Australian
Environment
Review

# Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People

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## Introduction

The recent decision of the Full Federal Court in *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People*[1] (*Fortescue Metals*) provides some highly instructive judicial statements on the strength of native title rights and interests more broadly, and on the approach required to recognise their existence.

This case adds to the recent trend towards a maturing of the recognition of native title rights by the Australian courts — in decisions such as *Akiba*,[2] *Karpany*[3] and *Brown*[4] — which should create renewed optimism for Australia's Indigenous people that native title may finally deliver on the hope promised by the High Court's pronouncements in *Mabo v Queensland [No 2] (Mabo)*.[5]

## Why does it matter to you

- *Fortescue Metals* case is one of the more emphatic Australian judicial clarifications of the *nature and content* of native title rights and interests, the correct approach to recognising them, and the right of Indigenous people to assert and enforce them, since the High Court's decision in *Mabo*. The traditional law concept of "spiritual necessity" was upheld as constituting exclusive possession. It was also acknowledged that the intermingling of the spiritual with the physical, with people and with land is the very foundation of traditional Aboriginal law and custom.
- The reasoning in this case has the potential to support a quantum leap or step change in the way native title rights or interests are identified, defined and legally recognised in Australia. In the author's view, it represents an invitation by the courts to native title claimants and lawyers to become bolder and more aspirational in asking the courts to recognise native title in a manner aligned with Indigenous world views, ontologies and epistemologies.
- The decision may also remind and encourage native title holders to seek a reconsideration of their previously determined rights and interests where there are new events that cause the determination to be incorrect or itis otherwise in the interests of justice.

## Background

The case concerns a determination of native title recognised in favour of the Yindjibarndi people, for the reasons set out in the judgments in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia*[6] and *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia (No 2)*.[7]

At first instance, the primary judge identified the two main issues as:

(i) Have the Yindjibarndi proved that they are entitled to a native title right to control access (or exclude others), equivalent to a right of exclusive possession, over so much of the claimed area in which no extinguishing, or partially extinguishing, act has occurred (the exclusive possession issue)?

(ii) If yes to issue 1, are the Yindjibarndi precluded from obtaining a determination of native title that they have a right of such exclusive possession because of the 2005 and 2007 determinations that they had only a right of non-exclusive possession over a different part of the claimed area (the abuse of process issue)?

The primary judge answered the first question in the affirmative, and the second question in the negative, and accordingly held that, in relation to the area of land defined as the "Exclusive Area", the "native title rights and interests confer the right to possession, occupation, use and enjoyment of that area to the exclusion of all others".[8] The determined native title rights and interests were not exclusive in relation to any water in any watercourse, wetland or underground water source, nor minerals etc, nor water captured by the holders of other interests.

The appellant, Fortescue Metals Group Ltd (FMG), appealed against that part of the original determination which conferred on the Yindjibarndi an exclusive right to possession, occupation, use and enjoyment of the Exclusive Area. Four grounds were argued in the appeal.

The Full Federal Court (Jagot, Robertson, Griffiths, Mortimer and White JJ) dismissed the appeal by FMG against the native title determination, with the plurality

unanimously holding in favour of the respondent, Warrie, on all four grounds. The decisions to reject Ground 1 were based on varying reasons, while the rejections of Grounds 2, 3 and 4 were based on agreed reasons.

## Analysis

As summarised above, the *Fortescue Metals* case involved two main issues on appeal: a highly technical, procedural issue, namely whether the native title determination involved an "abuse of process" and a fundamental, substantive issue that goes to the heart of native title rights and interests, namely the question of "exclusive possession".

In terms of the four grounds of appeal, Ground 1 was the abuse of process issue, while Grounds 2 and 3 were the exclusive possession issue. Ground 4 was whether "occupation by way of spiritual connection" met s 47B(1)(c) of the Native Title Act 1993 (Cth) (NTA), however this ground will not be discussed further in this case note. The key specific matters considered and the findings on which are outlined below.

