spoken), we'll say, "Well, (Aboriginal language spoken). And we can see it yuk, in our what you call it – in our - - -

Mr Hughston: Pointing to your head, yes - - -

Mr Woodley: - - - in our head. And when we see this place we associate it with what's happening here with the mining activities. Then the next thing come out, the next phrase come out of our mouths is (Aboriginal language spoken). Mean 'Sorry for that land being mined and it been taken away'.

Transcript, 513, Mr Michael Woodley.

131. In my expert report I note the role of exegesis in the performative process (Palmer 2022, 349). I am not aware that there is a specific Burndud song that celebrates Ganyjingarringunha *warlu* by name, or the Hamersley Range by name.⁶⁷ The songs are situated within the countryside by contextual discussion and teaching (*ibid.*). Both places are, in my opinion and based on the data reviewed, significant components of the performative process of the Burndud and so too of the context of its spiritual and cultural significance.

132. Mr Woodley states that the necessary exegesis is severely compromised by the factual consequences of the FMG mine. He had stated that you could not have a

⁶⁷ Wanduwarranha (Roy Parsons Gorge) is named in the song that celebrates this place. Burndud songs with translations provided by Mr Michael Woodley 12 May 2022.

Burndud without the Ganyjingarringunha creek. The reasonable implication of his statement is that if you do not have the Ganyjingarringunha creek, you cannot have the Burndud. While portions of the creek remain, the Burndud can be understood to be devalued and diminished by the degree to which its component geographic parts are destroyed or damaged.

CONCLUSION AND OPINION: SONG LINES AND DAMAGED COUNTRY

Barrimirndi and *jinbi*

133. Barrimirndi was a creative mythic being, having the form of a huge snake or serpent. He is associated with many rivers, creeks and pools which it is believed he created (paragraphs 122 and 123 above). In my opinion, based on the data reviewed above, Barrimirndi is directly connected to the whole of Ganyjingarringunha creek and its springs and water holes. These he is believed to have created in the course of his travels and his spiritual presence remains there to this day (paragraphs 121 and 122 above).
134. I have considered some of the evidence that was adduced, particularly during the mine site tour, but have also considered other evidence and witness statements. I consider it uncontroversial to conclude that Ganyjingarringunha Creek has been destroyed in its central portions in the vicinity of the Trinity Pit. I also am of the opinion that it has been damaged and altered in other areas within the mine sites (paragraphs 119 and 120). The spring within the creek system which was the subject of evidence adduced at location 5 has been either damaged by a bulldozer or destroyed (paragraphs 98 to 103). It also seems likely that the underlying water table has been reduced, with consequences for the natural environment (paragraph 96 to 97).
135. In my opinion and based on the data I have considered, Ganyjingarringunha and its component springs and pools are of significant cultural, spiritual and emotional significance to the Yindjibarndi people (paragraphs 121 - 125). The cultural significance is founded in part on the beliefs that relate to the ordaining actions of the great creative beings in the Ngurra Nyujunggamu. Place attests to belief and its existence therefore validates the credo. Absence of place or its transformation by mining and excavations compromises or negates this process, depending on the extent of the damage incurred (paragraph 125). The place is also judged to be spiritually potent and vital such that any damage to the creek and its associated water sources is understood to be an injury to the spiritual essence of the country (paragraphs 121 - 125). Failure in the exercise of the duty

to protect such a place, a responsibility of those with customary rights to the land, is understood potentially to incur the wrath of the spirit injured and the opprobrium of others (paragraph 126).

136. I have also demonstrated that there is a correlative that is believed to exist between a Yindjibarndi person and his or her country. This is understood to be reflected in a person's spirit or *wirrard*. By this way of thinking and believing, damage to country incurs harm to the person who has rights in it and who holds responsibility for it (paragraph 125).

137. The impact of the mines on Ganyjingarringunha creek and spring can be assessed in terms of the cultural losses I have identified in paragraphs 113 to 120 above and the summary I have provided in paragraphs 133 to 136.

Burndud

138. I presented field data in my expert report (Palmer 2022, 342 - 357) that supports the conclusion that the Burndud songs are a celebration of the endowment of the Yindjibarndi *ngurra* with cultural objects, natural species and resources. Storm clouds, animals and birds, reptiles and items of material culture are a part of the Yindjibarndi cultural universe ordained in the creative period of the Ngurra Nyujunggamu (*ibid.*). I present substantial detail in this account, showing the diversity of the beliefs in the creative activities (*ibid.*).

139. Burndud is conceptualised as following a path having successive named landmarks now identified with places in the countryside. The sequencing of the songs is believed to replicate the order of the creation activities described in the songs (Palmer 2022, 353). This is likened to the tracing of *jina* (footprints) across Yindjibarndi country (*ibid.*, 339, 346, 358, 368). I noted that the *jina* or track is 'neither singular nor confined' (Palmer 2022, 354; see also 56 and 361). Pathways are complex and may be represented as taking different routes (*ibid.*, 348, 354).

140. I have presented data in my expert report that supports the opinion that the Burndud performance is believed to be a reenactment of the ordaining acts of creation it first served to effect (Palmer 2022, 50-55, 363). It is also believed to revivify the country and sustain and perpetuate the link between those with rights to the country and that country, through the agency of the *wirrard* (*ibid.*, 58, 171, 189, 191, 264 and 363).

141. I have also presented data that support the conclusion that the Yindjibarndi regard the Burndud ritual as being of supreme importance. It is central to the initiatory

ceremonies that are an annual part of the ritual calendar of the Yindjibarndi. The enactment of the Burndud is essential to the continued spiritual welfare of not only the present generation but also to all successive generations (Palmer 2022, 57, 364). The performance as part of a ritual that serves to make a boy a man ensures continuity of ritual knowledge and so too the inexorable link between a Yindjibarndi person and country (*ibid.*, 364).⁶⁸

142. In summary, the Burndud can be understood to be of fundamental spiritual, emotional and social importance to all Yindjibarndi for three principal reasons. First, the Burndud is conceptualised as a creative journey which records the progress of ordaining songs across the countryside. Burndud ascribes a spiritual quality to country which it created. The spiritual attributes are now believed to inform the natural and social world of the Yindjibarndi. The spirituality the Burndud ordained is in its quiddity pervasive, suffusive.
143. Second, the Burndud provides the continuing basis for a significant aspect of the relationship between the Yindjibarndi and their country through the belief in their spiritual correspondence with it. The unity of person and country through spiritual correspondence endorses the command of rights within it.
144. Third, Burndud has cultural significance because it provided the basis for the induction of boys into manhood and the perpetuation of knowledge and teaching of the creative events that the Burndud occasioned. It is then a ritual that serves to sustain and perpetuate the cultural values, normative references and ritual knowledge that lie at the heart of what it is to be an Yindjibarndi person. In my opinion this represents far more than a mechanism to ensure social continuity. It is a means to endow, renew and perpetuate the abiding spiritual relationship that Yindjibarndi people believe they have with their country.
145. It is consequently my opinion that the integrity of the Burndud, as it articulates the relationship between person, country and its resources and the perpetuation of that relationship and associated beliefs through time is of supreme importance to the Yindjibarndi with whom I have worked. Its loss or partial loss threatens the fundamentals of the Yindjibarndi social, cultural and religious systems. It also threatens the mechanisms whereby they are able to legitimise and perpetuate their rights to

⁶⁸ ‘... responsibility and obligation that, you know, they too, you know, are coming towards – you know, coming, you know, the transition from a boy to a man and they have to carry on in those – in the knowledge and the transfer of knowledge, you know, for the next generation.’ Transcript, 511, Mr Michael Woodley.

country. Such a loss occasions deep emotions, regret, disquiet and guilt. I review some examples of this in paragraphs 150 to 157 below.

146. Based on my review of these data, I conclude above that portions of the Burndud song line have been impacted by the activities of the mine (paragraph 127 to 132 above).

This was a conclusion that I also reached in my expert report (Palmer 2022, 362).

147. In my 2022 report I set out field data that documented the response of the senior Yindjibarndi men to the impact of the mine on the Burndud song line and the values and normative referents they derive from it (Palmer 2022, 363-373). A principal response I there enunciated was that the Solomon Hub mines have meant that parts of the song line were no longer attested by the country, which had been mined. The data I here consider endorses this conclusion, as do my own observations during the mine site tour of the size and extent of the mine and associated infrastructure.

148. Based on the data reviewed here, it is evident that substantial portions of Ganyjingarringunha Creek have been destroyed and much also damaged or altered. Based on the data I have reviewed above Ganyjingarringunha creek represents a significant aspect of the beliefs and values relating to the Burndud. These values have been eradicated or diminished as a result of the mines. I also noted in my expert report that those with whom I worked were of the opinion that while the place Banggangarra had not been destroyed by the mine, it had suffered diminishment as a consequence of the mine (Palmer 2022, 370).

149. The impact of the mines on the Burndud can be assessed in terms of the cultural losses I have identified in paragraphs 142 to 145 above.

5. CLAIMANTS' RESPONSES TO THE MINE SITE TOUR: LOSS OF *NGURRA* (COUNTRY)

EVERY CORNER, THE HEART OF US⁶⁹

150. During the mine site tour Yindjibarndi men and women expressed their reaction to the transformation of their country by mining activities. As I demonstrate in this chapter, they expressed a range of emotions including distress and a deep sense of loss and guilt. As some of the data reviewed above illustrate, this was sometimes expressed in direct response to particular locations we visited and the questions asked of them by counsel. However, not all statements of loss and grief were made with respect to single places. In my assessment some of the most powerful statements of cultural loss and person anguish were made in relation to the whole area that had been subject to the substantial alterations wrought by the mines. In what follows I provide data extracted from the transcripts that support this opinion.

WITH BROKEN HEART AND BROKEN SPIRITS⁷⁰

151. The court witnessed a 'welcome to country ritual' performed in the vicinity of location 3, as marked on the Map of Mine View. This ritual was not transcribed. Both actions of the men and women and their identities at location 3 were recorded for the transcript by Mr Hughston and Ms Jowett (Transcript, 453) and some additional evidence was also taken.

