Depoliticising Native Title

Mediation, uncertainty and the extension of state government power in Western Australian native title determinations

Benjamin H. Ripper

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Abstract

The Native Title Act 1993 (Cth) (NTA) provides a statutory framework for Indigenous Australians to claim rights over their traditional land and waters. Claims are successful if these rights are deemed to have existed at sovereignty and survived post-sovereignty into the present. The Act was introduced as a result of the High Court Decision in *Mabo and Others v Queensland (No. 2) (1992)* and was met with by turns with celebration, confusion, consternation and fear. The subsequent push to federally legislate the decision was met with strong opposition from state governments and the mining lobby who demanded 'certainty' in granted land titles. After the NTA was enacted, the position of the Western Australian state government was to resolve native title claims via litigation and to continue to criticise the legislation as an un-workable threat to the state's economy. After 2000, attitudes to native title within government and business experienced a turn-around in which native title resolution has become an accepted part of the business landscape; resolution of native title via litigation was largely replaced by negotiated determinations by consent. The increase in mediation of native title claims has been accompanied by predominantly positive language from the Western Australian state government, native title respondents and Native Title Representative Bodies. In this thesis I argue that this positive language masks the realities of the mediation process, and that state government assessment of cultural evidence has led to reduced transparency in native title decision-making. The mediation policy has reduced uncertainty for the Western Australian state government and industry respondents, but has further entrenched the power imbalance between the Western Australian state government and native title applicants. I draw on the work of James Ferguson (1990) and Foucault's concept of 'governmentality' (Foucault 1978; Rose 1996; Lemke 2004) to reveal how the Western Australian state government has depoliticised native title decision-making. I examine how the Western Australian state government has exerted greater power over the native title process through its mediation regime than it has litigating native title claims in the Federal Court, and contextualise this within the Federal government's approach to native title policy.
Candidate’s Declaration:

The thesis is my own composition, all sources have been acknowledged and my contribution is clearly identified in the thesis. For any work in the thesis that has been co-published with other authors, I have the permission of all co-authors to include this work in my thesis. This thesis does not contain work that I have published, nor work under review for publication. The thesis has been substantially completed during the course of enrolment in this degree at UWA and has not previously been accepted for a degree at this or another institution.
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**Glossary**

**The Australian Labor Party**  One of the two major political parties in Australia. The Australian Labor Party has a broadly centre-left policy platform, having close historical affiliation to the union movement and what is generally regarded as the more socially progressive platform of the two major parties. At the time of writing, the Australian Labor Party forms the Federal government, and the governments in the states of South Australia and Tasmania, as well as the Australian Capital Territory.

**The Australian Liberal Party**  One of the two major political parties in Australia. The Australian Liberal Party has a broadly centre-right policy platform, advocating economic liberalism and what is generally regarded as the more socially conservative platform of the two major parties. At the Federal level, the Australian Liberal Party forms a Coalition with the National Party, who are associated strongly with regional Australia and agricultural interests. At the time of writing, the Australian Liberal Party forms governments in the states of New South Wales, Victoria, and Western Australia, while the affiliated Liberal-National Party holds government in the state of Queensland, and the Country Liberal Party holds government in the Northern Territory.

**Barnett government**  State executive government of Western Australia at the time of writing. Headed by Premier Colin Barnett, leader of the Western Australian Parliamentary Liberal Party. Elected as a minority government in September 2008 in coalition with the National Party. Re-elected with a majority in March 2013 (remaining in coalition with the National Party).

**Carpenter government**  State executive government of Western Australia between January 2006 and September 2008, headed by Premier Alan Carpenter, who was elected as head of the Western Australian Parliamentary Labor Party upon the resignation of Premier Geoff Gallop. Defeated in the September 2008 state election.

**Court government**  State executive government of Western Australia 1993 – 2001, headed by Premier Richard Court, leader of the Parliamentary Liberal Party in coalition with the National Party. Defeated in the February 2001 state election.

**Federal Court of Australia**  Has jurisdiction over civil disputes under federal law (excluding family law matters). Cases are heard at first instance by single Judges. In the Australian court hierarchy, it is equivalent to the Supreme Courts of the states and territories and superior to the Federal Circuit Court.

**Freehold**  A form of land title, where the crown has granted an interest, commonly referred to as ‘private ownership.’ A stronger form of title than leasehold. Also known as ‘fee simple.’ The *Native Title Act 1993 (Cth)* validated the granting of freehold titles prior to 1975.

**Full Court**  The appeal division of the Federal Court of Australia, comprising three Judges. Also known as the Full Bench.
Future Acts

Proposed activities after 1994 that will affect native title rights and interests by extinguishing them or creating rights inconsistent with native title. The Native Title Act 1993 (Cth) creates procedures for validating these activities, giving registered native title applicants the ‘right to negotiate’ over activities where native title may exist within the area claimed.

Gallop government


Guidelines for the Provision of Information in Support of an Application for a Consent Determination of Native Title (the Guidelines)

Policy framework for the structure and assessment of native title connection reports. The document was drafted in 2004, and implemented by the Office of Native Title (2004-2010) and the Land, Approvals and Native Title Unit (2010-).

High Court of Australia

Final Court of appeal in Australia. Has judicial oversight over laws created by the federal and state parliaments and rules on constitutional law matters. Presided by the Chief Justice and six other Justices.

Howard government


Indigenous Land Use Agreement (ILUA)

An agreement between a native title claim group and other parties with an interest in the claim area over the use and management of land and waters. One of the provisions made in the 1998 amendments of the Native Title Act by the Howard Government in 1998. ILUAs can be negotiated as part of, or separately from, a native title determination. Once negotiated, ILUAs are registered with the National Native Title Tribunal (NNTT) and are legally binding on all parties.

Keating government

Federal executive government of Australia between December 1991 and March 1996. Headed by Prime Minister Paul Keating after he challenged sitting Prime Minister Bob Hawke for leadership of the Parliamentary Labor Party.

Land, Approvals and Native Title Unit, Department of Premier and Cabinet

Provides strategic leadership to the Western Australian Government on all matters related to the Commonwealth Native Title Act 1993 (Cth). Responsible for overseeing the connection assessment process.

National Native Title Tribunal (NNTT)

Established by the Native Title Act 1993 (Cth). The NNTT originally had a significant role in the mediation of native title claims, but these responsibilities have now been moved to the Federal Court, with the NNTT’s mediation role now being constrained to Future Act matters. The NNTT is responsible for applying the ‘registration test’ to new claims and making arbitral decisions in Future Act matters. The NNTT also registers and assist with mediation of Indigenous Land Use Agreements.
Native Title Representative Bodies (NTRBs) Organisations created under the Native Title Act 1993 (Cth) to act as the legal representative for Indigenous people within prescribed areas in native title matters. NTRBs are appointed by the Minister for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). NTRBs are classed as Aboriginal Corporations under the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

Native Title Service Providers Organisations that are funded to undertake the work that an NTRB would otherwise undertake where no NTRB is appointed. NTSPs differ from NTRBs in that they are not classed as Aboriginal Corporations under the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

Office of Native Title (ONT) Western Australian native title policy office from 2004-2010. ONT was responsible for the implementation of mediation policy and drafted the Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title in 2004 (the Guidelines). The office undertook the assessment of native title connection material for consent determinations under these guidelines.

Pastoral Lease Crown land leased by the government for the purposes of farming.

Racial Discrimination Act (1975) Australian federal legislation that makes discrimination on the basis on an individual or group’s race unlawful.

Right to Negotiate A procedural right of registered native title claimants created by the Native Title Act so that they can negotiate with parties who wish to undertake activities that will affect their native title rights and interests while the claim is being determined. The Right to Negotiate may involve the native title claimant giving consent for the proposed activities with compensation, however it does not afford the claimants the right of veto over proposed activities.
Chapter 1 - Introduction

The push to resolve native title claims by agreement in Western Australia began in earnest in the early 2000s. After almost a decade of antagonism towards the concept of native title, the Western Australian state government (WA government) decided on a new approach, moving away from its strong litigious stance towards native title to instead negotiate with native title claimant groups and other respondents to determine native title claims (McCaul 2010). The new policy produced numerous determinations by consent and a dominantly positive discourse as to the benefits of its operation. The reality of the policy, however, does not live up these assertions and has further entrenched the WA government’s power over the native title process. The assessment of native title evidence has become less transparent, and the WA government has greater control over the criteria for the presentation of cultural evidence. This situation has led to native title outcomes that are driven by the interests of the WA government rather than the native title applicants whose rights are being recognised.

In this thesis, I critique the mediation process in Western Australia from an anthropological perspective. As the basis of this critique, I analyse native title discourse on mediation policy and contrast it with the realities of its operation. I will use both the terms mediation and negotiation. Mediation refers to the official

1 Throughout this thesis the word ‘state’ will be used in a variety of different ways concerning different meanings, objects and conceptions. To avoid confusion, I will use ‘WA government’ when referring to that entity, so as to differentiate it from theoretical conceptualisations of ‘the S/state’ which is usually referring to national government architectures and bureaucratic structures. It should be noted that in some quotations the WA government will simply be referred to as ‘the state’, or ‘The State’, or ‘state government.’ The government of Australia will be simply referred to as ‘the Federal government.’ When referring to other Australian states generally I will use the phrase ‘state governments.’
process of the WA government resolving native title claim by consent. I will use negotiation more generally to refer to actions within this process. Western Australia’s mediation policy has resolved over 20 native title claims, however, it has also allowed the WA government to greatly increase its control over the assessment of cultural evidence. Mediation policy has also resulted in a significant reduction in transparency in relation to native title decision-making, as connection reports, expert reviews of these reports and government position papers are not publically available, and thus government decisions on native title connection are not easily critiqued. This increase in state control has been depoliticised through the positioning of mediation as having improved the efficiency of the native title process to the benefit of all parties, and through the construction of connection assessment as a mere ‘technical problem’ (Ferguson 1990). It should not be interpreted as bad faith on behalf of policy makers, but rather as a side-effect of the apparatus of government policy, in which bureaucratic\(^2\) (as opposed to Judicial) mechanisms have been applied to the assessment and resolution of native title claims. In this chapter I broadly sketch this shift from litigation to mediation in Western Australia. I will briefly outline the anthropological and legal landscape of native title and demonstrate that mediation has become an important aspect of the native title process in Australia, but has not received sufficient attention and reflection by anthropologists.

The Native Title Act 1993 (Cth) (hence NTA) was introduced in the Federal Parliament by the Keating government in response to the High Court Decision in

\(^2\) In this thesis I will refer to ‘bureaucratic mechanisms’ and ‘bureaucratisation’ in native title. This is meant to differentiate the assessment of cultural evidence in native title by policy officers under WA government policy from the assessment of this material by the Federal Court.
the case of *Mabo and Others v Queensland (No. 2) (1992)*³ (hence *Mabo*). The NTA provides a statutory framework for Indigenous⁴ Australians to claim rights over their traditional land and waters. Claims are successful if these rights are deemed to have existed at sovereignty and survived post-sovereignty into the present. The *Mabo* decision was handed down in June 1992. The Judgment stated that the Meriam People of the Torres Strait possessed ‘native title’ over the island of Mer and that this title was recognised under Australian common law. For native title to be recognised, current rights must be consistent with those practised at sovereignty, and must not have since been extinguished by a valid act of government. Sovereignty here refers to the year in which the Crown declared ownership (sovereignty) over the state or territory in question. The date varies between the states and territories - for Western Australia it is June 11th 1829. Such acts include the issuing of freehold title or the leasing of land for purposes that are inconsistent with native title rights.

In the period between the *Mabo* decision and the introduction of the NTA, there was significant national unrest over the implications of the judgement for land titles in Australia. The NTA was legislated with the purpose of containing these implications of the *Mabo* decision within a defined structure, allowing the Federal government to limit the scope of native title rights and thereby mitigate economic uncertainty that was created by the *Mabo* decision. The legislation prevented a situation in which numerous native title claims across the country went before the

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⁴ The term 'Indigenous' is used throughout this thesis to refer to both Aboriginal People from the mainland of Australia, and Torres Strait Islanders and thus is used only when discussing matters in a national context. 'Aboriginal' is used throughout when referring to the Western Australian context, or specific claims on the Australian mainland.
Federal Court, having unknown implications for land title. The NTA allows for determinations to be made on the basis of negotiated agreements between the parties or litigation.

Claims under the NTA are filed with the Federal Court and may be determined via litigation, with the relevant state or territory as the first respondent. After the NTA came into effect in 1994, state governments were antagonistic toward the native title process and they sought to resolve claims within their territories by litigation. Between 1994 and 2002 the majority of claims were decided in the Federal Court, usually in a first instance trial, followed by a Full Court appeal. Occasionally, a third phase High Court appeal also took place in cases where the law required further clarification.

Native title is not only defined by the NTA, but also through an evolving jurisprudence based on significant decisions by the courts. The *Wik Peoples v State of Queensland and Others (Wik)* decision in 1996 found that pastoral leasehold was ‘co-existent’ with native title rights, and thus did not extinguish them. In December 2002, the High Court handed down a judgement upholding a Federal Court decision that native title did not exist in *Members of the Yorta Yorta Community and Others v the State of Victoria (Yorta Yorta)*. The judgement ‘set a high bar’ for native title claimants in the proof of cultural connection and continuity (Basten 2003: 2). It introduced requirements to prove the continuous

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5 The Full Court represents the next level of authority in the Federal Court system. The Full Court consists of three Federal Court judges as opposed to a single judge in the first instance trial.
6 *Wik Peoples v Queensland [1996] HCA 40*.
7 *Members of the Yorta Yorta Community and Others v the State of Victoria [2002] HCA 58*.
existence of a society ‘out of which the body of laws and customs arises.’ These requirements made it extremely difficult for applicants to prove a continuing cultural connection to land, and disadvantaged members of Aboriginal societies who had longer and more intensive contact with settler society. The High Court also introduced the concept of the ‘normative system of laws,’ which must be proven to have had a ‘continuous existence and vitality since sovereignty.’

Following this, it became incumbent on the applicants to establish the existence of a system of laws that could be traced unbroken to a society that existed in the claim area at sovereignty. Mediation became a credible alternative for the recognition of native title because the ‘high bar’ set for evidence of cultural continuity eroded the prospects of achieving positive determinations through the courts.

The WA government began reviewing their native title policy prior to the Yorta Yorta decision, and other state governments were also beginning to move away from litigation as a first preference for native title resolution. The WA government’s policy review was based on its new preference to resolve native title claims by negotiation (Wand 2001). While the policy was not a response to Yorta Yorta, the decision had a significant impact on how the new policy would operate. Primarily, the change was attributed to the time and cost of the lengthy litigation process, in which the large majority of cases involved more than one court. The length of time taken to resolve claims in particular contributed more and more

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8 Members of the Yorta Yorta Community and Others v the State of Victoria [2002] HCA para 50.
9 Members of the Yorta Yorta Community and Others v the State of Victoria [2002] HCA paras 37-44.
‘uncertainty’ for the states and other respondents. In addition to financial reasons, the negative effects of litigation on the welfare of the native title applicants were also cited (Eric Ripper Media Statement, 14/11/2001). Native title was taking too long, and causing too much stress for native title applicants.

In contrast to the native title of the 1990s, parties were now in agreement as to how the issue of native title should be resolved (Ritter 2009b). Mining companies and the pastoral lobby were also on board with the policy, as it gave respondents greater input into the shape of determinations (Office of Native Title 2004: 1). Negotiation, according to all parties, was to be a quicker, cheaper, fairer process that would achieve better native title outcomes for the claimants. Negotiation was regarded as the panacea for all the faults of the native title system.

The realities of mediating native title claims in Western Australia do not live up to this optimistic view. Mediation policy in Western Australia has led to more than 20 consent determinations and has existed in an environment where native title decisions are becoming less and less controversial, but after ten years of the policy, under both Labor and Liberal governments, its outcomes are yet to meet initial promises. Native title claims still take significant amounts of time to resolve, if they are resolved at all. Costs to the state, applicants and respondents alike are difficult to discern or even separate from those involved in going to court. The accountability of the process is also compromised, as decision-making

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10 Throughout this thesis I will refer to the term ‘uncertainty’ as a catalyst for government legislative and policy responses to Mabo and native title. ‘Uncertainty’ refers to such things as unclear implications for land tenure and unknown results in native title litigation with open-ended time-frames. It refers to the barrier of the unknown to the conduct of government and commercial business.
on cultural evidence has switched from the Federal Court, to Western Australia’s native title bureaucracy, in which the transparency of how decisions are made, and under what conditions, is greatly reduced.

The mediation policy of the WA government was introduced for a similar purpose as the introduction of the NTA. The NTA reduced uncertainty as to the implications of native title, but the ongoing litigation of numerous cases in the state was contributing to a different kind of uncertainty, as claims were remaining unresolved for long periods. Additionally, native title was a continually developing field of law, and there was significant uncertainty as to where native title would be found to exist and on what basis.

The concepts of ‘certainty’ and ‘uncertainty’ had punctuated government discussions on native title since the *Mabo* decision in 1992. Reduction of uncertainty was not a motivation limited to state governments who were strongly opposed to native title. The Court government’s (1993 – 2001) first approach to native title and the uncertainty it created was to either remove or temper it with legislation. With the move to mediation with the election of the Gallop government, as with the Court government, reduction of uncertainty was targeted in the policy (Eric Ripper Media Statement, 14/11/2001). Litigation was not commensurate with the ongoing process of governing, as the WA government’s policy position on native title was destabilised by uncertainty surrounding Federal Court decisions. In this case I will argue that ‘certainty’ is a codeword for control of the native title process. The WA government gained control of native title outcomes through depoliticising an ideological battle, and sealing it within the
bureaucratic process of connection assessment. The use of power through 'reasoning' and 'rationality' is not only evident in justifications of government action on native title, but in the very structure of the connection assessment process itself, particularly in the legal 'shadowlands' identified by Burke (2010) (discussed below). The WA government’s policy formulation must consider the needs not only of native title claimants, but those of pastoralists, miners and the broader community of citizens under its purview. These considerations are not served by the ‘uncertainty’ of litigating native title claims over state controlled land, as the possibility of a decision which the state believes will not benefit the 'broader community' is either high, or the process will be so protracted as to have the same effect regardless of the outcome.

This thesis focuses on the native title policy environment in Western Australia as the state that has seen the most change and development of native title policy. The state itself covers nearly a third of the entire Australian landmass, and along with Queensland, produces a significant amount of Australia’s mineral wealth (Ritter 2009b). Compared with some of the more populated eastern states, Western Australia has a large Aboriginal population and a relatively sparse rural settlement. These factors make native title a significant issue in Western Australia, which has ultimately led to a more intensive policy environment due to the large amount of native title claims filed (552 applications active, discontinued, or determined as of 2013) and powerful respondent interests in the mining and

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11 In the 1996 census Western Australia’s indigenous population stood at 50,791 (2.9% compared with 2% nationally. In 2001 it was 58,496 (3.2% compared with 2.2% nationally). In 2006, it was 58,711 (3% compared with 2.3% nationally) [Australian Bureau of Statistics, www.censusdata.abs.gov.au].

pastoral lobby. The WA government was also one of the primary antagonists to the *Mabo* decision and to the creation of NTA, as I discuss in Chapter Two. Thus the move to a mediation policy represented a significant change in approach. Only Queensland had a comparable native title policy environment, in which there were a large number of claims and the resolution of native title was a significant issue for the state’s mining and pastoral interests. In the more populous states of New South Wales and Victoria native title is less likely to exist and, due to their size, they do not have the number of pressing claims of WA or Queensland.13

**Anthropology, native title and the state**

*Anthropology and native title*

The discipline of anthropology has been historically concerned with the traditional law of ‘native’ cultures, especially those relating to land tenure and social structure. Thus anthropologists have been engaged, in both academic and applied settings, in the native title process and in discussing subsequent theoretical issues. Anthropological discourse on native title has been concerned with issues relating to expert testimony (Trigger 2004; Morphy 2006), anthropology in a legal context (Sutton 1998, 2003; Morton 2002; 2007; Burke 2011), applied anthropological approaches (Fingleton & Finlayson 1995; Finlayson & Jackson-Nakano 1996) and land tenure and the conceptualisation of Indigenous laws and customs (Dousset & Glaskin 2007). There has been debate specifically addressing the technical requirements of cultural assessment in the

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13 Native title has been found to exist in New South Wales on two occasions while there have been four positive determinations in Victoria. This compares to 35 in Western Australia and 81 in Queensland. This is largely due to greater contact with Europeans and therefore greater amounts of extinguishment (NNTT 2010a).
NTA by the courts, and the nature of court decisions (Glaskin 2003; Morton 2007; Sansom 2007; Palmer 2011; Redmond 2011), the problem of ‘tradition’ (Merlan 2006), analysis and criticism of the parameters of anthropological involvement in the native title process (Morris 2003; Morphy 2006; Bauman 2010), and the social effects of native title (Glaskin 2002; Smith & Morphy 2007).

In addition to academic commentary, anthropologists have worked at the coalface in the applied field, producing material for the courts and government. Indeed, the majority of native title anthropology in Australia is technical, dealing with claim-by-claim specifics and the problem of achieving recognition of native title within the framework of the NTA. Outside of the technical minutiae of native title cultural evidence sits an ongoing tension between the academic and professional wings of the discipline (and those who straddle both) as to the legitimacy of native title work as an anthropological product (Trigger 2011).

The body of anthropological literature relating to native title reflects anthropologists’ broad, multi-faceted involvement with the process. Mantziaris and Martin (2000) provided a hybridised legal and anthropological analysis of native title which conceptualised the ‘recognition space’ between Indigenous systems of law and custom and the Australian legal system, which was criticised for its overly legal focus (the book subtitled legal and anthropological analysis) and its parceling of the entire concept of native title into ‘components of legislation’ (Weiner 2003: 100). Peter Sutton (1998; 2003) advocated anthropological analysis of kinship systems as having the answers to the complex ‘system’ and ‘descent’ questions being asked by the native title process, and was
challenged for providing ‘generalist propositions about the nature of indigenous (sic) society and change’ (Pannell and Vachon 2001: 243). Works such as these have created a subsection of anthropology that is tailored to the native title process and is aimed at 'those legal and administrative practitioners concerned with the processing of claims, whether mediated, directly negotiated or litigated' (Sutton 2003: xvii).

There is a scarcity of anthropological literature dealing specifically with the topic of native title mediation. While there is significant anthropological involvement in the mediation of native title claims similar to litigation (Trigger 2010), this involvement is characterised by the production of cultural evidence that is of a less public nature than that which is produced for the Federal Court. Unlike in the litigation process, an expert anthropologist is not subject to cross-examination in open court. Reports produced for the Federal Court remain confidential unless published by the author with the permission of the claimants. Additionally, the process of assessment and decision-making regarding this cultural evidence is not exposed to public view in the way a court judgment is. Anthropological material presented to the WA government for assessment is subject to a review by an external expert, in which an anthropologist nominated by the state produces a report to aid the state government’s connection assessment. It is not guaranteed, however, that the anthropologist who authored the original connection report will receive this review. It is certainly the case that the review will remain confidential, presumably indefinitely.\(^\circ\) As a result of the difficulty in attaining

\(^\circ\) There has been continuous debate on how material produced for native title purposes is to be treated in the future. Connection material is confidential and ultimately the property of the claimant group. Reviews of this material commissioned by the WA government are likely to remain confidential also.
documentation of other cases of mediation, anthropological analysis on how cultural evidence is tested in the mediation process is limited to anecdotal commentary of those who have been involved in particular claims.

Despite the positive representations of negotiation by native title parties, the process of mediating native title claims is not without critique. David Ritter has argued against the notion that the prevalence of negotiation and agreement-making represents a softening of attitudes towards native title, and rejected the view that it is indicative of increased cultural understanding (Ritter 2009b: 173). Ritter states that such uncritical perspectives on the nature of these negotiations ignore the stakes involved for the states and other respondent parties to native title claims. As he states,

The broad consensus over native title that has now been reached is not a product of the slow fruition of benevolent attitudes through a kind of awakening acceptance. Negotiation has not become the dominant paradigm because the principle players have forswn an interest in power. Rather, agreement-making is an expression of power relations that were subject to vigorous contest and have now settled into a configuration that the principal parties either broadly accept or lack the facility to meaningfully seek to overturn (Ritter 2009b: xiv).

Others have also noted that negotiation should not be characterised as a merely benevolent policy designed to better facilitate the recognition of claimant rights. Bauman (2010:124) for example, has critiqued the mediation processes of the states as a conduit for state power, arguing that ultimately decisions in connection assessments are made ‘by and in accordance with the interests of governments.’

Native title anthropologists have argued about how native title should be conceptualised, and how ethnography can be translated into evidence, but have
not yet satisfactorily addressed the bigger picture of the native title process. Anthropologists have generally considered what native title applicants get from the process, but what exactly does the state gain by resolving native title by mediation? The transition of WA government policy from an antagonistic position on native title, to a conciliatory position fostering negotiation is a significant target for anthropological inquiry, and while there are some examples of anthropological attention (see Bauman, Martin and Neale 2011), it has been largely overlooked. The state government’s requirements for connection have not received the same scholarly attention as the requirements of the court. This is due to the deliberations of state governments with regards to connection assessment being outside of the public domain, not accessible for analysis and debate. Bauman and Macdonald (2011) state that within the litigation context, anthropological debate is hampered by ‘…restrictions against discussing the specifics of cases and legal privilege’ which can prevent the open dialogue and critique essential to improving practice…much of the rich data that could influence theories of change, tradition and continuity in Australia remains embedded in anthropological reports which are not publicly available (p. 3).

Court positioning on specific claims can be debated through the content of judgments and public evidence presented in court. Conversely, state-based assessments for mediation have reduced the transparency of the assessment of cultural evidence. Furthermore, they have stymied debate within the anthropological discipline, as government decisions on continuity and connection are unable to be analysed in the way court decisions are. The broader implications of this change in the power of the state in native title are yet to be addressed anthropologically.
An anthropological study of the native title mediation process should explore the interactions between government actors assessing cultural evidence. Paul Burke (2010) indicates that, in mediation processes, decisions about the viability of native title claims occur within state policy and law offices, and are closed off from external critique. Burke describes this discourse among state actors as the legal ‘shadowlands’ of native title policy, which includes:

State government connection guidelines, advice from Crown Solicitor’s offices, legal arguments put to state governments, the input of lawyers into mediation, and discussions between lawyers and anthropologists about the form of anthropological reports (Burke 2010: 57).

Burke particularly highlights ‘the supposed need to prove contemporary estate groups to satisfy continuity requirements and the complete disavowal of traditional succession’ in assessing connection material as evidence of the influence of the ‘shadowlands’ discourse on the content of native title (Burke 2010: 57). The term ‘shadowlands’ correctly evokes the suspicion that exists around such private interactions on policy and connection assessment. It also points to why the process of mediation has received such sparse anthropological scrutiny. Those on the outside, unable to know what occurs within this private sphere, can only speculate as to how claims are assessed and the reasons behind the acceptance or rejection of connection assessments.

In addition to work on native title in Australia, this thesis draws on several contributions to anthropologies of the state in particular works by Scott (1998), Foucault (1978), Lemke (2001; 2007) and Ferguson (1990). I argue that in quantifying Indigenous cultural ‘elements’ through the Guidelines for the
Provision of Information in Support of Applications for a Determination of Native Title (the Guidelines), the WA government has continued a process of simplification and rationalisation of Aboriginal law and custom, distilling Aboriginal diversity into a form that is compatible with Australia’s current administrative structures. James C. Scott outlines the process of simplification undertaken by states to render the populations they govern ‘legible’:

Certain forms of knowledge and control require a narrowing of vision…such tunnel vision…brings into sharp focus certain limited aspects of an otherwise complex and unwieldy reality. This very simplification, in turn, makes the phenomenon at the centre of the field of vision more legible and hence more susceptible to careful measurement and calculation. Combined with similar observations, an overall, aggregate, synoptic view of a selective reality is achieved, making possible a high degree of schematic knowledge, control and manipulation (Scott 1998: 11).

This process of reduction and simplification by governments is clearly represented in the native title process. The various state government connection guidelines, and the NTA itself, act to make Indigenous cultures ‘legible’ within a western bureaucratic context by simplifying complex systems into parts that may be quantified and measured by privileged actors. As mentioned above, Burke describes the discourse between such actors as the legal ‘shadowlands’ of native title policy, where ‘idiosyncratic views can hold sway unchecked’ (Burke 2010: 57), and thus particular characterisations of Indigenous cultural forms become normalised.

The WA government exercises power in the connection assessment process through reasoning and rationality, particularly in the legal ‘shadowlands’ described by Burke. Complex social action must be distilled into empirical evidence, which will then aid the production of a rational decision based on facts.
This is the nature of ‘government’ power, it is ‘more or less systematized, regulated and reflected’ and ‘follows a specific form of reasoning’ (Lemke 2007: 5). The connection assessment process produces a ‘rational space’, in which the state defines an ‘objective’ assessment of cultural elements. The WA government controls ‘rational space’ through which it can drive native title in the direction which best suits its purposes. In native title, it is the state who defines the framework for how cultural connection is assessed.

The WA government has been able to produce and operate its connection assessment framework by depoliticising the assessment of cultural connection in native title. James Ferguson (1990) provides an analogous account of a foreign aid funded ‘development’ program in the mountainous Thaba Theksa district of rural Lesotho in southern Africa. Ferguson illustrates how the conceptualisation of Lesotho as a ‘less developed country’ was incorrect (Ferguson 1990: 55). Attributing distorted and misinformed characteristics to the rural areas that were the focus of the project enabled the development agency to constrain its approach to ‘fixing’ mere technical problems, as opposed to political ones (Ferguson 1990: 69). This promoted a depoliticised, benign view of government and bureaucracy (Ferguson 1990: 256). A similar process of depoliticisation can be seen to occur through the mediation of native title claims. As David Ritter (2009a) has noted, in the era of consent determinations, the acceptance of native title by both sides of the political spectrum and respondent parties is not because of increased cultural understanding. Rather, it is because it has become more acceptable to them, and is itself the result of a larger power struggle (Ritter 2009b: 173).
The WA government’s mediation policy removed the politically and culturally contested process of recognising Indigenous connection to land and replaced it with a ‘technical’ problem. The ‘technical problem’ is outlined in the WA government’s Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title (Office of Native Title 2004) (the Guidelines), which outlines the nature and framework of cultural evidence the government requires to mediate native title claims. This evidence is fully assessed by the government prior to the negotiation of rights. It is the actual rights, land tenure and land use which reside within the contested space of native title mediation, while the decisions regarding the existence of potential rights to land, the question of society and structure thereof, does not.

In this thesis I contend that positive rhetoric on mediation and agreement making has become dominant in the native title discourse. Native title policy has shifted from a publically contested ideological battle, resolved via litigation, to a consensus that claims be resolved through a mediation regime controlled by the state. Within this regime, the content of native title decision-making is hidden from view and the ability to critically analyse this process is marginalised. The benefits cited in favour of this regime are consistent across all native title parties, such as lower cost and improved timeframes, however after ten years of this policy’s operation, the rhetoric of the parties is not reflected in outcomes. I argue that the changes wrought by the switch in policy have had a greater impact on how the WA government exercises power in the native title process than it has on the speed or cost of native title resolution. I critically analyse native title policy development in Western Australia from litigation to mediation, as well as the
present situation. To do so, I catalogue native title discourse from the WA government, NTRBs, the mining industry and the pastoral lobby, on agreement making. The sources of my enquiry comprise media statements, annual reports and submissions to government. I establish the current dominance of mediation and agreement making in the policy preferences of all native title parties and compare the discourse on agreement making with the reality of the actual benefits of this form of native title resolution. I also apply anthropological theories of ‘governmentality’ and the state to ascertain shifting power relations within the native title process, and discuss how agreement-making has enabled the WA government to exert greater influence over the content of native title rights.

