



No. WAD37 of 2022

Federal Court of Australia

District Registry: Western Australia Division:

General

Yindjibarndi Ngurra Aboriginal Corporation RNTBC (ICN 8721)

Applicant

State of Western Australia and others

Respondents

APPLICANT'S EXPERT ARCHAEOLOGISTS' SHORT RESPONSE TO THE FMG RESPONDENTS' EXPERT ARCHAEOLOGIST'S REPORT

(Filed pursuant to item 12(c) of the timetable attached to the orders made 28 August 2024)

Filed on behalf of (name & role of party) The Applicant

Prepared by (name of person/lawyer) Simon Blackshield

Law firm (if applicable) Blackshield Lawyers

Tel (08) 9288 4515 / 0414257435 Tel (08) 9288 4515 / 0414257435

Email simon@blackshield.net

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

(include state and postcode)

Response to Mr Doug Williams report – Prof. Peter Veth and Dr Caroline Bird

1. We note that we continue to be bound by the Expert Evidence Practice Note and we set out below our response to Mr Williams' report.
2. We agree that many criticisms can be directed towards the adequacy of controls for the site-formation history of individual rockshelters detailed in the FMG reports, the methods used to investigate and mitigate their loss, and variability in the thoroughness and quality of reporting.
3. There is a logical inconsistency in Mr Williams assessing the SHP sites as generally of low significance, when he notes the mitigation work, methods and reporting of all consultants were competent and yet considers the repeated conclusions and recommendations of the senior consultants (such as Denis Coutant and Scott Chisholm) as essentially wrong or exaggerated. The FMG consultants repeatedly conclude that the sites have good integrity overall and that the collection of early dates, and site types present in the SHP, represent a significant record of high significance for the Pilbara, arid zone and Australian archaeology. In our opinion, the sites answer archaeological questions of regional and national importance.
4. The FMG consultants looked at sites in a larger landscape context and have repeatedly argued that the evidence for early and repeated use from this corpus of sites was considerable and the area thus has high heritage value by comparison with other parts of the Hamersley Range. Two examples follow:

*... evidence of Aboriginal occupation from the initial colonisation of the Australian continent is very fragile and is eroding and decaying or has already done so. Currently 20% of the rockshelters excavated by Terra Rosa CRM at the Solomon Hub, compared with 7% of the sites synthesised by Morse in 2009, have yielded evidence of occupation greater than 25,000 years old. The inferences of this statistic are; that the selection criteria for the excavation of rockshelters in the Solomon Hub project area are well defined and stringent, **the area possesses exceptional preservation of Pleistocene remains in rockshelters, or the area was more intensely occupied during this period of antiquity than other areas in the Hamersley Ranges.** [emphasis ours].¹*

*The excavation programs that have been undertaken within the Solomon Hub Project over the last six years indicate that the area was **consistently occupied by Aboriginal people through the last 35 to 40 millennia** [emphasis ours] (see table 5, below). YIN09-002 is of particular importance in this context as it fits into an increasing network of sites (including TRYINPAD13-03, YIN10-011[sic], YIN10-014, YIN11-028, and YIN08-031) that demonstrate an intensive Pleistocene occupation of the area, and ongoing occupation through the LGM into the Holocene period. The dating results returned from the excavation of YIN09-002 make the site one of the oldest within the inland Pilbara and indicate that it may be associated with the initial colonisation of the Solomon area by past Aboriginal people.²*

5. On the basis of *in situ* dates from a feature at YIN09-002 (43,500 – 41,850 cal BP and 42,950 – 41,500 cal BP) and from YIN11-028 (47,829 – 41,442 cal BP from spit 10, with two other comparable dates from that site), we consider that a plausible age range for the oldest occupation dates in the SHP lies between 47 - 40 ka. This is consistent with age estimates for other sites in the Hamersley Range such as Juukan 2 (estimated at 47ka with the oldest calibrated date of 42,862 – 42,170 cal BP) and Hope Downs where several sites have dates that are older than 40,000, including ~47ka for HD07-3A-PAD13. First occupation boundaries are often reliably modelled, as in the case of the Juukan 2 analysis just published.
6. The stratigraphic integrity of all occupation sites is questioned by Mr Williams and we agree there could have been better controls through sedimentary, micromorphology, geochemical and further dating studies. However, to question the association of all early dates and cultural materials in the SHP seems skewed and **sits in direct contrast** to the observations of the senior consultants employed by FMG. The consultants concluded for five of the oldest rockshelter sites here (and elsewhere):