152. Mr Warrie spoke briefly at this time during the visit to location 3. My reading of the transcript (Transcript 454) and my observation at the time was that his statements were not planned and his words were the consequence of his emotions when participating in the welcoming ritual while looking over the extensive mining excavations and diggings. Mr Hughston acknowledge to his Honour that 'Mr Warrie is very upset' (Transcript, 454). Mr Warrie expressed his emotions as follows,⁷¹

Yes, sorry, huge - - - You don't know – recognise it – FMG thing. But no one recognise. This is my land, stolen from me ... Everything, even government. It is my ... and it's all been destroyed. My dreaming, my

⁶⁹ Transcript, 481, Mr Stanley Warrie.

⁷⁰ Transcript, 480, Mr Michael Woodley.

⁷¹ I reproduce the transcript without two interpolations provided by counsel.

stories, my dreamtime stories. My land, Yindjibarndi land, where my religion – this area is the cornerstone of my religion – stolen from me.

Transcript, 454, Mr Stanley Warrie.

153. Later, Mr Woodley was given the opportunity to explain to the court the ritual he and others had performed (Transcript, 480). Mr Woodley stated,

I think that's important as well, you know, what we were saying to the country, all of us, is that we come here with broken heart and broken spirits, tears in our eyes, and we're very sad that we just – this destruction that's happened here but don't blame us. You know, telling the *ngurra* and the spirit (Aboriginal Language Spoken) don't harm us so don't blame us, and we'll do everything in our power to move forward or trying to ...

Transcript, 480, Mr Michael Woodley.

154. Ensuing comments from both Mr Michael Woodley and Mr Angus Mack indicated the degree to which these senior men felt responsible for the damage and that they would face negative consequences as a result (Transcript, 480).

155. Mr Warrie also spoke about his feelings in the context of the same discussion.

Putting that thing - you know, when we come here we also carry a lot of grief as well with us, what happen in this area. This area also remind us, you know, of the things that happen here as well, and the stories been told what happened to our people here. You know, and we knowing that you know looking at the land now [Looking over at the mine]. This is - this is where our people lies as well. You know, that's our people right around these hills our people been buried in the hill you know, caves and things. You count the thousands of years that occupation in this area by Yindjibarndi, you know, that's the sort of grief period and even the grief that was also you know stolen from - that's a reminder here as well that there is another law in place that took everything away, gave us no rights.

You know, every time we do we get - try to explain we belong and that's the sort of things we trying to say, you know, what is always was, always will be our *ngurra*. Every - every corner of this Yindjibarndi *ngurra* it's the heart of all of us. Wherever you are in the corner, Yindjibarndi country, you entitled you know to become the next leader in generations growing up that handed down this sort of thing. Now it's our turn and we carry this grief as well watching these sort of things happen knowing that it's a struggle for us that there's another law in place that stops us from achieving what we want to or even trying to save some of that bit of land for the next generation to – that's all.

Transcript, 481, Mr Stanley Warrie.
Interpolation in square brackets by counsel.

156. On another occasion Mr Warrie made similar statements about his loss (Transcript, 600). He told the court that he felt, ‘something ... that’s inside of you that’s been taken out, your history - the whole, you know, looking at a big thing [the mine] in the, in the *ngurra*, ... it’s just like everything else been taken out, my history, my religion, my – the whole thing been just wiped off’ (Transcript, 600, Mr Stanley Warrie). Mr Warrie added that there were many things in his culture and belief that were private and could not be revealed to the court. Yet he had to suffer from seeing these things also, ‘being destroyed right before your very eyes, it’s ripping the heart out of, out of me. It’s like someone pulling my heart out’ (Transcript, 600, Mr Stanley Warrie). Mr Warrie, who had not visited the mine site for a long time, told how he had to carry the hurt he suffered as a result of the destruction whenever he visited the country – a statement I take to refer to his visits to country through ritual performance through the singing of the Burndud or, possibly through other mystical means.⁷² Consistent with this explanation Mr Warrie concluded, ‘You know, I never been to my land for a long time but I never left. I never left’ (Transcript, 600, Mr Stanley Warrie). For Mr Warrie then his burden of loss was a constant companion, not just one he experienced when he physically viewed or talked about the mine.

157. Mr Woodley acknowledged the deep-felt emotions of other member of the Yindjibarndi community present during the mine tour.

And, you know, yesterday was a very emotional day, you know, for all of us. So to be there and to, you know, again, experience these things, is very confronting. And they rip to the – you know, they kind of rip right at the heart and soul and spirits of the – of us, the Yindjibarndi. I saw that yesterday when some of the family members was felt on that tour, and I felt that as well.

Transcript, 509, Mr Michael Woodley.

LOSS OF *NGURRA*: CONCLUSION AND OPINION

158. The transcripts of evidence contain many additional examples of the free expression of pain and suffering expressed by the claimants.⁷³ In my expert report I also documented these as they related to both social and cultural loss (e.g. Palmer 2022, 171-179, 269-270, 271-285, 386-392).

⁷² Palmer 2022, 70.

⁷³ E.g. Transcripts 291, Mr Isaac Guinness; 328, Ms Estelle Guinness; 359, Ms Kaye Warrie; 473, Mr Angus Mack; 477, Mr Kevin Guinness; 566, Mr Angus Mack; 681, Ms Janet Cheedy. The list is not exhaustive.

159. The examples I have reproduced above and taken from the evidence presented at trial affirm my earlier data and the analyses and opinions I draw from them. In my view the feelings expressed in the face of the destruction of the natural environment that the mine has caused provide a means to understand the depth of the feelings of those who regard this country as their own and of which they are a part. It is also country for which they are responsible through the god-given bestowal that forms the basis of Yindjibarndi relationships to *ngurra*.⁷⁴
160. I am of the opinion that this choice of *ngurra* as the focus of loss is important to a proper understanding of the nature and extent of cultural loss. It is my opinion, based on the accounts considered, that the compass of loss in Yindjibarndi perception is the totality of *ngurra* that is subject to the forfeiture occasioned by the mines. *Ngurra* is not in these accounts disaggregated into component sites, although as I have discussed above, the site visits made this a primary matter for the attention of the court. The examples of the expressions of loss and grief, presented above, all make the country the object of attention. *Ngurra* as a totality is understood to hold spiritual essentialities. The mine is the cause for the loss of these critical spiritual attributes that define the essence of Yindjibarndi being. This loss is the cause of the deeply felt emotions described above.
161. My analyses show that country (*ngurra*) is much more than a series of ‘sites’. Country, according to Yindjibarndi perception and belief is an aggregation of places of cultural significance marked by reference to activities of the Dreaming ancestors who ordained Yindjibarndi culture and social living (chapter 4, above). The aggregation of place constitutes the totality of the *ngurra* which is the cornerstone of Yindjibarndi belief and associated practice.⁷⁵ It is that which is not only where Yindjibarndi hold rights and duties according to Yindjibarndi belief, practice and normative determinants, but also one with which they hold a personal correlation.⁷⁶ In this belief *ngurra* and existence as an Yindjibarndi person are metaphysically united. They are correlative and so can be understood in this sense to be one. Loss of country is then primarily measured in terms of the spiritual, emotional, cultural and social loss of the noumenality of Yindjibarndi existence.
162. Such an analysis would instruct that a proper evaluation of the nature of the loss and its extent must have as its primary focus the *ngurra* as the sum total of the spiritual,

⁷⁴ Palmer 2022, 52-53.

⁷⁵ Transcript, 454, Mr Stanley Warrie.

⁷⁶ Transcript 467, Mr Michael Woodley.

economic and social attributes of the country, as enunciated through the beliefs, practices and normative referents of the Yindjibarndi people.

6. THE SOLOMON HUB MINE SITES AND CULTURAL LOSS. ANALYSES AND OPINION

163. In this chapter I provide a summary, further analyses and opinions relating to the data I have reviewed in Part 1 of my supplementary report. In particular, I situate the data I have reviewed that relate to the totality of *ngurra* in Yindjibarndi belief and practice to the fundamental principles of rights in that country.

ENUMERATION OF CULTURALLY SIGNIFICANT PLACE

164. In chapter 2 I set out my methodology for gaining an estimate of the number of places that are of cultural significance to the Yindjibarndi that might be (or once were) within the FMG mining operations. I have explored by examination of the transcripts of evidence given during the mine site tour, how the cultural significance of these places might be understood (chapter 3). I have also reviewed the evidence given by the claimants as to their experience of cultural and spiritual loss reflective of the layers of spiritual, emotional and economic significance that a place may hold, according to Yindjibarndi law and custom (chapter 3). I have set out my opinions regarding these data at the end of each section of chapter 3.⁷⁷

DOMINION OVER *NGURRA* AND CULTURAL LOSS

165. While the analyses of ‘sites’ can provide helpful understandings regarding the Yindjibarndi relationship with their country, it is my opinion that such a focus on singular place does not provide for a comprehensive appreciation of the cultural value of Yindjibarndi land to Yindjibarndi people. This is because the focus of analysis aimed to yield a comprehensive appreciation of cultural value should be ‘country’ (*ngurra*) rather than ‘sites’ (paragraphs 160 to 162 above). Further, an appreciation of the significance of the totality of country requires that there be admission of the spiritual basis for country to be regarded and believed to be an inalienable and undeniable Yindjibarndi property.

166. In my 2022 report I described the process whereby the Burndud is comprehended by the Yindjibarndi to have bestowed country on the Yindjibarndi (Palmer 2022, 50-64). These understandings were based upon the field data I had collected. Based on these data and my understandings of them as an anthropologist I concluded that, ‘This bestowal of country areas in the Ngurra Nyujunggamu also

⁷⁷ Paragraphs 52-54, 80-87 and 110-112.

conferred dominion' (*ibid.*, 61, 95). The dominion was also affirmed through the agency of other spiritual forces (*ibid.*, 89). A person with dominion over an area of country is he or she who has rights in it. They can be referred to as an 'owner' of the country in question (*ibid.*, 201).

167. Rares J had also recognised the dominion that the Yindjibarndi held and exercised over their country, writing,

When Yindjibarndi visit places on their country to care for it, they establish themselves, and exercise dominion, over not only the particular place but the whole surrounds so as to connect with their country and its spirits.

Warrie [2017] FCA 803 [295].

168. Consistent with this statement his Honour found that the 'Yindjibarndi have the exclusive right to control access to Yindjibarndi country and, in particular, to the claimed area' (*ibid.*, [151]).