**Methodology**

*Project history and formation*

I began my research seeking to analyse how state governments assess cultural material in the mediation process, and in particular what elements of Indigenous culture were ‘valued’ by the state in satisfying its criteria for a native title settlement. Since what I am referring to here is a legal and political environment in which a great deal of information and decision-making is either subject to professional legal privilege or otherwise guarded by confidentiality clauses, I knew that doing fieldwork in such a context would be logistically difficult, particularly because my research was undertaken on a part-time basis. Moreover, it was not clear that fieldwork would contribute the data necessary to analyse decisions state policy officials had made on particular native title claims. It seemed likely that responses from policy officials to questions about assessment
processes would mirror the written, and publically available, policy they were applying. In many situations, policy officials would not be able to candidly answer interview questions without breaching confidentiality.

Rather than seeking to interview actors involved in the native title process, I sought to view a connection report produced by a Native Title Representative Body and submitted to the state of Western Australia as part of a connection assessment, and to analyse the report in terms of the WA’s particular set of connection guidelines. After much consideration of which NTRB and which specific claim I would request access to, I approached an NTRB that had, at that stage, a good relationship with the WA government and a strong record of negotiated consent determinations for claims within its purview. The claim I hoped to access was successful, did not experience any particularly complex legal barriers and was considered one of the least controversial in the state. The state policy office assessing the claim had publically cited this claim as an example of what was required to produce a favourable connection assessment.\footnote{This occurred in an unpublished presentation at 2009 ‘Native Title Connection Workshop’ hosted by the Office of Native Title.} The claim itself had been determined and should not, therefore, have presented complicated legal considerations in relation to the request.

The response to my request was drawn out over some time, and in the end, six months had elapsed before the NTRB eventually said no. After denying access to the requested claim, the NTRB then offered access to a claim report that was 11 years old, and which was not subject to the Guidelines I was to be assessing. Given the amount of policy development that had occurred between the
determination of this claim and the development of the Guidelines, the report would have been of little value to the project in terms of examining changes in the WA government’s approach. I was surprised by the denial of my request to access the report because many NTRBs had expressed concerns (see Farrell, Catlin and Bauman 2007) about mediated settlements and might have been expected to welcome an external examination of the sort I proposed.

Although this denial of access was a significant setback in my research, it also highlights what I have come to see as some of the fundamental problems with the current native title mediation process: the lack of transparency in assessments and the absence of information sharing between actors in the process. First and foremost, these problems are due the confidentiality of native title materials, but are exacerbated in mediation due to the WA government’s approach to connection assessments. The WA government’s approach to transparency, combined with existing confidentiality restrictions on connection reports, has created a situation in which an analysis of a native title claim determined by consent is impossible.

Actors in the native title process are wary because of the problem of confidentiality and legal privilege discussed earlier. This makes a detailed examination of the processes of native title mediation a complicated task, in that access to material for outsiders is minimal, and those that do have access are restricted by confidentiality in how that information is used. Even for the purposes of training anthropology graduates for native title work, access to anthropological material produced for native title is heavily impeded (Trigger 2010). Having been denied access to NTRB claim records, I decided to focus on this very lack of
transparency and other consequences of the mediation consensus. It was the process of mediation, and what this policy actually achieved in terms of outcomes for the state, as well as native title applicants, that became my focus.

I will use the term ‘agreement-making’ throughout this thesis, which can have multiple meanings in a native title context. The first is in relation to a consent determination, which involves an agreement between the native title applicant, the relevant state or territory government, and other additional respondent parties, which in turn leads to the resolution of the claim. With all the parties in agreement as to the existence and content of the native title rights of the applicant, the Federal Court can then make a judgment determining native title.

The second form of agreement-making concerns a subsection of the NTA covering ‘Future Acts’ and the ‘right to negotiate’ on land use that may negatively impact rights. The purpose of Future Act negotiations is to ensure that extended native title litigation does not present an encumbrance to economic development. Registered native title applicants have the ‘right to negotiate’ on all proposed activities or development on land over which they have filed a claim, which may impact negatively on their native title rights should their claim be positively determined. Agreements on these matters represent the vast majority conducted under the NTA, with applicants providing timely approval in exchange for economic benefits for their communities (Ritter 2009a: 28-34). Discourse on agreement-making frequently blurs and conflates these two processes, and it is therefore difficult to analyse this discourse without in some way doing the same.

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16 Native Title Act 1993 (Cth) Section 233, part 1.
17 Native Title Act 1993 (Cth), Section 24AA, part 5 and Section 190B, part 6.
This thesis deals specifically with the resolution of native title via agreement, however, in analysing discourse on agreement-making, it will inevitably include material addressing Future Act matters. I will endeavor to differentiate between the two forms where necessary to ensure there is no confusion.

This is an appropriate point at which to further situate myself in the context of this thesis. Biases exist everywhere in academic research. All authors, whether it is because of their other work, their upbringing or merely their choice to pursue a particular field or line of inquiry, will do so with a certain level of unavoidable subjectivity. It is only through the acknowledgment and declaration of such biases that a scholarly work may properly considered within the larger literature of a field of study. This acknowledgement should not overcome, nor constrict the author from dealing with any particular subject matter, but it is incumbent on the author to allow the reader to position the author correctly when considering their argument. Thus, in relation to the field of native title and of mediation of native title in Western Australia, it is important to situate myself in this field.

First, my father is a former member of the Western Australian Parliament and member of the Gallop and Carpenter Labor governments. The importance of declaring this relationship becomes apparent when I note that additionally, within both those governments, he served as the Minister responsible for native title matters in the state. This project deals specifically with the development of native title policy in Western Australia and provides an anthropological perspective on this policy, and therefore such a position within an elected government of the state will inevitably be addressed.
Second, the origin of this project lies in a process associated with native title in which I have a close professional affiliation; the assessment of native title claims by the State of Western Australia. While not being directly involved with the decision-making process in these matters, my position as a researcher within the Land Claims Section of the State Solicitor’s Office allows me an excellent view of the workings of this process. In native title matters, the State Solicitor’s Office provides legal support and advice to the state with regard to specific native title claims, and will participate in the litigation of a claim if it is the state’s wish to do so. Lawyers within the State Solicitor’s Office will also assist with and provide advice for the negotiation of claims under the Guidelines, and, if the claim is successful, follow them through to final determination by consent in the Federal Court.

My work, specifically, is to provide research support to the solicitors working within the Land Claims section, through the collation of documentary evidence of both anthropological and historical nature. I do not participate in nor influence the connection assessment process, nor is my continuing work contingent on any particular form of claim resolution pursued by the state. The material presented in this thesis in no way represents the opinions, either official or unofficial, of the State Solicitor’s Office. Nor is the content of this project the result of influence of any members thereof. This project, while supported by the State Solicitor’s Office in terms of leave provided for study, is completely independent of that organisation. I have been very careful to ensure that work for this thesis and my work for the State Solicitor’s Office are kept entirely separate. All materials and
sources utilised for this project are publicly accessible, and accessed through public channels.

On the subject of access to materials, I should note an ongoing tension throughout this thesis as to what I know about the subject and what I can ethically say about the subject. I have been very careful to ensure that all material cited in this thesis would be available to anyone who sought to read it. As a result, this has limited the pool of useable material and limited the scope of issues I can address. This element has been particularly frustrating at certain points of the project, as I am unable to cite potentially useful materials or knowledge that are available to me in my role without breaching the trust of my employers and undermining this thesis ethically. I should also note that this tension is not an uncommon one in the Australian native title field. It is a small field filled with open secrets, rumour and information held under strict confidentiality arrangements that for obvious reasons are not represented in formal discourse. In native title, much is known that cannot be said. In exploring the mediation process as I have here, it is my hope that I may nevertheless contribute to a greatly understudied aspect of the native title process.

Given the difficulties involved in accessing private interactions on policy and connection assessment, my focus in this thesis is a comparison of the discourse surrounding native title mediation policy, with the results of its operation. In order to provide context for the Western Australian state government’s mediation policy and the role of ‘uncertainty’ in native title policy creation, it is first necessary to establish some context. In this chapter I have sketched the transition of WA government native title policy to mediation, and set the parameters for my
analysis of the mediation process. In Chapter Two I present a background on the events surrounding the *Mabo* decision, the debate that followed on the production of legislation, and early reactions to the NTA from the WA government. From the election of the Court government in early 1993, the WA government voiced strong opposition to the *Mabo* decision and any attempt to legislate its principles. The WA government called for the Federal government to produce legislation guaranteeing all titles and extinguishing native title. When this call was not answered and the Federal government proceeded to draft the NTA, the WA government brought in its own legislation seeking to do the same.\textsuperscript{18} Ultimately, the legislation was successfully challenged in the High Court and ruled to be in breach of the *Racial Discrimination Act 1975 (Cth)* (RDA).\textsuperscript{19} This period in the mid-1990s is important to consider in the context of current WA government native title policy, because the overall aim of WA government has remained constant even though its approach to native title has changed fundamentally. In the early 1990s, it sought to reduce uncertainty through litigation and legislation, whereas since the 2000s, it has pursued the same goal through mediation, arguably with more success.\textsuperscript{20}

In Chapter Three I describe the development of native title policy in Western Australia and examine the public positions of all the iterations of the WA government since 1993 as well as those of NTRBs and major industry respondents. I will analyse media statements of the WA government regimes from the Court government (1993-2001) to the present Barnett government (2008-) to

\textsuperscript{18} Land (Titles and Traditional Usages) Act 1993 (WA).
\textsuperscript{19} Western Australia vs The Commonwealth [1995] HCA 47.
\textsuperscript{20} By resolving connection assessment earlier in the process (rather than at the end of a court case) the WA government was better able understand the implications of particular native title claims.
present the WA government’s public position on native title matters. I use the annual reports of a number of NTRBs in WA to present the public position of claimant representatives on resolution through mediation, and review government submissions and press statements for the views of industry respondents. I focus specifically on what I call the ‘surface language’ of native title, in which both state and non-state actors participate in producing an overly positive positioning of agreement-making in the public discourse. These viewpoints on the native title mediation process do not represent the realities of the negotiation process, and work to shield native title debate from public view.

In Chapter Four I address these operations of the mediation process in WA. I first interrogate the negotiation framework utilised by the WA government in the process, in which multiple negotiation models, ‘rights-based,’ ‘position-based’ and ‘interest-based,’ are used to the benefit of the WA government (Everard 2009). I demonstrate how these strategies further entrench the power-imbalance between the WA government and native title applicants. I place my argument in contrast to the positive discourse outlined in Chapter Two, and argue that native title mediation policy has not achieved its desired outcomes. Native title claims continue to take significant amounts of time to be resolved. Native title claimants are not receiving faster access to their rights and are in fact being exposed to a standardisation of rights in negotiation. Despite the emphasis on the advantages for claimants in the discourse, the advantages of the policy for the WA government are more pronounced in practice. Mediation reduces uncertainty for industry and establishes an orthodoxy for assessing native title evidence that is not subject to public scrutiny.
In Chapter Five, I conclude the thesis by analysing these processes and power shifts in terms of broader anthropological theorisations of the state. Employing Michel Foucault’s concept of ‘governmentality,’ I argue that the WA government has exercised power in the assessment of cultural evidence by asserting that they are subjecting native title claims to a rational and objective process and through control over the delineation of concepts (Lemke 2007). I also draw comparisons between processes of depoliticisation in native title with those described by James Ferguson in *The Anti-Politics Machine* (1990). It is through this exercise of power that the WA government has reduced the transparency of decision-making, which has in turn hindered analysis of how decisions on cultural connection are reached. Through this reduced transparency the WA government has achieved the uncontroversial resolution of native title claims, and reduced uncertainty for its economic interests.
Chapter 2 – Background

Western Australia has played a significant role in the story of Australian native title, moving from the position of an aggressive adversary to that of a pragmatic mediator and policy leader. It is important in discussing how native title resolution has become normalised in Western Australia to remember the extent of contestation around the issue in the early 1990s. Western Australia was not alone in this contestation, but its role in media debate and participation in High Court actions positioned it as the primary institutional antagonist to the *Mabo* decision and the *Native Title Act*. From the ruling in *Mabo*, to the legislation of the NTA, to the implementation of the mediation policy, the problem of ‘uncertainty’ has driven the WA government’s position. In this chapter I present a background to the current process, which outlines government, Indigenous and industry responses to the *Mabo* decision and the politics of legislating the NTA. I situate the WA government within this debate and trace the events that led to the introduction of the mediation policy in Western Australia. I will demonstrate how the concept of uncertainty became the driving force for government, industry and indigenous interests to pursue a legislative response to the *Mabo* decision, and how it ultimately contributed to the creation of the WA government native title mediation regime. I then provide an overview of the native title process as it currently stands, and explain the pathways for claim resolution. In this section I will also situate the role of anthropological evidence within the various frameworks created by native title legal and policy environments.
The *Mabo* decision – The beginning of uncertainty

The High Court decision in *Mabo No. 2* was handed down on the 2\textsuperscript{nd} of June 1992, and was met with by turns celebration, confusion, consternation and fear. Wild claims appeared in the media: that native title would claim suburban backyards in capital cities (Sydney Morning Herald, 26/12/1993: 29). Australia’s mining industry was extremely concerned with the stability of granted tenements and potential future applications in light of the decision. Pastoralists were concerned about the continued viability of their Crown leasehold title arrangements. Spokespersons from these concerned groups called for the introduction of Federal legislation to achieve ‘certainty’ of current and future land use. Hugh Morgan of Western Mining Corporation stated that:

> we now have a situation in which State governments are now powerless to bring back some sort of order and predictability into the law of property in land; at present, thanks to the High Court, much of that law is in disarray (Hugh Morgan quoted in Sydney Morning Herald 16/10/1992: 11).

The mining industry was concerned that the validity of mining rights granted after the introduction of the *Racial Discrimination Act 1975 (Cth)* (RDA) in 1975 would be challenged, as to the Court’s recognition of existing native title rights, these grants may be deemed to have contravened the Act. The High Court majority ruled that the RDA prevented the states from legislating wholesale extinguishment of native title. Hugh Morgan’s solution was that the Commonwealth should either set aside, or substantially amend the RDA so that the states could introduce such legislation (Russell 2005: 284). Mining interests reacted extremely negatively to *Mabo*, but pastoral interests were far more circumspect. Rick Farley, then executive director of the National Farmer’s
Federation, urged the Federal Opposition to ignore the extreme positions of its regional branches and negotiate with the government on native title legislation. He also called for the states to support the notion of a federal legislative solution in line with the High Court decision (Sydney Morning Herald, 16/10/1992: 11).

Despite these differences, both miners and pastoralists sought certainty and predictability of awarded land title, otherwise they feared their leases and development projects would be threatened by new land rights claims in the courts. They assumed that 'certainty' could only be delivered through legislation, so that structure could be applied to the resolution of future land claims and the implications for mining, pastoral leases and other developments could be understood. What these groups feared most was the possibility that numerous court cases would be lodged, which unconstrained by legislation, could deliver exclusive possession rights to Indigenous groups.

Pastoral and mining groups were not the only interested parties calling for legislation to produce 'certainty.' Indigenous organisations also hoped for the introduction of legislation to consolidate the principles of the Mabo decision in Australian law and provide a solid basis for Indigenous groups across Australia to pursue land rights. On the one hand the mining and pastoral industries were calling for legislation to define the scope of land rights, on the other Indigenous organisations sought legislation to prevent land rights being possibly eroded by subsequent court cases. As Russell explains:

> in 1993 the Central and Northern land councils in the Northern Territory, the Cape York Land Council in northern Queensland, and the Kimberley Land Council in the north of Western Australia wrote to Prime Minister Paul Keating. Their letter requested legislation to preserve native title and to recognize it on lands such
as national parks and vacant Crown land, so that once traditional owners were identified they could exercise their title without having to go through a complex process of litigation (Russell 2005: 285-286).

The Keating Government began a consultation process in late 1992 with the aim of a legislative response to the *Mabo* decision that would provide certainty to industry while maintaining the decision’s principles in terms of Indigenous land rights (Russell 2005: 286). Keating consulted with representatives of all concerned parties, including state and territory governments, Indigenous organisations, and the mining and pastoral industry (Cronin 2012).21 In a speech at Redfern in December of 1992 Keating encouraged the electorate to 'ignore the isolated outbreaks of hysteria and hostility of the past few months' and to accept the *Mabo* decision 'as an historic turning point, the basis of a new relationship between Indigenous and non-Aboriginal Australians' (Keating 1992). In January 1993, Keating announced that the Federal Government intended to introduce legislation that would implement the principles of the *Mabo* decision at a national level (Russell 2005: 286).

Native title did not become a major issue in the Federal election campaign until Northern Territory Chief Minister Marshall Perron produced legislation that sought to ‘protect’ all land title granted after 1975. Such legislation was clearly at odds with the Federal RDA and would require action from the Federal government to succeed. As Russell (2005) notes, Perron required the Federal

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21 Keating consulted with various groups during the period of deliberations over the legislation. Indigenous interests were represented by: Lois O'Donoghue (ATSIC), Patrick Dodson (Council for Aboriginal Reconciliation), Mick Dodson (Aboriginal and Torres Strait Islander social justice commissioner), Galarrwuy Yunupingu and John Ah Kit (Northern Land Council), David Ross (Central Land Council), Noel Pearson (Cape York Land Council), Peter Yu, (Kimberley Land Council) among others. The Australian Petroleum Association, the Australian Mining Industry Council and the National Farmers’ Federation represented mining and pastoral interests (Russell 2005; Cronin 2012).
government to introduce complementary national legislation setting aside the
RDA to allow the states and territories to pass legislation to secure recent title
grants:

Marshall Perron's initiative was very much in line with the
response to Mabo favoured by most of the state premiers. They,
too, were most concerned about removing impediments to
economic development and retaining control over land and
resource management. From their perspective, Commonwealth
legislation should be confined to relieving them of any problems
posed by the Racial Discrimination Act. The politicians in the
states and territorial corner played a much bigger role in the 1993
struggle over Mabo than the leaders of the official opposition in
Canberra (Russell 2005: 292).

The state governments, both Liberal and to some degree Labor, were far more
antagonistic than the Federal opposition toward the concept of a nationalised
legislative approach to the resolution of native title. The primary aim of the state
governments was to have Federal impediments to state based legislation removed,
so that native title could be resolved on a state-by-state basis.

In 1993 the primary opponent of a Federal legislative response to the Mabo
decision was the newly elected Liberal Western Australian state government
under Premier Richard Court. The Premier’s public statements played on the
misplaced, but common concerns of the electorate with the Mabo decision and the
implications for land titles.

All titles from 1975 to the present need to be validated and if they
are not, then some 'backyards' will be claimable under Mabo and if
the claim is successful, compensation awarded...It ignores who
will pay compensation in these 1975-1993 cases which coincides
with the most significant growth period in WA during which
thousands of land and mining titles were issued (Richard Court
Media Statement, 20/06/1993).

National legislation of the sort Keating was proposing was not what mining,
pastoral or state government interests wanted. What these parties sought, in most
cases, was the setting aside of the RDA, so that state governments could 'protect' land from native title litigation. Not all state governments explicitly called for the RDA to be set aside, some merely called for federal legislation to allow granted land tenure to be secured. How this would occur without the RDA being temporarily repealed in some way was not explained. While legal acts of government prior to 1975 (when the RDA was passed) extinguished native title without recourse, acts of government after 1975 which extinguished native title breached the RDA and could be subject to compensation claims.

Upon re-election in March 1993, Keating announced that native title would be the government's top legislative priority and continued in an extensive consultation process that had started prior to the election and would continue until late in the year. The Cape York, Kimberley, Central and Northern Land Councils, with the Western Australian Aboriginal Legal Service and others, represented Indigenous interests in the consultations and eventually became known as the Aboriginal Coalition (Cronin 2012: 58). The Aboriginal Coalition organised numerous meetings across the country and made a number of proposals for legislative solutions that protected the principles of the Mabo decision (Cronin 2012: 50-56).

Keating faced difficulties negotiating an agreement within cabinet, due to the economic concerns of some members and lobbying from state governments, the mining industry and pastoral interests. Additionally, an accord that satisfied the recommendations of Indigenous representation looked unlikely (Cronin 2012). After months of negotiation conducted by Keating with the Aboriginal Coalition, the state premiers, the mining and pastoral industries, there was enough agreement within the Federal government to achieve the affirmation of cabinet, clearing the
path for legislation to be drafted. State, mining and pastoral interests remained split on the legislation. The issue dominated the political scene in the final quarter of 1993 until the Senate finally passed the Native Title Act 1993 (Cth) in the early morning of 22 December 1993 (Russell 2005: 303).

The Native Title Act, continued uncertainty and the move to mediate in Western Australia

The NTA came into effect on the 1st of January 1994, and with it came a new Federal statutory office, the National Native Title Tribunal (NNTT), whose task it was to register native title claims, and to mediate and resolve Future Acts matters across the country using a ‘mixture of alternative dispute resolution and arbitration’ (Ritter 2009b: 122). The NNTT was unable to resolve native title claims itself as land matters could only be decided in the Federal Court. The tribunal did, however, advocate for negotiated claim resolutions to native title parties.

The existence of the NTA did not alleviate state concerns about the economic implications of resolving native title over their territory. The first year of the NTA saw a large number of native title claims registered, which made clear that native title was going to be a significant factor for land tenure in Australia for a number of years. It was deemed necessary for the state governments to introduce their own native title legislation to complement the Federal Act. Prior to the passage of the NTA, the Court government sought to pass legislation in the WA Parliament to extinguish native title in the state. The government tabled the Land (Titles and Traditional Usages) Act 1993 (WA), which extinguished native title in Western
Australia ‘in favour of a statutory right to traditional land use’ (Sydney Morning Herald, 07/09/1994: 10). Aboriginal groups challenged the Act in the High Court as being a breach of the RDA. The Court government had filed its own action with the High Court at the same time claiming that the NTA was unconstitutional (Sydney Morning Herald, 07/09/1994: 10). The state government’s legal representative said that ‘the Commonwealth did not have power under the Constitution to make laws which acted to prevent a State legislating on a particular subject, and Western Australia had enacted its own legislation’ (The Sydney Morning Herald 07/09/1994: 10). The High Court ruled the state legislation to be in violation of the RDA, and the WA government’s claim that the NTA was unconstitutional was dismissed.22

Following their defeat, with the NTA in place, the Court government sought to litigate all native title claims lodged within its purview, while at the same time calling for reform to the NTA (Richard Court Media Statement, 04/01/1996). The Court government publicly maintained its argument that native title was a threat to the state’s economy. Their focus, however, was no longer the uncertainty of land title in the face of native title claims but that the native title process itself was not working in a way that was compatible with the normal business of the state (Richard Court Media Statement, 04/01/1996). The WA government categorisation of native title shifted from the extreme predictions on the validity of titles and economic downturns, to criticism of a process that was ‘unworkable’ and was becoming a ‘growing legal nightmare’ (Richard Court Media Statement, 04/01/1996).

The debate hardened again following a decision in the High Court in *Wik Peoples v Queensland*\(^2\) which ruled that native title was not necessarily extinguished by the grant of a pastoral lease. The WA government returned to their earlier call for a legislative response to give certainty to awarded land title and Richard Court returned to his strong rhetoric:

> The Federal Government must take urgent legislative action to remove the doubt and provide certainty to the existing interests of pastoral leaseholders…The Native Title Act must now be amended to make it clear the rights of all leaseholders prevail over native title rights where there is inconsistency…It is three years since the Native Title Act was proclaimed and there is now greater uncertainty and doubt than there was before the Commonwealth Native Title Act was passed (Richard Court Media Statement, 23/12/1996).

The Howard government, having been elected in March 1996, responded to the decision with the introduction of a ‘ten point plan’ to tighten definitions as to the kinds of tenure that extinguish native title, and introduced stronger regulations regarding access to the right to negotiate (Butt, Eagleson & Lane 2001). The Senate passed the ‘ten point plan’ amendments to the NTA with a compromise that removed a proposed six-year time limit for filing a native title claim, allowed for claims where the applicants could not show current occupation of the land, and softened proposals on extinguishment. The compromise also allowed the states ‘opportunity to set up their own schemes for determining native title claims, provided they …[were] consistent with the Act’ (Butt, Eagleson & Lane 2001:113). It was this point that paved the way to the WA government to beginning its own assessment process to resolve native title claim by consent determination.

The move to a mediation policy was not immediate; it took the growing

\(^2\) *Wik Peoples v Queensland* [1996] HCA 40.
uncertainty created by numerous cases before the Federal Court and a change of
government to ultimately shift the policy. In the final years of the Court
government, three native title claims were determined via the consent of the
parties: Spinifex,$^{24}$ Kiwirrkurra$^{25}$ and the Nharmawangga Wajarri and Ngarla$^{26}$
(NWN) claim. While the Court government still maintained an antagonistic stance
towards the concept of native title, following the Howard government’s 1998
amendments to the NTA, it ceased to criticise the Act as ‘unworkable,’ and sought
resolve matters to its advantage (Richard Court Media Statement, 16/10/2000). It
was clear by this point in time that the NTA was not going away, and that further
Federal government amendments to the Act were unlikely for some time.

The consent determinations represented a change in course for the resolution of
native title claims in Western Australia. The Labor Opposition promoted a policy
of negotiation over litigation for all claims, and argued for an end to the
adversarial process of determining native title through the courts. When elected in
2001, the new Gallop government began a review of state native title processes
and resources to recommend pathways for the implementation of this policy
(Wand 2001).

Pathways to native title – An overview

Native title is not like other forms of land title in Australia. In legal terms, native
title is a ‘bundle of rights’ (see Glaskin 2003) which means that a determination

$^{24}$ Mark Anderson on behalf of the Spinifex People v State of Western Australia [2000] FCA 1717
(28 November 2000)
$^{25}$ Brown v Western Australia [2001] FCA 1462 (19 October 2001)
$^{26}$ Clarrie Smith v Western Australia [2000] FCA 1249 (29 August 2000)
of native title may include merely a subset of the rights available under the claim
group’s traditional laws and customs. Any native title right that is deemed
inconsistent with a non-native title right will cause that native title right to be
extinguished. This ‘partial-extinguishment’ drastically varies the content of
determinations of native title due to respondent interests having to co-exist with
those of the claimants. Therefore determinations that native title exists in remote
areas usually results in the recognition of more rights than in areas that are more
settled or have large amounts of pastoral activity. This conceptualisation of native
title arose from the 1998 amendments to the NTA following the High Court
decision in *Wik Peoples v Queensland*,27 which found that it was possible for
native title rights to co-exist with those of pastoral leaseholders.

Prior to the 1998 amendments, the NTA provided little indication as to what was
involved in the extinguishment of native title. Native title will be extinguished to
the extent that it is inconsistent with the non-native title right or interest. The
conceptualisation of native title as a ‘bundle of rights’ was consolidated by the
High Court decision in *Western Australia v Ward*28 (hence *Ward*) in 2002, which
has allowed for the partial extinguishment of native title (Glaskin 2003: 68). In
litigated determinations that native title exists, the determination will provide a
list of rights deemed to have been proven in the evidence where the use of said
rights are consistent with other forms of granted title. The rights are conferred on
an evidentiary basis and can only be extinguished by inconsistent forms of land
title.

28 *Western Australia v Ward* [2002] HCA 28, para 618
All native title claims begin with the lodgement of a document to the Federal Court. A ‘Form 1’ provides a basic outline of claim; its members, its physical boundaries and the nature of the rights that the claim group want acknowledged.

The amount of information provided within a Form 1 document may vary greatly, however, all include a section covering the ‘Native Title Claim Group Description’, in which the claim group is defined as the descendants of a particular set of apical ancestors\(^{29}\) or as a group of people adhering to a set of traditional laws and customs. Occasionally a Form 1 may include a complete list of applicants, but often the only applicants listed are the ‘named applicants’ who present the claim on behalf of their communities. Membership of the claim group is primarily based on connection to the apical ancestors listed in the ‘Native Title Claim Group Description’ and not on whether current living individuals are named on the Form 1. Once the Form 1 is lodged, the Federal Court informs the respondent party/parties (namely the state or territory in which the claim is located) of the lodgement and refers the claim to the NNTT to undergo the ‘Registration Test,’\(^{30}\) which will determine the claim’s eligibility under the NTA.

The Registration Test for native title claims is a set of 12 conditions outlined by the Act, which, if all are met, will allow a particular claim to be considered for determination by the Federal Court (NNTT 2004: 6). When a native title claim is successfully registered, applicants are afforded the right to negotiate over land use in the area claimed. This right to negotiate is not a right of veto, but rather a right to be consulted and to have input on actions that will directly affect native title

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\(^{29}\) An apical ancestor is the apex of a genealogical line. Ideally, for the purposes of proving connection, these ancestors would have been alive at the declaration of sovereignty or during first contact with settlers in the relevant region.

\(^{30}\) Native Title Act 1993 (Cth), Section 190A, parts 1-7
should it be recognised, such as the granting of mining leases or the release of land for residential sale (Ritter 2009a: 18). Such negotiations are known as ‘Future Act’ matters and are for the most part dealt with completely separately from the consideration of a native title determination. While passing the Registration Test is not required for the claim to proceed to litigation, it is a requirement to receive the right to negotiate and for the possibility of a claim being moved towards a mediated determination.

The conditions of the Registration Test state that Form 1 documents must include information pertaining to, among other things: the identification of area subject to native title; the identification of native title claim groups; the identification of claimed native title; and a factual basis for claimed native title. The Registrar must assess whether that claim has a prima facie case; be satisfied that at least one member of the native title claim has a ‘traditional physical connection with any part of the land or waters’; and that land claimed is eligible to be claimed under the NTA in that it is not already part of a determination under the Act (NNTT 2004: 36). All these conditions, in the opinion of the Registrar, must be satisfied for a native title claim to become formally registered.

Once a claim is registered, the NNTT, the claimant representatives, and the relevant state government (the first respondents in all native title claims) are referred back to the Federal Court to provide directions on how the claim is to be progressed. At this point other parties are invited to be additional respondents to the claim. There is no limit to the number of additional respondents that can be joined to a claim, provided an interest in all or part of the area claimed can be
established. The Federal Court will then adjudicate on whether the claim will be referred back to the NNTT for mediation. It is at this point, often regardless of whether a claim is directed into mediation or not, where claims approach a crossroads in going down the path of litigation or mediation, although it should be noted that a claim can shift between litigation and mediation at any point in the process. It is also possible for a claim to skip this stage and proceed unregistered, however in such cases the unregistered claim can only be resolved through litigation and the claimant group will not have the right to negotiate while the claim is being heard and adjudicated. Either the applicants or the state as first respondents can pursue a litigated determination. The Federal Court requires that the parties first attempt to reach agreement through negotiation. If the parties are unable to come to terms, hearings will be held and court dates will be set for the hearing of evidence at trial.

The process of litigation requires parties to produce a large amount of evidence that must be gathered prior to trial, often within tight timeframes set by the Federal Court. Cultural and historical evidence are presented to the Court in two forms: witness statements and oral testimony by the native title claimants, and the submission of a variety of expert materials followed by cross examination of the respective experts at trial. Both the native title claimants and respondent parties engage such experts. The experts most commonly engaged are anthropologists, historians and linguists. In addition, the Court adjudicates over whether the land titles of certain parcels of land within the claim area are consistent with native title rights or not. Actions of governments prior to 1975, including the issuing of
freehold title or the allocation of Crown land, extinguishes native title. Since the Wik decision, pastoral leases have been deemed to be consistent with native title rights and therefore can co-exist with a native determination over them. Native title trials can last for an extended period of time due to the sheer volume of evidence. In the Wongatha trial, a claim covering a large portion of the Goldfields region in Western Australia, over 100 hearing days were held between 2002 and 2004, and the judgment of Lindgren J was not handed down until February 2007.