¹ Chisholm, et al. 2014, p. 245 [Report 51, 51A, 51B]

² Coutant, Denis 2018, p.4 FMG.018.001.0653

YIN10-111 is a site of unusually high stratigraphic integrity for the Solomon area.³

The authors can state with confidence drawn from the number of dated samples... and the stability of the deposit that **YIN11-028** contains the oldest known Aboriginal occupation in the Pilbara...⁴

...the heritage place [**TRYINPAD13-03**] survived relatively undisturbed and can be considered to have a moderate to high level of overall integrity.⁵

YIN09-002 displayed a good overall integrity of deposit.⁶

FMG is advised that further mitigative excavation is recommended within **YIN10-014** due to the importance and significance of the archaeological deposit identified.⁷

7. Mr Williams has not discussed/considered the **extensive presence of other site types** such as walled niches, open sites with stratified context and residues showing processing tasks, quarry/ochre sites and other categories which are variably noted in the reports. The density of occupation sites, such as along Kangeenarina Creek, is high and while possibly late Holocene in age, evidences an intensive and systematic use of this landscape. We believe that a hunter-gatherer group could access any other site within the SHP in a day's travel, with the consultants noting that Yindjibarndi saw sites as used for related purposes.
8. We expressly say (par. 33) that it is **not possible to assess** the sites (as reported) against National Heritage Listing (NHL) criteria. Thus, the protracted discussion of national significance by Mr Williams is redundant. As a group of sites, however, they can address arid zone themes beyond the Pilbara region.
9. We note that preservation of organic material is often poor in Pilbara rockshelters. This presents problems for dating as charcoal is also not preserved. OSL is now increasingly used to address this problem. Although OSL dates have been obtained for some sites in the SHP, it is clear that this technique has been haphazardly applied. Mr Williams takes a very conservative approach to accepting dates from charcoal samples not obtained from features. However, we note that earlier dates from most of the sites discussed by him do **not come from features**, including Juukan 2 and Jundaru.
10. Mr Williams provides a comparative analysis of several other important sites in the Pilbara in relation to national heritage criteria. We note that all of the sites he discusses have had substantial investigations beyond the usual compliance requirements under the *Aboriginal Heritage Act 1972* (WA), including large-scale excavations and detailed specialist analyses. They have all been comprehensively published. None of the sites in the SHP have received comparable levels of investigation. We agree that numerous questions remain about site formation processes, integrity, dating and the interpretation of individual sites. We concur that there has been little or no detailed investigation to test the claims made about the significance of the corpus of sites and the broader archaeological landscape (such as peer-reviewed publications). Follow-up investigation or salvage, where it has occurred, has rarely involved specialists or methodologies other than the original site identification and dating compliance work (but see OSL report⁸ for TRYINRS13-04 rock engraving and use wear/ residue studies⁹ for salvaged surface artefacts along Kangeenarina Creek). Specifically, there has been no specialist analysis of site formation processes, and the dating program is poorly justified, particularly with respect to the selection of OSL samples. For these reasons we considered that it was not possible to formally assess individual sites against NHL criteria. Many of the specific issues Mr Williams raises with respect to the stratigraphic integrity and association of age determinations with cultural material for individual sites could and should be addressed by further investigation.

³ Curtis et al. 2015, p. 286. FMG.002.001.2100

⁴ Curtis et al. 2014, p.179. FMG.002.001.0612_0187

⁵ Curtis et al. 2013, p. 64. FMG.057.001.0045_0075

⁶ Coutant 2018, p. 3. FMG.018.001.0653

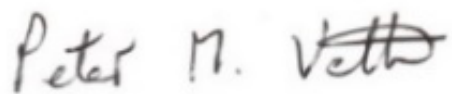
⁷ Curtis et al. 2014, p.12. FMG.002.001.2093_0059

⁸ Pietsch and Olley 2014, in Chisholm et al. 2014 Vol. 2pp. 54-62. [Report 51A],

⁹ Kononenko, N. 2012. Included in Rowland et al 2012, p. 174ff. FMG.002.001.0154.