169. I discussed how the Yindjibarndi now regard this dominion to have been lost in practice because of the development of the FMG mine without their consent (Palmer 2022, 195-208). I have discussed, again based on my field data, the relationship between dominion and what is regarded as the loss of rights to country and the cultural loss that is now the experience of those with whom I worked (*ibid.*, 209-219).

170. It was my conclusion that the loss of country bestowed through divine ordination, its theft, the denial of access and control now, 'informs feelings of cultural loss that relate to identity, autonomy and personal status' (Palmer 2022, 221). I referred the reader to paragraphs 209, 212- 214 of my 2022 report. It was my conclusion that,

This loss of dominion consequently results in a significant personal loss for senior Yindjibarndi men in particular (paragraph 219).⁷⁸ The men with whom I worked expressed the view that they now feel diminished in terms of their expected role as senior Yindjibarndi men, whose individuality and identity is defined in terms of their role in the practice of the Law (paragraphs 218 to 219) – which includes, as I have discussed in an earlier part of this report, looking after and having authority over all of Yindjibarndi country (see paragraphs 58 to 64). Based on the data I have reviewed above, this is a cultural loss that results in personal emotional hurt, a loss of identity and self-worth with consequential physical decline and perhaps even death (paragraphs 210, 219, 261 and 263). By my reading of

⁷⁸ Footnote added: paragraph references are to the 2022 report.

the field data I have collected, this constitutes a significant component of the cultural loss, as native title holders represented it to me.

Palmer 2022, 221.

171. The data I have reviewed above (chapters 4 and 5) are consistent with this opinion.

THE SENTIENCE OF YINDJIBARNDI COUNTRY AND CULTURAL LOSS

172. In a paper published in 2002, Professor Basil Sansom wrote about ‘emotions ... that have to do with the holding of the ownership of land’ (Sansom 2002, 156). In particular Sansom was seeking to explore how a person’s emotional response developed from situations relating to confronting situations (*ibid.*, 157). Sansom applies his thinking to situations where Australian Indigenous customary rights to country, recognised by the courts (*ibid.*, 162-163), have been negated through the destruction of that country. He records the deep emotions experienced as a consequence (*ibid.*, 163-4). These Sansom described as ‘epic emotions’, ones that are shared, ardent and intense (*ibid.*, 157-161, 170; Palmer 2022, 94, 101-105). Materials Sansom considers are consistent with the expressions of emotional hurt suffered by the Yindjibarndi today which I have reviewed above (chapter 5).

173. Sansom’s analyses of the emotions evoked in relation to damaged country relate specifically to the spiritual relationship that is believed to exist between a person and country. In this Sansom cites in turn the work of Deborah Rose who wrote,

Aboriginal people in many parts of Australia have taught me to consider country to be a conscious entity. Place is one kind of embodiment of being, and the encounters of living things are recorded there.

Rose, 2000, 215.

174. In developing his analyses Sansom is relying upon a fundamental belief. Country is sentient and responsive. There exists a complementarity between country and person. Country is also understood to have its own emotions – being angry, hurt or frightened at the prospect of being so (Sansom 2002, 174-5).

175. The data I have reviewed above (e.g. paragraphs 151 to 157) are consistent with the ideas and analyses presented in this paper by Professor Sansom.

DOMINION AND THE SENTIENCE OF COUNTRY: UNDERSTANDING CULTURAL LOSS

176. Dominion and the system of Indigenous law that renders country subject to exclusive rights and a belief in the sentience of country are linked and co-determinate. In my opinion, based on the data I have reviewed here as well as that presented in my 2022 report, Yindjibarndi believe that they own what, in a metaphysical sense, they are. Country correlates with its owners, through agency of the *wirrad*. Spirits in the countryside relate to people, there are relationships, some vexed.
177. As a consequence of the system whereby rights to country are sustained and perpetuated and the beliefs that relate to and underpin that system, loss of country is a loss of dominion and rights. The mine site cannot now be accessed without the permission and control of FMG who exert this control with vigour.⁷⁹ The Yindjibarndi are ‘locked out’. The land has been literally stolen – shovelled up by the metric tonne and trucked out. It is gone. Claimants state that this is so.⁸⁰ The Yindjibarndi see this as theft.⁸¹
178. Based on these understandings, there is then a two-fold loss. First, there is the physical loss of country, evidenced by the excising of the substance of countryside and the destruction or compromising of the land. This country cannot now be accessed or used. Prospects of it ever being usable in future times are not evident and are hard to imagine, based on the view of the mine sites. This loss of substance is compounded by an associated loss of Yindjibarndi history and heritage, which were attached to the now excised country. These are losses intensely expressed in the sentiments of the claimants.
179. The forfeiture of country is also a loss of a spiritual relationship between a person and his or her country. The loss and destruction has alienated the spiritual attributes and fractured the link between Yindjibarndi self and country. Yindjibarndi tell me that they define themselves in terms of their country (Palmer 2022, 98, 103, 186, 220-

⁷⁹ See paragraphs 42, 60 and 61.

⁸⁰ ‘This is my land, stolen from me’. Transcript, 454, Mr Stanley Warrie. ‘That something big has been taken out. It’s like something’s gone missing’. Transcript, 600, Mr Stanley Warrie; see also Transcript, 481. ‘It’s like walking in your home ngurra and everything is stolen - stolen and destroyed.’ Transcript, 477, Mr Kevin Guinness. See also Transcript, 651.

⁸¹ ‘really really cut me up and you know where that *myunmarra* - *myunmarra* is a thief, called a thief *myunmarra*, in our traditional way you know give them a good hiding.’ Transcript, 477, Mr Kevin Guinness. Palmer 2022, 205, 209-212, 220, 242.

221, 264, 269, 282, 321).⁸² Loss of country is then not only a traumatic event but is also a challenge the very essence of being Yindjibarndi.

180. The further conclusion I draw from these understandings and analyses is that the representation of the impact of the mines by reference to a catalogue of ‘sites’ is an insufficient and inadequate means to assess both the Yindjibarndi relationship with land, and the dimensions of their loss and consequential suffering. Based on my understanding of the data I have collected, the totality of Yindjibarndi land was imbued by the song of the Burndud (Palmer 2022, 50-57). It was subject to the life giving vitality of the creative song, bestowed with animals, birds and all living things that now make up the Yindjibarndi natural and cultural world (*ibid.*, 56). This is not a process and a significance that can be represented justly or adequately through the enumeration of ‘sites’, with an attempt to indicate the degree to which the mine has damaged them through the attribution of categories like, ‘salvaged’, ‘preserved’ or ‘protected’. This has been the process that has characterised much site survey work and some associated archaeology.⁸³ The bald inventory of ‘sites’, with designated identifying numbers and the allocation of categories that subjectively assess the degree of impact occasioned by the mining activities cannot provide a sound basis for an evaluation of the spiritual, social and cultural significance and importance to the Yindjibarndi people of *ngurra*. The court was told that one of the significant features I have discussed above, Ganyjingarringunha Creek, did not have a ‘site’ number.⁸⁴ Creeks are not ‘sites’ as the term is commonly used, and its significance defies such a narrow bounding. The passage of the Burndud on route to Banggangarra, traversing what is now parts of the mine,⁸⁵ likewise has no site number, nor would such a device be helpful.

181. It is my view that the *ngurra* as a totality, informed by the multiple layers of meaning and significance, some of which I have explored above, is greater than the sum of its parts. In this *ngurra* is perhaps somewhat akin to a great musical symphony. It is the performance of the multiple musical notes together by the variety of instruments, each with a distinctive sound, and rendered according to rules and prescriptions that give life, emotion, meaning and consequential value to the lived experience. In this sense a symphony is greater than the sum of its parts.

⁸² ‘When Yindjibarndi on the *ngurra*, we connect with all of this stuff, the ochres, the river, the trees, the birds, the animals. Everything connects. We only feel Yindjibarndi on Yindjibarndi country, you know? That’s the connection.’ Transcript, 467, Mr Michael Woodley.

⁸³ I have explored this in greater detail in my earlier report. See Palmer 2022, 312 – 320, 333.

⁸⁴ Transcript, 496. Mr Hughston.

⁸⁵ Transcript, 621, Mr Woodley.

THE CULTURAL SIGNIFICANCE OF *NGURRA*

182. By my understanding, *ngurra* constitutes the core of Yindjibarndi being, the lived experience and the social fabric of quotidian living. These are matters I have discussed in my 2022 report, in part by examining Yindjibarndi concepts that include *wirrard* and *nyinyaard* (Palmer 2022, 171 – 176, 189 – 191, 264, 271 - 283). Comprehending the significance of *ngurra* derives from attention to the entirety of *ngurra* as a part of the Yindjibarndi lived experience, social exchange and religious belief and practice. Consequently, again in my view and based on my analyses of the data reviewed, assessing loss must comprehensively consider the entity that is subject to that loss, being *ngurra* as a totality of the geographic and spiritual environment wherein the Yindjibarndi have held rights and duties since, according to their reckoning, the great creative period of the Dreaming, the Ngurra Nyujunggamu.
183. In my opinion and based on my analyses, the claimants and their evidence furnish the bases upon which we can beginning to comprehend something of the ways whereby they relate to the country they also own. It is through these understandings that any evaluation of the loss which they have occurred should be reached.
184. I note that Mansfield J, in his consideration of evidence presented to him in the Timbe Creek compensation claim, reached the same conclusion.

The direct evidence of Alan Griffiths⁸⁶, and the anthropological opinion evidence, does not depend on any proposition that some parts of Aboriginal landscape are more important than others. As Dr Palmer⁸⁷ observed, the 2002 paper of Professor Sansom⁸⁸ is in relation to the damage of loss, and “the hurt feelings of a hunting ground, of a generalised area, a resource lost.” The broad expanse of the *kulungra* area⁸⁹ is a similar example in this case. As Professor Sansom accepted, the kind of contention advanced by the Territory and the Commonwealth that there can be a significant area of landscape that is unimportant to Aboriginal people, or that there could be an area that is devoid of spirituality, defies logic in the Aboriginal tradition.

Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900 (Mansfield J), [370].