The alternative to resolution via litigation is to pursue a negotiated consent determination via mediation with the WA government. Once a claim has been referred to mediation, a native title claimant group, guided by their NTRB, enters into communication with the state government relevant to their claim. The nature and scope of this communication is dependent on the particular native title policy process of that state government. Most states have guidelines for the submission of cultural material, often known as a ‘connection report.’ The state of Western Australia has very specific guidelines as to the nature of the material required to satisfy the Guidelines and to therefore ‘prove’ a continuing connection to the land in question. Anthropologists who are either directly employed by the NTRB, or engaged as consultants for a defined period (or sometimes a combination of the two), produce these connection reports. The connection report may be supplemented by historical, linguistic, genealogical and documentary evidence.

31 1975 was the year in which the Federal RDA was passed.
32 Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31 (5 February 2007)
33 Native title claims are not required to have NTRB representation, claims can be represented by anyone of their choosing. There are numerous claims that have gone through the process of registration with independent representation however; I am not aware of a claim anywhere in Australia that has successfully achieved a determination of native title without the support of an NTRB.
material where deemed appropriate by the NTRB and where funding allows. While connection reports for state governments deal with similar material to those produced for the Federal Court in litigation matters, the state has far more control over the way they are presented.

A connection report follows from and expands on information presented in the Form 1 document discussed above. It builds on the claim group description presented in the Form 1 and outlines the group’s rights and interests that stem from an established system of traditional law and custom. As the WA government Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title (2004) state,

The connection report should clearly identify the persons or groups of persons comprising the claimant group, or the means by which those people can be readily identified. Further, the report should present information and analysis which establishes the group as a society, or part of a society, defined and united through its observance and acknowledgement of a normative system of Indigenous law and custom which is the foundation of the traditional laws and customs under which native title rights and interests are asserted to exist (Office of Native Title 2004: 8).34

The second half of this paragraph heavily references the High Court decision in Members of the Yorta Yorta Community vs. State of Victoria [2002], and suggests in its wording that the evidentiary requirements for proving this section are comparable to a litigation scenario. Western Australian state lawyers have outlined that the connection assessment process follows an ‘orthodox’ interpretation of ‘Yorta Yorta principles’ (Wright 2006). I discuss this in detail in Chapter Four.

34 Although the decision on connection assessment is made by the policy office, the ultimate decision on whether a claim formally enters into mediation rests with the Minister responsible and the Cabinet.
The language used in the Guidelines strongly implies that adherence to Yorta Yorta principles is pivotal to a favourable connection assessment. This can be seen in how the Guidelines stipulate the requirements to establish a ‘normative’ system of laws and customs.

The connection report should describe the features of the body of traditional law and custom by which the native title rights and interests of the claimants operate. For the purposes of a determination of native title, the claimants must establish that they hold native title rights and interests according to a normative system of traditional law and custom which has remained substantially unchanged since the time of the acquisition of sovereignty (Office of Native Title 2004: 9).

Particular points of note within this section state that the connection report must:

- Establish that there has been no break in the observance of laws and customs by the claimant group. Where change and adaptation have occurred, it must be shown that the laws and customs observed by the claimant group are nevertheless founded in tradition;...explain how the system of law and customs acknowledged and observed by the claimant group has been transmitted from generation to generation; [and][u]nless it is asserted that descent does not play a part in the transmission of native title rights and interests, show that the apical ancestors or other forebears relied on had rights and interests in the area covered by the application according to the normative system of law and custom (Office of Native Title 2004: 10).

Following on from these sections, the Guidelines require the report to provide detailed descriptions and explanations of the connection between the claimant group and the claimed area, the boundary of the claimed area, the claimant group’s asserted rights and interests in the claimed area and a summation of connection to any lands under pastoral lease (Office of Native Title 2004: 11-12).

While in the litigation context the presentation of the anthropological report is completely under the control of the expert and is elaborated upon in cross-examination, the connection reports provided in mediation processes are highly...
structured documents constrained within the state's native title policy.

Once the connection report and associated materials are submitted to the relevant policy office for assessment, research officers employed by the policy office then assess the report internally against the Guidelines. Solicitors working for the state may also read the report and provide opinions regarding the legal issues that the case raises. The policy office then engages an external anthropological expert to undertake a review of the report. Following this, the expert engaged by the state provides their review of the report to the policy office for their consideration. The policy office is not in any way required by the Guidelines to adhere to the recommendations of the review, with the final decision lying with the policy office itself. It is possible at this point that the state may make a request for supplementary material to be submitted. If a report is deemed to not meet the Guidelines, the NTRB will be allowed to supplement or even resubmit material to attempt to achieve a positive assessment. If a report is continually rejected by the state, the claim may return to litigation.

When a connection report is deemed to meet the Guidelines and has had its connection approved by the policy office, the parties will proceed to mediation to negotiate a consent determination. In Western Australia, mediation proceeds with

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35 Western Australia's policy office was variously the Native Title Unit at the Department of Premier and Cabinet (NTU), The Office of Native Title (ONT, various Departments), and the Office of Land, Approvals and Native Title Unit (LANTU).

36 This process does not always adhere to the conventions of peer review, in that the report's author has not always had access to a reviewer's report. It is also possible for anthropological experts to engage in a process known rather comically as 'hot-tubbing', in which the two experts meet in person to discuss issues with the connection report, but this is not a policy requirement. This process may be undertaken in litigation matters also.
the policy office acting as a mediator between the claimant representative, solicitors employed by the state and representatives of all other parties to the claim. It is at this stage that the nature of the rights and interests that are to be awarded to the claim group are determined. All parties, including any mining or pastoral interests, must agree on any settlement before a determination can be made. Once an agreement is reached, it must be approved by state cabinet, and then referred back to the Federal Court for determination. The Federal Court judge presiding over the claim will then present a determination that confirms the decision in law and formally recognises the native title rights of the claimants.

The assessment of connection reports and the negotiation of consent determinations in Western Australia presents a patchwork structure containing seemingly contradictory elements. The WA government is the first respondent to all native title claims in the state. In the case of native title negotiations, however, the state is also the mediator. The WA government interrogates the merits of a claim during the connection assessment, but after a claim has satisfied their Guidelines, the state then moves to the role of mediator between the NTRB or NTSP (Native Title Service Provider)38 and other respondent interests in the claim. There is nothing in the policy that states the strength of a connection report has any bearing on the kinds of native title rights that may be agreed upon. A particularly strong connection report does not place a claim on a particularly strong negotiation footing: a report either satisfies the condition of the Guidelines or it does not. This places the WA government in an exceptionally powerful

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38 Native Title Service Providers differ from Native Title Representative bodies in that they only provide native title services to claimant groups, rather than also undertaking the work of an Aboriginal Corporation.
position, in that it is able to enter into negotiations with native title claims on its own terms.

As a native title claim continues on one of the above pathways to resolution, it is likely to engage in Future Act negotiations with the state government and respondent parties. To ensure that a protracted native title claim resolution does not cause significant delay to development in an area under claim, the NTA allows for a 'Future Act' to be negotiated between the state and/or private interests and the native title applicants. A 'Future Act' is defined in the NTA as an act that:

(i) …validly affects native title in relation to the land or waters to any extent; or
(ii) the following apply:
   (A) it is to any extent invalid; and
   (B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and
   (C) if it were valid to that extent, it would affect the native title
   (Native Title Act 1993 Cth, Section 233 (1), part C).

The negotiation of an agreement for a 'Future Act' is a requirement of the NTA, which states that parties must 'negotiate in good faith with a view to obtaining agreement' (Native Title Act 1993 Cth, Section 31(1) part B). The NTA does not give the native title applicants the right of veto over a Future Act, only the right to negotiate. Ultimately if the native title applicants do not want a Future Act to go ahead they must seek a ruling from the NNTT to prevent it. However, the reality is that such rulings are nearly impossible to achieve and in most cases are not a viable option (Ritter 2009a: 32-33). Lack of a veto power, and the rarity of NNTT rulings against a Future Act, limits the applicant’s negotiation platform. Applicants can, however, delay acts from occurring and represent an ongoing impediment to a development's economic viability. Thus the benefits grantee parties gain from negotiating Future Act agreements are timely consent, and an
assurance that the native title applicants will not pose any further obstacles to a project reaching its economic potential (Ritter 2009a: 27).

Prior to the introduction of Western Australia’s mediation policy, the WA government’s language regarding native title was dominated by antagonism to the very concept. After the mediation policy was instituted, there was a gradual but significant shift in tone. WA government language regarding native title became more conciliatory and encouraged industry participation in resolving native title by consent. Through the mid-2000s, as more and more industry respondents became involved, native title became less controversial, and more accepted as a part of doing business in the state. Following the decision in Yorta Yorta, pursuing a claim through litigation looked increasingly difficult for NTRBs, and mediation with the WA government offered what appeared as a genuinely achievable alternative. The following chapter will chart this shift in the language, and present the positions of native title parties towards the mediation process in Western Australia.
Chapter 3 – The Language of Mediation

Introduction

The Native Title Act 1993 (Cth) (NTA) is currently in its 20th year of operation and much has changed in the approach the WA government takes towards the resolution of native title. The initial opposition to Indigenous land rights has evolved to a situation where native title is approached as part of the status quo. The amendments the Howard government made to the NTA in 1998 somewhat diluted its power, however, it became quickly apparent to the WA government that the NTA was not going away and that native title was an issue that all states would have to address. In Western Australia (a state heavily reliant on primary industry and mining and a major source of the early criticism of the NTA), attitudes to native title within government and business have experienced a turn-around in which native title resolution has become an accepted part of the business landscape (Ritter 2009a). State governments have largely replaced litigation with native title agreements, in both the determination of native title claims and in development projects through the Future Acts process. Government native title policy changed from pursuing outcomes through the court system and legislation, to encouraging negotiation and agreement making between claimants and respondent parties.

The increase in mediation of native title claims after the year 2000 has been accompanied by predominantly positive language from government, native title respondents and Native Title Representative Bodies (NTRBs). The initial
response from native title stakeholders to proposed policy changes from many states (Western Australia included), was a near universal agreement that mediated consent determinations were preferable to litigation (Wand 2001: 5). The change was primarily attributed to the cost and length of the litigation process, with a majority of cases involving a high number of hearing days at trial, followed by appeals to higher courts. The length of time involved in litigating claims created more and more ‘uncertainty’ for the states and other respondents. The High Court decision in *Members of the Yorta Yorta Community and Others v the State of Victoria [2002]* (*Yorta Yorta*) introduced an onerous threshold for the recognition of native title, leading many claimant groups and their representatives to no longer consider litigation a viable option. Thus many claimant groups took the approach that successful mediation was the only realistic way to achieve recognition of native title. The WA government positioned negotiation as a more efficient and equal process that could achieve greater levels of native title recognition (*Office of Native Title 2004*).

With the shift in focus to mediation came a different language surrounding native title processes. Ideological statements that questioned the validity of native title as a concept were replaced by conciliatory statements focussed on the achievement of the resolution of native title to the satisfaction of all (*Ritter 2009b: 79-80*). With the adversarial atmosphere of litigation somewhat removed, the state, NTRBs and other respondents were all required to maintain appropriate levels of dialogue with each other to maintain relationships for the sake of current and future negotiations. To some extent, this need to maintain relationships explains positive public descriptions of the mediation process by native title parties.
However, the increased practice of linking native title agreements to the implementation of Indigenous social programs has also affected the continued advocacy for the mediation process (see FACHSIA 2009). This situation has created a certain type of language that has pervaded the mediation of native title claims, the words of its actors and the literature that accompanies it. This is the current language of native title, in which the importance of agreement-making and maintaining relationships cannot be stressed enough. Within this language, the native title process is no longer seen merely as the recognition or denial of the traditional land rights of Indigenous Australians by the legal system, but as a tool of ‘reconciliation’, a method of ‘closing the gap’ between the Indigenous and non-Indigenous people, and as an aid to ‘capacity building’ in Indigenous communities.

This chapter provides a short history of the development of language relating to native title in Western Australia to the present. While my focus is on Western Australia, the language examined has to a large extent become pervasive across Australia. The chapter will cover the various incarnations of the Western Australian state government since 1993, the pastoral and mining industry sectors, and NTRBs. I discuss the germination of advocacy for mediation and its accompanying language, beginning with the Federal government in the build up to legislation of the NTA. I then shift focus to the language surrounding mediation from the National Native Title Tribunal (NNTT). I analyse the language of advocacy for negotiation and agreement making, and illustrate its spread across the previously highly contested ideological borders of economic development versus the recognition of Indigenous rights. I will outline the language of the WA
government regarding mediation policy, and the responses to the policy from NTRBs, the pastoral lobby and the mining industry. In doing so, I seek to reveal the extent to which the resolution of native title by consent has become uncontested, normalised and uncontroversial.

The National Native Title Tribunal: ‘overwhelmingly positive’

The NNTT was originally created expressly to advocate negotiation between native title parties, mediate those negotiations, and then ultimately resolve native title matters. This approach was ultimately overrun by the desire of state governments and other respondent parties for litigated resolutions and state legislation. Advocacy for negotiation remained, but was marginalised by arguments from the states that ‘uncertainty’ was damaging state economies and that the ‘right to negotiate’ provision in the NTA was to blame for this (Richard Court Media Statement, 11/03/1999). While litigation was the response of most state governments in the 1990s, the NNTT continued to advocate for a mediated approach. When negotiation and agreement-making became the policy of the majority of states after the year 2000, the NNTT trumpeted the success of its advocacy, and continued to argue for negotiated outcomes in native title (NNTT 2010b: 18-19).

In 2008 the NNTT celebrated 15 years of the Native Title Act by producing a film. 15 Years of Native Title (NNTT 2008), as described by David Ritter (2009b), presented an ‘overwhelmingly positive’ account of the current operation of the native title process. The film portrays the current system’s focus on mediation and agreement-making as the result of a sea change in the perception of
native title amongst state governments and respondents. The central message of the film was that native title advocates, the NNTT being the biggest and best funded, had succeeded in convincing the sceptics in politics, industry and the broader public that native title was not a threat to the economy or to the broader Australian community. In Ritter’s view, the film’s presentation of the current native title regime completely ignores the events and processes that led to the dominance of mediation in native title policy.

The configuration of native title that has emerged is not the product of cultural revelation; actors within the system have not simply learned that agreement-making is the wiser choice. Rather, the present policy consensus on native title in Australia is predicated on a distribution of rights and power, supported by a common set of normative assumptions about how things work, that was only settled after bitter and protracted contest (Ritter 2009: 173).

Ritter does not contest the facts of the film, but rather the sentiment. The predominant language of native title invokes recognition and reconciliation, and the current propensity of governments and other respondents to advocate negotiation and agreement-making is used as primary justification for this. The common meaning of the terms ‘negotiation’ and ‘litigation’ also contribute to the rather simplistic notion of negotiation as positive, and litigation as negative. ‘Litigation’ is adversarial, and suggests that the parties with the most money and power are favoured, whereas ‘negotiation’ and ‘mediation’ suggest equality amongst parties, and above all, respect.

As will be discussed in Chapter Four, the statistics relating to the resolution of claims show a relatively modest difference between litigated and non-litigated determinations. On average it takes only 10 months less to resolve a claim via mediation than it does to carry out full litigation (NNTT 2010a) and although the
costs relating to mediation are unclear due to confidentiality arrangements, it can be assumed that mediation involves significant expenses for lawyers, experts and researchers in the same way that litigation does. There is yet to be a proper cost analysis between the two forms of native title resolution. This is because the task of negotiating an agreement is spread across a variety of government departments and budgets and therefore it is not simply a matter of totaling solicitor billing hours and court costs. Further, the dichotomy between litigation and negotiation in terms of timeframes and government expenditure can be shown to be a false one when one considers that claims can, and occasionally have, moved in between the two processes. There are claims that have gone through a full first instance trial, only to move into mediation before the judgment is handed down.39

The ‘overwhelmingly positive’ tone was not merely confined to the NNTT promotional material, but also its statistically focused report publications. In March of 2010 the NNTT released the fourth installment of its National Report Card series, presenting a status report on a wide range of native title matters. In the media release accompanying the report, the Tribunal highlighted a continuing two-year trend in native title matters being decided through mediation rather than litigation (NNTT 2010a). In its opening summation, the NNTT states that

*Between 1 January 1994…and 31 December 2009, 129 determinations of native title were registered under the NTA…Of the 129 determinations:…92 were determinations that native title exists over the whole or part of the determination area [and] 37 were determinations that native title does not exist…During the 16 years of the NTA’s operation, determinations that native title does exist have been made in New South Wales, Queensland, South Australia, Victoria, the Northern Territory and Western Australia. Seventy-six (or 83 per cent) of those determinations were made by consent of the parties. Most of the determinations that native title*

39 Such as the Karajarri claim in WA’s Pilbara region.
These non-claimant proceedings merely represent developers and the state ensuring that native title is extinguished in areas they wish to develop. Thus it is intriguing as to why this comment is juxtaposed with the number of positive consent determinations. The NNTT is not only stating that the majority of claims are being decided through mediation, but it is also implying most claimants are getting what they want from the process. This is continued for the remainder of the report. Facts and figures are presented intimating that 'native title' is not only moving forward, but achieving results, results being the 'disposition' of claims; the reduction of contested space through agreement and, by implication, through cultural understanding and reconciliation. The report continually reminds the reader that the majority of the determinations have been reached 'with the consent of the parties' (NNTT 2010a: 1), that is, without the costly and adversarial litigation that was the hallmark of early native title claims. The overall message is that ‘things are changing’: policies have changed, attitudes have changed and ‘we’ are moving forward. It is the phrase: 'with the consent of the parties' (NNTT 2010a: 1) that drives mediation as the preferred method of resolving claims. It is reassuring; it implies a sense of maturity in the process. Things are not only getting done, but they are getting done faster, friendlier and more respectfully than through litigation.

The Native title language of the Western Australian state governments 1993 - present

Western Australia was not the first state to undertake negotiation towards consent determinations, but as the largest state with the largest amount of land covered by
native title claims, its implementation of a mediation policy greatly contributed to the current native title landscape. The state went from being an ideological opponent of legislating native title into law, to one of the primary advocates for resolving native title through agreement. This change of position was certainly the result of a change in governments; however, the maintenance of mediation policy through these changes suggest that the policy was not merely a product of ideology.

*The Court Coalition government (1993-2001)*

The Coalition government led by Richard Court was brought to power a mere 7 months after the High Court decision in *Mabo* and at the beginning of the Federal Labor Government’s attempt, led by Prime Minister Paul Keating, to provide a legislative response to the decision. Keating had already faced strong opposition from mining companies with interests in both Western Australia and Queensland and pressure from Queensland Labor Premier Wayne Goss to insulate mining interests in his state from native title litigation. With the election of a conservative government in a state with a strong reliance on primary industry and the mining sector, and with a relatively high Aboriginal population, the process of legislating native title and the following processes of resolution under the NTA had a consistent and reliable antagonist (Ritter 2009b: 83).

The move to legislate native title initially produced responses from the states relating to the validity of Federal jurisdiction in the area of land administration.

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40 The ‘Coalition’ is made up of members of the Australian Liberal Party and the Australian National Party. The partnership has existed in various forms across Australia, and has occasionally split or reformed based on electoral circumstance. Richard Court, as the leader of the Parliamentary Liberal Party (the larger of the two parties), was Premier. Hendy Cowan, as leader of the Parliamentary National Party, was Deputy Premier.
Richard Court stated that ‘[s]uch a move is designed to undermine the States' constitutional rights and responsibilities’ (Richard Court Media Statement, 02/09/1993). As discussed in Chapter Two, this position transitioned to one that argued the ‘unworkability’ of the proposed Act, the cost of resolving claims, and the ‘uncertainty’ causing damage to the economy in the mean-time.

The key questions still remain unanswered, such as the determination of native title, its impact on development, the level of compensation for extinguishment of native title and who pays the compensation…The Prime Minister is providing an incentive for groups to make claims, since they will be funded by the Commonwealth Government, whereas there is no provision for the funding of defendants…Rather than creating a climate of certainty in which private investors and businesses can operate with confidence, the latest proposal reinforces the uncertainties which have gripped the nation (Richard Court Media Statement, 02/09/1993).

The uncertainty that ‘gripped the nation’ related to the consistent speculation, by politicians, commentators and industry lobbyists alike, as to what the result of a legislated native title regime would be. As was shown in Chapter Two, the speculation itself varied widely from concern that mining projects would face delays, to the extreme and inflammatory claim that people’s backyards would be under threat unless the government legislated against it (Smith and Morphy 2007: 19).41

For the majority of two terms in power, between the years 1994 - 2000, the Court government tackled the native title issue using litigation and legislation to achieve their aims. Litigation was the first response to all claims lodged in the Federal Court and legislative measures were used in an attempt to mitigate the amount of

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41 This claim was made by a number of individuals after the decision in Mabo, including Federal Deputy Opposition Leader Tim Fischer (Smith and Morphy 2007: 19).
land subject to native title rights, and the nature of the rights themselves. In particular the ‘right to negotiate’ was targeted as an illegitimate and unworkable element of the native title process.

The State Government introduced legislation into Parliament in October last year to establish a state native title system which included removing the right to negotiate on pastoral leases in favour of a consultation regime...in relation to the vast majority of this State, you have two choices...either wait indefinitely for your title or pay off claimants to secure it...This system is not legitimate, is not just and is not sustainable. It faces collapse if left unchanged (Richard Court Media Statement, 11/03/1999).

As can be seen from the above statement, the Court Coalition government’s rhetoric concerning native title focused heavily on themes of the uncertainty of current land title, the endangerment of the economy, the unworkability of the Act itself, and the need for state legislation to rectify these problems. In the later stages of the government's term, the language the Court government used to describe the NTA did not soften, but it did begin to implement the concept of state-based solutions to native title. The Court government negotiated three consent determinations, two in the Western Desert and one in the Pilbara.42 While these determinations were the exception rather than the rule, they highlight that the idea of state controlled negotiated settlements was not born of a particular ideological view on Aboriginal land rights. The Court government differed from the later Gallop and Barnett regimes on the preconditions of such consent determinations. Regardless of how specific and onerous their conditions may have been, the Court government was no longer so ideologically opposed to the concept of native title that they would not negotiate and settle a claim where there

42 One consent determination, with the Spinifex People Claim (2000), was actually completed (i.e. finalized with the Federal Court) during the Court government. Two other claims, Kiwirrkurra (2001) and Nharnwarra Wajarri & Ngarlawangga (2001) reached in principle agreement with the Court government but were formalized well after it was out of office.
was nothing tangible 'at stake.' In his media release announcing the agreement and resulting determination, the Premier stated that it was fortunate for the claimants that ‘the Spinifex negotiations related only to vacant Crown land and reserve land - no pastoral leases were involved’ (Richard Court Media Statement, 16/10/2000). Premier Court also highlighted that the state would retain all ‘its ownership of minerals, petroleum and water’ (Richard Court Media Statement, 16/10/2000).

*The Gallop Labor government (2001-2006)*

In April 2001 the newly elected Labor government in Western Australia, led by Premier Geoff Gallop, commissioned a review of state native title processes and resources (Wand 2001). The Wand review was based upon the new government’s policy to focus on native title determination by negotiation rather than litigation, and the foreshadowed ‘overhaul’ of its native title approach in the lead-up to the election. Paul Wand, a retired mining company executive, who was formerly a Vice President at Rio Tinto, headed the review, which was to consider: the level of evidence required in connection assessment, the scope for co-operation between the government and native title claimants in the assessment process, the prioritisation of claims, and the applicability of negotiation principles and practices of other states (Eric Ripper Media Statement, 19/04/2001). In announcing the review, the government highlighted that only two claims were settled by consent by the Court government versus the 39 that were then headed

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43 The Nharnuwara Wajarri & Ngarlawangga (NWN) agreement was accompanied by a set of ‘Pastoral Access Protocols’ which left claimants with less rights as native title holders than as native title applicants. A particular requirement is that the NWN have public liability insurance of $5 million to enter a pastoral lease (Flanagan 2002).
for trial. In a presentation to the Chamber of Minerals and Energy conference *Moving Forward: Best practice in indigenous relations*, the Minister responsible for native title argued that:

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\text{This cycle of antagonism, litigation and higher court appeals has got to stop…WA needs a balanced approach to native title which respects the interests of all people…The review will provide the Government with recommendations on the best way to achieve an environment where native title agreements are the norm rather than the exception (Eric Ripper Media Statement, 19/04/2001).}
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In the eyes of the Gallop Government, the process of litigating native title was not in the best interests of all parties, or even any party. The Government categorised litigation as antagonistic, costly, and ultimately damaging to the state. Native title was characterised as an issue that would impact the state as a whole, and the resolution of the issue to the satisfaction of all parties would benefit the entire community.

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\text{Economic development and improved living standards for all Western Australians depends on approaching native title issues in a respectful and constructive way…Ignoring indigenous [sic] aspirations for recognition of traditional ownership is an invitation for long, costly and bitter legal battles…Agreements can cover the interests of all people in the management and use of land and waters... while litigation over native title can have negative personal and financial impacts on those involved (Eric Ripper Media Statement, 14/11/2001).}
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Litigation was conceptualised as an obstructionist method of ‘ignoring’ Indigenous connection to land, and engagement in native title litigation as making a political statement against the native title rights of claimant groups.

The Wand review stated that the then native title policy office, the Department of Premier and Cabinet (DPC)-based Native Title Unit, was vastly under-resourced for its current workload, and that native title work was spread too widely over state agencies. The result was the creation of the Office of Native Title (ONT),
initially located within DPC (later within Treasury and the Department of the Attorney General), whose purpose would be to assess connection material relating to native title claims and to spearhead the mediated determination of these claims post connection assessment. Connection assessment was to be conducted under the newly minted *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title*, a framework under which connection reports were to be analysed and traditional laws and customs to be ascertained. This assessment process and the blanket referral of all native title claims to mediation represented a shift from the courts to the state bureaucracy in the evidentiary assessment of Aboriginal laws and customs. The Connection Guidelines stated that they reflect the responsibility upon the Government to give thorough consideration to the evidentiary basis of the claims made in a native title application before proceeding to negotiate the terms of an agreed determination. The provision of evidentiary material by native title claimants is therefore a necessary precondition to the Government’s participation in consent determination negotiations. These Guidelines are provided to assist those involved in the native title process to understand the basis upon which the Government will enter into such negotiations (Office of Native Title 2004: 2).

The government would assess each claim on the basis of ‘connection materials’ submitted by the NTRB representing the claim. Claims whose connection materials satisfied the government’s requirements would then enter into negotiations with all respondent parties, that is, the state, mining and pastoral interests, lobby groups and any other party who held interests in the land and waters under claim. The ONT, which had undertaken the assessment of the connection material, then became the mediator of the negotiation, having to

44 It is not usual for claimant groups to seek private legal representation outside the NTRB structure and the author is not aware of a privately represented claim submitting connection material for a consent determination. Certainly, no such agreement has been finalised. However, the various incarnations of the Guidelines have not insisted on NTRB representation to achieve a determination.
convince other respondents as to the legitimacy of the claim and bring them to terms with the claimant group.

The policy saw a number of claims resolved via consent determination, particularly in the Western Desert and Pilbara regions. The increase in determined claims was the centrepiece of arguments for the policy’s success, alongside the avoidance of litigation and the associated cost. In a ‘Native Title Factsheet’ provided with a media statement regarding the Ngaanyatjarra Lands native title agreement, the government attempted to contextualise the contemporary native title situation by providing the following ‘background’:

There were more than 130 outstanding native title applications when the Government came to office, and only two had been settled in the eight years of the Court Government. The former Government’s preference for litigation against native title claimants cost taxpayers’ (sic) millions and created legal uncertainty. The Miriuwung-Gajerrong court case alone cost all parties collectively at least $10million (sic). In 1995 the Court Government’s State native title legislation was thrown out by the High Court (seven to nil) for breaching the Commonwealth Racial Discrimination Act (Eric Ripper Media Statement, 23/12/2004).

The points touched on in this background section highlight the Gallop government’s reasoning in instituting the policy to negotiate by first preference. Primarily they argue that the policy avoids the large costs associated with litigation, although they also reference the ‘legal uncertainty’ created by attempting to resolve native title claims in the courts. This reference reveals much about the government’s reasoning. Clearly the government was not confident in the Federal Court making consistent judgments in native title matters, and this lack of confidence was something that had to be communicated to industry.

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45 The location of consent determinations in Western Australia will be discussed in Chapter 4.
46 Stanley Mervyn, Adrian Young, Livingston West and Others on Behalf of the Peoples of the Ngaanyatjarra Lands v The State of Western Australia and Others, [2005] FCA 831
Uncertainty in relation to development projects was one of the primary concerns of the mining industry in the original legislating of native title. The WA government was clearly seeking to portray negotiation as the policy that would remove such uncertainty. Native title mediation was a controlled environment, in which parties could not be blindsided by an unexpected Federal Court decision.

*The Carpenter Labor government (2006-2008)*

The Alan Carpenter\(^47\) led Labor government continued with the native title policies of its predecessor, retaining the status of agreement-making as the only credible solution to resolving native title claims. During this period (2006-2008), the government presented the success of its native title policies in terms of the number of claims resolved compared to other states, the amount of land on which native title had been resolved and the speed by which this had been achieved. In a statement announcing the 21\(^{st}\) resolved native title claim in the state, the government highlighted what it believed to be the measures of success of native title:

> Working together with claimants, industry and other interested parties, native title has now been resolved over about 28 per cent of WA’s land mass, an area of more than 733,000sq.km...No other State comes close to this record (Eric Ripper, Media Statement 09/11/2007).

There can be no argument that Western Australia had resolved numerous native title claims over large swaths of land in this period. The statistics relating to the amount of land in which native title has been resolved are, at least in part, reflective of size of Western Australia itself and that the size of the average native

\(^{47}\) Geoff Gallop resigned as Premier and retired from politics in 2006.
title claim dwarfs figures from other states. However, the Gallop and Carpenter governments achieved an exponential increase in resolved claims from the Court government era.

*The Barnett Liberal government (2008 - Present)*

The election of the minority Barnett Liberal government in late 2008 was the litmus test for agreement making as a bipartisan policy. By the time the Gallop/Carpenter government lost office, native title had receded from the political front line in Western Australia and across Australia generally. Only the occasional controversial court decision, such as in *Bennell and Oths vs The State of Western Australia* (the *Single Noongar Claim*) brought ideological arguments back to the native title discourse. Native title as a political issue was not at the forefront of the 2008 election campaign, and as a result the Barnett opposition did not present an alternative policy to that of the Carpenter government, nor did it provide commentary on the performance of the incumbents in the execution of their own policy. The absence of native title from the election campaign is itself an indication of the bipartisan consensus that agreement making was the way forward in native title for the state. With little or no political argument on native title issues, it was difficult to predict how the new Barnett government would approach native title, or how it would continue with negotiations already underway when it came to power.

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48 Of the 733,000sq.km of land then covered by resolved native title claims in WA, 188,000sq.km (or over 25%) was the Ngaanyatjarra Lands claim which reached agreement in 2004 and was determined in 2006 (Eric Ripper Media Statement 23/12/2004).