11. Similarly, although we agree there has been considerable effort expended to identify sites and mitigate impacts by avoidance or limited salvage, resulting in what appears to be a relatively high density of sites with Pleistocene dates, there seems to have been little attempt to follow this up with more comprehensive investigations, including specialist analyses, particularly where sites have been salvaged prior to destruction.
12. This contrasts with recent intensive investigations at Bangkangarra, involving specialist analyses of site formation and dating, which suggest that this site will prove to be significant. Bangkangarra is on the boundary of the SHP and in a locality which is inextricably linked to the wider SHP archaeological and cultural landscape.
13. Bangkangarra has revealed a c. 2m deep cultural deposit. As over 40 OSL samples and sediments are being analysed, it is our professional opinion that the large, over 1,000 artefact assemblage, will again date to, and likely before, 40,000 years ago. This is both plausible and consistent with regional patterns.
14. We agree that the primary purpose of probing is not to estimate depth of deposit and that probe depth is not a predictor of depth of deposit. However, as we note (in par. 88), the reliance on probing 'and the requirement for proximity to other heritage place elements mean that some archaeological sites may not have been test-pitted.' This is demonstrably true for YIN11-028, where initial assessment failed to establish the presence of a PAD (potential archaeological deposit).
15. In pars 111-121, Mr Williams dismisses our concerns about the lack of publication of results of the extensive heritage investigations in the SHP. We acknowledge that publication is not a mandatory requirement of compliance investigations, and that there are obstacles to preparing material for publication including issues of confidentiality and approval and the time involved. Nor do we think that publication of 'grey literature' should be necessarily routine or required. However, when we were presented with the large volume of reports and the claims made in them for an unusually high volume of Pleistocene sites and a rich, diverse and ancient cultural landscape in the SHP, we were surprised that we were only aware of one of these sites (YIN09-002), through a minor mention in a ten-year old review article without corroborating details. In addition to the Pleistocene dates, we were unaware of the excavations of open surface sites and the successful use-wear results from surface artefact scatters. Such significant claims would normally be shared for wider review and would contribute to regional heritage significance assessment for the Pilbara, and likely beyond.
16. We note that during the period of investigation of the SHP, significant results from compliance excavations in the region have been published, including Watura Jurnti, Yurlu Kankala, Juukan 2 and several sites at Hope Downs. Published reviews of compliance data have also appeared for excavated rockshelters in the West Angelas and for rockshelters and surface sites at Christmas Creek. The dissemination of results from 'grey literature' through publication of key sites and through reviews is important for the evaluation of site significance and we note the reliance by the consultants retained by FMG on key regional reviews (e.g. by Drs Steve Brown, Kate Morse and Ben Marwick) and preliminary published data from sites such as Juukan 2, Djadjiling, Yirra and Malea (now Jundaru). For the 'interested archaeologist' mentioned in par. 120, access to 'grey literature' reports through the relevant government department depends on those reports being lodged and some awareness that they might contain important information - such as old ages. Transparent heritage planning must be underwritten by knowledge of records and data, even if only in summary form. As senior archaeologists who have reviewed both academic and grey literature from Western Australia for some 40 years, we were surprised at the scale and apparent import of some of the SHP records.
17. Our point about visibility and peer review is reinforced by the fact that none of the SHP sites or claimed older ages have been referenced, or referred to, in Pilbara-wide reviews over the last decade including publication of the analyses carried out at Hope Downs (Cropper and Law 2018 *British Archaeological Reports*) or at the Juukan 2 excavations just published (Slack et al. 2024 *Quaternary Science Reviews*) who note (p. 2) "These investigations, therefore, have established human occupation of the region

>40,000 years, but thus far no archaeological sites of similar antiquity have been reported for the western plateau”.

A handwritten signature in dark ink that reads "Peter M. Veth". The signature is written in a cursive style with a large, stylized 'P' and 'V'.

Professor Peter Veth

08/10/2024

A handwritten signature in dark ink that reads "Caroline Bird". The signature is written in a cursive style with a large, stylized 'C' and 'B'.

Dr Caroline Bird

08/10/2024

NOTICE OF FILING

Details of Filing

Document Lodged:	Expert Report
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	10/10/2024 10:21:55 AM AWST
Date Accepted for Filing:	10/10/2024 10:22:08 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



A handwritten signature in blue ink that reads "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.