185. In my opinion this, ‘logic in the Aboriginal tradition’ is equally applicable to the indivisibility of Yindjibarndi *ngurra*, which includes country both within and beyond the

⁸⁶ Footnote added: A senior claimant and native title holder of the area of the Timber Creek town site.

⁸⁷ Footnote added: Expert anthropologist commissioned by the Applicant.

⁸⁸ Footnote added: Expert anthropologist commissioned by the First Respondent. The article is Sansom 2002.

⁸⁹ Footnote added: The area of Timber Creek where water tanks had been built so damaging the track of the Dingo Dreaming (Timber Creek [352]).

Solomon Hub area. *Ngurra* is divine bestowal and is regarded as inviolate. That part could be lost is not contemplated in the beliefs that define its originating. That a portion has been not only appropriated but also eradicated challenges the whole of the relationship between the Yindjibarndi and their land as divinely ordained and as spiritually articulated. In terms of my anthropological analyses then cultural loss cannot be comprehended by seeking to enumerate component parts subject to the destruction (sites, individual songs). Rather, it should be understood in terms of the loss to the totality of Yindjibarndi country and the entirety of Yindjibarndi religious beliefs founded upon that country.

PART 2: LOSS AS DIMINUTION OF CULTURE AND ITS CONSEQUENCE

7 CULTURAL LOSS AND THE YINDJIBARNDI COMMUNITY

INTRODUCTION

186. In my 2022 report I considered the social disruption that has resulted from the divisions in the Yindjibarndi community. I was of the opinion that these divisions have been a consequence of the development of the mine and how that business has been managed in terms of dealings with the native title holders. In this, my focus was principally on the disagreements that have fractured the social relationships of the Yindjibarndi (and others) in Roebourne.⁹⁰ I reviewed the social milieu of Roebourne as comprising a close community of kin (Palmer 2022, 118-119), and provided a short history of the development of the divisions in the Yindjibarndi community (*ibid.*, 120-131). I looked at examples of social disharmony, tensions and dislocation and the associated feelings of loss in relation to Yindjibarndi cultural institutions. These included the Galharra (*ibid.*, 134-137) and the importance of kinship in sustaining social cohesion and commensality and how the divisions in the community have impacted on these values (*ibid.*, 138-159). I also documented the physical consequences of the split, including assaults and fighting (*ibid.*, 164-170) and the role played by social media (*ibid.*, 167-169). I explored aspects of the Yindjibarndi language in order to gain an understanding of the feelings and emotions these divisive circumstances engender (*ibid.*, 171-174).

187. For the most part I sought in my 2022 report to understand the effects of the mine and the resultant split in the Roebourne community in terms of social loss. By 'social loss' I mean the deleterious and adverse consequences of the divisions as evidenced by the loss or diminution of the relationships Yindjibarndi people are expected to have with one another. Such expectations are founded upon normative values that provide the blueprint for what is expected and what is considered to be acceptable. Anguish develops when these normative values are disregarded. Emotional pain and suffering is a consequence. In terms of the expected returns on a social relationship, there is a deficit. That which would normally be expected is lost. I documented these emotions in my 2022 report (Palmer 2022, 171-179).

188. In the course of my analyses I pointed to an additional aspect of loss and its emotional consequences. This related to an account of changes to the manner whereby

⁹⁰ Palmer 2022, chapter 3, pages 37-64.

ritual activities were now organised at Woodbrook, a location a short distance from Roebourne (*ibid.*, 160-163). It was my opinion that the changes evident in relation to this activity indicated that there was an additional, and to my mind significant, aspect of the effects of the mine on the Yindjibarndi people living together in Roebourne. This relates to the fact of a cultural loss which is in addition to and, in terms of an anthropological analysis, distinct from, the examples of social loss. By ‘cultural loss’ I mean a lessening or forfeiture of a fundamental component of Yindjibarndi belief and practice. I touched on this aspect of loss, writing by way of conclusion that both kinship and categorical system of kin reckoning,

owe allegiance to prescribed rules for interaction: obligations, duties, expectations and ways of doing things. These are not the dictates of mere good manners or an accomplished demonstration of social etiquette. These are the Law, the principles that underpin Yindjibarndi living as established by supernatural ordinance. Contravention breaks this Law.

Palmer 2022, 185.

189. I went on to state,

... contravention of the god-given Law is not only measured in terms of a deviation from a given path. It poses a threat to autonomy and the integrity of Yindjibarndi identity. Breaking what anthropologist Fred Myers called ‘a moral order’ (Myers 1986, 124) of social relationships will threaten the social value of relatedness (*ibid.*) which mediates an individual’s inclinations and the well-being of the community as a whole. The hurt is consequently not merely that which stems from the breaking of a conventional way of doing things. It goes to the core of what it means to be Yindjibarndi in upholding the moral order that represents the essentiality of an Yindjibarndi person.

Palmer 2022, 186.

190. It is my purpose in this chapter to relate these preliminary observations to the evidence given either in written statements or through *viva voce* evidence. In this way I expand upon and augment my earlier opinions and so expand upon my initial distinction between social and cultural loss.

RITUAL HARMONY AND SUSTAINING PERSON AND COUNTRY

191. In response to questions asked in cross examination by Mr Ranson, Ms Estelle Guinness defined the Yindjibarndi word *gummwani*, volunteered by Mr Ranson, as

meaning, ‘coming back together’.⁹¹ Mr Kevin Guinness, in his witness statement, had rendered the term as *gummawarni*, meaning to ‘reunite’.⁹² In both cases the word was used in the context of the failure of the Yindjibarndi groups to resolve their differences and to come back as a unified people. This concept was also the subject of questions asked by Mr Ranson of Sonya Wilson,⁹³ although the Yindjibarndi word (*gumawarri*) was not used in either the evidence or the witness statement.

192. Mr Woodley, in his evidence (Transcript, 524, Mr Michael Woodley), gave an additional layer of meaning to the word, rendered in transcript as *gummmwari*. Mr Woodley had been asked by Mr Hughston to explain the meaning of the term *wirrard* which he did, summing up by stating,

So it’s - and the reason the *wirrard* is important because it’s – it’s one of the – the single most important part of your body that connects us to the other Yindjibarndi People which then connects us all to the - into the *ngurra*.

Transcript, 523, Mr Michael Woodley.

193. His Honour asked if *wirrard* was ‘a personal thing or a collective thing’ (Transcript, 523, his Honour). Mr Woodley responded,

Yeah, it’s collective things, your Honour. It’s personal for you but the only - the only time you can feel sad, your *wirrard* make you sad because you’re connected to multiple other things, you know, your people and your country and that’s what the *wirrard* is, you know, in essence. It drives the emotions of how Yindjibarndi, you know, see things and how they can be affected by things.

Transcript, 524, Mr Michael Woodley.

194. Mr Woodley amplified his comments, saying that *wirrard* gives you life. He likened it to your *ngayiny* or breath.⁹⁴ It connects a person both to the *ngurra* and to other Yindjibarndi people, with whom you share emotions in response to life experiences of joy or sorrow. He gave the example of a death. The gathering and sharing of grief which follows a death in the community is also called in Yindjibarndi *gumawarri*.⁹⁵ At this time in the period of sorrow all the *wirrard* ‘come together and sharing as well’ (Transcript, 524, Mr Michael Woodley). Mr Woodley then gave an account of his close

⁹¹ Transcript, 338, Ms Estelle Guinness and Mr Ranson.

⁹² Witness statement, Mr Kevin Guinness, 78.

⁹³ Transcript, 273-4, Ms Sonya Wilson and witness statement, Ms Sonya Wilson, 11.

⁹⁴ Wordick 1982, 320; Juluwarlu archive, n.d. *ngayiny*. I discuss this word and the concepts it evokes in my 2022 report (Palmer, 2022, 282).

⁹⁵ In this account I adopted the spelling of the word as *gumawarri* for consistency.

relationship with his *ngurra*, expressed through the agency of his *wirrad*, which he shares in common with all other Yindjibarndi people.

Without my country, I don't exist. You know, I don't - I don't fit in anywhere. You know, I can't fit in anywhere. This *ngurra* makes me fit in. You know, it makes - it gives me my - gives me my identity. I'm nothing without it. All Yindjibarndi People here today have that same - you know, have that same connection and feeling.

Transcript, 524, Mr Michael Woodley.

195. Mr Woodley told me that *gumawarri* was given to the Yindjibarndi people by the Marga during the Ngurra Nyujunggamu and it was a part of the Law.⁹⁶ He stated that Guma was the place where the people got together on the Fortescue River when the first Birdarra Law was given by the creative being.⁹⁷
196. Mr Woodley told me that, according to Yindjibarndi belief and the normative values they espouse, *gumawarri* observance is a basic tenet of the practice of Yindjibarndi Law.⁹⁸ It is understood as an essential component in the sustaining of that Law through time. Failure to conduct the *gumawarri* breaks the Law for the Birdarra. It was his belief that if that Law is broken then the essentiality of Yindjibarndi society is also considered broken. Consequently, neglect and abandonment of the *gumawarri* represents a substantial loss of the practice of Yindjibarndi Law and threatens its viability and continuity.
197. For Mr Woodley this cultural loss has an added personal dimension. Mr Woodley told me⁹⁹ that should you try to remove the Law from his very self, he could not exist. The Law (including its practice) is integrally bound up with his existence. He said that if the Law gets lost, in this context because of the failure to perform the ritual observances of the Birdarra properly, he would become nothing. That is to say his essential self would have been destroyed. The failure to observe these things is then for him and the other Yindjibarndi an existential issue.
198. Mr Angus Mack also stated that, 'It is custom that the community joins as one people to do the Burndud' (witness statement, Mr Angus Mack, 119). Similarly, Charlie Cheedy in his witness statement commented,

⁹⁶ KPFN, August 2023, 1.

⁹⁷ KPFN, August 2023, 1.

⁹⁸ KPFN, August 2023, 1. The data in the rest of the paragraph are drawn from the same source.

⁹⁹ KPFN, August 2023, 1. The data in the rest of this paragraph are drawn from the same source.

The Law business is being broken by the split between YAC and WYAC members who will not come together as they used to, and as is required by Yindjibarndi Law.

Witness statement, Charlie Cheedy, 17.

199. In my opinion and based on the data I here review, this consequence of cultural loss is shared by all senior Yindjibarndi women and men who observe customary Law and practice.