49 The Barnett government took power with support of the Nationals and some independents to form what is known as a 'minority' government. The Liberal Party and National Party were no longer in formal coalition, but the Nationals 'supported' the Liberals forming government.
The first indication of the policy trajectory of the Barnett government with regard to native title was its plan to build a 'gas processing hub' in Western Australia's Kimberley region. The gas hub, to be built in cooperation with Woodside Petroleum Ltd., was to be located at James Price Point 52 kilometers north of Broome on land under claim by the Goolarabooloo/JabirrJabirr people. In a statement outlining the government's plan to resolve the native title issues regarding the site, Premier Barnett said that:

Our aim is to acquire the site by consent. This could include restoring rights equivalent to native title over the site at the cessation of LNG processing. Compulsory acquisition of the land remains an option…With respect to acquisition of the site area, the WA Government has agreed to a proposal by the Commonwealth to fund a facilitator to work with the key parties…towards a negotiated resolution to acquire the site (Colin Barnett Media Statement, 23/12/2008).

While Barnett highlighted agreement making as the preferred outcome for the government, his suggestion that the government was considering compulsory acquisition of the land was not typical of government comments on negotiation procedures. In fact, such public airings of the powers governments are able to wield in the native title process were rare, and the tone of the rhetoric in this instance was reminiscent of the beginnings of native title in the state (see Richard Court Media Statements, 20/06/1993; 02/09/1993; 04/01/1996). While there would be no return to the Court government policies, which exhibited ideological opposition to native title and focused on legislative and litigious responses, negotiated responses to native title would be in the context of pursuing development goals for the state. The Barnett government did not engage in

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50 The gas hub project has stalled at the time of writing, as the developer Woodside has decided to drop James Price Point as the location for its gas hub. Colin Barnett has stated that he wants to continue with the deal with Aboriginal Traditional Owners and acquire the land despite this. It is still subject to a number of protests and court challenges from both Aboriginal Traditional Owners and environmental groups.
ideological debate on native title. Instead the resolution of native title became merely an issue of expediency in conducting the business of the state.

Despite Barnett's aggressive approach to negotiation, the language of native title agreement-making used by his government did not change. The Barnett government continued to produce positive statements relating to consent determinations and agreements similar to their Labor predecessors. Upon reaching an initial 'Heads of Agreement' regarding the gas hub with the Kimberley Land Council (on behalf of the Goolarabooloo/JabirrJabirr People) Barnett stated:

While more remains to be done, I am pleased by the progress made in such a short time. We are well on our way to making a significant positive impact on the lives of Aboriginal people and delivering a lasting, positive legacy for future generations in the Kimberley through responsible economic development.... (Colin Barnett Media Statement, 15/04/2009).

When this agreement failed to produce an Indigenous Land Use Agreement (ILUA) within a satisfactory timeframe, Barnett again raised the notion of a compulsory acquisition by the government. However, he still urged for agreement to be reached and the appropriate consents to be obtained. The tone of language did not shift, in stating that the gas project was 'critical' for the development of the state, nation and Indigenous people he argued that

Economic independence and real opportunity is the best way towards self-determination for Aboriginal people and goes a long way towards reconciliation... The State Government would prefer to sign an ILUA based on consent, and I continue to encourage claimants to resolve the issues within their groups...If that is not possible, we will be aiming to achieve a negotiated outcome that is consistent with the Heads of Agreement signed by the Kimberley Land Council on behalf of the Goolarabooloo/JabirrJabirr claimants in April 2009...The State Government and Woodside remain committed to delivering about $1.5billion of social and economic benefits to local Aboriginal communities, as part of the LNG precinct project (Colin Barnett Media Statement, 02/09/2010).
Barnett's connection of ILUA and other native title agreements to the concepts of self-determination and reconciliation is consistent with the language of other, more progressive governments in the period where native title was ideologically contested in both federal and state politics. From the early 2000s to the election of the Barnett government in late 2008, state government approaches to native title had arrived at a near uniform state, and the language associated with these approaches had a familiar conciliatory cadence and broader political references. At the end of what was a highly contentious negotiation over the Gas Hub project, which was highly contested within the Kimberley Aboriginal community, the Premier returned to the familiar language of agreement making. Despite a protracted and divisive argument, in which the Premier had openly threatened the compulsory acquisition of land, he stated that:

The State Government’s preference has always been to reach an agreement. While we did start a formal process under the Native Title Act to acquire the land, we continued negotiating with the traditional owners to obtain their consent…These processes ran in parallel…this is an important act of self determination that will generate real economic opportunities and real jobs for indigenous (sic) people over many years…The agreement will give indigenous (sic) people in the Kimberley a higher level of economic independence and is a real and practical milestone in the reconciliation process (Colin Barnett Media Statement, 06/05/2011).

Apart from the James Price Point negotiations, the Barnett government maintained the 'negotiation as first preference' native title policy, albeit without providing a public commentary nor engaging in active and ongoing policy review.\(^{51}\) There were no major policy announcements relating to native title in the first two years of the government's first term. The majority of government

\(^{51}\) The Barnett government did oversee a review of the Guidelines in 2010 which provided a much more explicit account for what was required in a connection report, but these could not be described as major changes.
statements relating to native title during this period were in the context of 'fostering' development projects. In a statement announcing the finalisation of the Unguu and Dambimangari native title claim agreements, Barnett said:

This decision...is further evidence of the State Government’s commitment to resolving native title in this State...The Liberal-National Government has now resolved five native title claims and negotiated major native title agreements over key areas of the State, including...the Yawuru Agreements in Broome, and the Murchison Radio-Astronomy Observatory Agreement in the Mid-West...Negotiations to establish port facilities, industrial and gas processing precincts in the Pilbara and Kimberley regions are also under way and an agreement to resolve native title by negotiation over the South-West is progressing (Colin Barnett Media Statement, 23/12/2010).

The media statements of the Barnett government are written in a language that intertwines native title agreements and development projects, to the extent that government discourse relating to native title only occurs within the context of development. Native title is portrayed as an obstacle to development requiring resolution. When resolution is achieved, it is hailed as a step towards loftier social aims. By association, the WA government’s progression of development becomes tied to the overarching goals of reconciliation and self-determination.

**Federal Government, NTRBs and industry perspectives**

**Federal government responses to agreement-making**

The WA government’s mediation of native title consent determinations has recently become intertwined with the introduction of both state and federal Indigenous social policies. Areas such as housing, education, jobs and health have been cited as indicators where improvements are needed (FAHCSIA 2010). In June 2010 the Federal government produced a discussion paper, which sought to
highlight how native title agreements can be used in its initiative to ‘close the gap’ and reduce Indigenous disadvantage. The Federal government’s vision of native title is stated as one that recognises its importance as a property right but also acknowledges that

Native title, particularly agreement-making, can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians. Native title negotiations can also provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships (FAHCSIA 2010: 4).

The paper proposed the creation of a regulatory body that would oversee and encourage the implementation of native title agreements that had provisions in these areas. It stated that native title agreements were instrumental in creating ‘opportunities for relationship building and capacity building’ and were required for ‘wealth creation for native title groups and their communities’ (FAHCSIA 2010: 8). The position of the Federal government is to advocate the continuation and expansion of agreement-making by the states and industry, while at the same time linking federal-level social policy to a mechanism of state native title policy.

The practice of linking Aboriginal economic and social outcomes to native title is evident within the materials produced by the Western Australian government departments. The 2008-2009 Western Australian Office of Native Title (ONT) Annual Report directly linked the outcomes of native title mediation to improving the social and economic standing of Aboriginal People. The report states at the beginning of its ‘Current and Emerging Issues’ section that

The resolution of native title claims involving the negotiation of broader benefits has been identified as an important strategy in the COAG Indigenous Affairs agenda for overcoming Indigenous disadvantage. Broader settlements will not only resolve a native title claim but will also provide a range of tangible benefits to Indigenous Australians. The Commonwealth, States and Territories are currently
negotiating an agreement for Commonwealth provision of resources to fund broader settlements (Office of Native Title 2009: 17).

These ‘broader settlements’ were envisioned to include provisions for housing, education, employment and other socio-economic programs designed to improve native title holders’ living standards. Tying such important government programs to the resolution of land rights is problematic in that it places the responsibility for implementation of such programs on NTRBs and Prescribed Bodies Corporate (PBCs) after native title has been resolved. This amounts to the government abrogating its responsibilities for the wellbeing of Aboriginal people. It is not hard to envision situations in which such ‘broader settlements’ could successfully erode native title rights by trading them for essential programs that are necessary for a community’s ongoing viability.

The ‘Current and Emerging Issues’ section of ONT’s report contained a statement asserting the need for Indigenous Land Use Agreements (ILUAs) to be negotiated alongside native title mediation to increase the ‘certainty and efficiency for Government business’ (Office of Native Title 2009: 17). The report defines ILUAs as:

Voluntary agreements between a native title group and other parties about the use and management of land and waters as per the Native Title Act 1993 (Cth) (NTA) (Office of Native Title 2009: 17).

It states that ILUAs are utilised because:

Experience has shown that determining whether native title exists doesn’t necessarily resolve all the issues the Government encounters when doing business with native title groups, especially where exclusive possession native title has been recognised. It is for this reason that the negotiation of ILUAs prior to, or alongside, a determination of native title is being explored with a view to facilitating the doing of government business in the post determination environment (Office of Native Title 2009: 17).
The definition of ILUAs as ‘voluntary’ is put into context by statements in the NNTT Annual Report of 2010 regarding four consent determinations achieved in Australia during the 2010 reporting period. The report cites four agreements that ‘fully resolve[d] native title determination applications’ (NNTT 2010b: 65). These four agreements all occurred within the state of Queensland. Three of these agreements involved ‘alternative resolution’ in which two claims groups agreed, subject to the registration of related ILUAs, to discontinue their applications, and the third agreed to the uncontested dismissal of their native title claim (NNTT 2010b: 66). The single consent determination in the reporting period that provided a positive determination over land for the claimant group was for the Dulabed and Malanbarra Yidinji, just south of Cairns. The determination was ‘conditional upon the registrations…of four related ILUAs’ (NNTT 2010b: 66). While this determination occurred in Queensland rather than Western Australia, it reveals the context in which ILUAs are defined by ONT as voluntary, given their suggestion that ILUAs will increase the ‘certainty and efficiency of government business.’ ILUAs are ‘voluntary’ in the sense that they can be used as a condition of native title consent determination.

*The language of agreement-making in NTRBs*

It is not only the WA government that promotes mediation as the preferred form of native title claim resolution. Despite the dissenting voices to the ‘win-win’ conceptualisation of agreement-making, the language and approach of NTRBs in Western Australia to the government’s negotiation structure echoes the
government’s own rhetoric. In their various annual publications, NTRBs argue in the same way as the government does about the superiority of native title mediation in the resolution of claims. In the Yamatji Marlpa Barna Bama Maaja Aboriginal Corporation’s 2005 Annual Report, the organisation stated that YMBBMAC recommends seeking determination of native title applications by consent. This approach is the most efficient and satisfactory way of obtaining recognition for traditional owners as it avoids expensive and stressful adversarial hearings (YMBBBMAC 2005: 6).

The term ‘efficient’ in this case is clearly referring to the cost of resolving the claim for the NTRB. The ‘strategic under-funding’ of NTRBs as outlined by Ritter (2009) plays into this argument, as while the raw cost to the state government of producing native title agreements is unclear, it is certainly cheaper for NTRBs. Similar sentiments were included in the Goldfields Land and Sea Council’s (GLSC) annual report of the same year, in which, despite the organisation’s inability to have one of their represented claims entered into mediation with the WA government, stated that:

A negotiated approach is quicker, less costly and more constructive for all involved. In the Goldfields this means governments, pastoralists and the mining industry, among others, sitting down and talking through issues with Aboriginal land-owners. This allows for everyone’s needs to be recognised and accommodated and for the benefits from the land settlement to be shared (Goldfields Land and Sea Council 2005: 8-9).

These positions are maintained through future annual reports from both organisations despite, particularly in the case of GLSC, limited progress being made in the resolution of the native title claims they represent.

In the case of the NTRBs and in that of the WA government, the context of

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52 Native title representative bodies are required by the Federal government to provide extensive organisational reporting to maintain public funding.
53 Now called the Yamaji Marlpa Aboriginal Corporation (YMAC).
ongoing state development projects must be considered when analysing attitudes towards agreement-making. In place of progress of the resolution of native title claims was an increased focus on third party agreements providing economic and social benefits to the community’s native title claimants. In YMBBMAC’s 2008 Annual Report, CEO Simon Hawkins’ report concentrated on the need for the ‘equitable distribution of the generated wealth’ from the mining boom (Hawkins in YMBBMAC 2008: 3). While Hawkins stated that his organisation believed that their native title claimants deserved a larger slice of the $16 billion profits from iron ore industry, he did not directly connect native title agreements to Aboriginal social policy. However, the pursuit of the recognition of land rights did appear to be given equal attention to securing economic benefits from the Pilbara mining boom.

The 2009 Annual Report of the Yamatji Marlpa Aboriginal Corporation revealed some changes in language when referring to the intention of native title agreements. Where in the 2008 report Hawkins highlighted the need for the equitable distribution of wealth, the 2009 report saw the introduction of language congruent with the Federal Government’s ‘Closing the Gap’ initiative. The ‘Yamatji and Pilbara Highlights’ section of the 2009 YMAC Annual Report focuses almost exclusively on the strong continuation of mining agreements despite the global financial crisis. In his CEO’s report, Hawkins stated that the activity of the mining industry ‘continued to dominate the work of the organisation…’ and that of the 376 meetings conducted by the organisation in 2009, 228 were to negotiate mining agreements compared to 148 to progress native title matters (Hawkins in YMAC 2009: 4). Hawkins specifically cited the
importance of the right to negotiate for native title claimants, afforded by the NTA, to ‘close the economic gap’ (Hawkins in YMAC 2009: 5).

This sentiment is repeated in the 2010 report, where Simon Hawkins cited a recent court decision that YMAC believed had the potential to threaten the right to negotiate, stating that ‘if’ Traditional Owners lose this mechanism, the ability to secure benefits will be greatly diminished, which in turn will undermine efforts to close the gap’ (Hawkins in YMAC Annual Report 2010: 15). The agreements referred to are predominantly Future Act negotiations, which, other than providing timely permission for respondents to access land, ultimately have no affect on whether a native title claim will be resolved via mediation. Much of the language applied to these separate negotiations, however, has been transferred to matters relating to claim resolution. Similar comments advocating the agreement-making policy in Western Australia appear in the annual reports of other NTRBs in the state, such as the South West Aboriginal Land and Sea Council (SWALSC) and the Central Desert Native Title Services (CDNTS) (SWALSC 2004; 2005; 2006; 2007; 2008, CDNTS 2008; 2009; 2010).

**Mining and pastoral industry responses**

When native title was first being legislated, mining and pastoral interests lobbied heavily for legislation to extinguish native title rights. With legislation and jurisprudence in place, they cannot revert to this previous position and instead lobby for particular policy directions that serve their interests. The response of mining and pastoral associations, companies and individuals to the native title agreement-making has mirrored that of other parties in the process. Large and
small mining companies, the mining lobby and the pastoral lobby have all participated in the mediation process in Western Australia as respondent parties. However, their participation alone cannot be taken as a full acceptance of the negotiation process as in no case would they be first respondents to a claim. The position of the government with regards to a particular claim will ultimately drive the actions of other respondents. Agreements however, by their nature, require the agreement of all parties to proceed. The number of claims which have been resolved by consent shows that these other respondent parties are willing to come to terms on native title matters. Mining and pastoral positions on native title mediation can be measured in the way they lobby the state government on policy, in submissions and in their own media and policies.

Industry representative groups such as the Pastoralists and Graziers Association (PGA) and the Minerals Council of Australia (MCA) have acted as respondents in numerous native title claims in WA representing individual pastoralists and they have participated in both litigation and mediation processes. In a submission to the Federal Attorney General, the PGA stated categorically that:

Pastoralists across Western Australia prefer to mediate rather than litigate native title claims. The… [PGA] actively advocates this position…in matters where pastoralists are involved…Pastoralists want to see claims progressed and resolved quickly and efficiently so that there is no more uncertainty about managing their stations (PGA Discussion Paper Submission 2009: 1).

On ABC’s Four Corners in 2012, former President of the Australian Mining and Industry Council Campbell Anderson stated the mining lobby’s first response was to call for the complete ‘extinction’ of native title. The then director of Western Mining, Hugo Morgan, had indeed called for the RDA to be repealed so that the state could simply extinguish native title (ABC TV Four Corners’s 03/05/2012).
When asked to reflect on native title and the mining industry in the current context, Campbell Anderson stated that *Mabo*:

Certainly required the industry to talk more to Aboriginal people, and I think that's a plus. I think... the relationship between the mining industry and the Aboriginal people is much better than is generally considered in the community, and I think that's probably because of Mabo rather than despite it (Campbell Anderson, ABC TV Four Corners 03/05/2012).

The position of the mining industry has certainly moved on from the rallying cries for extinguishment that took place in the 1990s. The absence of aggressive lobbying for large scale legislative reform and participation in negotiation processes suggests that the industry believes that agreement-making is in its own interests. In a submission to the Federal Attorney General’s Department, the MCA stated that

Members of the MCA recognise that Industry’s engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australians’ rights in law…future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities…Industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests, and welcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians (MCA Discussion Paper Submission 2010: 1).

The acknowledgement from both major industry respondents to the Federal government that the continuation of native title agreement-making is necessary for the stability of ‘future operations,’ represents a significant change in their position on native title. It is clear that both groups have moved on from being the primary antagonists towards the NTA, to being active participants in resolving native title by consent. While increased 'efficiency and operability' of the native title system will always be within their agenda, there are no longer blanket claims as to the systems 'unworkability' that were present prior to the year 2000. The absence of
lobbying for change is the clearest indication of industry's approval of mediation policy.

Conclusion

The policy of pursuing the resolution of native title claims through negotiation rather than litigation has been met with the full support of all major parties to the native title process. As a result of the policy, and the support of native title parties, public native title discourse has been dominated by positive and conciliatory language towards agreement-making and its many perceived benefits. In reviewing the material presented above, the lack of public critique of the policy is evident, whereas in cases where native title has been litigated, such critique and argument abounds. In the context of anthropology, the conduct of cultural assessment in a court setting and the relationship of anthropology to the law have been openly contested in the public arena (see Burke 2011). This is not so with claims which are mediated and resolved by consent determination. Instead, a ‘surface language’ promoting reconciliation by negotiation shields the contested environment from public view, and from open critique. In the court context, where the views and arguments of the native title parties, the claimants, the state, industry respondent groups, and expert witnesses are available for comment, the final judgment can be considered in the context of the evidence presented. This is not the case in consent-determined claims, where information is withheld until the final stages of the process, when an agreement is formally announced and the Federal Court determines the claim.

To truly assess whether mediation is the best process for all parties, the analysis
must push through this ‘surface language.’ The full public approval of the process by all relevant native title parties is not enough to come to a satisfactory conclusion. There needs to be a deeper analysis of the benefits a negotiated process affords each individual party. If these benefits do not align with publicly stated positions on the process, then the question should be asked as to why this is the case. The WA government’s construction of its mediation regime placed itself in a position of significant power regarding the assessment of cultural evidence and the entry of claims into mediation with respondents. The WA government itself plays role of mediator while at the same time being first respondent to the claim. The structure of negotiating these native title claims is problematic as the processes of assessing cultural evidence and negotiating native title rights are separated and conducted with differing power structures. The situation allows the state to frame the debate on the proof of native title. The WA government make decisions regarding cultural connection based on its own interpretations while exposing an assessment of native title rights to open negotiation. In the following chapters I will outline the realities of the WA government mediation regime in contrast to the discourse examined above, and argue that the WA government’s mediation policy is an exercise of government power.
Chapter 4 – Mediation: Results, Realities and Orthodoxy

Introduction

In Chapter three I accounted for the development of native title policy and how positive positions on native title agreement making have become dominant in public discourse about native title. The dominance of this discourse on agreement-making has masked the reality of who most benefits from this form of native title resolution. The initial justifications and arguments for changes to state government policy, and the talking points in advocacy for agreement-making, all imply that mediation policy benefits all native title parties. This position was born out of the dissatisfaction with the litigation process on all sides, particularly with the length of time taken to resolve claims, and the cost. These arguments are propagated within the ‘surface language’ but are simply not commensurate with the way native title mediation operates. The reality of the WA government mediation regime is that transparency in native title decision-making has been greatly reduced, and the WA government’s control of the assessment of cultural evidence has allowed it to construct its own orthodoxy with regards to what constitutes cultural connection.

The benefits of agreement-making argued within the ‘surface language’ have not been corroborated by the reality of the post-determination environment. The argument that consent determinations would greatly reduce the timeframes for claim resolution is a prime example. Where native title litigation is slow, mediation, it was argued, would resolve claims faster and would therefore cost less (Wand 2001: 121). The statistics relating to the resolution of claims, however,
show a relatively modest difference between the timeframes of litigated and non-litigated determinations. A National Native Title Tribunal analysis of 157 native title claims across Australia revealed that on average, a negotiated native title claim takes 6 years and one month to resolve, compared with 6 years and eleven months for a claim resolved by litigation (NNTT 2010a). This means that on average it takes only 10 months less to resolve a claim via mediation than it does to carry out full litigation, including higher courts if needed. Further, as was noted in Chapter Three, claims can move between litigation and mediation over the course of resolution. Therefore it is difficult to separate the two forms of resolution for the purposes of comparing cost and efficiency.

The question concerning whether all native title parties benefit from mediation stands or falls on the basis of what can be categorised as a benefit. A better question would be: who benefits most from mediating native title? The reality of native title mediation is that claimants do not receive more rights by negotiation. While they do receive a similar breadth of rights, I argue that what they receive has been simplified and standardised by the mediation process. Further, the 'interest based' negotiation model used in native title to correct the power imbalance between applicants and the WA government is compromised because applicants are first required to go through a rigorous connection assessment process similar to litigation, in which their rights under the NTA are assessed. Only when these rights are established does mediation begin, where they will be nothing if not watered down through negotiation. In litigation, once rights are determined, they are not eroded through negotiation. The process actually exacerbates the power imbalance between native title parties by giving the WA
government the power to establish its own orthodoxy on what constitutes a cultural connection within a space not subject to the same transparency as litigation.

In this chapter I confront the operation of the mediation process in contrast to the characterisation presented in the ‘surface language’ about mediation. In particular, I analyse the rights that are awarded in the process and to what extent bureaucratic mechanisms have led to a standardisation of native title rights. I outline the modes of negotiation used by the WA government in the mediation process and show how this has allowed the WA government to create an orthodoxy in the proof of cultural connection. I argue that of all parties, it is the WA government that benefits most from the shift from litigation to mediation, as it has gained significant control over the assessment of evidence and the content of native title rights.

**The simplification of native title rights**

One basis for ascertaining whether native title applicants are benefiting from the mediation policy is to determine whether claimant groups receive a similar breadth of rights from mediated consent determinations as other claimant groups receive from successful litigation. To make this comparison it was necessary to review all judgments in determinations where native title exists in Western Australia, and collate the rights awarded to the various successful native title claim groups. In mediated consent determinations, while the content of the determination is decided in negotiation between the parties, it is the Federal Court who provides the final judgment accepting that the negotiation has adhered to the
NTA, both in the form of the connection assessment and the rights awarded to the claimant group. To analyse this material I created seven rights categories, and sorted the awarded rights of mediated and litigated determination accordingly.\textsuperscript{54}

In analysing the rights awarded in both litigated and mediated determinations in Western Australia, native title holders appear to have received a similar breadth of rights with similar frequency through both processes. What is evident, however, is that the rights awarded in consent determinations have greater consistency of wording and content than those awarded in litigation.

In total, I reviewed 24 consent determinations and 7 litigated determinations\textsuperscript{55} and the awarded native title rights were distilled into seven categories: Right of use and enjoyment to exclusion of others; right of use of flora and fauna; right of use of resources; right to protect and maintain sites; right of access; and the right to make decisions over land.\textsuperscript{56} While these categories removed much of the specific detail of what was entailed in the awarded right, the categories provide a snapshot of the native title awarded to a particular claim group. In some cases,\textsuperscript{57} the right of 'full use and enjoyment of the land to the exclusion of others,' or some similar variant was recognised, thus making the recognition of other rights redundant. For the purposes of this project those claims were deemed to have had rights recognised in all six categories. Litigated determinations are presented in Table 1, consent determinations are presented in Table 2.

\textsuperscript{54} A full list of recognised rights in these claims is provided in Appendix A.
\textsuperscript{55} The rights awarded in both the Ward and Nyangumarta consent determinations were split into two separate 'schedules' pertaining to different levels of rights and access. For the purposes of this project each 'schedule' has been counted as an individual determination. Rubibi was subject to two separate litigated determinations in the form of Rubibi No. 1 and Rubibi No. 6, Bardi Jawi and Neowara were also split into separate schedules.
\textsuperscript{56} I should note the irony that the simplification of rights in mediated determinations revealed itself only after I attempted to do exactly the same thing in constructing the tables.
\textsuperscript{57} Ngaanyatjarra for example.
<table>
<thead>
<tr>
<th>Claim</th>
<th>Year</th>
<th>Right of Possession, Occupation, Use and Enjoyment</th>
<th>Right to Take Flora, Fauna and Water</th>
<th>Right to Take Natural Resources</th>
<th>Right to Care For, Maintain and Protect Sites</th>
<th>Decisions Over Land</th>
<th>Right to Control Access</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rubibi (No. 1)</td>
<td>2001</td>
<td>Yes, but not to exclusion</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Neowarra (Schedule 4)</td>
<td>2004</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Neowarra (Schedule 5, 6, 7 &amp; 8)</td>
<td>2004</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ngarluma/ Yinjibundu</td>
<td>2005</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Bardi Jawi (Schedule 3)</td>
<td>2005</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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<td>Bardi Jawi (Schedule 4)</td>
<td>2005</td>
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<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Rubibi (No. 7)</td>
<td>2006</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 1. Native Title Rights Recognised – Litigated Determinations
<table>
<thead>
<tr>
<th>Claim</th>
<th>Year</th>
<th>Right of Possession, Occupation, Use and Enjoyment</th>
<th>Right to Access</th>
<th>Right to Take Flora, Fauna and Water</th>
<th>Right to Take Natural Resources</th>
<th>Right to Care For, Maintain and Protect Sites</th>
<th>Decisions Over Land</th>
<th>Right to Control Access</th>
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<tbody>
<tr>
<td>Spinifex People</td>
<td>2000</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Clarrie Smith (NWN)</td>
<td>2000</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ngaipi (Tjarabalun)</td>
<td>2001</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Kiwurtkanja</td>
<td>2001</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Karajarri</td>
<td>2002</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Martu</td>
<td>2002</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Ngaanyatjarra Lands</td>
<td>2005</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ward (Schedule 2)</td>
<td>2006</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Ward (Schedule 3)</td>
<td>2006</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Eastern Gurama</td>
<td>2007</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Noonkanbah</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ngarla</td>
<td>2007</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nguruppa</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Ngurrara</td>
<td>2007</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Barriibara</td>
<td>2008</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Thalanyji</td>
<td>2008</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Thalgar</td>
<td>2009</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nyangumarta (Schedule 3)</td>
<td>2009</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Nyangumarta (Schedule 4 &amp; 5)</td>
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<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Uungu Part A</td>
<td>2011</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Dambinmangari</td>
<td>2011</td>
<td>Yes (partial)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Uungu Part B</td>
<td>2012</td>
<td>Yes (partial)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Bunaba</td>
<td>2012</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Ngurrara Area C</td>
<td>2012</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Table 2. Native Title Rights Recognised – Consent Determinations
The recognition of rights from particular categories did not present a pattern suggesting that either litigation or mediation necessarily resulted in more or less rights awarded to the claim groups. In the sample, some rights were slightly more likely to be awarded in litigation, others slightly more in mediation; ultimately though, there was no strong trend in favour of either. What was revealed in the process of collating the material was the simplification and/or standardisation of the rights recognised in consent determinations when compared to those recognised during litigation. In the seven successful litigated determinations, the recognised rights included specific regional detail. For example in Daniel vs Western Australia, determined via litigation in 2005, the Yindjibarndi had the following rights recognised in parts of the claim area

7...(e) A right to collect and forage for bush medicine, limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River;
(f) A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, goanna, kangaroo, emu, turkey, echidna, porcupine, witchetty grub and swan but not including dugong or sea turtle), limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River;
(g) A right to forage for and take flora (including timber logs, branches, bark and leaves, gum, wax, Aboriginal tobacco, fruit, peas, pods, melons, bush cucumber, seeds, nuts, grasses, potatoes, wild onion and honey), limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River; (Daniel vs Western Australia [2005] FCA 536).

These rights were all included under the category 'right of use of flora and fauna,' which, because it is a simplification for the purposes of analysis, does not reveal the detail and specificity of those rights to the Yindjibarndi people. This example was repeated in almost all of the rights categories in all of the litigated determinations. Litigated determinations then produced multiple specific rights that fit within a single category.

58 Daniel vs Western Australia [2005] FCA 536
Rights recognised under consent determinations, however, did not exhibit the
tendency to produce multiple rights for each category to the same extent. They did
not provide as many examples where multiple rights could be listed within a
single one of my seven categories. This is particularly evident in those determined
since 2004. In the case of *Ngaanyatjarra Lands*[^50], the single right included in the
category 'right of use of flora and fauna’ is from Section 1 part (b) "the right to
take fauna and flora."[^60] This example further highlights a point of difference
between the rights recognised in consent determinations versus those recognised
in litigation: the rights recognised in consent determinations were far easier to
categorise than those awarded in litigated determinations. Their briefness and lack
of regional detail, I argue, is representative of the state-wide policy approach of
Western Australian connection assessment process. The *Karajarri* and
*Ngaanyatjarra Lands* consent determinations contain the following identically
worded rights pertaining to the use of resources:

1…(iv) the right to take other natural resources of the land such as
ochre, stones, soils, wood and resin (*Nangkiriny v Western Australia*
[2004] FCA 1156 (8 September 2004) [Karajarri])

1…(d) the right to take other natural resources such as ochre, stones,
soils, wood and resin (*Peoples of the Ngaanyatjarra Lands v Western
Australia and Ors* [2005] FCA 831 (29 June 2005))

In fact, despite that the location of the claims are in the Kimberley and the
Western Desert regions respectively, that each claim was presided over by a

[^50]: Stanley Mervyn, Adrian Young, Livingston West and Others on Behalf of the Peoples of the
Ngaanyatjarra Lands v The State of Western Australia and Others, [2005] FCA 831 (29 June
2005).

[^60]: Stanley Mervyn, Adrian Young, Livingston West and Others on Behalf of the Peoples of the
Ngaanyatjarra Lands v The State of Western Australia and Others, [2005] FCA 831 (29 June
2005).
different judge, and that the determinations were separated in time by a period of nine months, the rights awarded to the claim group in each claim are almost completely identical. While the 24 consent determinations reviewed the rights analysis process do not completely mirror one another, there are continuing themes of brevity and a standardisation of the rights recognised to native title groups in mediated determinations. It is slightly ironic that the process of categorising rights in which I have undertaken in this project to assess mediation has in fact revealed that a categorisation of rights appear to have already taken place as a side effect of mediation.

The causes of this standardisation of native title are many, and for the large part, indirect. It is not my contention that the WA government has consciously sought to simplify native title rights across the state, but that this is the side effect of a state wide policy approach to the assessment of the cultural forms of a diverse subsection of the populace. It is also a part of the act of negotiation itself, in which native title rights may themselves be used as bargaining chips. The repetition of this process over time by native title policy officers, solicitors and respondents alike ultimately leads to a streamlining of the process through bureaucratisation. It is not unreasonable to expect that actors undertaking the work of policy will become more accustomed to the intricacies of the process while also using experience from previous projects under the policy to inform decisions on different matters. It is clear from this process of reviewing determinations that the WA government’s control over the native title process is so complete, that it is beginning to influence, down to the wording, the content of native title
determinations. From here it would be hard to argue that native title claimants benefit from mediation in terms of the recognition of rights. The breadth of rights awarded is similar to litigation, but the rights recognised in court exhibit far more specificity concerning the land and sea in which the rights are held. The effect of this apparent standardisation is unquantifiable, but it is ambiguous as to whether it can be characterised as a ‘benefit’ of mediation.