### *Abuse of process (Ground 1)*

The procedural issue for determination was whether bringing the proceedings was an abuse of process (*res judicata* or subject to issue estoppel) by Warrie because there was a potential inconsistency between one or more existing determinations of native title in relation to different parts of the Yindjibarndi lands, namely the findings and determinations in *Daniel v Western Australia*[9] (*Daniel*) and on appeal *Moses v Western Australia*[10] (*Moses*). It was argued that the primary judge erred in recognising exclusive native title rights and interests over the area comprising the Exclusive Area, as it was inconsistent with the determinations in *Daniel* and *Moses* which applied in respect of a different part of Yindjibarndi country. The *Daniel* and *Moses* determinations had earlier recognised there were only non-exclusive native title rights and interests over that other part of Yindjibarndi country. The plurality examined and teased out this issue in extensive detail, before unanimously rejecting FMG's arguments on Ground 1, albeit for varying reasons as explained below.

#### Conduct constituting the abuse

Jagot and Mortimer JJ were prompt to admonish FMG for framing the abuse of process argument on the basis that the abuse of process arose from the inconsistency of judgments (or more specifically, the inconsistency of determinations of native title). Their Honours noted that the primary judge's exercise of judicial power in making a determination consistent with s 225 of the NTA should not be identified as "an abuse of the processes of [the] Court".[11] Rather, their Honours said that such an abuse of process must be located in the conduct of a party in relying on a cause of action or during a proceeding. It is "that conduct, and not an exercise of judicial power, [which] might be identified as abusing the Court's processes."[12]

According to their Honours, the impugned conduct should have been the filing of the claim in July 2003 by the traditional owners for a determination recognising native title of an exclusive nature over parts of the claimed areas, or the continuation of a claim of that nature after *Moses* was determined in June 2007. This meant that the issues of bringing the administration of justice into disrepute and unjustifiable oppression were to be assessed through that prism, and the chronology of events since July 2003 or June 2007.[13]

Jagot and Mortimer JJ found that neither of the two touchstones of abuse of process identified by the High Court in *Tomlinson*[14] were made out, namely that the claim:

(a) would be unjustifiably oppressive to a party; or
(b) would bring the administration of justice into disrepute.[15]

Their Honours further opined that to "fix" a group of Indigenous people making a claim over land and waters with a factual finding made a decade earlier in respect of different land and waters, without allowing them the usual ability to have their claimed rights and interests determined by the judiciary on the evidence and their own merits, might be something that would bring the administration of justice into disrepute.[16]

#### Recognition of native title rights

The court emphasised that a determination of native title consistent with s 225 of the NTA is declaratory of what the court found. Any native title rights and interests that exist are rights and interests that the fact-finding processes of the court cause to be recognised. The NTA "recognises and protects" native title and native title cannot be extinguished contrary to the NTA.[17] A determination of native title has the purpose of identifying rights and interests of all parties that exist in lands and waters in the determination area. It is a declaration regarding rights and obligations arising from operation of law upon past events.

Jagot and Mortimer JJ stated that the primary judge's reasoning about the nature of a native title determination being a *recognition* of the content of a set of existing rights, over a specific area of land and waters, was critical to their conclusion that there was no abuse of process in claiming exclusive possession.[18] This was because:

- what needs to be protected, in terms of sites, will be specific to that land and waters;

- how traditional law and custom operates to give rise to rights and interests was likely to vary because there were different lands and waters in question; and
- who speaks for particular areas under traditional law would be specific to the land and waters involved.

As such, in their Honours' view it followed that the law to be observed on that land and waters might manifest itself differently in terms of what can be or should be done, where and when. Therefore, the actual nature and content of the rights which might arise under traditional law and custom could be different.[19]

Accordingly, FMG could not succeed in its argument that the earlier findings in the *Daniel* and *Moses* determinations were conclusive and binding on the court in the current proceedings.

## Process involves asserting and vindicating native title rights

Jagot and Mortimer JJ noted[20] that the primary judge identified the Preamble to the NTA as an important part of the statutory context, particularly when read with the terms of ss 13(1)(b), (4), (5) and 86(1) of the NTA.[21] In this light, their Honours upheld the primary judge's finding that "the Yindjibarndi were not engaged in an abuse of process in seeking to vindicate their right to control access"[22], which right was found to exist. The Yindjibarndi were therefore "entitled to rely on their unextinguished native title right to control access despite its potential inconsistency with Nicholson J's finding in *Daniel* [2003] FCA 666 a [292]"[23] and the *Moses* determination in 2007. This was so particularly since any inconsistency could "be cured by the new proceeding under s 13(1)(b) in respect of the earlier findings and the 2007 determination."[24]