Conclusion and opinion

200. *Guma* is found in the Yindjibarndi dictionary (Juluwarlu Archive, n.d., 11) where it is glossed as ‘together’. The suffix *-warri* acts as a verbaliser.¹⁰⁰ Related terms are *barri-guma*, which means ‘to sit together’¹⁰¹ and *wangjari*, describing communal reconciliation of differences both before and after ritual observances.¹⁰² By my understanding, based on the data reviewed above, *gumawarri* is one of a small suite of words found in the Yindjibarndi language which identify the settling of differences and the sharing of positive and common emotions. The *gumawarri* is the occasion when such differences, disagreements or other difficulties are settled. This process is prescribed both before and after ritual action as well as during periods of common sorrow, the formal mourning occasioned by a death. It functions to ensure that all participants both prior to and after ritual action feel at ease and satisfied (‘feel good about’) the ritual proceedings. It is then, in anthropological terms, a ritual process.

201. This is a process I have observed in other ritual contexts¹⁰³ and has been reported by other writers.¹⁰⁴ In my opinion and based on my own experiences as well as the data reviewed above, it reflects the belief that prior to entering the ritual domain, differences and disputes must be settled and any bad feelings or anger resolved. Failure to do so

¹⁰⁰ Also listed are *gunawarri* ‘assemble together’ and *gumarlarri*, ‘get together. Wordick’s earlier dictionary (Wordick 1982, 90, 295) has ‘*kumamarri* come together, *kuma* together’. The sense seems to be of *guma*, ‘together’ plus suffix ‘*-warri*’ giving ‘happening or becoming’ (a verbaliser). See Wordick 1982, 88.

¹⁰¹ Wordick 1982, 90: *parni-marri*- ... sit together or with each other, *parni* sit.

¹⁰² *Wangga*, ‘speech, talk, speak, talk about (Juluwarlu Archive n.d., p. 29), plus *-jarri* S. ‘each other (reciprocal suffix).’ (Juluwarlu Archive, n.d., p. 13). Wordick has ‘*-yarri* Reciprocal suffix (Wordick 1982, page 354). See also *ibid.*, pp. 91, 229.

¹⁰³ Palmer 1981, 113-114 and 125.

¹⁰⁴ R.M and C.H Berndt 1977, 347-350. The Berndts present their data in a somewhat different context to the one I consider here. Stages of the ritual process, identified by Turner (1974, 81-3, following, to some extent, Van Gennep 1909/1960) demonstrates that ritual induction requires entry into a liminal state that is essentially of another world. Ritual process also serves to stress the importance of ‘*communitas*’, ‘lowliness and sacredness, of homogeneity and comradeship’ (Turner 1974, 82-3). Grievances and dispute are antipathetic to both entry in to this liminal stage and participation in the *communitas* which is intrinsic to the process.

may not only result in negative spiritual consequences but is regarded as breaking the rules set down in the Dreaming for ritual practice.¹⁰⁵

202. The etymological roots of the word *gumawarri* provide a testament to the spiritual originating of the ritual process it represents. There is a place named Guma in Yindjibarndi country.¹⁰⁶ The Yindjibarndi Dictionary identifies it as, ‘Assembly Hill Fortescue River.’¹⁰⁷ This is the place where the Yindjibarndi people first assembled to settle all disputes prior to participating in the first Birdarra ritual.¹⁰⁸ The place Guma consequently attests to a divinely ordained ritual process that was laid down in the Dreaming. The *gumawarri* is ritual practice prescribed by the divine and validated by place whence the Law is believed to have originated. *Gumawarri* is then keyed into the very origins and divinely ordained structures of the sustaining Birdarra law.
203. I conclude, based on these understandings, that fidelity to its observance is of paramount importance to adherence to the Yindjibarndi normative system (the Law). Failure to comply with the process challenges the foundations of Yindjibarndi religious belief, as understood to have been ordained and attested by place within the countryside. Non-observance of the *gumawarri* serves to negate the significance of the breath of life for a Yindjibarndi person – the *wirrand*, its relationship through the agency of a person with the country and with the community of Yindjibarndi people.
204. I further conclude that it is manifest, based on the material I have considered both here and in my previous report, that the social and ritual processes evoked by use of the word *gumawarri* (or its cognate forms) have suffered diminution and loss. This is a cultural loss which is a direct consequence of the mine at the Solomon Hub, facilitated by the manner whereby FMG have sought to facilitate their activities by reference to a particular sub-set of the native title holders.¹⁰⁹

SAVING AND LOSING YINDJIBARNDI HISTORY AND CULTURE

205. Ms Lorraine Coppin gave evidence to the court regarding her long involvement in recording and publishing many aspects of Yindjibarndi history and culture (Transcript, 396 – 413, Ms Lorraine Coppin). Ms Coppin commented on a number of booklets and

¹⁰⁵ Palmer 1981, 114.

¹⁰⁶ Juluwarlu Archive, n.d., 11.

¹⁰⁷ I collected the place name Gumana for the hill a short distance upstream from the location of the first Birdarra ritual at Bilinbilin in the Fortescue River when I visited the location in the early 1970s. Palmer 1977, 230.

¹⁰⁸ Juluwarlu Aboriginal Corporation 2008, 56-57. Here is a detailed account of the location of Gumana with associated narratives, with photographs. The account does not make specific mention of the settling of disputes.

¹⁰⁹ See paragraph 213, cross reference and footnote.

posters she had helped produce (*ibid.*, 396-419). She also spoke about how she was developing cultural materials in a manner that would be accessible to and of interest to children (*ibid.*, 408-411). The subject of these posters and shorter booklets included aspects of Yindjibarndi belief and custom. Some of these items and associated photographs were marked as exhibits for the court process.¹¹⁰

206. Ms Coppin also told the court about an unfinished project which she had embarked upon. Ms Coppin explained that she wanted to preserve for future generations cultural knowledge held by senior Yindjibarndi men and women before they died. Ms Coppin's evidence reads,

So I'm the founder of Juluwarlu group. Juluwarlu documents and records Yindjibarndi history. So for me and my partner Michael we started Juluwarlu with the instructions and visions from the old people that help us that documenting Yindjibarndi history.

Transcript, Ms Lorraine Coppin, 396.

207. Ms Coppin recalled that the process started during the first Yindjibarndi native title claim¹¹¹ in about 1997 (*ibid.*). During the native title process Ms Coppin began to realise the importance of the cultural knowledge that Yindjibarndi elders held and was inspired to commence a detailed recording of it (*ibid.*). Ms Coppin listed some of those who were involved. They included members of the Sandy family (*ibid.*, 397-8). She described two of those as 'key members of the Wirlu-Murra Aboriginal Corporation'. Both had died recently.¹¹² Before that organisation started,

the two old girls that came on this journey with us through Juluwarlu all helping us with the elders document Yindjibarndi country, collecting stories from animals to plants, understanding the song lines, the Burndud, all that information that relate and significant and important to Yindjibarndi to help us capture.

Transcript, Ms Lorraine Coppin, 398.

208. Ms Coppin told the court that the elders involved all got along well (*ibid.*). She showed the court photographs taken at this time, which was in the period 2000-2004. During these exchanges various people were identified from the photographs, along with the places on Yindjibarndi country where they were taken (*ibid.*, 399-403). Some of those identified subsequently became members of the Wirlu-Murra Aboriginal Corporation.

¹¹⁰ Exhibits 4, 5, 6 and 7.

¹¹¹ Daniel v State of Western Australia [2005] FCA 536.

¹¹² I am able to identify these two women as Sylvia Allan and Allery Sandy.

Ms Lorraine Coppin described the times they spent together as ‘Very fulfilling and happy. Everyone was together. Just a rewarding feeling after every field trip’ (*ibid.*, 403).

209. Ms Coppin identified for the court a hard cover book that Juluwarlu had also produced as a result of the research (Juluwarlu Aboriginal Corporation 2007; Transcript, 404, Ms Lorraine Coppin). She explained that this was one of three such books they were able to publish which documented the places and cultural significance of Yindjibarndi country (*ngurra*). The plan was to do thirteen in total, one for each of the Yindjibarndi areas for which thirteen different Yindjibarndi families were responsible (Transcript, 404-405).¹¹³ Counsel for the applicant, Ms Jowett, asked Ms Lorraine Coppin what had happened to the remaining books that were yet to be published. Ms Coppin responded,

So the project was on hold when - when we had this - when we had to stop what we was doing at Juluwarlu and focus more on the struggle of FMG.

Transcript, Ms Lorraine Coppin, 405.

210. A similar point was made by Mr Warrie in his witness statement.¹¹⁴ Similar views were expressed in detail by Issac Guinness in his witness statement.

I can’t go on country much with the old people because they won’t come together to take us younger people out. I want to learn more but it’s being blocked through the division. Knowledge about our country is everything to me and other Yindjibarndi People. It helps you stand strong. When my old people used to take us out for learning time, they told us to sit down and feel. You feel whether you belong there or not. We need to keep it going for our children but the problems that have been caused because of the division of our elders makes this hard to keep going for me and for my kids.

Witness statement, Issac Guinness, 41.

211. Ms Lorraine Coppin stated that she hoped to bring the project to map Yindjibarndi *ngurra* and its culturally significant palaces to completion. However, she admitted that ‘most of the elders’ that she had worked with previously had now died (*ibid.*, 407).

Conclusion and opinion

212. Based on the transcripts I have reviewed above, I consider it a reasonable inference that a proposed systematic recording of the 13 constituent *ngurra* of

¹¹³ A map that shows these *ngurra* is appendix MC1 to the witness statement of Mr Middleton Cheedy.

¹¹⁴ Witness statement, Mr Stanley Warrie, 104.

Yindjibarndi country had been placed ‘on hold’. Just three of the *ngurra* had been researched and the results published. The last of these was produced in 2008 (Juluwarlu Aboriginal Corporation 2008). The research that provided the materials for these publications came from the co-operative efforts of many Yindjibarndi elders. This included those who later became members of the Wirlu-Murra Aboriginal Corporation. This research and writing occurred prior to the development of the divisions that later came to characterise the Roebourne Yindjibarndi community.