Modes of negotiation

When the NNTT was created in 1994, mediated consent determinations were the intended pathway for the majority of claims. This situation did not eventuate, as the preference of many state governments at the time was to seek a ruling by the Federal Court on the existence of native title, rather than an immediate entry to mediation. As shown in Chapters Two and Three, the preference for consent determinations cannot be attributed merely to the ideological position of a particular government; there are other elements to consider as to why the mediation has become settled native title policy in Western Australia. The first is that the government had become relatively satisfied with the current state of the NTA. The Court government negotiated the first consent determinations in WA after the Howard government amendments to the NTA in 1998. Following High Court decisions in *Western Australia v Ward*62 (Ward) and *Members of the Yorta Yorta Aboriginal Community v Victoria*63 (Yorta Yorta) in 2002, and seeking to avoid the continued expense of litigation, many state governments moved towards negotiation as the preferred model for determination of native title.

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61 As was shown in Chapter Three, mediation as first preference in native title has been the policy of both parties in Western Australia.
62 *Western Australia v Ward* [2002] HCA 28
63 *Members of the Yorta Yorta Community and Others v the State of Victoria* [2002] HCA 58
Native title negotiation is designed on an interest-based model (as opposed to a position-based model more common in business), what the NNTT refers to as ‘principled negotiation’ (Dolman 1999: 9). In interest-based negotiation, a third party mediator will attempt to bring the parties away from their positions on the matter and instead highlight the interests behind those positions. Instead of parties asserting that they want possession of an object, they are encouraged to state what they would do if they were to acquire the object. Negotiation can then proceed in relation to the specific interests of both parties that are incompatible and may require compromise. The intent of interest-based negotiation is to uncover ‘what is most important to the stakeholders and allows people to develop and agree to creative solutions that help to overcome previously intractable differences’ (Katz 2006: 50). In contrast to the adversarial position model, the interest-based model is designed so the parties work in partnership to achieve mutually positive outcomes (Katz 2006: 51).

The ‘Principled Negotiation’ model, which focuses on interest, not positions, and which is designed to generate a range of options (Australian Law Reform Commission 1998, Part 4.50), is evident once all parties sit down in native title mediation. However, this forms only part of the overall ‘process’ of native title negotiation. The actual process of mediation is itself the result of other processes that utilise other distinct negotiation models, and a ‘principled negotiation’ of native title rights may be overridden by more forceful negotiation tools. Positional, rights-based and power-based models are used throughout the native title negotiation process (Everard 2009: 10). When a claimant group submits
connection material to the relevant state government, in essence they are involved in a rights-based negotiation. In reviewing the connection material, the state government is assessing the strength of the claimants’ rights. The state is effectively assessing whether the claim would satisfy the Federal Court if the matter were to enter litigation. The choice of whether or not to enter mediation or go to Court is based on this assessment of the rights of both parties. In Future Act negotiations, a positional model is used, as it involves the direct exchange of consent to act with compensation. Finally, there is the negotiation tool the WA government (or any other state government) may hold over any interest-based, positional negotiation process: the power-based model, in which it is merely the power of the party that determines the outcome. A state government threatening the compulsory acquisition of land if a timely agreement is not reached is Everard’s example of this negotiation technique (Everard 2009: 10), which occurred in the case of the Kimberley gas hub project in Western Australia discussed in Chapter Three (The Australian Newspaper, 27/12/2008).

It is the state’s use of multiple negotiation models that places native title claimants in a disadvantageous position. Those claims that enter into the interest-based negotiation, or mediation proper, have already passed through the far more rigorous rights-based negotiation of cultural assessment, in which dialogue is exceptionally limited and dominated by the WA government. In addition, the WA government retains the power to move to a power-based negotiation if the interest-based negotiation is not proceeding in accordance with its needs. How the WA government uses this is completely dependent on its dispensation towards the claim and the interests of other respondent parties. Despite efforts to the contrary, an obvious power-imbalance exists in the native title mediation process. Mick
Dodson\textsuperscript{64} identified a power-imbalance in mediation early in the native title process:

The central problem for mediation of native title claims is power imbalance. A mediator is not a judge. A mediator cannot force justice on the disputing parties. The mediator will attempt to ensure equality of process. Both parties get a say, the mediator allows neither party to interrupt, etc., however, where there is gross disproportion in the power of parties to a dispute, a mediated settlement is likely to enshrine that inequality (Dodson 1996: 9).

Dodson states that the imbalance could be addressed if Indigenous groups were given the time and the resources to participate, and if respondent parties showed the will to achieve reconciliation (Dodson 1996: 8). I argue that the power-imbalance today is even larger than the one identified by Dodson in the immediate years after the Native Title Act was enacted. WA government processes for determining if native title exists, through connection material, is yet another situation in which claim groups are vulnerable to the will of state policy officials.

To have access to the interest-based negotiation, a claim group must provide evidence or a ‘connection report’ (as discussed in Chapter Two) in addition to other materials in accordance with the requirements of the WA government. This formulates the rights-based part of the negotiation, where the WA government seeks to assess whether a claim would satisfy the evidentiary needs of the Federal Court. The Western Australian Guidelines produced in 2004, which have since been revised in 2012, state that a connection report must provide, among other things;

information which establishes that the claimant group has continued to observe and acknowledge a system of law and custom which has connected them to the land claimed since the acquisition of sovereignty…[,] sufficient evidence…to enable an inference to be drawn that the relevant system has been observed by every

\textsuperscript{64} Aboriginal and Torres Strait Islander Social Justice Commissioner from 1993-1998.
generation and has had a continuous existence and vitality since sovereignty...[and] an explanation of how the laws and customs structure the behavior of the claimant group (Office of Native Title 2004: 8).

With regards to the traditional laws and customs themselves, a connection report is expected to describe the features of traditional law and custom from which native title rights and interests are derived. The report must also establish that there has been no break in the observance of this law and custom, and that the observance has been continuous since the declaration of sovereignty by British Crown in June 1829. Where change or adaptation has occurred, it must be shown why such changes do not constitute a break in the observance of law and custom (Office of Native Title 2004: 9-10).

Political concerns play a larger part in mediated determinations because responsibilities for assessing a claimant group’s connection to land have shifted from the judiciary to the WA government native title policy office. The Federal Court provides a relatively open environment in which evidence attesting a claim group’s connection to land can be presented. A judge who is independent from any local political issues hears claimant testimony, along with the anthropological and historical evidence. The judge may then make a decision on the recognition of rights and interests based on the evidence presented. In the native title negotiation process, the 'connection material' provided to policy offices to establish a claim group’s traditional connection to land is merely a first step in a multi-faceted negotiation. Once certain conditions of connection are satisfied, a claim group is allowed entry into negotiations in which the interests of the parties are assessed.

There are also instances within the negotiation process in which a state
government can exercise power. Kaanju Ngaachi Traditional Owner David Claudie (2007) provides an example from Queensland, where native title negotiation occurs in a similar process to Western Australia. Claudie outlines the problematic nature of an interest-based mediation process in the native title context. His main concern is with the time elapsed between lodging the application for native title with the NNTT and resolution of the matter with the Queensland state government. Claudie highlights three main impediments to a consent determination of native title, which are broadly shared by many native title claim groups.

The native title process itself has been at the heart of and/or exacerbated these problems. The nature of the native title process is such that it has enabled our claim to be dragged out for eight long years while (1) the State takes its time to come to an agreement with us on land tenure, land use and management arrangements, (2) our Native Title Representative Body pauses then attempts to organise itself, and (3) claimants whose actual connection to the claim area is questionable continue to dominate proceedings to the detriment and exclusion of Kaanju families actually from the area under claim (Claudie 2007: 98).

While point three is an internal issue for the claim group, albeit a common one, points one and two highlight two extremely important issues in native title mediation. The first point is time. The state has potentially limitless time to resolve the claim, depending on a state government’s priorities (and unless the claimants wish to proceed to court); the speed in which a claim is resolved is entirely up to the government. As Claudie states, ‘government and other “stakeholders” presume control over our traditional lands,’ whereas the claimants are saddled with having to prove their connection. The claimants begin all mediations from a position of weakness, as the state already possesses sovereignty over the lands under claim. In the current regimes in Western Australia and in Queensland, the state is in the curious position of being both the mediator and the
first respondent party. In addition to the power of the state, external ‘stakeholders’ also have a considerably more powerful position, as many easily have the financial means to continue with ongoing negotiations over a number of years, so much so that claimant groups can be frustrated into conceding contentious positions merely to move the process along.

Claudie’s second point feeds into his first, in that many NTRBs do not have adequate resources to undertake lengthy native title negotiation. As a result, the relationship between the claim group and Representative Body can become strained and in some cases irreparably damaged. In Claudie’s case, the Cape York Land Council was unable to deal with the two-dozen claims they were responsible for at the one time. It prioritised the Wik and Eastern Kuku Yalanji claims, and delayed Claudie’s Kaanju Ngaachi claim (Claudie 2007: 104-105). Such a situation further weakens a claim group’s position in mediation, as the state is under no pressure to resolve the issues, and the claimants’ interests cannot be put forward. Respondent parties, on the other hand, can continue to pressure the state to acknowledge their interests in the land under claim, and Future Act negotiations can overcome the negotiations towards a mediated consent determination (Ritter 2009a: 19). Claudie’s article provides an excellent example of the systemic problems with native title negotiation. The interest-based model of mediation is designed to work in situations where the power balance is lopsided, however in the native title context, where this it not the only model that is used, its effectiveness is compromised.

The ‘bundle of rights’ model of native title has contributed to a situation in the mediation context where individual native title rights can be argued upon and
bargained with by the state and other respondent parties, regardless of their evidentiary basis. I contend that the process of mediated determinations has led to the standardised forms of rights discussed above that are offered by the WA government to claimant groups. The diversity of indigenous cultural structures is not represented in what is conferred in mediated determinations, where rights have become standardised with repetition of process. This standardisation is representative of native title policy attempting to transform indigenous cultural structure into ‘legible’ (Scott 1998) forms that are compatible with Australian bureaucratic processes.

**From public contest to opaque orthodoxy**

The point of difference between cultural assessment that occurs in mediation and the assessment that occurs in litigation is transparency. In mediation, the presentation and assessment of cultural evidence and the reasons for a particular judgement are removed from the public arena. 65 External anthropological consultants nominated by the WA government policy office independently review submitted connection material, but the decision-making process with regard to the success of cultural evidence rests with policy staff. The level of dialogue between the state and the applicants is not subject to any regulations or requirements and varies between claims. In the Guidelines the Western Australian Office of Native Title stated that once a connection report is submitted

The Office of Native Title will undertake a preliminary internal

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65 Copies of Federal Court connection reports are not generally available however, their authors are exposed to cross-examination as are the authors of reports presented by the state. The evidence presented is able to be challenged or clarified on a point by point basis if necessary. Additionally, in a reasons for judgement document, the presiding judge can state which particular elements of a connection report informed their judgement of cultural connection.
review to identify whether there are any fundamental requirements which have not been addressed in relation to the form and content of the material... Following its internal assessment, the Government will appoint an appropriate person or persons to undertake an independent review of the connection material and to provide advice to the Government as to their assessment (Office of Native Title 2004: 13).

How the connection material is reviewed in terms of the Guidelines would obviously depend on a number of factors, such as the level of experience of those conducting the internal review and the process of selecting 'appropriate persons' to provide independent advice. This area of the native title process has received little academic anthropological analysis, although it has been highlighted by Burke and referred to as a 'vast legal shadowland' (Burke 2010). Specifically, how the Guidelines are utilised, on what level connection material is scrutinised, and the benchmarks for success are not for public consumption.

The WA government’s control over the assessment of cultural connection in mediation has allowed it to apply the strictest interpretation of principles emerging from the *Yorta Yorta* High Court decision. At the 2006 Western Australian Office of Native Title Workshop, Stephen Wright, then a solicitor for the State of Western Australia, gave a presentation outlining the state’s response to recent Federal Court decisions and how the WA government applied *Yorta Yorta* principles in connection assessments. Wright’s presentation of the State’s approach to native title mediation revealed the power imbalance between the applicants and respondents. At the beginning of his paper, Wright presented the following table (Table 3.) listing Federal Court decisions after the High Court's decision in *Yorta Yorta*, and containing a short summary of the outcome of the decision.
Table 3. Federal Court decisions since Yorta Yorta (Wright 2006: 2-3)

<table>
<thead>
<tr>
<th></th>
<th>Year</th>
<th>Case Name</th>
<th>Judge(s)</th>
<th>Native Title Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2003</td>
<td>Daniel v Western Australia (Ngarluma Yindjibarndi)</td>
<td>Nicholson J</td>
<td>Non-exclusive native title in most areas, no native title in some areas</td>
</tr>
<tr>
<td>2</td>
<td>2003</td>
<td>Neowarra v Western Australia (Wanjina)</td>
<td>Sundberg J</td>
<td>Exclusive possession native title held by cultural bloc</td>
</tr>
<tr>
<td>3</td>
<td>2003, 2005</td>
<td>De Rose v South Australia (No.1 &amp; 2)</td>
<td>Wilcox, Sackville, Merkel JJ</td>
<td>Non-exclusive native title held by particular members of the Western Desert cultural bloc</td>
</tr>
<tr>
<td>4</td>
<td>2004</td>
<td>Lardil v Queensland</td>
<td>Cooper J</td>
<td>Non-exclusive native title held by 4 different groups</td>
</tr>
<tr>
<td>5</td>
<td>2004</td>
<td>Gale v New South Wales (Darug)</td>
<td>Madjwick J</td>
<td>No native title in part of Sydney</td>
</tr>
<tr>
<td>6</td>
<td>2005</td>
<td>Gumana v Northern Territory (Blue Mud Bay)</td>
<td>Selway J</td>
<td>Exclusive possession native title held by community</td>
</tr>
<tr>
<td>7</td>
<td>2005</td>
<td>Sampi v Western Australia (Bardi Jawi)</td>
<td>French J</td>
<td>Exclusive native title to the land, no native title in sea or islands</td>
</tr>
<tr>
<td>8</td>
<td>2005</td>
<td>Alyawarr v Northern Territory</td>
<td>Wilcox, French, Weinberg JJ</td>
<td>Exclusive native title held by a community</td>
</tr>
<tr>
<td>9</td>
<td>2005, 2006</td>
<td>Rubibi Community v Western Australia</td>
<td>Merkel J</td>
<td>Exclusive native title held by a community</td>
</tr>
<tr>
<td>10</td>
<td>2006</td>
<td>Jango v Northern Territory</td>
<td>Sackville J</td>
<td>No native title in part of Western Desert</td>
</tr>
<tr>
<td>11</td>
<td>2006</td>
<td>Risk v Northern Territory</td>
<td>Mansfield J</td>
<td>No native title in Darwin</td>
</tr>
<tr>
<td>12</td>
<td>2006</td>
<td>Griffiths v Northern Territory (Timber Creek)</td>
<td>Weinberg J</td>
<td>Non-exclusive native title</td>
</tr>
</tbody>
</table>
After presenting this table, Wright argued that Federal Court decisions since *Yorta Yorta* fell into two distinct categories:

those that have correctly applied the *Yorta Yorta* principles, and
those that have departed from or sought to water down those principles (Wright 2006: 2).

In a footnote within the piece, Wright stated that his paper was intended to
'promote discussion amongst participants at the Office of Native Title's Connection Workshop' and that it did not 'necessarily' reflect the position of the Western Australian state government on particular native title claims (Wright 2006: 1). However, the position he presented shed light on views held within the state legal apparatus with regard to the consistency of Federal Court decisions on native title. The piece also highlights the context in which native title claims are assessed in consent determinations. In the preamble to the paper Wright again states that the paper is intended to lay groundwork for discussion at the workshop, however, he also states that the paper seeks 'to explain the State's perspective on the law, which will assist you to understand how the State is likely to assess a connection report and help you engage in a constructive debate with the State' (Wright 2006: 1). In light of that hint, the following statement in relation to the nature of a number of Federal Court decisions has profound implications for NTRBs seeking to resolve claims by consent determination in WA:

I suggest that cases such as *Wanjina, Lardil, Gale, Blue Mud Bay, Risk, Jango* have applied the *Yorta Yorta* principles in what I call an 'orthodox' way. That involves defining the law and custom, and the society, at sovereignty based on the historical and anthropological evidence (informed by the oral evidence of Aboriginal tradition); and then working forward in time to determine whether the society and its laws and customs have continued to be acknowledged and observed...This approach is far more likely to be acceptable to the State...I suggest that in other cases, such as *De Rose, Bardi Jawi and Rubibi*, and to some degree *Griffiths*, the Federal Court has moved beyond a strict interpretation of the *Yorta Yorta* principles to accommodate
particular difficulties with the claims (Wright 2006: 14).

The subtext of this statement is that for a native title claim to receive a favourable connection assessment and achieve a consent determination, it will have to adhere to a 'strict' interpretation of Yorta Yorta principles. Wright’s argument was that the most restrictive interpretations of Yorta Yorta principles applied by the Federal Court are ‘orthodox,’ which suggests that the other decisions he claims had ‘moved beyond a strict interpretation’ would be considered unorthodox. The dismissal of these ‘unorthodox’ interpretations is contrary to the notion that mediation represents a less arduous path for claimant groups in the presentation of connection evidence and the resolution of native title. If, as Wright claimed, there are two streams of native title decisions, and the WA government will only apply the reasoning behind what it believes are the ‘orthodox’ interpretations to connection assessments, the implication is that mediation is the tougher form of resolution in terms of evidence. The strict interpretation, particularly its definition of society and requirements for adherence to a normative system of laws, suggests that some applicant groups, particularly those more impacted by European settlement, may be better off seeking a determination of native title through the courts where they may benefit from an ‘unorthodox’ decision from a Federal Court Judge.

In adopting a restrictive interpretation of Yorta Yorta as the orthodoxy, the WA government put itself in a position of where it was better able to control the native title process. It allowed the WA government to impose the most stringent criteria for native title in areas where significant interests are held. The mediation process allows the parties to negotiate over particular rights in a way that is simply not
possible in a litigation scenario. In a litigated determination the state has no way of knowing whether an ‘orthodox’ or ‘unorthodox’ legal interpretation will be applied by the Judge, or what rights the Judge will award. In the mediation context the State decides which interpretation is applied, and the rights that it is willing to agree to. So while the concept of mediation may have been constructed in the ‘surface language’ to provide a fairer, less-expensive and less arduous native title experience for all parties, it is clear that mediation also provides the state with more power and control over the outcome of the process. The process also allows the politics and interests of a particular region to affect how the content of native title is decided, something which is completely detached from a proceeding in the Federal Court.

One of the clearest and oft cited benefits of the consent determination process is that native title claimants no longer had to endure cross-examination at the hands of respondent parties. The problems faced by Indigenous witnesses in cross examination are many, including overcoming language barriers, concerns over the secrecy of material in which they are compelled to discuss and anxiety as to their own cultural authority to speak for certain places and people. Cultural differences in how information is conveyed and how language is interpreted can put Indigenous people at a disadvantage in a court situation, as Diana Eades has discussed:

the Anglo assumption that information is best sought by repeated asking of questions is central to the legal process. But this assumption is not shared in many Aboriginal societies, including those where the language spoken is Aboriginal English…In these societies, important information is generally sought through less direct means…Further, it has been argued that cultural differences in the way silence is used and interpreted can seriously disadvantage many Aboriginal witnesses (Eades 2000: 163).
Numerous anthropologists and linguists have addressed the issues facing Indigenous witnesses in cross-examination, both before and after the introduction of the NTA (see Eades 1988; Beckett 1994). Mediated consent determinations allow such issues to be circumvented by reducing or removing direct interaction between claimants and state lawyers. While this is argued to be of benefit for native title claimants, in that they do not have to endure the stress of cross-examination, it also means a certain detachment from the process as the production and presentation of evidence falls completely to the NTRB.

The advantages of the mediation process for NTRBs are entirely cost and resource based. The underfunding of NTRBs combined with large workloads involving multiple claims has resulted in situations where they are simply unable to afford litigation. David Ritter states that such underfunding is ‘systemic…preventing any serious chance of the proper functioning of the NTRB system’ and that ‘[t]he scarcity of resources…dominate the problem of representation’ (Ritter 2009b: 57). For NTRBs, negotiated claims represent far less in terms of staff time, and cost for the briefing out of lawyers. While the costs of mediation for the state are hard to quantify, it is far easier to determine how mediation is beneficial financially to NTRBs. Ultimately, if the state is not convinced that a claim satisfies its conditions of proof, the economics of resolving the claim will be of secondary concern. For an NTRB however, whose resources are exceptionally limited when compared to those possessed by the state and other respondent parties, the pursuit of a consent determination over a full litigation process could be regarded as somewhat of an economic necessity. While the ‘principled-negotiation’ model discussed above was designed to reduce this economic
imbalance, the situation in which an NTRB is tied by economics to a voluntary resolution process puts it at a disadvantage against other parties who have the economic scope to move away from a consent determination if they see fit.

While the cost related benefits of agreement-making for an NTRB are significant, the process of producing connection material for the proof of the claim, at least in terms of the anthropological material, is not largely different from that of a litigated determination. A report detailing evidence of connection must still be produced, with similar aims of those reports produced for the courts. As is evidenced by Wright's position on orthodox versus unorthodox Federal Court decisions, it is possible for the state assessment of a report to be even more rigorous than the assessment of the Court. Where the process differs for the NTRBs is that the organisation and preparation of claimant witnesses is not required, the cost associated with briefing lawyers for court is removed, and the time-frames for the production of connection material are far less restrictive than when preparing material for the court. In many ways, the NTRB participation in state negotiation processes is driven by low levels of funding from the Federal government.66

In 2007, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the NNTT convened a native title connection workshop focused on the mediation process and how it might be improved for claimants and non-claimants alike. The response to various 'connection guidelines' like the one

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66 In Western Australia there have even been cases where the WA government has provided 'top-up' funding to an NTRB to ensure of the organisation's ability to continue in the mediation process and to reach agreements in suitable time-frames.
outlined above were understandably mixed, with some claiming they made 'substantial contribution' to efficiency in recognition of native title, while others stated the requirements:

> lacked clarity...[and were] excessively onerous, both in terms of the length of time and resources they demand in preparing and assessing reports as well as the demands that they place on the claimant group (Farrell, Catlin and Bauman 2007: 14).

Grievances such as these are ongoing, particularly as due to the restrictions placed on connection material (see Koch 2008), anthropologists writing a report may be unable to draw on any obvious examples for how a successful one may be produced. Whilst some state governments have provided ‘Practical Guides’ for the production of connection reports (e.g. Western Australia and Queensland), these documents do not provide specific examples of how anthropological inquiry can be tailored to the government’s needs.

In the concluding comments of Farrell, Catlin and Bauman’s report, the balance between the legal positioning of litigation and mediation was cited as one of the major obstacles to achieving a more flexible framework for assessing connection material. The workshop produced ‘...repeated references...to the need for better communication, transparency and collaboration between the parties’ (Farrell, Catlin and Bauman 2007: 22). This position is juxtaposed with wariness of the possibility that a claim may return to litigation. The mindset of the parties can never be completely mediation-focused if a return to litigation is forever on the horizon. As the report states:

> This has an inevitable impact on how creative or open the connection research process can be and is arguably the major limitation to reforming the context within which connection materials are prepared and assessed. It also highlights that, while s 86A of the Native Title Act sets out that mediation by the NNTT should assist parties to reach
agreement on who the native title holders are, in most jurisdictions the current processes have simply relocated the evidentiary process from the Court to, largely, State or Territory governments. As some participants suggested during the workshop, it appears that greater duress is being applied to reaching agreement on connection in the mediation process than could reasonably be expected at trial (Farrell, Catlin and Bauman 2007: 22).

Despite these issues with the presentation and assessment of connection materials, it is clear from the material presented in Chapter Three that determinations by consent continue to be the first preference for NTRBs.

A process such as native title mediation, when controlled by government, is liable to become subject to the machinations of politics and the target of lobbying. While native title as a national and state-wide issue was broadly subject to similar forces, the mediation of native title claims allows claims to be individually targeted. As has been discussed in Chapter Two, when native title was legislated the entire mining lobby engaged the WA government to provide a legislative solution that would suit their interests in a variety of regions. In the context of native title mediation, such broad intervention is not needed, because native title claims that are in conflict with particular respondent operations can become the focus of targeted lobbying. As Bauman has argued,

> Currently, many connection assessment processes are a policy-driven hybrid mix of interest-based and positional bi-lateral negotiations and evaluative quasi-judicial arbitrations managed by the states and territories in greater or lesser collaboration and cooperation with NTRBs and NTSPs. The ultimate decision is made by and in accordance with, the interests of governments, usually by cabinet, against a backdrop of threats of litigation (Bauman 2009: 124).

This hybrid of interest-based and positional negotiation, and judicial arbitration creates a situation in which the claimants are reliant on the state’s dispensation towards the claim, and this dispensation is open to influence by non-government
respondent parties through political contact and the media. As Bauman puts it, they (NTRBs & NTSPs) are 'dependent on the goodwill of states and territories' (p. 126), and it is this dependence that avails the WA government all the power in the process. Applying 'goodwill' on a case-by-case basis removes all of the 'uncertainty' for the WA government that numerous governments have sought to excise from native title since Mabo. Every decision by governments relating to land rights post Mabo has been to reduce uncertainty and ultimately to control the distribution of native title rights. The NTA itself was created for that very purpose, and while there were numerous calls from industry and others to legislate native title out of existence altogether, what the Act did was to 'put a leash' on native title outcomes on the mainland. It provided a structured process of deciding claims and, so the government hoped, worked to avoid decisions that blindsided respondents in the way that Mabo did.

**Conclusion**

Native title policy in Western Australia has developed significantly over the last two decades, however, the catalyst for this development has been masked by the 'surface language' that I discussed in Chapter Three. The increase in consent determinations via mediation is not representative of a greater understanding of Indigenous cultures or recognition, as was inferred in the NNTT’s film *Fifteen Years of Native Title* (NNTT 2009), but is the result of respondent parties’ interests being far better served by mediation (Ritter 2009b). Uncertainty is, and has always been, the greatest threat to native title respondent parties, both government and non-government. Resolving claims via mediation removes the threat and risk that respondents will be blindsided from what they perceive as
unorthodox decisions by the Federal Court.

While the mediation process reduces uncertainty for the WA government and respondents, significant degrees of uncertainty remain with the native title applicants. There is yet to be a true test of the WA government cultural assessment, as thus far, no claim that has been denied access to mediation due to cultural assessment has gone on to a full litigation process. The decision in *Bennell vs Western Australia*[^67] (Single Noongar) in 2006 suggests that some claims would be better off going to trial. The Single Noongar claim was the result of an amalgamation of six claims in Western Australia’s southwest region. Due to the existing underlying claims, the Single Noongar claim was not able to be registered with the NNTT and thus was not entered into mediation with the WA government. The claim went to Court in 2005, and in 2006 Justice Wilcox handed down a judgement confirming the existence of a single Noongar society.[^68] The WA government appealed the judgment and the Full Bench of the Federal Court set aside the judgement and asked for a return to the docket judge.[^69] However, the first instance victory resulted in the Single Noongar claim group entering into settlement negotiation with the WA government - something that the Single Noongar claim group had been unable achieve outside of the courtroom. From the passing of the NTA to the current policy of mediated consent determinations, native title has been about controlling the distribution of Indigenous land rights. The public reaction to the Single Noongar claim’s victory at the first instance shows that there is still fear surrounding native title in Australia’s urban areas.

[^67]: Bennell vs Western Australia [2006] FCA 1243
[^68]: Bennell vs Western Australia [2006] FCA 1243.
The consent determination process allows the government to control where native title is recognised, and how it is recognised.

The result of this control over the process has had a profound effect on the environment in which native title is resolved. The landscape has evolved from the highly contested ideological debates of the 1990s, to the dominance of a conciliatory, agreement-based policy that requires continued active participation of all parties. The policy of mediation has resolved a large number of claims in Western Australia with little of the controversy that has surrounded litigated determinations. While improvements in timeframes and cost have been by turn modest and hard to quantify, there have certainly been improvements. The results may not have matched the promises of the ‘surface language,’ but no longer is native title the ideological battleground it was in the 1990s. Mediation policy has created a consensus, in which the validity of native title rights is no longer publically contested. Debate over the form and content of cultural evidence has shifted from the public sphere of the courtroom to the private sphere of the ‘shadowlands.’ Was the increase in state control an intentional or unintentional consequence of the move to mediation? In the following chapter I will address the processes involved in the increased control of the state over native title matters, and draw upon the works of Foucault (1978) and Ferguson (1990) to argue that the WA government switch from litigation to mediation is an exercise of power that has effectively depoliticised native title in WA.
Chapter 5 – Power, Depoliticisation and Native Title

Introduction

In the previous chapters I have sought to outline the trajectory of Western Australian native title policy from its beginnings in reactive legislation and High Court challenges to the ‘conciliatory,’ agreement-based approach prevalent from 2002 onwards. In Chapter Three, I examined the ‘language’ of native title mediation, in which the rhetoric of the WA government, NTRBs and respondents in the mining and pastoral sector, built up the concept of ‘agreement-making’ into a catch-all solution to the issues facing the resolution of native title. Those issues were primarily the lengthy timelines, excessive cost, burden on claimants and the overall ‘adversarial’ nature of the litigation process. In Chapter Four, I addressed the reality of what mediation has and has not achieved, and challenged the notion that cultural assessment in the mediation process was ‘less onerous’ than that of litigation. I also interrogated the claim that mediation has achieved ‘better outcomes’ for Aboriginal communities post-native title in terms of the kinds of rights awarded to them in a consent determination compared to a litigated one.

The conclusion of my analysis is that there have been marginal improvements as a result of the WA government’s preference to mediate claims rather than litigate them. There have been a significant number of claims that have been determined via mediation, and the process has seen the active involvement of respondent parties. The policy has, however, achieved only a marginal reduction in the average timeframe of claims and it has not been shown empirically to be significantly cheaper than litigation.
There have been other side effects of the native title mediation policy that should be noted when considering the policy’s effectiveness as a whole. The policy has significantly reduced the transparency of the assessment of cultural evidence presented on behalf of the native title claimants and the way in which anthropological analysis is applied to the policy. The policy has also undoubtedly increased the control the WA government has over the process, particularly in terms of the prioritisation of claims for assessment and determination, but also in terms of the content of the determinations themselves and the rights recognised for native title claimants.

The side-effects of native title mediation policy are better seen in Ferguson’s (1990) terms as ‘instrument effects,’ that ‘are at one and the same time instruments of what “turns out” to be an exercise of power’ (Ferguson 1990:255). In this chapter, I analyse these ‘instrument effects’ of the mediation regime, and contextualise these in terms of the overall aims of government and the nature of bureaucratic processes. To do this, it will be necessary to examine anthropology’s theorising how ‘government’ power is exercised through bureaucratic structures. I will examine native title mediation in the context of the work of Foucault (1978; 1979) and others (Lemke 2002; 2007, Rose 1996) on the concept of ‘governmentality’ and how government power is ‘rationalised’ in the native title mediation process. I will also examine the WA government and native title mediation in the context of James Ferguson’s (1990) *The Anti-Politics Machine*,

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70 In his conceptualisation of ‘instrument effects,’ Ferguson follows Foucault’s rendering of the way in which the modern penal system did not succeed in rehabilitating criminals, but succeeded in producing ‘delinquency’ as a means of exercising social control (Foucault 1977: 277).
in particular the process of ‘depoliticisation’ and the role of ‘instrument effects’ in increasing state power and promoting broader WA government aims through native title.