White J pointed out that the intention in the Preamble includes the rectification of "the consequences of past injustices"[25] and that Aboriginal peoples and Torres Strait Islanders "receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture fully entitle them to aspire".[26]

Furthermore, it was held that there was no abuse of process involved in the way the earlier findings were treated as relevant to the present proceedings. To the contrary, s 86 did not prevent, but rather permitted, the Yindjibarndi people to rely on portions of the earlier transcript in 2007 to seek a contrary finding on the issue of exclusive rights to the present claimed area.[27]

Robertson and Griffiths JJ considered that the critical point in concluding that there was no abuse of process was that, consistently with earlier High Court authorities:

> *Griffiths* and *Banjima* clarified the law by identifying the correct focus in determining whether native title rights or interests involve exclusive possession. The 2005 and 2007 determinations were made in a different era, by reference to different evidence and without a proper appreciation of that correct focus.[28]

The correct focus to be adopted is discussed further below in the context of the "exclusive possession" issue.

## Indefinite nature of native title determinations

The court supported the primary judge's view that an order making a determination of native title "has an indefinite character which distinguishes it from a declaration of legal right as ordinarily understood",[29] citing *Ward* per Gleeson CJ, Gaudron, Gummow and Hayne JJ.[30]

While native title determinations are not necessarily final, the court made it clear that they ordinarily will be.[31] Unless and until revoked or varied under s 13(1)(b), a native title determination "stands as a final adjudication of the matters in dispute, and is no less final than any other court order".[32]

The indefinite character reflects "the continuing acknowledgment and observance of traditional laws and customs and continuing connection with land" required to meet the definition of "native title" in s 223(1) of the NTA.[33]

Jagot and Mortimer JJ and White J agreed with the primary judge that the "indefinite character" of a native title determination is due to the fact that such a determination may be revoked or varied under s 13(1)(b) of the NTA "not only because of the occurrence of subsequent events that have caused the original determination no longer to be correct (s 13(5)(a)), but also because, critically, on the ground in s 13(5)(b) that 'the interests of justice require the variation or revocation of the determination'".[34]

In considering where "justice and injustice" lay, and how values and public confidence in the administration of justice were relevant to the question whether the claim of exclusive possession was an abuse of process, Jagot and Mortimer JJ endorsed[35] the Full Court's view in *Fazeldean* that the considerations involved an "informed recognition of the deep importance of the vindication of proven historical connection affecting generations past, present and future".[36] These are resounding and powerful principles being echoed by the Full Federal Court. The author believes that similar principles would be applied by the courts in considering whether "the interests of justice" require variation of a native title determination under s 13.

The jurisprudence on the variation of determinations is only starting to emerge, with the decision of *Tarlka*[37] in 2017 being the first time the Federal Court varied an approved native title determination. It found that both

grounds in s 13 were met, as the new event that made the determination incorrect was the High Court decision in *Brown*, and it was in the interests of justice to implement the agreement in the consent order. In the author's view, the *Fortescue Metals* case may prompt a series of new applications to vary determinations.

### *Exclusive native title rights (Grounds 2 & 3)*

The key substantive issue for the appeal court was whether the primary judge erred in relying on findings concerning adverse spiritual consequences for strangers entering onto the claim area without permission, and in holding that this supported a determination of exclusive native title rights. The appellant, FMG, argued that *Griffiths v Northern Territory*[38] and *Banjima People v Western Australia*[39] either did not support the conclusion or if so, were incorrectly decided. FMG also argued that the primary judge had incorrectly found that the Yindjibarndi had continued to observe the traditional law and custom concerning permission to enter country from sovereignty to the present day.

The court unanimously dismissed Grounds 2 and 3, upholding the primary judge's conclusion that the native title rights and interests were those of "exclusive possession".