213. Based on my assessment of the data I considered in my 2022 report (Palmer 2022, 180-183) I am of the opinion that this split was a consequence of the FMG mine and the company’s policies as they related to the native title holders of the land upon which the mine was developed. The relationship between the mine, FMG’s policies and the split are also attested by the evidence presented to the court.¹¹⁵
214. The need to ‘focus more on the struggle of FMG’ had an additional consequence which is also a cultural loss. The cultural knowledge that has been lost in the years since the documentation project had to be abandoned is, in my opinion, likely to be irreplaceable. It is a further casualty of the mine.

CANONS OF RELATIONSHIPS AS CULTURAL LOSS

Introduction

215. In my 2022 report I identify a number of characteristics of Yindjibarndi social relationships (Palmer 2022, 132-163). This included consideration of ritual relationships (that is those prescribed by law and custom that relate to ritual practice – see *ibid.*, 162-3). This is an aspect of cultural loss I have discussed above (see paragraphs 191 to 204). In my account of the manner whereby I understand the Yindjibarndi to organise and regulate their social relationships, I described the fundamental structural systems at play. This is known by the Yindjibarndi as the Galharra (*ibid.*, 73-77). I explain how this system works to establish and maintain Yindjibarndi social relationship and kinship. The nature and expectations of those relationships is also mandated according to the nature of the kin relationship, which application of the categorical system determines. This includes ritual roles and responsibilities.

¹¹⁵ Witness statements: Mr Ricky Smith, 28; Mr Stanley Warrie, 26, 27, 50-54, 56-67, 73, 78, 95, 101-104; Ms Lyn Cheedy, 7, 36-37, 70; Mr Middleton Cheedy, 52-53; Mr Kevin Guinness, 37, 43, 75; Mr Angus Mack, 56, 105; Ms Janet Kapetas, 18-21; Mr Michael Woodley, 99, 209, 338-389, 435; Mr Isaac Guinness, 20, 36-41. This list is not exhaustive.

216. In my earlier report I also identify additional relationships that describe particular sorts of relationships. The first of these is *nyinyyard*. This quality of human interaction can be roughly glossed as ‘sharing and generosity’ but having additional normative weight in that there is an imperative to liberality and reapportionment (*ibid.*, 78-81). I also noted two additional terms that develop from roles assumed by individuals in life events. The first was *wurruru*, understood as a woman who through spiritual agency identifies the originating *ngurra* of an unborn baby and subsequently acts as a sort of midwife at the birth (*ibid.*, 82-84). The second was *gajardu*, the man who identifies the spiritual essence of an unborn baby in terms of its *nyirlun* or totem (*ibid.*, 85-86). Both *wurruru* and *gajardu* constitute relationships that carry particular obligations and behaviour (*ibid.*, 84 and 86).
217. In my 2022 report I presented field data that supported my opinion that the institutions of Yindjibarndi social relationships had been impacted by the split that had developed between the Wirru-Murra group and those aligned with the Yindjibarndi Aboriginal Corporation (*ibid.*, 133-160). I discussed the feelings that were a consequence of the fracturing of these relationships and the values they represented (*ibid.*, 171-179). I provide my opinions, based on my data, as to the extent of the social loss (*ibid.*, 184-187) and the emotional pain and suffering, expressed through my consideration of Yindjibarndi language and expressions (*ibid.*, 188-191).
218. In presenting this account I identified the fact of cultural loss (*ibid.*, 185-186). This is a loss occasioned by the breaking of what are believed to be divinely ordained dictates of how Yindjibarndi people should relate one to another. It is what anthropologist Fred Myers called a breaking of the moral order (*ibid.*, 186). I was of the opinion that the loss of adherence to the normative values prescribed in the creative era, represents a significant source for pain and suffering (*ibid.*). It is also, in my opinion, a cultural loss in itself. Yindjibarndi culture is diminished by the degree to which normative values that direct relationships have been eroded or destroyed.
219. In my review of the evidence now presented to the court, I find additional materials that serve to support my conclusion and opinion, expressed with respect to cultural loss.

Cultural loss and social relationships

Galharra

220. Mr Warrie expressed the belief that the Galharra system had been handed down since the creation times, the Ngurra Nyujunggamu. He stated that the Galharra system,

‘connects us with the *ngurra* and our religion’ (Witness statement, Mr Stanley Warrie, 10).

He expanded on what he meant in a subsequent paragraph of his statement.

One of the Burndud songs is about the many clouds forming and building up over the Hamersley Ranges (Gamburdayinha). The songs travel along Gamburdayinha to a hill called Mumiyanha which is an important site for being the place where the rules for the Galharra roles in the Birdarra ritual comes from in a song.

Witness statement, Mr Stanley Warrie, 130.

221. Mr Angus Mack also stated that according to his belief the Galharra system had its origins in the ‘creation time’. He summarised some of its principal features.

The Galharra system ... governs everyday life, how to act on country, and how every person in the Yindjibarndi community relates to each other. It determines which people you can marry and how you relate to family and extended family. For example, how you talk to fathers brothers, aunts, uncles and in-laws. Galharra is part of life, you have to do it.

Witness statement, Mr Angus Mack, 35.

222. Mr Isaac Guinness, in response to a question asked by Mr Edwards, identified the Marga who gave ‘us our law and culture ... they were the ones who handed down the law and also the system, how we work in our cultural ways as in the Galharra, all of that. Yeah, all the Galharra that’s been connected in with the law and culture as well, been handed down to us’ (Transcript, Mr Isaac Guinness, 287-8). Mr Woodley told Mr Hughston that compliance with the rules of the Galharra was mandated by the Mingala (Transcript, Mr Michael Woodley, 514).

223. Mr Angus Mack understood the Galharra to be not only a system of divine originating, but also one that is essential to the maintenance of effective social relationships. It is a system that is central to a person’s sense of identity and direction.

The Galharra is a system that you govern yourself. You govern your daily life with. You get given – given to us way back in creation time, we call it Ngurra Nyujunggamu, creation time. It all happened at a certain place called the (Burupu). We got given that and we still practice it and it still keeps us in line, how to respect other people and respect ourself and respect all life itself, like flora and fauna, country and that governs you in country as well, because if you don’t have that Galharra you’re sort of lost in your ways of who you are.

Transcript, 561-2, Mr Angus Mack.

224. Ms Lorraine Coppin gave a detailed account¹¹⁶ of the origins of the Galharra system and observance of its prescriptions, in terms of associated narratives of events of the creative period or Ngurra Nyujunggamu. According to this belief two of the Seven Sisters descended to earth. They belonged to the *balyarri* and *garimarra* sections.¹¹⁷ According to the Galharra system, a *balyarri* woman is sister-in-law to a *garimarra* woman and vice versa. This is because, according to the system, a *balyarri* woman marries a *garimarra* man. The sister of the *garimarra* man is also *garimarra*. Thus a *balyarri* woman is sister-in-law to a *garimarra* woman and vice versa. Ms Coppin explained that this pair (a moiety in anthropological terminology) are known as *bungalira*. In performance of the Birdarra ritual this moiety (also known as a generation moiety) perform a specific function that is distinct from the other paired sections (*buringu* and *banaga*).¹¹⁸

225. The *bungalira*, or moiety paired Seven Sisters, upon their arrival on earth, failed to keep to the rules of the Galharra. Ms Coppin explained what happened.

When they came down to our country, they – Marga were the Burlinyjirrmarra [name of one of the Marga]. He was the main Marga – he was aware that they was there. So they were doing wrong things by relationship. They were doing around with – not following the family structure, called the Galharra system. They were jumping over to marry men of other side, so you know, doing the wrong thing by breaking this Galharra. So the Marga punished the two *bungalira*, two Marga [the two sisters] women and they turned them into anthills.

Transcript, Ms Lorraine Coppin, 412.

Nyinyaard

226. The centrality of the concept of *nyinyaard* to Yindjibarndi culture and moral order is confirmed by beliefs discussed by witnesses who attribute to it supernatural origination.¹¹⁹ In this sense it is firstly understood to be a part of Yindjibarndi Law.¹²⁰

For example, Mr Warrie stated,

Nyinyaard is taught by the elders that all Yindjibarndi, including the WYAC members, should follow under Yindjibarndi Law.

Witness statement, Mr Stanley Warrie, 26.

¹¹⁶ Transcript, 412, Ms Lorraine Coppin. The data in this paragraph are derived from this source.

¹¹⁷ The constituent categories or ‘sections’ of the Galharra are explained in my earlier report: see Palmer 2022, 73-77.

¹¹⁸ The *gangu*, being those members of the parental generation, and the *jinjangu*, those being the same generational moiety as the initiates. This arrangement is discussed in part by those giving evidence (see witness statements Mr Stanley Warrie, 10 and 12; Ms Lyn Cheedy, 38. Transcript, 414, Ms Lorraine Coppin). See also Palmer 2022, 76.

¹¹⁹ See paragraph 213, cross reference and footnote.

¹²⁰ I discuss this word in my 2022 report; see paragraphs 20 and 49 of that report.

227. Others called it a ‘rule’ or Law (witness statement, Ms Lyn Cheedy, 36; Mr Kevin Guinness, 15 and 44). Mr Angus Mack was more specific regarding the origins of *nyinyaard*.

Nyinyaard is a very significant part of Yindjibarndi culture. You cannot forget it and it stays in you; it guides you with the right way to act, it is the law of life. It was set down in the creation time and is similar with Christianity with its morals for life. We were given rules by Marga (the creator). We must follow these rules no matter where we are or which generation we are part of. We must teach it to the younger generations.

Witness statement, Mr Angus Mack, 40.

228. When giving evidence to the court Mr Angus Mack stated,

It always come back to who you are as a person you should follow these principles of *nyinyaard* respect. You follow those rules what we was given back in Ngurra Nyujunggamu the creation time. You have to follow these rules.

Transcript, 563, Mr Angus Mack.

229. Ms Lorraine Coppin stated that in her belief *nyinyaard* was implemented through supernatural agency.

So we must maintain this structure and system that Marga and Mingala have given to us. Obviously he taught us also if you break these rules you get punished. Creation stories have told us that. There’s lessons there that we must take into our life and learn from.

Transcript, 426, Ms Lorraine Coppin.