The concept of a single state ‘intention’

In discussing the notion of ‘control’ and ‘power’ within Western Australia’s state native title apparatus, it is important to consider the ‘intentions’ and the diffuse nature of power in the Western Australian state. While the will of the state is often conceptualised as a monolithic entity, it is actually the case, particularly within the Westminster system of government, that various state departments more often work in opposition to one another than in concert. Within the Western Australian state native title apparatus, there are no less than six departments and the state cabinet who are involved or have stakes in native title decision-making. The decision-making process is centred on the Office of Native Title/Native Title Unit, the State Solicitor’s Office and the Cabinet, but other departments such as the Departments of Environment and Conservation, State Development, Regional Development and Lands, and Mines and Petroleum all have various stakes and agendas based upon their own programs and institutional outlooks. The WA government may aim to have a unified approach to native title claims and native title more generally, but there are inherent tensions within the different sectors of government that undermine that aim. In addition to the negotiations between the state mediators, claimant representatives and respondent parties, the WA government must essentially negotiate with itself to achieve its aims.
Different state departments inevitably have differing intentions based upon their sphere of influence and the various technical qualifications of their staff. The political positioning of a state department can be affected by a number of elements. While it can be said that a department that regulates mining may be sympathetically aligned with mining interests, this is not the only consideration that should be made. Government departments have specific areas in which they provide regulation and control, and it is through these areas that their effectiveness and success is measured. The Department of Mines and Petroleum for instance, is tasked with providing and regulating mining and prospecting tenements for the extraction of resources in Western Australia. A process that makes the awarding of these tenements more difficult could be seen within the department as negatively affecting its efficiency and success. While the positioning of their clients (i.e. miners) is important in influencing the agenda of the department, it is the intentionality of the department’s modus operandi (i.e. to award or to not award mining tenements) that ultimately positions a department within the overall government structure. With this in mind, it becomes clearer how such departments may view the policy and process of native title, and why the WA government’s approach to native title is much more complicated than simply the policy of its native title office.

**Foucault and the nature of ‘government’ power**

Before I analyse the exercise of power in Western Australian native title mediation, I will first briefly conceptualise the process of native title recognition in Australia as a whole. Native title has been usefully defined as the ‘recognition space’ between the Australian and Indigenous systems of law (Mantziaris and
The ‘recognition space’ refers to rights and interests that are produced within the Indigenous system of law and custom that are commensurable with Australian law. Native title is a product of this space in that it is the recognition of rights that are translatable by Australian law. To use Scott’s (1998) terms, native title recognises a ‘simplified’ version of Indigenous law and custom that makes it ‘legible’ within the Australian legal system. Scott argues that this kind of simplification comes at the expense of ‘local knowledge’ (Scott 1998: 35). Following Scott, I argue that the connection requirements of the WA government are a reaction to the diversity of native title claims, and reflect the desire of the WA government to produce a uniform structure that encapsulates all Indigenous communities. Scott argues that the regulation of such diversity without simplification by state bureaucracies would be a “nightmare”:

>The nightmare is not experienced by those whose particular practices are being represented but by those state officials who aspire to a uniform, homogenous, national administrative code…local land tenure practice is perfectly legible to all who live within it from day to day…it is completely familiar. State officials, on the other hand, cannot be expected to decipher and then apply a new set of property hieroglyphics for each jurisdiction. Indeed, the very concept of the modern state presupposes a vastly simplified and uniform property regime that is legible and hence manipulable from the center (Scott 1998: 35).

The effect of this process of rendering Indigenous cultures ‘legible’ in native title is not necessarily the result of a conscious aim of the writers of a state’s native title policy, but is merely a product of how policies are written and how governments govern. The consent determination process is a progression from litigation in that it provides a context that is far more ‘legible’ to a respondent party, that is, something more akin to a business negotiation. It divorces

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71 For example, some methods of retribution under traditional laws would not be compatible with the Common law.
respondents (other than the WA government) from evidence relating to connection. As a result, only a few privileged actors have a view of the process in which native title is assessed in mediated consent determinations.

If native title mediation policy is to be conceptualised as an exercise of WA government power, then we must note how ‘government’ power itself is theorised and how this relates to the processes and situations discussed in previous chapters. Here I draw on my statement above that the mediation process has increased the WA government’s control over the native title process and its actors, and apply Foucauldian conceptions of ‘government’ power (Foucault 1979; Lemke 2002; 2007, Rose 1996) to the native title process.

Michel Foucault’s concept of ‘governmentality’ refers specifically to the ‘art of government,’ that is; the practices and rationalities by which individuals are governed and through which governments attempt to produce citizens who will carry out its policies. It has been defined as ‘the conduct of conduct…the technologies that govern individuals’ (Bevir 2010: 423). Foucault himself referred to the art of government as:

   essentially concerned with answering the question of how to introduce economy – that is to say, the correct manner of managing individuals, goods and wealth within the family…and making the family fortunes prosper – how to introduce this meticulous attention of the father towards his family into the management of the state (Foucault 1978:92).

‘Governmentality’ therefore is the process by which the power evident within the structure of the family is extended to the state. In his lectures at the College de France, Foucault sought to outline the ‘history of “governmentality”’ through the analysis of
The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security (Foucault 1978: 102).

The beginning of this ‘history of governmentality’ was the governmentalisation of the state, what Foucault termed a ‘singularly paradoxical phenomenon,’ in that the techniques of government have become the only space for political contestation, because ‘the governmentalization of the state is at the same time what has permitted the state to survive’ (Foucault 1978: 103). Thus it is the extension of bureaucratic power that strengthens the state and better allows it to govern effectively.

In his analysis of Foucault’s notion of ‘governmentality,’ Thomas Lemke refers to the concept as an ‘analytics of government’ that centres on the primacy of knowledge and political discourses within the structure of the state. It uses a concept of the ‘technology,’ which includes material and symbolic devices, encompassing political technologies as well as technologies of the self. Governmentality conceives the state as the ‘instrument and effect’ of political strategies that frame relations between public and private spheres and defines the structures of political institutions and state apparatuses (Lemke 2007: 43). Foucault identifies three different forms of power relations – ‘strategic games,’ ‘government’ and ‘domination.’ Government refers to more or less systematized, regulated and reflected modes of power (a “technology”) that goes beyond the spontaneous exercise of power over others, following a specific form of reasoning (a “rationality”) (Lemke 2007: 5). ‘Strategic games’ refers to the field of power that characterises everyday interplay between individuals that is spontaneous and
unconscious. Domination on the other hand is overt, coercive and conscious. Government lies between these two forms of power, it is between the conscious and the unconscious, between coercion and hegemony. The use of ‘reasoning’ and ‘rationality’ of government power is evident throughout the production and introduction of policies in modern, liberal, economic-rationalist states. In the presentation of policy, the state must rationalise that policy to the electorate and to stakeholders.

Thomas Lemke’s analysis reveals that ‘government’ power is based primarily on the creation of structures in which relations between individuals, third parties and state are contained.

Government defines a discursive field in which exercising power is “rationalized.” Ways in which this occurs include the delineation of concepts, the specification of objects and borders, and the provision of arguments and justifications. In this manner, government makes it possible to address a problem and offers certain strategies for managing or solving the problem (Lemke 2007: 44).

The rationalisation of government power is in the construction of an objective framework for decision-making. A government controls interaction with individuals by framing these interactions within a structure it controls.

When this definition of government power, as a series of structures that mediate the relations between state and non-state actors, is applied to the native title process, it becomes obvious just why mediation has become the preferred option for state governments generally. Litigation does not allow a state government unfettered control over such things as the ‘delineation of concepts.’ It merely provides a venue to put forward its argument, which is then assessed by an
independent third party.\textsuperscript{72} This is what it meant by the wish to 'reduce uncertainty' professed in government literature pertaining to native title.

The concept of 'uncertainty' was prevalent in government responses to native title since the NTA was passed in 1993. Former Western Australian Liberal Premier Richard Court (1993-2001) railed against the 'uncertainty' the NTA introduced to the WA economy and its perceived negative impact: ‘Because of the uncertainties over the Native Title Act we are now exporting employment opportunities for the next generation of Australians’ (Richard Court Media Statement, 30/11/1997). The WA government positioned itself as reacting to an ‘uncertain’ situation by creating policy or legislation, exerting its power, and therefore ‘providing certainty’ to the WA economy. Certainty was maintained through the WA government’s continued control over the issuing of mining tenements, and the administration of residential and commercial leases. In late 1999, upon the passing of the \textit{Titles (Validation) and Native Title (Effect of Past Acts) Amendment Bill 1999 (WA)} in Western Australia, Premier Court issued a statement that:

These [commercial] leaseholders now have certainty of tenure and can be reassured by the fact that, in the future, they will not be caught up in expensive native title litigation…The Coalition Government is pleased to deliver certainty to these leaseholders and in some cases give landholders the long awaited confidence they need to proceed with development (Richard Court Media Statement, 25/11/1999).

The motivation to reduce uncertainty was not limited to state governments who

\textsuperscript{72} It should be noted that in a Foucauldian analysis of government, a judge would not be considered independent of the architecture of government, nor ‘above or passive in the functioning of government power. It should be noted a Federal Court Judge is part of the Federal government architecture and therefore can be considered an external 'third party' to the WA government. The machinations of power relations between levels of government is something which I will address at a later stage in this chapter.
were strongly opposed to native title. The Court government’s first response was to remove or mitigate it with legislation. When that strategy failed, they then pursued litigation in every native title determination application within its jurisdiction. The Gallop Labor government (elected in February 2001) held a more accepting stance towards native title claims, but this did not mean that ‘uncertainty’ was no longer an issue. In announcing its policy to resolve native title via negotiation, the Gallop government argued for the need to move beyond litigation due to cost pressures:

WA has a looming legal and financial crisis in native title, with 44 applications already heading for trial in the Federal Court…That’s more than every other State and Territory put together. The cost of dealing with all native title applications through the Courts could run into hundreds of millions with uncertain results (Eric Ripper Media Statement, 14/11/2001).

As with the Court government, the uncertainty of litigation was not commensurate with the ongoing process of governing. The problem Ripper labels as ‘uncertain results’ is the problem of the WA government’s policy position being subject to another power. The decision-making ability of a government is improved by the predictability of variables; therefore ‘certainty’ is necessary for effective policy. Certainty can be understood as meaning control, in this case the WA government’s control of native title processes. Control was gained by depoliticising a publically contested ideological battle through the application of bureaucratic processes. This was achieved in WA by the rationalisation of the cultural evidence assessment process to a checklist administered by the WA government's native title policy office. The 2004 Guidelines state, before providing said checklist, that in relation to any cultural assessment:

the Federal Court must be satisfied that it is able to make an order consistent with the terms agreed…There is a responsibility upon the Government to give thorough consideration to the evidentiary
basis of the claims made in a native title application before proceeding to negotiate the terms of an agreed determination. The provision of evidentiary material...is therefore a necessary precondition to the Government’s participation in consent determination negotiations (Office of Native Title 2004: 2).

The justification for the assessment requirements is that the WA government is ultimately responsible to the Federal Court in how it assesses a claim, and therefore must adhere to a checklist that purports to meet Federal Court standards for assessing cultural evidence. The difference now is now that the WA government makes the decision. While the Federal Court may monitor progress and will ultimately sign off on any consent determination, they have absolutely no input into how the state goes about assessing cultural evidence. The Federal Court itself does not provide a checklist of what is required of a claimant group in terms of cultural evidence; individual judges apply the NTA and jurisprudence to the evidence presented before them, whatever that may be. The Guidelines are seen as a purely bureaucratic mechanism, a rationalisation of the decision whether or not to recognise the native title of a claimant group.

When applied to the WA government’s approach to the native title process, these themes of rationality and reasoning as justifications for government actions are enduring. The use of power through reasoning and rationality is not only evident in justifications of government action on native title, but in the very structure of the connection assessment process itself, particularly in the legal ‘shadowlands’ identified by Burke (2010) and discussed in Chapter Four. Complex social action must be distilled into empirical evidence, which will then aid the production of a rational decision based on facts. The WA government provides a justification that this system is based upon that of a court situation. However, with the structure
and relative openness of the process removed, the process is much more susceptible to the machinations of government expediency and political aims. The connection assessment process requires the voluntary entry of the claim group into the process, as they cannot be forced into mediation as they can be forced into the courtroom. Thus the claim group must submit itself to the government’s ‘rational space’, in which the state owns what is deemed to be an ‘objective’ assessment of cultural elements. By owning this ‘rational space’, the state can drive native title in the direction which best suits its purposes, as it is the state that is providing the framework for how cultural connection is assessed. It cannot be underestimated how the WA government’s requirements for the elements of a ‘legitimate’ Aboriginal society may become reflected in how Aboriginal groups see themselves and others around them. Burke’s reference to the fetishisation of ‘contemporary estate groups’ in the mediation process (Burke 2010: 57) brings into focus the issue of ‘self-essentialising strategies of claimant group members’ identified by Correy (Burke 2010: 57; Correy 2006: 344). While this is an issue that has been identified within native title as a whole (see Merlan 2006: 86; Weiner 2000: 126), Burke’s implication is that particularly conservative, empiricist views of Indigenous societies hold sway within state policy offices. It follows that this issue may be more pronounced following mediated determinations than litigated ones. This is indicative of the indirect yet pervasive nature of state power.

While the notion of a monolithic state was problematised earlier in this chapter, this does not mean that state strategies in policy formation cannot be pitched at a single outcome. Whether or not these strategies are conscious or unconscious in
their formation is certainly debatable, but their existence is perhaps central to the very nature of what government is. If control of the native title process is the WA government's aim, what, if any, is the purpose of gaining this control and what is the outcome? To answer this it is necessary to consider the following statement from Nicolas Rose on the mentality of rule in liberal democracies in the context of how the WA government currently approaches native title claims:

Rulers are confronted, on the one hand, with subjects equipped with rights and interests that should not be interdicted by politics. On the other hand, rulers are faced with a realm of processes that they cannot govern by the exercise of sovereign will because they lack the requisite knowledge and capacities. The objects, instruments and tasks of rule must be reformulated with reference to these domains of market, civil society and citizenship, with the aim of ensuring that they function to the benefit of the nation as a whole (Rose 1996: 43 original emphasis).

The need of rulers to ensure the benefit of the 'whole' underlines very clearly the reasons behind the strategy that led to the increase in WA government control over native title deliberations, and why native title deliberations were moved to a depoliticised bureaucratic process. The WA government rationalised in its policy formulation that it must consider the needs not only of claimants, but that of pastoralists, miners and the broader community of citizens under its rule. These other interests are not benefited by the 'uncertainty' of litigation due to lengthy timeframe and the possibility of a decisions which has unclear implications for the 'broader community.' Therefore it does not necessarily matter that the timeframes for the resolution of claims by mediation versus litigation are similar, even if it was the stated aim of the government that mediation be quicker. What matters is that uncertainty surrounding the litigation of a native title claim is present for the entirety of the process, wherein a mediated determination, negotiated under the purview of state bureaucratic mechanisms and processes, is a controlled
environment in which the state can seek to manage the outcome and, at least theoretically, appease all actors. The outcome of this control is a stabilisation of a previously unstable situation in which the WA government was placed. Mediation provides the government with a more stable, repeatable process, which reduces uncertainty and aims to function to the benefit of the state as a whole.

The intentionality behind the shift towards ‘repeatability’ and standardisation is debatable, as it is difficult to know the internal thought processes of the policy makers themselves. However, the effectiveness of the policy in publicly ‘de-contesting’ the process, whether intentional or not, cannot be denied. As I recounted in Chapter Three, the preference for negotiation in native title matters is one which is shared by the majority of stakeholders in native title, government, respondent and NTRBs alike. The very nature of negotiation as a conciliatory process has prevented public criticism of the mediation process, as other current and future negotiations could suffer from the ramifications such public criticism would likely bring.

**Native title in Western Australia and the Anti-Politics Machine**

In his 1990 work *The Anti-Politics Machine*, James Ferguson provides a detailed account of a foreign aid funded ‘development’ program in the mountainous Thaba Theksa district of rural Lesotho in southern Africa. The program began in 1975 and ended in 1984 and was generally perceived by its creators as a ‘failure’ in its aims to improve agriculture and pastoralism in the mountainous region (Ferguson 1990: 74; 255). Ferguson begins his analysis by demonstrating how Lesotho was
conceptualised by the ‘development apparatus’\textsuperscript{73} as a ‘Less Developed Country’ and in the process worked to reduce issues of poverty in the country to ‘technical problems’ to which the aid program would provide solutions (Ferguson 1990: 87). Ferguson proceeds to illustrate how this conceptualisation of Lesotho and in particular the rural area the project centered on was incorrect, and in many cases was the opposite of what was claimed in the development literature (Ferguson 1990: 25-75). The project systematically ignored numerous political and cultural realities in its justification of the implementation of its agricultural and pastoral programs (Ferguson 1990: 103-117) This was despite the detailed history of such aid projects failing for ignoring exactly these things (Ferguson 1990: 228-236). Ferguson’s findings are worthy of further elaboration because of their comparability with the WA native title mediation process.

Ferguson describes a process by which the development agency structured the program around a depoliticised notion of government and bureaucracy (Ferguson 1990: 254-256). The development agency reduced the issues that the program aimed to 'fix' to mere technical problems, as opposed to political ones. If fact, the development literature appeared to go out of its way to avoid mentioning the politics of Lesotho at all as a possible factor that should be considered in constructing the program. The program ignored the political intentions of the numerous actors who would implement and would therefore influence the actions of the program. The development literature Ferguson reviewed ignored that in the period prior to the implementation of the program and during the program’s operation, Lesotho was in the midst of an authoritarian government attempting to

\textsuperscript{73} Ferguson uses this term to describe the bureaucratic framework of development organisations, and bureaucrats themselves (Ferguson 1990: 74).
cement its control over supporters of the opposition party. This political situation culminated in a coup in 1986, just two years after the program was abandoned (Ferguson 1990: 103-108). The program constructed itself as a neutral entity, and perceived the government as merely an apolitical tool to provide social services and promote economic growth (Ferguson 1990: 65). The government of Lesotho was then enabled, through the conduit of the program, to conduct 'extremely sensitive political operations involving the entrenchment and expansion of institutional state power almost invisibly,' because as a neutral, technical, project 'no one can object' (Ferguson 1990: 256). This is the same depoliticisation of government action evident in the native title mediation process.

In the era of consent determinations, as David Ritter noted (2009b), the acceptance of native title by both sides of the political spectrum and respondent parties is not because of increased cultural understanding but because it has become more acceptable to them, and was itself the result of a larger power struggle (Ritter 2009: 173). While there are situational differences between the implementation of an aid program and a native title consent determination, it is necessary at this point to go back to the ‘language’ of native title discussed in Chapter Three and the stated purposes for the creation of mediation policy. The WA government sought to reduce both cost and time-frames and provide a conciliatory environment for the resolution of native title claims (Wand 2001). Ferguson (1990: 256) argued that the elements of government expansion that occurred during the Thaba Theksa development program were depoliticised because they were hidden behind the neutrality of the project. I would argue the stated intentions of the WA state government represented similar levels of
political neutrality. In the Thaba Theksa case, government expansion was considered entirely reasonable and was largely uncontested because it occurred in the context of ‘development.’

For the planners, the question was quite clear: the primary task of the project was to boost agricultural production; the expansion of government could only be secondary to that overriding aim... If one considers the expansion and entrenchment of state power to be the principle effect – indeed, what ‘development’ projects in Lesotho are chiefly about – then the promise of agricultural transformation appears simply as a point of entry for an intervention of a very different character (Ferguson 1990: 255).

A similar process occurred in the switch in Western Australian native title policy from litigation to mediation. Native title parties viewed litigation as being too expensive, and mediation was the (ostensibly) cheaper alternative. Litigation was taking too much time; mediation was thought to be quicker. Claimants found the process of testifying too strenuous and confronting; mediation would spare them that ordeal. All these issues and solutions could be put into the category of a neutral, reasonable assessment of what needed to change in native title. It can be inferred that because the policy was not removed when the conservative government was elected in 2008 that the policy was not considered politically controversial. While, as in Ferguson’s case, these elements had varying degrees of success and failure, the ultimate result was greater government control over the broader process. In Thaba Theksa the aid program gave the government access and control to a remote rural area of Lesotho ‘almost invisibly’ (Ferguson 1990: 256). In the smaller political context of the Western Australian native title system, the switch to mediation gave the government more control over the cultural assessment process in a similar fashion.

When the WA government created the Guidelines, they effectively removed the
politically and culturally contested process of recognising Indigenous connection to land and replaced it, at least publicly, with a 'technical' problem. In creating this 'technical' problem, the WA government also created its solution, which involved the application of knowledge via the native title bureaucracy. It has become routinised and has been applied to a diverse range of claims across regions and 'cultural blocs' in Western Australia. The result is a standardisation of rights awarded in consent determinations as examined in Chapter Four. The contested space of native title cultural analysis now occurs within Burke's 'shadowlands' (2010), which resides within the native title bureaucratic apparatus. This contested space is unacknowledged in the broader native title system and certainly does not receive input or comment (officially) from those external to the native title bureaucracy.

In a mediated native title process in WA, the cultural assessment of a claim is removed from the contested space of negotiations proper with the NTRB and other respondents and is dealt with as a 'technical' issue to be resolved prior to the beginning of actual negotiations. The negotiations then focus only on the rights to be awarded, the creation of Indigenous Land Use Agreements (ILUAs) and land tenure. In other words, it is the actual rights, land tenure and land use which reside within the contested space of native title mediation, while the decisions regarding the existence of rights to land, the question of society and the structure thereof, does not. This effectively depoliticises the decision-making process relating to the surviving rights and continued existence of Aboriginal 'societies.'
The ‘shadowlands’ and native title anti-politics

I have thus far discussed how the mediation of native title claims by the state has reduced the transparency by which Aboriginal cultural evidence is assessed. This has occurred by the WA government removing the presentation and defense of cultural evidence and materials from the open contested space of the Federal Court to the 'shadowlands' (Burke 2010). Until this point I have discussed the 'shadowlands' as an ‘instrument effect’ of the WA mediation regime. I will now further examine how the 'shadowlands' resonates with the issues of rationality and power discussed in terms of Foucault (1978), Lemke (2007) and Rose (1996) earlier, and the situations described by Ferguson in the Anti-politics Machine (1990).

Just as Ferguson states, calling the Thaba Theksa project a 'failure' would be an overstatement, the same should be said of WA's native title mediation policy. Under the policy, numerous consent determinations have been achieved and Western Australia has the highest number of determined claims in the country. However, many of the aims of the policy can now be seen as simply unachievable in the current native title context.

The timeframe reduction that the policy sought to address appeared to be based simply upon the notion that litigation is slow, therefore any alternative would be faster. While the average time for mediated consent determinations is shorter by several months, the location and nature of the claims that have been determined in this way must temper validity of this average if it is to be applied to the state as a whole. The lack of consent determinations in the more settled areas of the state
suggests the complications that more extensive contact with European settlement brings will lead to longer periods of cultural assessment. The increased number of respondent parties due to the larger interests in the land being claimed will also lengthen the period required to negotiate rights after successful cultural assessment. Ferguson provides an analogous observation, stating:

If it is true that "failure" is the norm for development projects in Lesotho, and that important political effects may be realized almost invisibly alongside with that "failure," then there may be some justification for beginning to speak of a kind of logic or intelligibility to what happens when the "development" apparatus is deployed – a logic that transcends the question of planners' intentions. In terms of this larger unspoken logic, "side effects" may better be seen as "instrument effects'…effects that are at one and the same time instruments of what "turns out" to be an exercise of power (Ferguson 1990: 255).

If we are to replace the ‘development apparatus’ with ‘the native title apparatus,’ what can we say are the ‘instrument effects’ of reduced transparency in the cultural assessment process? Policy makers would clearly not describe ‘reduced transparency’ as one of their aims in mediating native title claims as opposed to litigating them - it is merely a ‘side effect’ of the WA state government handling the process. The ‘instrument effect’ is the relocation of the highly contested space of the assessment of Aboriginal cultural evidence and of the continued existence of Aboriginal societies to a space in which this debate is obscured. This resonates strongly with the governmental interventions that were shielded by the Thaba Theksa Development Program. Ferguson argues that it was the political neutrality of the program that allowed government expansion into previously uncontrolled rural areas without meeting serious obstacles. While the program itself could not in any way be described as successful in its aims, this government expansion, as an instrument effect of the program, achieved something that could not be achieved in the same way without the existence of the project. As Ferguson
argues, it was the cover of the program that allowed the government of Lesotho to carry out such significant expansion in such an uncontested way (Ferguson 1990).

A similar argument can be made for how native title mediation policy has allowed the WA government to carry out sensitive political manoeuvres in the awarding of native title rights by consent. The aims of the native title mediation process cannot be described as ultimately successful. The timeframes of native title claims settled under litigation versus those settled under mediation differ only mildly, and the rate at which claims are being determined via consent has slowed now that claims less affected by European settlement have been dealt with. The ability of the process to deal with urban and rural Aboriginal communities is at this stage unproven. However, the instrument effects of instituting this policy have been far more successful in becoming the norm in native title matters: government control has increased, Aboriginal communities have built ongoing relationships with the mining sector, bureaucratic structures have been created within communities that now interact with other sectors of the economy, and ultimately the native title process is more broadly accepted. The 'shield' in this case is the bureaucratic process; the issues of cultural connection and continuity rationalised into a technical exercise making the sensitive political maneuvers of reconciling Aboriginal rights to rights with broader development interests possible.

**Power relations between state and federal governments, historically and in native title**

From a Foucauldian perspective, both the Federal Court Judge and a state native title policy office should be considered as part of the same overall government
architecture; both are mechanisms of government working indirectly to shape the populace. From this perspective, a Federal Court judge cannot be considered an independent arbiter between a government and a civilian party. Thus in Foucauldian terms, the consideration of native title claims by a state government policy office would not be differentiated from the consideration of a similar claim by the Federal Court. Both circumstances involve submitting to the architecture of government, they are merely different parts of the same machine. This point of analysis succeeds when a single government is the focus, and does not take into consideration power relations between layers of government and bureaucracy. This problem has been referred to as a eurocentric ‘blindspot’ that ignores ‘forms of “fragmented” or “graduated” sovereignty such as that which exists in Australia in favour of the single state European structure’ (Lemke 2007: 47). Despite this blindspot, a consideration of governmentality in relation to nations with graduated sovereignty is useful in analysing power relations between bureaucracies. An example of such was recounted by Ferguson, in which the aid bureaucracy within the Thaba Theksa Program clashed with the bureaucracy of the government of Lesotho over ultimate control of the program. The dispute over control lead to competing flow charts indicating different chains of command, dysfunctionality of processes, and ultimately the collapse of the program (Ferguson 1990: 221-226).

In Australia, state governments have often clashed with the Australian Federal government over control and jurisdiction over institutions and resources. The power relationship between these two levels of government in Australia has been framed by the distribution and use of money. There are many examples of this
struggle for control, from the funding and structure of health and education systems and the distribution of Federal tax revenues, to social issues such as marriage equality and Indigenous welfare programs. Another such example is the policy environment surrounding native title, from the reaction to the Mabo decision and the implementation of the NTA, to the processing of claims and the implementation of agreements. Native title is an area of continued contestation between state and Federal governments, one in which the WA government played and continues to play a significant role. When the outcomes of state based mediation are put into this larger context of state and federal relations, the switch to mediation can be seen as a continuation of an ongoing bid for control by the states which began with the Mabo decision in June 1992.

The relationship between the states and the Federal government in Australia is one that has been predominantly based on financial matters; principally revenue collection and the dispersal of said revenue. This financial relationship has been categorised by the gradual emergence since federation in 1901 of the Federal government as the dominant revenue collector (Harris 1979). Prior to WWII, both the Federal and state governments collected income tax from the populace. As the Federal Government began to increasingly depend on income tax revenue to support the war effort in the early 1940s, it faced difficulty in raising income tax levels due to competing state income tax regimes. This resulted in the Federal government passing several pieces of legislation designed to make the Federal government the sole income taxing authority (Harris 1979: 20). The states reacted by challenging the four Acts in the High Court of Australia, but they were defeated on the grounds that the Acts were deemed a valid exercise of federal
power. The uniform taxation regime introduced in 1942 that resulted from this decision lead to an increase in Federal tax revenues of 982% in the decade from 1938-1948 and the degradation of revenues due to the states by 28% during the same period (Harris 1979: 20). The Premiers’ Conference of 1946 saw the Commonwealth announce that it would continue this arrangement indefinitely. The uniform regime saw the necessary increase of federal grants to the states, which moved to a more regularised system of distribution. This system is what categorises federal and state relationships to this day (Harris 1979: 21).

State revenues were further eroded with the introduction of the Goods and Services Tax in 2001, which saw the forced elimination of many state-based sales taxes. The Goods and Services Tax revenue collected by the Federal government is distributed annually on strategic reasoning relating to the national economy as a whole. The current Australian system is structured so that the Federal government has jurisdiction over the collection and distribution of revenue, which the state governments then use on their own terms to provide services to the public. Specific policy positions held by various incarnations of each state government compete within this dynamic of financial control by the Federal government.

This history of conflict over the collection of revenue, and the positioning of the Commonwealth as the dominant revenue collector in the second half of the twentieth century is the background to the jurisdictional battle that occurred with the introduction of the NTA. The states very quickly came to view the NTA as an imposition of the Commonwealth on the main independent revenue stream available to the states: land use (Ritter 2009b: 73). This was highlighted by the
fact that the two main states objecting to the legislation were Western Australia and Queensland, the two most land and mineral rich states in the country. While there were certainly ideological factors at play (although at the time WA had a Liberal government and Queensland a Labor government) land and mineral resources were of exceptional importance to the economies in those states and it was the perceived threat those of revenue streams that formed a large part of the basis of their objections (Ritter 2009b: 75). The ideological battle was certainly evident in the media, but it was the battle for power and control that underwrote these surface conflicts (Russell 2005). It is easy to conflate the machinations of differing ideological positions on native title with the positions of states and the Federal government, when actually they are on a different axis. They are influential on one another, but still separate conflicts. Federal government control versus state control does not equal pro-native title versus anti-native title in the way the early years of native title have been categorised.

The move to mediation that occurred in native title in Western Australia during the early 2000s happened in concert with the fading of the ideological conflict over Indigenous land rights to mere background noise. The pitched political battle in the media that categorised the second half of the 90s at this point had almost disappeared and was replaced by a ‘gentle drone’ (Ritter 2009a: 1), and this change in approach was not greeted with any comparable public recriminations. As Ritter points out, ‘commentators…referred warmly to the “new culture of agreement-making” which, among others things, is said to address socio-economic disadvantage, bring satisfaction to all stakeholders, promote Aboriginal unity and advance the cause of reconciliation’ (Ritter 2009a: 1). The key element
of this switch in control, and the calm that surrounded this change, was that at no point has the Federal government sought to regain it. The native title process began with the Federal government, the newly created National Native Title Tribunal and the Federal Court overseeing the negotiation and litigation of claims.