#### Spiritual necessity amounts to control of access

Jagot and Mortimer JJ (with whom Robertson and Griffiths JJ and White J agreed) upheld the primary judge's application of *Griffiths* case, in which the Full Court had developed the law on "spiritual necessity" as follows:

> If control of access to country flows from spiritual necessity because of the harm that "the country" will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive …[40]

Their Honours also affirmed the primary judge's view that it did not matter that after sovereignty, Yindjibarndi traditional law and customs on excluding *manjangu* (strangers) became a restricted ability of Yindjibarndi people in practice to enforce their traditional law under the common law.[41] The court reasoned that FMG's argument would otherwise have required the Yindjibarndi people "to have at their disposal the kinds of tools for the enforcement of native title that are only given to native title holders under the [NTA] after a determination is made."[42]

The Full Court said it would be "an intolerable irony" should Australian law and non-Aboriginal people be able to use the inability of oppressed Aboriginal peoples "to enforce their customary law against those who entered and sought to exploit their land" as a basis to continue the disenfranchisement and dispossession. Their Honours made it clear that the NTA does not countenance that, and nor are its objectives served by such an approach.[43]

The plurality concluded that the explanation of spiritual necessity "neatly captured the essence of the relationship of the Yindjibarndi to their country and their spiritual obligation"[44] as embodied in their traditional laws and customs. The obligation was to protect that country, including from the presence and activities on it of strangers unless they first obtain permission from the Yindjibarndi people.

#### Content and nature of native title rights

Furthermore, the judgment contains some highly instructive statements on the content and nature of native title rights. All five Justices unanimously confirmed that "the very foundation of traditional Aboriginal law and customs … is in the spiritual, and the intermingling of the spiritual with the physical, with people and with land. That is how Aboriginal law works."[45]

Their Honours held that "the distinctions … between spiritual belief and real property rights, or personal property rights, are not to be imported into an assessment of the ***existence and content*** of Aboriginal customary law. ***To do so would be to destroy the fabric of that customary law***."[46] [emphasis added]

The court was at pains to convey how Aboriginal people's spiritual relationship to their country "is enmeshed in traditional law and custom", and that this is one of the important factors which distinguishes traditional laws and customs from common law proprietary rights.[47] They said: "This does not prevent Anglo-Australian law from recognising rights arising from that system of traditional law."[48]

Instructively, the Full Court explained the correct approach to recognising the existence and content of traditional laws and customs. That is, only after identifying through evidence the content of traditional law and custom, should the court ask — To what rights and interests relating to land that law and custom gives rise? Only then, having identified those rights and interests, does the Court look for ***how*** those rights ***should be recognised***, ***or translated***, by reference to Anglo-Australian law.[49] What occurs is "**recognition** of native title; not conferral, and not transformation into non-Aboriginal property rights."[50]

As the court found that, on the evidence there were traditional laws requiring strangers to be granted permission to enter or exploit country, whereby the purpose of those laws was to protect both country and outsiders from harm, then this was properly characterised as "a right to control access, which is the essence of exclusive possession".[51]

In the author's view, if there is a common law equivalent, they can be translated, however if there is no common law equivalent, yet those pre-existing rights and interests endure, they need simply to be recognised or rendered in customary law terms. Based on the Full Court's reasoning in *Fortescue Metals*, it is argued that this may include the spiritual or metaphysical terms of the traditional law reflected in ancient traditional law songlines or jukurppa (also known as the Dreamings), such as recognising the existence of ancestral living beings within the lands and waters, because that is the rich "fabric" of the customary law and that is the character of the rights and interests possessed.

Additional support for this notion may be found in the words of Jagot and Mortimer JJ where they said that "it all depends on the evidence", illuminating that "[t]here are not necessarily any hard boundary lines, or prohibitions on how rights and interests might be articulated, and many nuances in terms of the nature and content of rights in land and waters are possible."[52]

### *Concluding comments*

The reasoning of the appeal court in the *Fortescue Metals* case, together with other recent native title jurisprudence, has the potential to support a quantum leap or step change in the way native title rights or interests are identified, defined and legally recognised in Australia. Traditional custodians who yearn to have their rights or interests recognised in a manner that effectively implements their traditional law principles should find great comfort and hope in these judicial utterances.

In the author's view, the case should encourage lawyers acting for native title claimants or potential claimants to become bolder, more aspirational and more ambitious in asking the courts to recognise native title in a manner that is more authentic to customary law. That is, in a manner that is aligned with Indigenous world views, ontologies and epistemologies. In this way, native title rights and interests could be rendered in accordance with ancient Indigenous traditional law principles such as in songlines.

The decision also serves as a firm reminder to native title holders that it may be open to them to vary their native title determinations if they wish to challenge the previously defined nature, scope or content of their native title rights and interests so that they fully reflect the current Australian native title law, and their factual circumstances.