230. Mr Woodley understands *nyinyaard* to be ‘a fundamental aspect’ of Galharra law (witness statement, Mr Michael Woodley, 282). He went on to describe its principal characteristics (*ibid.*). He also stated that Mingala gave the *nyinyaard* law (Transcript, Mr Michael Woodley, 515).

231. Ms Lorraine Coppin’s comments regarding the instructive role of narratives (paragraph 229 above) were expanded by Mr Middleton Cheedy in his witness statement.¹²¹ Mr Middleton Cheedy was speaking of a narrative of the willy wagtail (rendered as Tjiti Tjiti) and the pelicans (Jerinya).¹²² The narratives as accounts of events of the Ngurra Nyujunggamu attest to the supernatural origins of *nyinyaard*.

¹²¹ Witness statement, Mr Middleton Cheedy, 56-59.

¹²² *Jirrijirri* and *jiruna*. Juluwarlu archive n.d., 14.

This story teaches Yindjibarndi People that greed and mistreating people who serve them (like Tjiti Tjiti not getting food from the Pelican) is wrong. The Tjiti Tjiti was punishing everyone with trying to extinguish the fire stick which was disproportionate to what the Pelicans had done to him. The Tjiti Tjiti should have just been punishing the Pelicans not the whole world. Under the rules of the *nyinyaard* the Pelicans should have given the Tjiti Tjiti the same amount of food as they gave themselves.

Witness statement, Mr Middleton Cheedy, 59.

232. An additional aspect of the moral order that *nyinyaard* mandates is that its observance extends beyond relationships between people. It is understood to be a principle that also applies to how the Yindjibarndi should relate to their country. In this, the reciprocity implicit in the tenet is evident. It can be expressed as a simple statement: ‘you look after country, it will look after you’. This was articulated by Mr Kevin Guinness and by Mr Woodley in their witness statements.¹²³

233. Similarly, Ms Lorraine Coppin stated when giving evidence,

That’s what we call the *nyinyaard*. I look after you, you look after me. We look after country, country looks after us.

Transcript, 426, Ms Lorraine Coppin.

234. Additional statements are found in the transcripts.¹²⁴ The *nyinyaard* precept is also understood to apply to the natural resources of the land, including the environment.¹²⁵

235. Mr Woodley expanded on this belief in his witness statement.

If Yindjibarndi People don’t comply with or won’t acknowledge *nyinyaard* they become cursed by the country. We call this *gurruwara*¹²⁶ and it is a death warrant.

Witness statement, Mr Michael Woodley, 283.

236. Mr Angus Mack believes that *nyinyaard* is related to an individual’s *wirrard*. He stated that should you contravene the former the latter will be ‘disrupted’ and become ‘down’.¹²⁷ Mr Woodley expressed a similar belief when he gave evidence.¹²⁸

¹²³ Witness statement, Mr Kevin Guinness, 53, Mr Michael Woodley, 18.

¹²⁴ Transcript, Lyn Cheedy; 248, Ms Kaye Warrie, 370.

¹²⁵ Transcript, Mr Michael Woodley, 515, Mr Kevin Guinness, 652 (see also witness statement, Mr Kevin Guinness, 53).

¹²⁶ Footnote added: Yindjibarndi *gurru* (dead; Jurluwarra Archive n.d., 12) plus suffix *-wara* which gives the sense of occurrence (cf. Wordick 1982, 112) and occurrence to a person (*ibid.*, 117).

¹²⁷ Witness statement, Mr Angus Mack, 41.

¹²⁸ Transcript, Mr Michael Woodley, 515-516.

There is another part to *nyinyaard*. Under our Law, Yindjibarndi *ngurra* is obliged to produce and share its resources with the Yindjibarndi People but only if we continue to follow the Law by caring for our *ngurra* and our people.

Witness statement, Mr Michael Woodley, 285 and 286.

Wurruru and gajardu

237. The *wurruru* relationship is sometimes likened to a ‘godmother’ as well as being characterised as one who performs the duties of a midwife. Mr Warrie explained this in his witness statement.

Another special relationship comes about with our *urruru*. They are the women who helped our mothers when we are being born. Sylvia Allen (deceased) is my *urruru*. In a *urruru* relationship we look after and care for each other.

Witness statement, Mr Stanley Warrie, 11.

238. Mr Warrie expanded on his understandings of the *wurruru* when he gave his evidence to the court (Transcript, Mr Stanley Warrie, 580-590).

... when babies are born, someone comes and takes care of the things, you know? Like a *urruru* is a godmother, sort of. They take care of you, as you grow up, as well.

Transcript, Mr Stanley Warrie, 580.

239. Mr Warrie explained something of the enduring relationship he had with his *wurruru* as he was growing up (Transcript, Mr Stanley Warrie, 582-586). He also explained how the relationship was adversely affected by the split in the community which was a consequence of court action relating to Wirlu-Murra (*ibid.*, 586).

240. Counsel asked Mr Warrie whether the events that caused the damage to the *wurruru* relationships were right or wrong from the point of view of Yindjibarndi Law and custom (Transcript, 588, Ms Jowett). Mr Warrie’s response was, by my reading of the transcript, that he thought the actions were unheard of – that is to say they were not consistent with the way things have always been expected to be conducted (Transcript, 588, Mr Stanley Warrie). He had previously stated, ‘this is unheard of in our way, you know. Never been heard of before’ (Transcript, Mr Stanley Warrie, 586).

241. Mr Warrie also indicated (again, by my understanding of his meaning) that what was important now was to understand why such an outcome had occurred, rather than to ascribe blame (Transcript, 586-7, Mr Stanley Warrie). In my opinion, he was in this

regard, maintaining the integrity of his relationship with his (now deceased) *wurruru*, despite all that had occurred.

242. Mr Warrie's sister, Ms Kaye Warrie, expanded on the *wurruru* relationship when she gave her evidence (Transcript, Ms Kaye Warrie, 357). The *wurruru* helps the mother during the birth, after the baby is born and throughout its early years (*ibid.*). The special relationship creates an enduring bond, not only between the *wurruru* and the child but with the whole of the immediate family (*ibid.*). The relationship endures for life. Ms Warrie explained to the court that the *wurruru* relationship was founded upon 'rules'. The rules were summarised as,

... always [being] there for him, you know, and for us because we knew her. We - I grew up knowing - knowing them. And we had a lot of respect for her, you know.

Transcript, Ms Kaye Warrie, 358.

243. Ms Warrie told the court that when these rules were broken as a consequence of the split cause by the FMG mine,

It made me feel really sad. It hurt my *wirrard*, you know, yeah. *Wirrard* is my feelings. It hurt the whole family

Transcript, Ms Kaye Warrie, 358.

244. In his witness statement Mr Middleton Cheedy explained what was meant by the Yindjibarndi word, *gajardu*.¹²⁹ The account is consistent with that set out in my 2022 report (Palmer 2022, 85). In that report I explained how, by my understandings, the *gajardu* relationship served to link a person with the natural world, through the agency of a person. In Mr Middleton Cheedy's case, this person (his *gajardu*) came from a distant language group and was not a Yindjibarndi man (witness statement, Mr Middleton Cheedy, 5).

245. Mr Warrie also spoke of the *gajardu* relationship when he gave his evidence (Transcript, Mr Stanley Warrie, 587).¹³⁰ Mr Warrie compared the *wurruru* relationship, which always applies to a woman, with a man's role in relation to the quickening of a child and the natural world, known as the *gajardu* (*ibid.*). Mr Warrie did not state whether he had a *gajardu* and this was not a matter pursued by counsel. Mr Warrie did however

¹²⁹ Rendered in the statement as 'gudjeru'. Witness statement, Mr Middleton Cheedy, 5.

¹³⁰ Rendered in the transcript as 'gagadu'.

remark, in relation to the *gajardu*, that phenomena associated with it were, ‘a sort of spiritual thing’ (*ibid.*).

Conclusion and opinion

Galharra

246. The beliefs of those as recorded in the evidence I have reviewed demonstrate a belief in the divine originating of the Galharra system. Both the structure and consequential moral action serve to legitimate the Galharra as a part of the rule-based system of Yindjibarndi social relationships. Its originating in Yindjibarndi country, as the credo has it, affirms that the Galharra is not solely about social relationships. It is embedded in the country and is, through its honouring, a means to equate a person with country. It is then, in my opinion as an anthropologist, true to say that the Galharra is fundamental to the manner whereby Yindjibarndi people relate to one another and to others whose kin relationship can also be established by reference to the same categorical system, or a variation of it. It is both as belief and practice a central part of the Yindjibarndi culture and cultural universe.

247. In my opinion, and based on acceptance of this analysis, any diminution of the operations of the system in contemporary exchanges, represents a cultural loss. In circumstances where the observance of Galharra has been diminished or is absent, it is to be expected that there will be substantial personal anguish on the part of those who adhere to the normative systems of Yindjibarndi Law. Such consequences I have discussed in my 2022 report (Palmer 2022, 133-154, 185).

Nyinyaard

248. Based on these data I am of the opinion that it is the claimants’ belief that *nyinyaard* is a tenet of the Yindjibarndi moral order because of its divine origins. It is part of the rules, believed to have been ordained in the creative era, that now determine social relationships. It is then also understood to be a component part of the Galharra system, which I have discussed above. The data also show the diversity and complexity of the moral system that is evoked by use of the word *nyinyaard*. The reciprocity inherent in observance of *nyinyaard* extends to relationships with country, the latter understood as sentient and capable of such mutuality. This relationship extends to the products of the country – its resources and their well-being. In this observance of the rules that *nyinyaard* prescribe relate to the spiritual core of Yindjibarndi being; the *wirrard*. Failure to respond to the needs of the country not only diminishes a person’s *wirrard* but also their feeling of

well-being. In addition, it is inherently dangerous since, potentially at least, a failure to exercise responsibilities for country through proper exercise of *nyinyaad* might prove fatal.