When the states, WA and Queensland in particular, changed their approach and sought to resolve claims themselves with their own negotiation regimes, there was no dispute from the Federal Government over jurisdiction or concern about their approach. Conversely, as the mediation regime has continued in Western Australia over the past decade, the Federal Government has been promoting state-based agreement making as the model for all native title matters (for example FAHCSIA 2010). While the Federal Court maintains the role of an overseer in negotiated settlements, and makes the final determination official via a ‘judgment,’ it has very little involvement in the decision-making process with regards to connection or influence over the content of the final agreement. It is the role of the Federal Court to assure that a consent determination complies with the NTA. It is within a judge’s power to request access to connection material and reject the determination on the basis of non-compliance, but the reality is that this has not yet occurred.

While advocating the continuation of the state-based regime, the Federal Government is in the process of dismantling its one institutional creation resulting from the NTA, the National Native Title Tribunal. As of the May 2012 Federal Budget the NNTT has been officially defunded, and has been absorbed into the Federal Court. The reaction of the Federal government to the State government take-over of native title process cannot be categorised as striving to regain or even
maintain the same amount of control it once had. The reaction can only be categorised as one of general retreat from active input in the process other than the occasional amendment to legislation. Claims may still be resolved via litigation in the Federal Court, but it is apparent from government policy statements and discussion papers (FAHCSIA 2010; NNTT 2010a) that this is not the Federal government’s preference.

To consider why the Federal government’s withdrawal occurred I return to Foucault’s (1978) concept of ‘governmentality’ discussed earlier and the concepts explored by Ferguson (1990). Analysis of ‘governmentality’ explores the processes by which governments exert power to shape the governed. In this context I wish to explore how the Federal government exerted power to situate other governments under its control to carry out its policies. The current native title regime is an example of this process occurring between layers of government. It exhibits how a controversial Federal legislative intervention that was vigorously opposed, eventually transformed into state government policy that assumed the Federal government’s responsibility for the mediation of native title. While the WA government gained control of the content of native title claims and determinations under the auspices of rational, effective government, the Federal government created a native title system in which the primary responsibility has been voluntarily deferred to the states who had previously fought against it, without the need for the explicit use of power.

The result of the protracted contestation of native title is that the WA government, under the stewardship of multiple governments, has not only acquiesced to the
process, but has created a policy that actively seeks to foster mediated outcomes. The Federal government has imposed a process and is now at the point where it has absolved itself of the responsibility of overseeing it. The states are in control of land use, but on the Federal government’s terms. The practice of ‘governmentality’ is to exhibit power while devolving responsibility. The Federal government in this case used its power to enact native title legislation, and as a result of its contest with the WA government, has ultimately absolved itself of the responsibility of resolving native title. While the Federal Court has the ability to involve itself in the process where necessary, it does not have to contribute to the content of the agreement in any way, whether it be in the rights awarded, or the form of cultural assessment. What it does provide is the framework for what the WA government can recognise. It frames what native title can be. The WA government may work within that framework, but not outside of it. Just as the WA government frames the argument of native title connection assessment, the Federal government frames the content of a native title determination.
Chapter 6 – Conclusion – Mediation and Future of Native Title Consensus

Over the last 20 years, native title in Western Australia has developed from a highly controversial recognition of Aboriginal land rights by the High Court and a federally enforced legislative burden, to a politically neutral process enclosed within state bureaucratic structures. This model has been arrived at by consensus between the WA government, industry representatives and NTRBs. For the most part, these groups agree that determinations by consent are the preferred method of resolving native title claims.

Governments of both major political parties, and other native title respondents and applicants, have argued that the benefits of pursuing a determination of native title through agreement are greater than those pursued through trial. While this consensus saw an increase in native title claims resolved via agreement, it also led to reduced transparency in decision-making on how native title is recognised. In the increasing number of cases settled by negotiation, cultural evidence is no longer assessed in courtrooms under public scrutiny and is now assessed through processes internal to the Western Australian state bureaucracy. 74 The structure of the mediation regime allowed the WA government greater control over the terms on which native title claims were decided, and over the content of native title determinations. The WA government, in its attempt to improve the efficiency of the native title system, created a situation in which its preferred interpretation of

74 Several cases continued in the Federal Court in the era of mediation policy. Notably: Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9) [2007] FCA 31, Bennell vs Western Australia [2006] FCA 1243, Rubibi Community v Western Australia (No 7) [2006] FCA 459 and Sampi v Western Australia [2005] FCA 777. Successfully litigated cases during this period were all represented in the rights analysis in Chapter Four.
native title jurisprudence has become the standard for the assessment of cultural connection. Additionally, the content of recent determinations by consent has revealed that bureaucratic processes show a steady pattern toward the standardisation of native title rights.

Following the *Mabo* decision in 1992, the WA government was a major opponent of the Federal government’s drive for national legislation. This negative reaction was fueled by the fears of large mining industry interests in the state, and concerns that the situation would negatively affect economic development. While the Court government did not completely retreat from this initial position, it did come to accept that the NTA was a reality that the state would have to accommodate. After the *Land (Titles and Traditional Usages) Act 1993 (WA)* was successfully challenged in the High Court, and it was clear that the NTA was not going to be repealed, the Court government pursued litigation in an attempt to gain resolutions of native title in the state that were favourable to the government.

Mediation policy developed in the context of this evolving attitude to native title in WA. Towards the end of the Court government’s second term, and with the election of the Gallop Labor government, negotiation of consent determinations became the favoured method of native title resolution as it was seen as less costly and more time efficient. Additionally, it removed the uncertainty of ongoing litigation and gave predictability to native title outcomes. The move to mediation became possible as native title law evolved and became more acceptable to interests that had formerly challenged it. As David Ritter argues:

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Indigenous groups claiming customary interests were only admitted to the negotiating table because the judicial recognition of the doctrine of native title and the passage of the NTA gave them a measure of enforceable rights. Yet no agreement-making really followed until...the balance of power and convenience within the native title system had been reordered sufficiently in the direction of state government and primary industry that the respondents became prepared to deal...The deal-making that is now so prevalent reflects underlying power relationships; it does not alter them (Ritter 2009b: 173-174).

Though respondents began to accept native title, it was the WA government’s removal of the contest of connection evidence from the courtroom that made it uncontroversial. The contested space of native title mediation consists of negotiations on the rights to be recognised, future land use in the claim area, and land tenure. Cultural evidence is no longer within this contested space. WA government discourse has constructed cultural assessment as a technical problem to be solved separately by the ‘objective’ assessment of the WA government. The increase of WA government control was successfully depoliticised with the promise of a process that was more efficient and represented a less ‘detailed and rigorous’ assessment process than that of the Federal Court (Office of Native Title 2004: 3).

Anthropologists writing about native title have been largely concerned with the ‘technical problem’ of native title, that is, how anthropologists can effectively translate Indigenous cultural forms (land tenure, land holding groups, and so on) in a way that is commensurate with the NTA and the interpretation of the courts. There has been little attempt to deconstruct the actions of government with regard to native title policy and cultural evidence. In this thesis I have shown how the WA government’s policy to mediate native title claims within its own bureaucratic structures has allowed it to frame the native title debate and shield it
from public critique through reducing the transparency of native title decision making. I have argued that the mediation process in Western Australia provides a much more effective basis for the WA government to exercise power than the previous policy favouring litigation. Litigation is a more overt demonstration of state power, in that the WA government uses its resources to argue and position itself against a claim. However, with this form of resolution, ultimate control over decision-making lies with the Federal Court. Mediation is a less antagonistic form of dispute resolution in which power may be subtly exercised to ensure results in line with WA government priorities.

The WA government has gained significant control of native title decision-making and is thus better able to exercise power over native title parties. This is merely the first layer of power relationships within the native title process. As significant as this layer is, what must also be understood is how the power relationships between the WA government and the Federal government played a role in the formation of the current mediation process. Native title is an issue over which the WA government and Federal government fought a protracted battle of jurisdiction over the validity of federal legislative action, which was only settled after a High Court decision in favour of the Federal government. The present situation, in which the WA government controls its own native title regime and the Federal government is decreasingly involved must be considered in the light of the situation in the 1990s, where native title was pushed onto the states by the Federal government amid cries of Federal overreach. The Federal government steadily removed itself from the native title landscape, with statements encouraging the continuation of state policy regimes and the defunding of the
NNTT as an autonomous government agency in 2012. Recent policy announcements merely encourage further expansion of policies the states already have in place (see FAHCSIA 2010). This is the second layer of power relations in native title, in which the Federal government has devolved responsibility for native title policy to the state governments.

I have argued thus far that the WA government's native title mediation policy has greatly increased state control over native title outcomes. I am not arguing, however, that this was the original intention of the policy. When the WA government reviewed the native title process in 2001/2002, the intention was to institute a policy that would resolve native title matters in the state more effectively than the previous, litigation-focused methods. The 'effectiveness' of the policy was to be judged primarily in terms of time and cost, but also in terms of the predictability of native title outcomes and the acceptability of these outcomes to native title respondents. The impetus for change was uncertainty surrounding the large amount of claims registered in WA measured against the rate of resolution, and the relative unpredictability of litigation. The WA government sought to integrate native title matters into the broader bureaucratic process and to normalise the settlement of native title in the context of state development. For native title to be effectively resolved, it had to gain acceptance as 'part of doing business' in the state, rather than being regarded as an exceptional matter that was to be determined in the Federal Court (Ritter 2009a). It was through this method that 'uncertainty' with respect to native title matters would be reduced, and thus have a lesser effect on prospective development in the state. The instrument effect of this policy was reduced transparency in the process of
assessing claims due to the WA government internalising the review of cultural evidence. NTRBs were trapped between their limited funding and the cost of litigation, and ceding native title decision-making to the state. The NTRBs were faced with a choice between the more open (but resource intensive) assessment of cultural evidence by the Federal Court and the less intensive, but opaque mediation process. For most NTRBs, it was no choice at all.

In instituting the mediation policy, the WA government was not engaging in a deliberate grab for power over the native title process, nor was it a complete failure in achieving its stated aims. The policy was created to address genuine concerns with how native title was being resolved through the Federal Court. I argue, following Foucault and Ferguson (1990: 255), that the control the WA government achieved was an ‘instrument effect’ of the application of policy and bureaucracy to the native title process. As James Ferguson positions himself in his assessment of development project in Lesotho:

...what we are concerned with is not an abstract set of philosophical or scientific propositions, but an elaborate contraption that does something. To say what such an apparatus does is not a critique, still less a refutation. Would we say that the vivisection of a frog constitutes a critique? Or that it aims to refute the frog’s organs? (Ferguson 1990: xv-xvi).

Ferguson claims he is not critiquing development (Ferguson 1990: xv); it is perhaps more accurate to say that he is not critiquing the intention of development, instead he is arguing that the more insidious results of development programs are the instrument effects of the bureaucratic structures that implement them. These forces have been at play in the implementation and action of native title policy over the past two decades, in the pursuit of a more efficient native title process through the implementation of bureaucratic structures.
As I neared the end of this research project, the situation in WA native title policy had begun to change. The future of mediation policy in Western Australia is currently in a state of uncertainty. The situation is near a tipping point between the continuation of negotiation as first preference, and the return to a litigious path for the majority of cases. It is assured that agreement making will continue in Future Act processes under the NTA, as developers and other interested parties now have structures in place for these processes that have been working effectively for some time. Conversely, the system of resolving of native title by agreement has not been working effectively. After nearly two years of inaction on native title policy in which the Barnett government had continued with Gallop/Carpenter approach, the WA government conducted a minor restructure of WA’s native title policy office. The Office of Native Title was removed from the Department of the Attorney General and dissolved into the Department of Premier and Cabinet, where it once again became the Native Title Unit.76 The Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title were put under review in late 2009, and a new document, The Guidelines for the Provision of Connection Material was in place in February of 2012. The new Guidelines are similar in scope to the 2004 version, although they are far more explicit in detailing what is required of a connection report. Additionally, there are certain minor changes throughout the document that suggest modifications in the WA government’s approach to the assessment of native title evidence. In

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76 Within the broader Land, Approvals and Native Title Unit (LANTU).
particular there have been changes to the ‘Assessment of Connection Material’ section. In 2004, the document stated that:

Following its internal assessment, the government will appoint an appropriate person or persons to undertake an independent review of the connection material and to provide advice to the government as to their assessment (Office of Native Title 2004: 13).

The 2012 version of the document states ‘If deemed necessary, independent legal or anthropological comment may be sought on the connection material (Department of Premier and Cabinet 2012: 10, my emphasis). This suggests a further layer of decision-making that is masked from view and a further strengthening of control of cultural assessment within the WA government.

Prior to the changes to the Guidelines, the mediation regime was showing signs of dysfunction, primarily with fewer consent determinations being achieved and claims that had undergone connection assessment as a precursor to mediation moving into litigation. One such claim is the Badimia native title claim which covers 36,129 square kilometres in the Geraldton region, approximately 450 kilometres north east of Perth. The claim group, with their NTRB Yamatji Marlapa Aboriginal Corporation, produced connection material for the WA government as part of the requirements to negotiate a consent determination of native title. The initial assessment of the material was not successful, nevertheless, the WA government was positive that the claim could pass the assessment with some additional information:

The State government advised YMAC that connection material provided to date did not meet the State’s guidelines. However, the State indicated that with the provision of some “further targeted information” it was possible that the requirements for those guidelines may be met…YMAC provided that further information in June, by way of an oral presentation to the State and the Office of Native Title (ONT) by YMAC’s appointed anthropologist
YMAC’s account of the state’s request reveals some of their frustration with the state’s approach to connection assessment; particularly with a request for ‘targeted information’ that would ‘possibly’ mean the Guidelines ‘may’ be met. It is the sort of cagey response that evokes a teacher unwilling to provide a direct answer lest the students not learn for themselves.

the State’s reply to our final presentation was that the connection material we have provided still does not meet the state’s guidelines and, accordingly, the State has refused to make a positive determination on the Badimia Native Title claim (YMAC 2009: 33).

The Badimia claim subsequently sought funding for contested litigation from the Federal government, went to trial and had on country hearings in July 2012 (YMAC 2012:58). At the time of writing the claim is awaiting a judgment from the Federal Court. The claim is representative of the failures of mediation policy both in terms of the transparency in connection assessment and in fulfilling the promise to shorten native title resolution timeframes. YMAC’s reaction to move the claim into litigation is representative of the frustration of NTRBs with the lack of transparency in connection assessment, and decreased willingness on their behalf to continued participation in the mediation process. The presence of a claim in litigation, which five years ago was close to satisfying connection assessment for a consent determination, is a clear example of an increasingly dysfunctional process.

The current native title policy situation is at this tipping point for a number of reasons, but primarily it is the fact that the native title claims that were best positioned to satisfy the WA government requirements for connection have been
determined. The remaining native title claims represent far more complex roads to addressing connection due to Aboriginal people in those areas having had a more prolonged and intensive encounter with settler society and having faced greater dispossession at the hands of settlement. The continuity requirements of the NTA and the WA government’s Guidelines mean that establishing native title in such circumstances is extremely difficult. Additionally, the remaining claims present greater political obstacles in that they cover land that represents exceptional value to the state, and the interests of a greater number of respondents. Mediation policy allowed the state to prioritise and resolve ‘simpler’ claims first. Such prioritisation makes perfect sense in a policy context, as claims with less legal complexity inevitably found quicker passage through the process. This has achieved somewhat lopsided statistics as to the policy’s success. The early years of the policy’s existence saw a large number of claims determined via consent, but the rate of consent determinations has dwindled in recent years as the WA government deals with claims with greater historical complexity.

The result of this earlier prioritisation is that a large number of native title claims have been left languishing for years without a defined pathway to resolution. A return to litigation, at least in part, was in many ways inevitable given the inability of the WA government to negotiate determinations over more densely settled areas. The rate of consent determinations that were achieved in the mid-2000s was unsustainable, and is unlikely to return. The result will be a return to frustrations with extended timeframes for the resolution of native title.

The WA government's current approach to native title is evidence of a policy that
has become divorced from ideology. The Barnett government has not publicly positioned itself on native title issues unless a particular development project is at stake, such as the case of the Browse project in the Kimberley. This position is different from that of the Court government in that native title is challenged when it effects specific government priorities, rather than challenged as a threat to the state's general economic wellbeing. The Barnett government’s position is one that is prepared to co-exist with the native title process, and participate in it, as long as it does not produce any barriers or difficulties for the government's policy program. While this position has meant that representatives for native title claims that present little or no barrier to development are able to pursue consent determinations, there is a level of disinterest on behalf of government in negotiating these claims. Native title claims in areas in which the government has an economic or policy stake have higher chances of being addressed in a timely manner. The pursuit of the resolution of native title claims for resolution’s sake alone no longer appears to be a priority of the WA government, but equally nor is challenging the recognition of native title as the Court government did in the 1990s.\footnote{Evidence of the evolution in the WA government’s approach to native title is the recent increase in claims proceeding to litigation in the Federal Court. Since 2010, the Court has heard evidence for the Ngaju, Yilka, and Badimia claims, with others on court lists awaiting hearings. The litigation of these claims was not had a significant impact on the ongoing negotiations of other claims. An interesting question with regard to this point is what will happen to native title agreements in times of economic hardship. If development drives native title agreement, and development slows or becomes stagnant, it is fair to assume that the will to participate native title negotiation would disappear. This situation would inevitably lead to increased litigation and possibly native title becoming re-contested.}

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brought on by policy decisions of the WA government, rather it was through NTRBs and NTSPs seeking resolution of these claims through the Federal Court because the WA government was unable or unwilling to progress mediation. These developments should be seen as NTRBs and NTSPs reacting to the increased control of the WA government over the assessment of cultural connection and the progression of native title claims. Complex native title claims that do not have the leverage of development projects within the claim area are in the position where NTRBs representing them must choose to return to litigation or face a protracted period of inactivity in progressing their claim.

The prospects for resolution of native title claims covering the highly settled areas of Western Australia rest heavily on the outcome of the WA government's non-native title settlement with the Noongar community in the state's south-west (following on from the decision in the Single Noongar appeal). If the settlement is successfully negotiated, it is possible that future agreements in other well-populated regions of the state will follow. This would result in claims receiving some benefit from native title that would otherwise have likely continued to evade resolution. If the WA government does not pursue non-native title settlements, it is likely that litigation will be the only option for these claimants to seek resolution.

Conclusion

In this thesis I have illuminated the ‘shadowlands’ (Burke 2010) of native title mediation policy and provide an analysis of the actions of the WA government in resolving native title claims by consent. This focus was born out of an inability to
satisfactorily investigate how the WA government assesses connection material due to lack of access. The nature of the ‘shadowlands’ prevents an investigation into the interaction between anthropology and the state, in the same way that Burke (2011) investigates the interaction between anthropology and law within the Federal Court in native title litigation. The WA government has depoliticised native title resolution through constructing mediation as a policy that benefits all native title parties. By assessing cultural evidence within its own bureaucracy, it has removed this contested space from public critique. Through reduced transparency and increased control of the native title process it has mitigated uncertainty for itself and industry respondents on whom its economy depends. For native title applicants, the reality of native title mediation has only marginally reduced time-frames, and has resulted in a process that has become bureaucratised and standardised.

The obvious question arising from my analysis is whether there was an alternative to the present situation, one that would have allowed for a negotiated solution to native title without the increase in state power. I do not believe that there was, or at least I am unable to see how the creation of a state regime for resolving native title claims could not involve an increase in state power. The introduction of an independent body to assess connection material would introduce too much uncertainty to be acceptable to the government and industry respondents. This is mere speculation, but as I have argued it is the presence of uncertainty that has driven native title legislation and policy development from the time of the High Court’s decision in *Mabo*. The Federal government controlled the implications of *Mabo* with the NTA, and the WA government, when it could not do so via
legislation or litigation, controlled the implications of the NTA with its mediation policy.

The mediation process has allowed the WA government to decide where native title is to be recognised, and how it is to be recognised, with certainty. For native title applicants, the promise of a more efficient process for the recognition of native title rights has not eventuated. In my view the mediation process has further detached applicants from the process in which the recognition of native title rights is contested. The alternative is a return to litigation, which promises the same lengthy time-frames that mediation policy sought to remove.
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Appendix A

Rights Awarded in Native Title Claims in Western Australia (referred to in Table 1 and Table 2)

Litigated Claims

*Rubibi (No.1)* - Rubibi Community & Anor v The State of Western Australia & Ors [2001] FCA 607 (29 May 2001)

(i) rights and interests to possess, occupy, use and enjoy the claim area;
(ii) the right to make decisions about the use and enjoyment of the claim area;
(iii) the right to conduct ceremonies on the claim area, in accordance with traditional law and customs;
(iv) the right of access to the claim area for ceremonial purposes;
(v) the right to control the access of others to the claim area;
(vi) the right to use and enjoy the resources of the claim area for ceremonial purposes;
(vii) the right to control the use and enjoyment of others of the resources of the claim area;
(viii) the right to hunt and gather for ceremonial purposes;
(ix) the right to manufacture ceremonial artefacts, tools and weapons from the resources of the claim area for ceremonial purposes;
(x) the right to maintain and protect the claim area, as a sacred ceremonial area under traditional laws and customs; and
(xi) the right to maintain, protect and prevent the misuse of the cultural knowledge associated with the claim area.

*Neowarra* - Neowarra v Western Australia [2004] FCA 1092 (27 August 2004)

*Schedule 4*

4. Subject to Order 9, the nature and extent of native title rights and interests in
relation to each part of the determination area referred to in Schedule 4 [being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded] are an entitlement against the whole world to possession, occupation, use and enjoyment of the land and waters of that part.

Schedule 5
(a) the right to engage in the following activities:

(i) having access to the determination area but so that Native Title Holders may seek sustenance in their accustomed manner only from:

(A) unenclosed and unimproved parts of land that is or has previously been the subject of a pastoral lease granted after 1934; or
(B) unenclosed or enclosed but otherwise unimproved parts of land that is or has previously been the subject of a pastoral lease granted before 1934;

(ii) camping;
(iii) hunting for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs from:

(a) unenclosed and unimproved parts of land that is or has previously been the subject of a pastoral lease granted after 1934; or
(b) unenclosed or enclosed but otherwise unimproved parts of land that is or has previously been the subject of a pastoral lease granted before 1934;

(iv) having access to painting sites in order to freshen or repaint images there;
(v) having the use of land adjacent to those painting sites for the purpose of engaging in the preceding activity;
(vi) gathering and fishing for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs from:

(a) unenclosed and unimproved parts of land that is or has previously been the subject of a pastoral lease granted after 1934; or
(b) unenclosed or enclosed but otherwise unimproved parts of land that is or has previously been the subject of a pastoral lease granted before 1934;

(vii) using traditional resources for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(viii) conducting and taking part in ceremonies;
(ix) visiting places of importance and protecting them from physical harm;
(x) manufacturing traditional items (such as spears and boomerangs) from resources of the land and waters for the purpose of satisfying personal, domestic or non-commercial communal needs.

(b) the right to pass on and inherit the native title rights in (a).

Schedule 6
(a) the right to engage in the following activities:
(i) having access to the determination area with liberty to seek sustenance therefrom in their accustomed manner;
(ii) camping;
(iii) hunting on the land for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(iv) having access to painting sites in order to freshen or repaint images there;
(v) having the use of land adjacent to those painting sites for the purpose of engaging in the preceding activity;
(vi) gathering and fishing on the land for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(vii) using traditional resources for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(viii) conducting and taking part in ceremonies;
(ix) visiting places of importance and protecting them from physical harm;
(x) manufacturing traditional items (such as spears and boomerangs) from resources of the land and waters for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs.

(b) the right to pass on and inherit the native title rights in (a).

Schedule 7

(a) the right to engage in the following activities:
(i) having access to the determination area;
(ii) camping;
(iii) having access to painting sites in order to freshen or repaint images there;
(iv) having the use of land adjacent to those painting sites for the purpose of engaging in the preceding activity;
(v) using traditional resources for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(vi) conducting and taking part in ceremonies;
(vii) visiting places of importance and protecting them from physical harm;
(viii) manufacturing traditional items (such as spears and boomerangs) from resources of the land and waters for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs; and

(b) the right to pass on and inherit the native title rights in (a);

Schedule 8

(a) the right to engage in the following activities:
(i) having access to the area;
(ii) moving freely through and within the area;
(iii) hunting for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(iv) gathering and fishing for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(v) using traditional resources of the area for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(vi) manufacturing traditional items from the resources of the area for the purpose of satisfying the Native Title Holders’ personal, domestic or non-commercial communal needs;
(vii) conducting and taking part in ceremonies within the area;

(b) the right to pass on and inherit the native title rights in (a).

**Ngarluma/Yindjibarndi - Daniel v Western Australia [2005] FCA 536 (2 May 2005)**

6. Subject to paragraphs 4 and 8 to 15 inclusive, the Ngarluma People have the following non-exclusive native title rights and interests in relation to the Ngarluma Native Title Area:

   (a) A right to access (including to enter, to travel over and remain);
   (b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
   (c) A right to camp and to build shelters (including boughsheds, mias and humpy), limited to the proximity of river courses within the Ngarluma Native Title Area, and to live temporarily thereon as part of camping or for the purpose of building a shelter;
   (d) A right to fish from the waters, limited to the coastal areas landward of the low water mark, and inland water courses;
   (e) A right to collect and forage for bush medicine;
   (f) A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, sea turtle, dugong, goanna, kangaroo, emu, bush turkey, echidna, porcupine, witchetty grub, swan), limited in the case of water fauna to coastal waters landward of the low water mark and inland water courses;
   (g) A right to forage for and take flora (including timber logs, branches, bark and leaves, gum, wax, Aboriginal tobacco, fruit, peas, pods, melons, bush cucumber, seeds, nuts, grasses, potatoes, wild onion and honey);
   (h) A right to take black, yellow, white and red ochre;
   (i) A right to take water for drinking and domestic use;
   (j) A right to cook on the land including light a fire for this purpose, limited to the proximity of river courses;

7. Subject to paragraphs 4 and 8 to 15 inclusive, the Yindjibarndi People have the following non-exclusive native title rights and interests in relation to the Yindjibarndi Native Title Area:

   (a) A right to access (including to enter, to travel over and remain);
(b) A right to engage in ritual and ceremony (including to carry out and participate in initiation practices);
(c) A right to camp and to build shelters (including boughsheds, mias and humpies), limited to the Millstream-Fortescue Area, and to live temporarily thereon as part of camping or for the purpose of building a shelter;
(d) A right to fish from the waters, limited to the Millstream-Fortescue Area;
(e) A right to collect and forage for bush medicine, limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River;
(f) A right to hunt and forage for and take fauna (including fish, shell fish, crab, oysters, goanna, kangaroo, emu, turkey, echidna, porcupine, witchetty grub and swan but not including dugong or sea turtle), limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River;
(g) A right to forage for and take flora (including timber logs, branches, bark and leaves, gum, wax, Aboriginal tobacco, fruit, peas, pods, melons, bush cucumber, seeds, nuts, grasses, potatoes, wild onion and honey), limited to the Millstream-Fortescue Area and the upper reaches of the Sherlock River;
(h) A right to take black, yellow, white and red ochre, limited to the Millstream-Fortescue Area;
(i) A right to take water for drinking and domestic use;
(j) A right to cook on the land including light a fire for this purpose, limited to the Millstream-Fortescue Area;
(k) A right to protect and care for sites and objects of significance in the Yindjibarndi Native Title Area (including a right to impart traditional knowledge concerning the area, while on the area, and otherwise, to succeeding generations and others so as to perpetuate the benefits of the area and warn against behaviour which may result in harm, but not including a right to control access or use of the land by others).

8. The non-exclusive native title rights and interests in relation to the ‘Inter-tidal Zone’ (defined in the First Schedule) do not include the rights in subparagraphs (b), (c), (e), (g), (h), (i), (j) or (k) of paragraph 6 above.

9. The non-exclusive native title rights and interests in relation to the ‘Offshore Islands’ (defined in the First Schedule) do not include any of the native title rights and interests in subparagraphs (a)–(j) of paragraph 6 above.

10. The non-exclusive native title rights and interests in relation to the ‘Cemetery Reserve Area’ (defined in the First Schedule) do not include:
(a) the right to engage in ritual and ceremony referred to in subparagraph (b) of paragraph 6 above, save to the extent it relates to ritual and ceremony for the dead; or
(b) any of the rights in subparagraphs (c), (d), (h), (j) and (k) of paragraph 6 above.

_Bardi/Jawi - Sampi v Western Australia [2005] FCA 777 (10 June 2005)_
Schedule 3

4. Subject to paragraphs 6 and 7 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 3 [being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded] is the right of possession and occupation of that part as against the whole world, including the following rights:
   (a) the right to live on the land;
   (b) the right to access, move about on and use the land and waters;
   (c) the right to hunt and gather on the land and waters;
   (d) the right to engage in spiritual and cultural activities on the land and waters;
   (e) the right to access, use and take any of the resources of the land and waters (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes;
   (f) the right to refuse, regulate and control the use and enjoyment by others of the land and its resources;
   (g) the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.

5. Subject to paragraphs 6 and 7, the nature and extent of the native title rights and interests held in relation to each part of the Determination Area referred to in Schedule 4 [being certain intertidal areas and adjacent and offshore reefs and islets together with the waters in their immediate vicinity] are:
   (a) the right to access, move about in and on and use and enjoy those areas;
   (b) the right to hunt and gather including for dugong and turtle;
   (c) the right to access, use and take any of the resources thereof (including water and ochre) for food, trapping fish, religious, spiritual, ceremonial and communal purposes.

Schedule 4

Provided that, in respect of areas within that defined in Schedule 4 which are seaward of the mean low water mark, the preceding native title rights and interests are limited to reefs and islets within that area when they are exposed or covered by not more than 2 metres of water.

6. The native title rights and interests are exercisable in accordance with and subject to the:
   (a) traditional laws and customs of the native title holders; and
   (b) laws of the State and the Commonwealth, including the common law.

7. Notwithstanding anything in this determination there are no exclusive native title rights or interests in:
   (a) waters which flow, whether permanently, intermittently or occasionally, within any river, creek, stream or brook;
   (b) any natural collection of water into, through, or out of which a river, creek, stream or brook flows; and
   (c) waters from and including an underground water source, including water that
percolates from the ground.

**Rubibi (No. 7) - Rubibi Community v Western Australia (No 7)(with Corrigendum dated 10 May 2006) [2006] FCA 459 (28 April 2006)**

Schedule 4

(a) except in relation to flowing and subterranean water - the right of possession and occupation as against the whole world; and
(b) the right to take flowing and subterranean water for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

Schedule 5

(a) the right to live on the land;
(b) the right to access, move about in and on and use the land and waters;
(c) the right to hunt and gather on the land and waters for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);
(d) the right to engage in spiritual and cultural activities on the land and waters;
(e) the right to access, use and take any of the resources of the land and waters (including ochre) for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes); and
(f) the right to care for and maintain and protect the land and waters, including places of spiritual or cultural significance.

Schedule 6

the right to access, move about in and on and use the land and waters;
(b) the right to hunt and gather in and on the land and waters, including for dugong and turtle for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);
(c) the right to access, use and take any of the resources of the land and waters (including the fresh water) for personal, domestic or non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes); and
(d) the right to maintain and protect the land and waters, including its places of spiritual significance.
Consent Determinations

*Spinifex People - Mark Anderson on behalf of the Spinifex People v State of Western Australia [2000] FCA 1717 (28 November 2000)*

(a) a right to possess, occupy, use and enjoy the land, including the right to live on the land;

(b) a right to make decisions about the use and enjoyment of the land;

(c) a right to hunt and gather (including ochre) and to take water, for the purposes of satisfying their personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;

(d) a right to maintain and protect sites of significance to the common law holders under their traditional laws and customs;

(e) a right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners.

These native title rights and interests confer possession, occupation, use and enjoyment of the land on the native title holders to the exclusion of all others.