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*The views, opinions and conclusions expressed in this article are those of the author alone and do not represent the views of any other person or organisation.*

## Footnotes

1. *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177; BC201909419 (*Fortescue*).
2. *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* (2013) 250 CLR 209; 300 ALR 1; [2013] HCA 33; BC201311628.
3. *Karpany v Dietman* (2013) 252 CLR 507; 303 ALR 216; [2013] HCA 47; BC201314318.
4. *Western Australia v Brown* (2014) 253 CLR 507; 306 ALR 168; [2014] HCA 8; BC201401345.
5. *Mabo v Queensland (No 2) (Mabo)* (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.
6. [2017] FCA 803; (2017) 365 ALR 624; BC201709283.
7. [2017] FCA 1299; (2017) 366 ALR 467.
8. *Fortescue Metals* above n 1, [2].
9. *Daniel v Western Australia* [2003] FCA 666; BC200303526.
10. *Moses v Western Australia* (2007) 160 FCR 148; 241 ALR 268; [2007] FCAFC 78; BC200704369.
11. *Fortescue Metals* above n 1, [98].
12. *Fortescue Metals* above n 1, [98].
13. *Fortescue Metals* above n 1, [98].
14. *Tomlinson v Ramsey Food Processing* [2015] HCA 28; (2015) 256 CLR 507; 323 ALR 1; BC2015975.
15. *Fortescue Metals* above n 1, [113]–[114].
16. *Fortescue Metals* above n 1, [124].
17. *Fortescue Metals* above n 1, [43]–[45] and [80]–[81].
18. *Fortescue Metals* above n 1, [80].
19. *Fortescue Metals* above n 1, [81].
20. *Fortescue Metals* above n 1, [55], quoting the primary judge at [372].
21. Section 13(1)(b), (4) and (5) of the NTA allows variations and revocations of native title determinations. Section 86 of the NTA deals with evidence and findings in other proceedings.
22. *Fortescue Metals* above n 1, [67].
23. *Fortescue Metals* above n 1, [67].
24. *Fortescue Metals* above n 1, [67].
25. *Fortescue Metals* above n 1, [572].
26. *Fortescue Metals* above n 1, [572].
27. *Fortescue Metals* above n 1, [38].
28. *Fortescue Metals* above n 1, [386].
29. *Fortescue Metals* above n 1, [45] quoting the primary judge at [354].
30. *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at 71–72 [32]; 191 ALR 1; BC200204355.
31. *Fortescue Metals* above n 1, [45].
32. *Fortescue Metals* above n 1, [574] per White J, citing *Sandy (on behalf of the Yugara People) v State of Queensland* [2017] 254 FCR 107; [2017] FCAFC 108; BC201705723 at [38].

33. *Fortescue Metals* above n 1, [45], quoting the primary judge at [354].
34. *Fortescue Metals* above n 1, [46].
35. *Fortescue Metals* above n 1, [140].
36. *Western Australia v Fazeldean (No 2)* (2013) 211 FCR 150; 299 ALR 180; [2013] FCAFC 58; BC201302903 at [35].
37. *Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC v Western Australia* [2017] FCA 40; BC201707826.
38. (2007) 165 FCR 391; 243 ALR 72; [2007] FCAFC 178; BC200710226.
39. (2015) 231 FCR 456; 322 ALR 199; [2015] FCAFC 84; BC201505341.
40. *Fortescue Metals* above n 1, [60] quoting the primary judge at [378], who cited *Griffiths* n 38, 165 FCR at 428–29, [127]–[128] per French, Branson and Sundberg JJ.
41. *Fortescue Metals* above n 1, [223].
42. *Fortescue Metals* above n 1, [223], [286].
43. *Fortescue Metals* above n 1, [290].
44. *Fortescue Metals* above n 1, [173].
45. *Fortescue Metals* above n 1, [288].
46. *Fortescue Metals* above n 1, per Jagot and Mortimer JJ [288], with Robertson and Griffiths JJ concurring [397] and White J concurring [528].
47. *Fortescue Metals* above n 1, [361]–[363].
48. *Fortescue Metals* above n 1, [363].
49. *Fortescue Metals* above n 1, [363].
50. *Fortescue Metals* above n 1, [288].
51. *Fortescue Metals* above n 1, [363].
52. *Fortescue Metals* above n 1, [81].