249. In my opinion it is evident that the tenets of the *nyinyaad* represent a significant and central part of Yindjibarndi culture. In circumstances where the observance of *nyinyaad* has been diminished or is absent, it is to be expected that there will be substantial personal anguish on the part of those who adhere to the normative systems of Yindjibarndi Law. Such consequences I have discussed in my 2022 report (Palmer 2022, 78-81, 155-156, 171-179).
250. The data I have reviewed above are however, again in my opinion and based on the materials considered, representative of a cultural loss. I am of this opinion because I have concluded that *nyinyaad* is essentially and quintessentially an attribute of Yindjibarndi Law and its normative values that frame moral order. Such a cultural loss is not complete. The rule of *nyinyaad* is honoured by some. However, its universal application within a community of Yindjibarndi people is fractured. Its applicability now to an owner's duty to his or her land is also broken.
251. This cultural loss is a consequence of certain events. These events relate to the development of the mine at the Solomon Hub and the manner and policies that those responsible for the mine have employed in their relationships with those who hold native title rights to the land wherein the mine is situated.

Wurruru and gajardu

252. The trial evidence presented both in terms of the witness statements and the evidence as now found in the transcripts provides limited data upon which to form an opinion as to the origins of the *wurruru* and *gajardu* relationships. Based on the data I have reviewed in relation to the *wurruru* relationship I am of the opinion that Yindjibarndi people believe that it is a component of the rules that are together identified as Yindjibarndi Law. The rules that determine the manner whereby the *wurruru* relationship is to be observed, its obligations and duties as well as it benefits, forms a part of the normative system that is a tenet of the Yindjibarndi religious and moral order. While it is not specifically stated, I think it reasonable to conclude that it is believed to have divine originating, as have the other aspects of Yindjibarndi Law I have considered in my reports.
253. The data I have reviewed show that there is within the claimant experience an appreciation of cultural loss in relation to what is represented as a breaking of the rules

that prescribe the *wurruru* relationship. This occasions sorrow and social loss, but is also, again in my opinion, a further example of how the Yindjibarndi have suffered cultural loss. In the example I have reviewed here this would appear to be a direct consequence of the circumstances surrounding the development of the FMG mine.

254. I am unable to draw any concluded opinion with respect to the *gajardu* relationship beyond noting that it too is evidently believed to represent a part of the ordinance of Yindjibarndi Law. I do not find data to support a conclusion that its loss, if loss there has been, is attributable to the mine developed by FMG or the company's subsequent manner of engagement with the native title holders of the land wherein the mine is situated.

CANONS OF RELATIONSHIPS

255. The cultural losses which I have discussed in this chapter relate to different aspects of the manner whereby the Yindjibarndi organise their social relationships. They relate to the organisation and management of ritual activities, the relationship between one generation and the next and the transmissibility of cultural knowledge, the system of kinship and social organisation (Galharra), the moral imperative of *nyinyard* and two additional relationships that prescribe how a relationship will be sustained and perpetuated over time. I have demonstrated in this account that these principles of Yindjibarndi social organisation are believed to have been established in the creative period of the Ngurra Nyujunggamu. They were ordained, bestowed and mandated by the supernatural agencies that created the known physical and spiritual world. They are then properly to be understood as tenets or axioms, their pursuit prescribed by dogma and they are canons of the Yindjibarndi religious system.

256. I have discussed how one of this suite of cultural prescriptions is manifest in ritual action (paragraph 200 above). In terms of an anthropological analysis, observance of other prescriptions of social interaction through adherence to the normative requirements that each is believed to carry, also represents a ritualised moment in time. This understanding is endorsed by the supernatural originating of all those items considered here. Observance is compliance with a spiritual world beyond the here and now conceived of as being of both the past and the present. So, for example, observing *nyinyard* or an aspect of the Galharra system, evokes the supernatural and ordaining world of the Ngurra Nyujunggamu. It is, like all ritual, a moment of liminality where quotidian action is briefly interrupted by an act that signals compliance with and participation in a divine rule of Law.

257. Victor Turner, in his account of the ritual process, understood that the sharing of and joint participation in belief and action that had its origins in a group's deep culture, brought them into a state of what he termed, 'communitas' (Turner 1974, 82-82 and 120). Turner identified what he termed, 'normative communitas' as being applicable to situations where,

under the influence of time, the need to mobilise and organise resources, and the necessity for social control among the members of the group in pursuance of these goals, the existential communitas is organised into a perduring social system.

Turner 1974, 120.

258. In my opinion the Yindjibarndi community can be understood to represent a communitas. Members share commensally laws and customs and are willingly subject to the same canons. The essentiality of the Yindjibarndi as a set of people is forged from the communitas that is a product of the commensality through observance of Law and custom, by honouring its normative references. This sense of community, the reality of communitas, lies at the centre of the continued integrity of the Yindjibarndi as a viable group. The Law and its canons are the means whereby this integrity is sustained.

259. In my opinion and in regard to the Yindjibarndi, this communitas is fractured as a consequence of the constituent members of the Yindjibarndi as a set being unable or unwilling to sustain the observance of fundamental tenets of social organisation. This, in terms of these anthropological understandings, is the cultural loss that is occurring.

260. The examples of the organisation and management of social relationships and the shared precepts that underlie the processes that each evokes or demands, are, with one exception, impacted by the actions that have resulted as a consequence of the FMG mine. The exception is the *gajardu* relationship which I exclude from this analysis since I lack sufficient data to form a concluded opinion.

261. The consequences of the mine include FMG's policies and actions in relation to the selective organising and managing the native title holders. These policies and actions have caused a division in the Yindjibarndi community. This division has resulted in the breaking of the canons of Yindjibarndi Law. The result is then, in my opinion, a cultural loss that is attributable to the establishment of the mine at the Solom Hub and subsequent events.¹³¹

¹³¹ See paragraph 213, cross reference and footnote.

REFERENCES

- Berndt, R.M. and C.H. 1977. *The World of the First Australians*. Ure Smith, Sydney.
- Gennep, A. van 1960 (1909). *The Rites of Passage*. Routledge and Kegan Paul, London.
- Juluwarlu Aboriginal Corporation 2007. *Ngurra Warndurala Buluyugayi. Exploring Yindjibarndi Country*. Juluwarlu Aboriginal Corporation, Roebourne.
- Juluwarlu Aboriginal Corporation 2008. *Ngurra Warndurala Buluyugayi Wuyumarri*. Juluwarlu Aboriginal Corporation, Roebourne.
- Juluwarlu Archive, n.d. *Yindjibarndi Dictionary*. Juluwarlu Aboriginal Corporation, Roebourne.
- Myers, F. R. 1986. *Pintupi Country, Pintupi Self. Sentiment, Place, and Politics among Western Desert Aborigines*. Smithsonian Institution Press, Washington and London and AIAS, Canberra
- Palmer, K. 1977 'Aboriginal sites and the Fortescue River, north-west of Western Australia'. *Arch. and Phys. Anthropol. in Oceania*, vol. 12.3: 226-33.
- Palmer, K. 1981. 'Aboriginal Religion and the Ordering of Social Relations'. Ph.D. thesis, Department of Anthropology, University of Western Australia, Nedlands.
- Palmer, K. 2014. 'Yindjibarndi 1 WAD6005/2003 Anthropologist's Report.' Appleby Consulting Pty Ltd, Upper Brookfield, QLD.
- Palmer, K. 2018. *Australian Native Title anthropology. Strategic practice, the law and the state*. ANU Press, Canberra. <http://epress.anu.edu.au/>
- Palmer, K. 2022 'The Yindjibarndi People's compensation claim. WAD 37 of 2022. Anthropologist's expert report.' Appleby Consulting Pty Ltd., Meelon, Western Australia.
- Rose, D.B. 2000. 'Signs of Life on a Barbarous Frontier: Intercultural Encounters in North Australia.' In, *The Archaeology of Difference: Negotiating Cross-Cultural Engagements in Oceania*. R. Torrence and A Clarke (eds.). Routledge, London. Paper sourced from https://press-files.anu.edu.au/downloads/press/p11081/pdf/6_rose_hr2_1998.pdf
- Sansom, B. 2002. 'A Frightened Hunting Ground: Epic Emotions and Landholding in the Western Reaches of Australia's Top End.' *Oceania* 22, pp. 156-194.
- Turner, V. 1974. *The Ritual Process*. Pelican Books, Harmondsworth.
- Wordick, F. 1982. *The Yindjibarndi language*. Pacific Linguistics, Research School of Pacific and Asian Studies, the Australian National University, Canberra. (<http://pacling.anu.edu.au/index.html>)

DECLARATION BY THE EXPERT AS REQUIRED BY THE PRACTICE DIRECTION

I, Kingsley Palmer, have made all the inquiries that I believe are desirable and appropriate (save for any matters identified explicitly in the report), and no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.

A handwritten signature in black ink, appearing to be 'Kingsley Palmer', written in a cursive style.

Kingsley Palmer

15 February, 2024.

APPENDIX A. THE SERVICES REQUIRED

BLACKSHIELD

LAWYERS

12 September 2023

Dr Kingsley Palmer

BY EMAIL

Dear Kingsley,

**RE: WAD37/2022 in the Federal Court of Australia: Yindjibarndi Ngurra
Aboriginal Corporation RNTBC ICN 8721 vs State of WA & Ors:
Supplementary report**

Thank you for preparing your expert anthropological report dated August 2022 in the above proceedings (**expert report**). You will recall that you prepared your expert report pursuant to your brief duplicated at pages 141-142 of that report.

I am now writing to expand your existing brief so as to prepare a supplementary expert anthropological report. Your supplementary report should state any qualification to, development of or change of the opinions set out in your expert report taking into account:

- a) your observations of the Federal Court of Australia hearings conducted in Roebourne on 7-11 August 2023, at the Solomon Hub Project on 14 August 2023 and at Bangkangarra on 15-17 August 2023;
- b) the transcript of the hearings referred to in paragraph a), which have been provided to you; and
- c) the statements of the witnesses who gave evidence during the hearings referred to in paragraph a) as well as those which are tendered by the consent of the parties. The parties are currently conferring as to final versions of these statements, taking into account objections ruled on or conceded and amendments or corrections made by the witnesses. We will forward you the final versions as they are finalised.

A.B.N. 51 836 017 567

Level 28, AMP Tower
140 St Georges Terrace
PERTH WA 6000

PH: (08) 9288 4515

EMAIL: simon@blackshield.net

In closing please note that YNAC must file your supplementary report on or before 8 March 2024.

Please contact me on **0414 257 435** or Sophie Kilpatrick on **0412 411 023** should you have any queries about this letter.

Yours faithfully



Simon Blackshield
Solicitor