3.2 Subject to paragraphs 4, 5, 6, and 7.2 the nature and extent of the native title rights and interests in the land and waters described in Part B of the Second Schedule are:

(a) a right to possess, occupy, use and enjoy the land, including the right to live on the land;

(b) a right to make decisions about the use and enjoyment of the land;

(c) a right to hunt and gather (including ochre) and to take water, for the purposes of satisfying their personal, domestic, social, cultural, religious, spiritual or non-commercial communal needs, including the observance of traditional laws and customs;

(d) a right to maintain and protect sites of significance to the common law holders under their traditional laws and customs;

(e) a right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners.

These native title rights and interests do not confer possession, occupation, use or enjoyment on the native title holders to the exclusion of all others.
Clarrie Smith (NWN) - Clarrie Smith v Western Australia (includes corrigenda dated 3 October 2000) & attachment [2000] FCA 1249 (29 August 2000)

(a) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the land;
(b) the right to hunt, fish and gather (including to gather ochre) for the purpose of satisfying their personal, domestic or non-commercial communal needs, including observing traditional laws and customs; and
(c) the right to have access to and camp on the balance of the determination area in order to:
   (i) exercise the rights set out in (b) above;
   (ii) travel through; and
   (iii) visit and care for places which are of cultural or spiritual importance.

Ngalpil (Tjurabalan) - Ngalpil v Western Australia [2001] FCA 1140 (20 August 2001)

(i) the nature and extent of the native title rights and interests held by the common law holders in relation to the Determination Area are the right to possess, occupy, use and enjoy the land and waters of the Determination Area to the exclusion of all others, including:
   (a) the right to live on the Determination Area;
   (b) the right to make decisions about the use and enjoyment of the Determination Area;
   (c) the right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual and communal needs;
   (d) the right to control access to, and activities conducted by others on, the land and waters of the Determination Area;
   (e) the right to maintain and protect sites which are of significance to the common law holders under their traditional laws and customs; and
   (f) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the Determination Area.
(ii) the native title rights and interests are exercisable in accordance with the traditional laws and customs of the common law holders.

Kiwirrkurra - Brown v Western Australia [2001] FCA 1462 (19
October 2001)

1) the nature and extent of the native title rights and interests held by the Kiwirrkurra people in relation to the Determination Area are the right to possess, occupy, use and enjoy the land and waters of the Determination Area to the exclusion of all others, including:

(a) the right to live on the Determination Area;

(b) the right to make decisions about the use and enjoyment of the land and waters of the Determination Area;

(c) the right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual and communal needs;

(d) the right to control access to, and activities conducted by others on, the land and waters of the Determination Area;

(e) the right to maintain and protect sites which are of significance to the Kiwirrkurra people under their traditional laws and customs; and

(f) the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the Determination Area.

(2) the native title rights and interests are exercisable in accordance with the traditional laws and customs of the Kiwirrkurra people.

Karajarri - Nangkiriny v Western Australia [2004] FCA 1156 (8 September 2004)

(1) the nature and extent of the native title rights and interests in Determination Area A held by the Karajarri people are:

(a) the right to possess, occupy, use and enjoy the land and waters to the exclusion of all others, including:

(i) the right to live on the land;

(ii) the right to make decisions about the use and enjoyment of the land and waters;

(iii) the right to hunt, gather and fish on the land and waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;

(iv) the right to take and use the waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;
(v) the right to maintain and protect important places and areas of significance to the Karajarri people under their traditional laws and customs on the land and waters; and

(vi) the right to control access to, and activities conducted by others on, the land and waters, including the right to give permission to others to enter and conduct activities on the land and waters on such conditions as the Karajarri people see fit; and

(b) the right to use and enjoy the flowing and subterranean waters, including:

(i) the right to hunt on and gather and fish from the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, cultural, religious, spiritual, ceremonial and communal needs; and

(ii) the right to take and use the flowing and subterranean waters and other resources accessed in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs.

(i) ochre;
(ii) soils;
(iii) rocks and stones; and
(iv) flora and fauna

for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs; and

(c) the right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.

_Ngaanyatjarra Lands - Stanley Mervyn, Adrian Young, and Livingston West and Ors, on behalf of the Peoples of the Ngaanyatjarra Lands v Western Australia and Ors [2005] FCA 831 (29 June 2005)_

G. The State has agreed with respect to the areas set out in Schedule 2 of the Minute of Consent Determination of Native Title that, but for the complete extinguishment of native title effected over those areas, the Applicants in WAD 6004 of 2004 would have held native title rights and interests conferring the right to possession, occupation, use and enjoyment of the land and waters to the exclusion of all others, save in respect of flowing and subterranean water….

3 Subject to paragraphs 5, 6 and 7, the nature and extent of the native title rights and interests held in relation to Reserve 24980 (Warburton Range Stock Route) [being an area where there has been partial extinguishment of native title] are:

(a) the right to enter and remain;
(b) the right to take fauna and flora;
(c) the right to take water for personal, domestic, or non-commercial communal purposes;
(d) the right to take other natural resources such as ochre, stones, soils, wood and resin; and
(e) the right to care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders.

4. Subject to paragraphs 5, 6 and 7, the nature and extent of the native title rights and interests in each other part of the Determination Area [being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded] are:
(a) except in relation to flowing and subterranean water - the right of possession, occupation, use and enjoyment to the exclusion of all others; and

(b) the right to take flowing and subterranean water for personal, domestic, or non-commercial communal purposes.

5. The native title rights and interests described in paragraphs 3 and 4(b) do not confer possession, occupation, use and enjoyment on the native title holders to the exclusion of all others.

6. The native title rights and interests are:

(a) exercisable in accordance with the traditional laws and customs of the native title holders; and

(b) subject to the laws of the State and the Commonwealth including the common law.

Ward - Ward v Western Australia [2006] FCA 1848 (24 November 2006)

Schedule 2

8 Subject to paragraphs 10, 12 and 13, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 2 are an entitlement against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others.

Schedule 3

9 Subject to paragraphs 10, 11, 12 and 13, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 3 are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:

(a) the right to access and move about the land;
(b) the right to hunt and fish, to gather and use the resources of the land and waters such as food and medicinal plants and trees, timber, charcoal, ochre, stone and wax, and to have access to and use of water on or in the land and waters;
(c) the right to live, being to enter and remain on the land, to camp and erect temporary shelters and other structures for that purpose, and to travel over and visit any part of the land and waters;
(d) the right to light camp fires;
(e) the right to do the following activities:
   (i) engage in cultural activities on the land;
   (ii) conduct ceremonies;
   (iii) hold meetings;
(iv) teach the physical and spiritual attributes of places and areas of importance on or in the land and waters;
(v) participate in cultural practices relating to birth and death, including burial rights; and
(vi) record, conserve, maintain and curate sites and activities arising in subparagraphs (i) to (v) above;

(f) the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;

(g) the right to make decisions about the use and enjoyment of the land and waters by the Native Title Holders; and

(h) the right to share or exchange subsistence and other traditional resources obtained on or from the land and waters.

Eastern Guruma Hughes (on behalf of the Eastern Guruma People) v State of Western Australia [2007] FCA 365 (1 March 2007)

(1) the nature and extent of the native title rights and interests held by the native title holders are non-exclusive rights to:

(a) enter and remain on the land, camp, erect temporary shelters, and travel over and visit any part of the land and waters;

(b) hunt, fish, gather or take and to use, share and exchange the resources of the land and waters such as food, water and medicinal plants and trees, timber, charcoal, ochre, stone and other traditional resources (excluding minerals);

(c) engage in ritual and ceremony on and in relation to the land and waters; and

(d) care for, maintain and protect from physical harm, particular objects, sites and areas of significance to the native title holders.

(2) The native title rights and interests set out in sub-paragraph (1) are exercisable in accordance with the traditional laws and customs of the native title holders for personal, domestic and non-commercial communal purposes (including social, medicinal, cultural, religious, spiritual and ceremonial purposes).

(3) The native title rights and interests set out in sub-paragraph (1) do not confer:

(a) possession, occupation, use and enjoyment on the native title holders to the exclusion of all others; nor

(b) a right to control the access of others to the land and waters of Determination Area A.

Nookanbah - Cox on behalf of the Yungngora People v State of Western Australia [2007] FCA 588 (27 April 2007)
(i) the communal right to possess, occupy, use and enjoy the land and waters to the exclusion of all others; and

(ii) the communal right to take, use and enjoy the flowing and subterranean waters for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

(b) With respect to the area covered by Reserve 23226 and Reserve 26355, non-exclusive communal rights to use and enjoy the land and waters as follows:

(i) the right to enter and remain on the land and waters;

(ii) the right to camp and erect shelters and other structures and to travel over and visit any part of the land and waters;

(iii) the right to take fauna and flora from the land and waters for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);

(iv) the right to take other natural resources of the land such as ochre, stones, soils, wood and resin for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);

(v) the right to take, use and enjoy the waters and flowing and subterranean waters for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes);

(vi) the right to engage in ritual and ceremony; and

(vii) the right to have access to, care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders.

(c) The native title rights and interests set out in sub-paragraphs (1)(a) and (b) are exercisable in accordance with the traditional laws and customs of the common law holders.

(d) The native title rights and interests set out in sub-paragraph (1)(a)(ii) do not confer the right of use and enjoyment on the common law holders to the exclusion of all others.

(e) The native title rights and interests set out in sub-paragraph (1)(a)(i) confer possession, occupation, use and enjoyment on the common law holders to the exclusion of all others.

**Ngarla - Brown (on behalf of the Ngarla People) v State of Western Australia [2007] FCA 1025 (30 May 2007)**

(1) the nature and extent of the native title rights and interests held by the common law holders are non-exclusive rights to:

(a) access, and to camp on, the land and waters;
(b) take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters;
(c) engage in ritual and ceremony; and
(d) care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders.

(2) The native title rights and interests set out in sub-paragraph (1) are exercisable in accordance with the traditional laws and customs of the common law holders for personal, domestic and non-commercial communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

(3) The native title rights and interests set out in sub-paragraph (1) do not confer:

(a) possession, occupation, use and enjoyment on the common law holders to the exclusion of all others; nor
(b) a right to control the access of others to the land and waters of Determination Area A.

Ngururrpa - Payi Payi on behalf of the Ngururrpa People v the State of Western Australia [2007] FCA 2113 (18 October 2007)

3. Subject to paragraphs 4, 5, 6 and 7, the nature and extent of the native title rights and interests in the Determination Area [being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded] are:

(a) except in relation to flowing and subterranean water - the right of possession, occupation, use and enjoyment to the exclusion of all others; and
(b) the non-exclusive right to take flowing and subterranean water for personal, domestic, or non-commercial communal purposes.

4. The native title rights and interests described in paragraph 3(a) confer possession, occupation, use and enjoyment on the native title holders to the exclusion of all others.

5. The native title rights and interests described in paragraph 3(b) do not confer possession, occupation, use and enjoyment on the native title holders to the exclusion of all others.

6. The native title rights and interests are:

(a) exercisable in accordance with the traditional laws and customs of the native title holders; and
(b) subject to the laws of the State and the Commonwealth including the common law.
Subject to paragraphs 5, 6 and 7 the nature and extent of the native title rights and interests in relation to Determination Area "A" are:

(b) in relation to flowing and subterranean waters, the right to use and enjoy the flowing and subterranean waters, including:

(ii) the right to take and use the flowing and subterranean waters for personal, domestic or non-commercial communal needs.

For the avoidance of doubt, the native title rights referred to in paragraph 4 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land and waters (and activities pursuant to them) by the Native Title Holders.

The native title rights and interests referred to in paragraph 4(b) do not confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others.

Notwithstanding anything in this Determination the native title rights and interests include the right to take and use ochre to the extent that ochre is not a mineral pursuant to the Mining Act 1904 (WA), but do not include other minerals and petroleum as defined in the Mining Act 1904 (WA), the Mining Act 1978 (WA) as in force at the date of this determination, the Petroleum Act 1936 (WA) and the Petroleum Act 1967 (WA) as in force at the date of this determination.

The native title rights and interests are subject to and exercisable in accordance with:

(b) the traditional laws and customs of the Native Title Holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.

Subject to paragraphs 4, 5, 6 and 7 the nature and extent of the native title rights and interests is:

(a) except in relation to flowing and subterranean water – the right of possession, occupation, use and enjoyment to the exclusion of all others; and
(b) the right to take flowing and subterranean water for personal, domestic, or non-commercial communal purposes.

4. The native title rights and interests described in subparagraph 3(a) confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others.

5. The native title rights and interests in subparagraph 3(b) do not confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others.

6. The native title rights and interests are:

(a) exercisable in accordance with the traditional laws and customs of the Native Title Holders; and

(b) subject to the laws of the State and the Commonwealth including the common law.

**Thalanyji - Hayes on behalf of the Thalanyji People v State of Western Australia [2008] FCA 1487 (18 September 2008)**

Subject to paragraphs 6, 7 and 8 the nature and extent of the native title rights and interests in relation to the Determination Area are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:

(a) enter and remain on the land, camp, erect temporary shelters, and travel over and visit any part of the land and waters of the Determination Area;

(b) hunt, fish, gather and use the traditional resources of the land and waters of the Determination Area;

(c) take and use water, and for the sake of clarity and the avoidance of doubt this right does not include the right to take or use water captured by the holders of the Pastoral Leases;

(d) engage in ritual and ceremony on, and in relation to, the land and waters of the Determination Area; and

care for, maintain and protect from physical harm, particular sites, areas and ceremonial or other sacred objects connected with the land and waters of the Determination Area, which are of significance to the Native Title Holders.

**Thudgari - Thudgari People v State of Western Australia (includes corrigendum dated 23 November) [2009] FCA 1334 (18 November 2009)**

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Subject to paragraphs 5, 6 and 7, the nature and extent of the native title rights and interests in relation to the Determination Area are that they confer the following non-exclusive rights on the Native Title Holders:

(A) Access the land and waters;
(B) Enter and remain on the land, camp, erect shelters and light fires for cooking, heating and lighting purposes;
(C) Take flora, fauna, fish and other traditional resources (excluding mineral) from the land and waters;
(D) Take and use water, and for the sake of clarity and the avoidance of doubt this rights does not include the right to take or use water captured or controlled by the holders of the pastoral leases pursuant to those leases or other valid permit or authority;
(E) Engage in ritual and ceremony;
(F) Care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders; and
(G) Be accompanied on to the determination by those people who, though not native title holders, are spouses, parents or descendants of native title holders.

Nyangumarta - Hunter v State of Western Australia [2009] FCA 654
(11 June 2009)

Schedule 3

Subject to paragraphs 9, 10 and 11, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 3 (being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded) are:

(b) in relation to flowing and underground waters, the right to use and enjoy the flowing and underground waters, including:

(ii) the right to take and use the flowing and underground waters for personal, domestic or non-commercial communal needs.

Schedule 4

Subject to paragraphs 9, 10 and 11, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule 4 (being areas where there has been a partial extinguishment of native title, where any extinguishment is not required to be disregarded and that are not inter-tidal or sea areas) are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:
(a) the right to access and move freely through and within each part of the Determination Area referred to in Schedule 4;

(b) the right to live, being to enter and remain on the land, to camp and erect shelters and other structures for that purpose;

(c) the right to do the following activities:

(i) hunt and fish for personal, domestic and non-commercial communal needs;

(ii) take flora and fauna;

(iii) take other natural resources of each part of the Determination Area referred to in Schedule 4 including soil, sand, clay, gravel, ochre, timber and stone for personal, domestic and non-commercial communal needs;

(iv) share and exchange natural resources of each part of the Determination Area referred to in Schedule 4 including soil, sand, clay, gravel, ochre, timber and stone for personal, domestic and non-commercial communal needs;

(v) engage in cultural activities in the area, including the transmission of cultural heritage knowledge;

(vi) conduct ceremonies;

(vii) conduct burials and burial rites;

(viii) hold meetings;

(ix) visit, maintain and protect from physical harm, places and sites of importance in each part of the Determination Area referred to in Schedule 4; and

(x) access and take water for personal, domestic or non-commercial communal purposes, and for the sake of clarity and the avoidance of doubt, this right does not include the right to take or use water lawfully captured or controlled by the holders of pastoral leases numbered 3114/485 (Mandora), 3114/1079 (Wallal Downs) and 3114/1154 (Anna Plains).

(d) the right to be accompanied onto each part of the Determination Area referred to in Schedule 4 by those people who, though not native title holders and who (for the avoidance of doubt) cannot themselves exercise any native title right set out in this determination, are:

(i) spouses, parents, children of native title holders, or

(ii) people required by traditional law and customs for the performance of ceremonies or cultural activities on any part of the Determination Area referred to in Schedule 4; or

(iii) people who have rights in relation to any part of the Determination Area referred to in Schedule 4 according to the traditional laws and customs acknowledged by the native title holders.
Exclusive rights in relation to certain land

Subject to paragraph 11, the Native Title Holders have the rights to possession, occupation, use and enjoyment of land within the Determination Area which:

(a) has not been the subject of prior extinguishment of native title (as described in Schedule Two and Schedule Three); and

(b) has been the subject of prior extinguishment of native title but which extinguishment must be disregarded by operation of sections 47A or 47B of the Native Title Act (as described in Schedule Four),

to the exclusion of all others (and which land is hown as shaded orange on the maps at Attachment One to Schedule One).

For the avoidance of doubt, the native title rights referred to in paragraph 5 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land (and activities pursuant to them) by the Native Title Holders.

Non-exclusive rights in relation to other land

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to land within the Determination Area which has been the subject of partial extinguishment of native title (as described in Schedule Two and which land is shown as shaded purple on the maps at Attachment One to Schedule One):

(a) the right to enter, travel over and remain on the land;

(b) the right to live and camp on the land (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the land including:

(i) sharing and exchanging those resources; and

(ii) manufacturing traditional items from those resources

for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii));

(d) the right to light fires for domestic purposes but not for the clearance of vegetation;

(e) the right to take and use water from the land; and
(f) the right to engage in cultural activities on the land including:

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(ii) conducting ceremony and ritual;

(iii) holding meetings;

(iv) participating in cultural practices relating to birth and death, including burial rights;

(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and

(vi) maintaining, and protecting from physical harm, places and areas of importance including, for the avoidance of doubt, freshening or repainting images at painting sites.

Non-exclusive rights in relation to Intertidal Areas

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to Intertidal Areas within the Determination Area:

(a) the right to enter, travel over and remain on the Intertidal Area;

(b) the right to live and camp on the Intertidal Area (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the Intertidal Area including:

(i) sharing and exchanging those resources; and

(ii) manufacturing traditional items from those resources,

for personal, domestic and communal needs (including, but not limited to cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii));

(d) the right to light fires for domestic purposes;

(e) the right to take and use water from the Intertidal Area; and

(f) the right to engage in cultural activities on the Intertidal Area including:

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(ii) conducting ceremony and ritual;

(iii) holding meetings;

(iv) participating in cultural practices relating to birth and death, including burial rights;
(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and

(vi) maintaining, and protecting from physical harm, places and areas of importance including, for the avoidance of doubt, freshening or repainting images at painting sites.

Non-exclusive rights in relation to waters

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to waters within the Determination Area (which waters are shown as dotted light blue on the maps at Attachment One to Schedule One):

(a) the right to enter, travel over and remain on the waters;

(b) the right to hunt, fish, gather and use the resources of the waters for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii)); and

(c) the right to take and use water.

Dambimangari - Barunga v State of Western Australia [2011] FCA 518 (26 May 2011)

Exclusive rights in relation to certain land

Subject to paragraph 11, the Native Title Holders have the rights to possession, occupation, use and enjoyment of land within the Determination Area which:

(a) has not been the subject of prior extinguishment of native title (as described in Schedule Two and Schedule Three); and

(b) has been the subject of prior extinguishment of native title but which extinguishment must be disregarded by operation of sections 47A or 47B of the Native Title Act (as described in Schedule Four), to the exclusion of all others (and which land is shown as shaded orange on the maps at Attachment One to Schedule One).

For the avoidance of doubt, the native title rights referred to in paragraph 5 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land (and activities pursuant to them) by the Native Title Holders.

Non-exclusive rights in relation to other land

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to land within the Determination Area which has been the subject of partial extinguishment of native title (as described in Schedule Two and
which land is shown as shaded purple on the maps at Attachment One to Schedule One):

(a) the right to enter, travel over and remain on the land;

(b) the right to live and camp on the land (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the land including:

(i) sharing and exchanging those resources; and

(ii) manufacturing traditional items from those resources

for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii));

(d) the right to light fires for domestic purposes but not for the clearance of vegetation;

(e) the right to take and use water from the land;

(f) the right to engage in cultural activities on the land including:

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(ii) conducting ceremony and ritual;

(iii) holding meetings;

(iv) participating in cultural practices relating to birth and death, including burial rights;

(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and

(vi) maintaining, and protecting from physical harm, places and areas of importance including, for the avoidance of doubt, freshening or repainting images at painting sites.

Non-exclusive rights in relation to Intertidal Areas

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to Intertidal Areas within the Determination Area:

(a) the right to enter, travel over and remain on the Intertidal Area;

(b) the right to live and camp on the Intertidal Area (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the Intertidal Area including:

(i) sharing and exchanging those resources; and
(ii) manufacturing traditional items from those resources for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii));

(d) the right to light fires for domestic purposes;

(e) the right to take and use water from the Intertidal Area;

(f) the right to engage in cultural activities on the Intertidal Area including:

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(ii) conducting ceremony and ritual;

(iii) holding meetings;

(iv) participating in cultural practices relating to birth and death, including burial rights;

(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and

(vi) maintaining, and protecting from physical harm, places and areas of importance including, for the avoidance of doubt, freshening or repainting images at painting sites.

Non-exclusive rights in relation to waters

Subject to paragraphs 11 and 12, the Native Title Holders have the following rights in relation to waters within the Determination Area (which waters are generally shown as dotted light blue on the maps at Attachment One to Schedule One):

(a) the right to enter, travel over and remain on the waters;

(b) the right to hunt, fish, gather and use the resources of the waters for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with paragraph 11(a)(ii)); and

(c) the right to take and use water.

Unngu - Area B - Puenmora v State of Western Australia [2012] FCA 1334 (27 November 2012)

Exclusive rights in relation to certain land

Subject to para 10, the Native Title Holders have the rights to possession,
occupation, use and enjoyment of land within the Determination Area which:

(a) has not been the subject of prior extinguishment of native title (as described in Sch Two); and

(b) has been the subject of prior extinguishment of native title but which extinguishment must be disregarded by operation of s 47B of the Native Title Act (as described in Sch Three),

to the exclusion of all others (and which land is shown as shaded orange on the map at Attachment One to Sch One).

For the avoidance of doubt, the native title rights referred to in para 5 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land (and activities pursuant to them) by the Native Title Holders.

Non-exclusive rights in relation to Intertidal Areas

Subject to paras 10 and 11, the Native Title Holders have the following rights in relation to Intertidal Areas within the Determination Area:

(a) the right to enter, travel over and remain on the Intertidal Area;

(b) the right to live and camp on the Intertidal Area (including erecting shelters and other structures for those purposes);

(c) the right to hunt, fish, gather and use the resources of the Intertidal Area including:

(i) sharing and exchanging those resources; and

(ii) manufacturing traditional items from those resources for personal, domestic and communal needs (including, but not limited to cultural or spiritual needs) but not for commercial purposes (as in accordance with para (ii));

(d) the right to light fires for domestic purposes;

(e) the right to take and use water from the Intertidal Area; and

(f) the right to engage in cultural activities on the Intertidal Area including:

(i) visiting places of cultural or spiritual importance and protecting those places by carrying out lawful activities to preserve their physical or spiritual integrity;

(ii) conducting ceremony and ritual;

(iii) holding meetings;

(iv) participating in cultural practices relating to birth and death, including burial rights;

(v) passing on knowledge about the physical and spiritual attributes of the Determination Area and areas of importance on or in the Determination Area; and
(vi) maintaining, and protecting from physical harm, places and areas of importance including, for the avoidance of doubt, freshening or repainting images at painting sites.

Non-exclusive rights in relation to waters

Subject to paras 10 and 11, the Native Title Holders have the following rights in relation to waters within the Determination Area:

(a) the right to enter, travel over and remain on the waters;

(b) the right to hunt, fish, gather and use the resources of the waters for personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes (as in accordance with para (ii)); and

(c) the right to take and use water.

Other

For the avoidance of doubt, and subject to paras 10 and 14, in exercising the native title rights and interests referred to in para 7 any question of:

(a) whether a place or area in the Determination Area is a place or area of cultural or spiritual importance to the Native Title Holders;

(b) whether an activity or practice is a cultural activity or practice of the Native Title Holders;

(c) the location, timing and content of any cultural activity, practice, ceremony or ritual of the Native Title Holders; and

(d) the use, exchange, sharing, or manufacture of traditional items by the Native Title Holders

is to be determined in accordance with the Native Title Holders' traditional laws and customs.

Qualifications on native title rights and interests

The native title rights and interests described in paras 5, 7 and 8:

(a) are exercisable in accordance with:

(i) the laws of the State and the Commonwealth, including the common law; and

(ii) the traditional laws and customs of the Native Title Holders for their personal, domestic and communal needs (including, but not limited to, cultural or spiritual needs) but not for commercial purposes; and

(b) do not confer any rights in relation to:

(i) minerals as defined in the Mining Act 1904 (WA) (repealed) and the Mining Act 1978 (WA);

(ii) petroleum as defined in the Petroleum Act 1936 (WA) (repealed) and in the Petroleum Act and Geothermal Energy Resources 1967 (WA);
(iii) geothermal energy resources and geothermal energy as defined in the Petroleum and Geothermal Energy Resources Act 1967 (WA); or

(iv) water captured by the holders of the Other Interests pursuant to those Other Interests.

The native title rights and interests described in paras 7 and 8 do not confer:

(a) possession, occupation, use and enjoyment of the land or waters of the Determination Area on the Native Title Holders to the exclusion of all others; nor

(b) a right to control the access to, or use of, the land and waters of the Determination Area or their resources.

_Bunaba - Wurrunmurra v State of Western Australia [2012] FCA 1399 (12 December 2012)_

Exclusive native title rights and interests

Subject to paras 7, 8 and 9 the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Three, being areas where there has been no extinguishment of native title or areas where any extinguishment must be disregarded, are:

(a) except in relation to flowing and underground waters, the right to possession, occupation, use and enjoyment of that part of the Determination Area to the exclusion of all others; and

(b) in relation to flowing and underground waters, the right to use and enjoy the flowing and underground waters, including:

(i) the right to hunt on, fish from, take, use, share and exchange the natural resources of the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes;

(ii) the right to take, use, share and exchange the flowing and underground waters for personal, domestic, cultural or non-commercial communal purposes.

Non-exclusive rights and interests

Subject to paras 7, 8 and 9, the nature and extent of the native title rights and interests in relation to each part of the Determination Area referred to in Schedule Four, being areas where there has been a partial extinguishment of native title and where any extinguishment is not required to be disregarded, are that they confer the following non-exclusive rights on the Native Title Holders, including the right to conduct activities necessary to give effect to them:

(a) the right to access and move freely through and within each part of the Determination Area referred to in Schedule Four;
(b) the right to live, being to enter and remain on, camp and erect shelters and other structures for those purposes on the Determination Area referred to in Schedule Four;

(c) the right to:

(i) hunt, gather and fish for personal, domestic, cultural and non-commercial communal purposes;

(ii) take and use flora and fauna for personal, domestic, cultural and non-commercial communal purposes;

(iii) take, use, share and exchange the natural resources of each part of the Determination Area referred to in Schedule Four including soil, sand, clay, gravel, ochre, timber, charcoal, resin and stone for personal, domestic, cultural and non-commercial communal purposes;

(iv) light fires for domestic purposes but not for the clearance of vegetation;

(v) engage in cultural activities in the area, including the transmission of cultural heritage knowledge;

(vi) conduct and participate in ceremonies;

(vii) conduct burials and burial rites and other ceremonies in relation to death;

(viii) hold meetings;

(ix) visit, maintain and protect from physical harm, areas, places and sites of importance in each part of the Determination Area referred to in Schedule Four; and

(x) access, take, use, share and exchange water for personal, domestic, cultural or non-commercial communal purposes.

The native title rights and interests referred to in paras 5(b) and 6 do not confer:

(a) possession, occupation, use and enjoyment of those parts of the Determination Area to the exclusion of all others, nor

(b) a right to control the access of others to the land or waters of those parts of the Determination Area.

Ngurrara 2 – Area B – Kogolo v State of Western Australia (No 3) [2012] FCA 1332 (27 November 2012)

Subject to paras [5], [6] and [7] the nature and extent of the native title rights and interests in relation to Determination Area "B" are:

(a) except in relation to flowing and subterranean waters, an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and
waters of that part to the exclusion of all others; and

(b) in relation to flowing and subterranean waters, the right to use and enjoy the flowing and subterranean waters, including:

(i) the right to hunt on and gather and fish from the flowing and subterranean waters for personal, domestic or non-commercial communal needs; and

(ii) the right to take and use the flowing and subterranean waters for personal, domestic or non-commercial communal needs.

For the avoidance of doubt, the native title rights referred to in para 4 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land and waters (and activities pursuant to them) by the Native Title Holders.

The native title rights and interests referred to in para 4(b) do not confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others.

Notwithstanding anything in this Determination the native title rights and interests include the right to take and use ochre to the extent that ochre is not a mineral pursuant to the Mining Act 1904(WA), but do not include other minerals, petroleum and geothermal energy resources as defined in the Mining Act 1904 (WA), the Mining Act 1978 (WA) as in force at the date of this determination, the Petroleum Act 1936 (WA) and the Petroleum and Geothermal Energy Resources Act 1967 (WA) as in force at the date of this determination.

The native title rights and interests are subject to and exercisable in accordance with:

(a) the laws of the State and the Commonwealth, including the common law; and

(b) the traditional laws and customs of the Native Title Holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.

Ngurrara – Area C - May v State of Western Australia [2012] FCA 1333 (27 November 2012)

Exclusive native title rights and interests

Subject to paras 5, 6 and 7 the nature and extent of the native title rights and interests in relation to the Determination Area are:

(a) except in relation to flowing and subterranean waters, an entitlement as against the whole world to possession, occupation, use and enjoyment of the land and waters of that part to the exclusion of all others; and

(b) in relation to flowing and subterranean waters, the right to use and enjoy the flowing and subterranean waters, including:
(i) the right to hunt on and gather and fish from the flowing and subterranean waters for personal, domestic or non-commercial communal needs; and

(ii) the right to take and use the flowing and subterranean waters for personal, domestic or non-commercial communal needs.

For the avoidance of doubt, the native title rights referred to in para 4 include the right to make decisions about the manner of exercise of those rights and interests in relation to the land and waters (and activities pursuant to them) by the Native Title Holders.

The native title rights and interests referred to in para 4(b) do not confer possession, occupation, use and enjoyment on the Native Title Holders to the exclusion of all others.

Notwithstanding anything in this Determination the native title rights and interests include the right to take and use ochre to the extent that ochre is not a mineral pursuant to the Mining Act 1904 (WA), but do not include other minerals, petroleum and geothermal energy resources as defined in the Mining Act 1904 (WA), the Mining Act 1978 (WA) as in force at the date of this determination, the Petroleum Act 1936 (WA) and the Petroleum and Geothermal Energy Resources Act 1967 (WA) as in force at the date of this determination.

The native title rights and interests are subject to and exercisable in accordance with:

(a) the laws of the State and the Commonwealth, including the common law; and

(b) the traditional laws and customs of the Native Title Holders for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes) but not for commercial purposes.